

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

CASE NO: 79535/2016

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
7/11/2022

In the matter between:

SELLO C. THAHA

PLAINTIFF

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA
("PRASA")**

DEFENDANT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 07 November 2022.

JUDGMENT

COLLIS J

INTRODUCTION

1. The Plaintiff has instituted action against the Defendant for damages suffered as a result of personal injuries sustained in an accident that occurred on the 20th of July 2016.

2. At the time of the incident the Plaintiff was a passenger holding a valid ticket in a Metrorail passenger train, at the time being operated by the Defendant. Whilst the train was in motion, the doors of the coach in which the Plaintiff was a passenger were open, with the result that the Plaintiff was pushed off the train by some commuters in the process of them readying themselves to disembark from the train. As a result of this, the Plaintiff fell on the railway tracks and sustained serious bodily injuries.

3. At the commencement of the proceedings the parties informed the court that the issue of liability has become resolved between them on the basis that the Defendant undertakes to pay 90% of the Plaintiff's proven or agreed damages.

ISSUES FOR DETERMINATION

4. Therefore, this Court was called upon to determine the quantum and in particular general damages, loss of earnings and a claim for future medical expenses.

5. The parties further informed the Court that the presentation of their respective cases will be done through presenting certain medico-legal reports of a number of experts in addition to adducing *viva voce* evidence.

6. The Court was further advised that insofar as the Defendant does not have corresponding expert reports refuting the Plaintiff's expert reports, such reports are admitted by the Defendant.

7. In this regard the Plaintiff had filed medico-legal reports of the following experts in support of his claim:

7.1 Dr P Engelbrecht (Orthopaedic Surgeon);

7.2 Dr P Miller (Neurosurgeon);

7.3 Dr A Pauw (Clinical Psychologist);

7.4 A Greeff (Occupational Therapist);

7.5 J.J Prinsloo (Industrial Psychologist);

7.6 Argen Actuarial Solutions (Actuary).

These reports were all handed into Court as an Exhibit and marked by the Court as Exhibit A.

8. The Defendant, admitted the reports of Dr P Miller (Neurosurgeon) and Dr A Pauw (Clinical Psychologist) which were presented by the Plaintiff. Accordingly, these reports and the opinions expressed therein, are uncontested.

9. Three set of experts also prepared Joint Minutes namely the Orthopaedic Surgeons, Occupational Therapists and Industrial Psychologists. These reports were

also handed in before this court by agreement between the parties and marked as Exhibit B.

10. The Defendant in turn, had filed the medico-legal reports of the following experts namely:

10.1 Dr C Barlin (Orthopaedic Surgeon);

10.2 G Vlok (Occupational Therapist);

10.3 L Marais (Industrial Psychologist).

The reports presented on behalf of the defendant, was marked as Exhibit C before the Court.

EVIDENCE

11. During the hearing of the matter the following witnesses testified on behalf of the Plaintiff:

11.1 The Plaintiff.

11.2 Mrs A Greeff (Occupational Therapist).

11.3 Mr J.J Prinsloo (Industrial Psychologist).

EVIDENCE

12. On behalf of the plaintiff Ms A Greeff an Occupational Therapist was called. It was her testimony that she examined the Plaintiff on the 18 October 2018 this some two years post the accident. In her report the witness recorded that at the time of the accident the Plaintiff was appointed as a Packer with Phakiso Corporate Services. The position which he held at the time required moderate to heavy physical strength and endurance. Following the accident, he was absent from work for a period of 3 (three) months. As to the Plaintiff's employment history, the witness recorded in her

report from documentation provided that the Plaintiff was declared fit for light duty only for a couple of weeks following the accident. During her consultation with the Plaintiff, he also reported to her, that his employer Phakiso Corporate Services was not willing or able to provide the Plaintiff with the recommended light duty position upon his return to work. The witness did not verify this information with the employer. Ms Greeff further testified that the Plaintiff reported to her that he has not been able to secure alternative employment although he has been looking for employment.¹ The witness opined that the Plaintiff's work history indicates employment of a mainly unskilled physical nature. Further that it is accepted that the Plaintiff retains symptomatic pathology in his spine that renders him poorly suited for employment that requires heavy physical strength exertion. In addition, it is accepted that performing work tasks of a moderate nature probably will also elicit increased developing of symptomology constituting awareness of pain and discomfort.² Her assessment of the Plaintiff at the time confirmed that he is an individual who makes a concerted effort to avoid posturing that could cause him undue pain and discomfort. This however causes him to be slow in his execution of tasks and he was not able to complete the endurance component of the activity due to pain that was triggered in his spine during the execution of a test that simulates unskilled employment as a Packer. As to his work ability, the witness was further of the opinion that a job match could not be secured on the day of the assessment and it is thus accepted that the symptomatic pathology noted in his spine renders him vulnerable and compromised in his post-accident capacity of maintaining competitiveness in the saturated unskilled labour market.³ Further, that individuals such as the Plaintiff who have limited qualifications, invariably try to obtain jobs in the unskilled heavy to very heavy domain of work. The Plaintiff cannot and will not be able to perform work in this domain of work. It is important to note that at no point when cross-examined, was it put to the witness that the Defendant's expert will refute the opinion expressed by this witness.

¹ A Greeff, page 74.

² A Greeff, page 81.

³ A Greeff, page 81.

13. The Defendant also presented the evidence of Ms. Van Zyl, an Occupational Therapist who testified in corroboration of her report. As per her report,⁴ the witness examined the Plaintiff on 11 July 2019. In her report the expert recorded the Plaintiff's work history as follows, namely that pre-incident, the Plaintiff was employed as a Packer at Early Bird and work a 9-hour day, six days a week. The physical demands of his work, included bending, lifting and carrying objects with both hands. He was also required to work with the forklift driver and therefore had to work continuously. Post incident, the Plaintiff was declared fit for work, although on his return, his supervisor was of the opinion that he was unfit for work and he was then dismissed. He has been unemployed ever since and has been seeking employment. From a physical point of view, the expert opined that the Plaintiff remains suited for the open labour market to do work that is classified as medium in physical demand and that his injuries sustained did not affect this ability to work.

14. In the Joint Minute⁵ prepared by the Occupational Therapists, the experts agreed that the worked performed by the Plaintiff pre-accident would be classified as tasks as medium in physical demand. Furthermore, that his employers' failure to accommodate him post-accident, would reflect poorly on his work record and could negatively impact on his future prospective employment. The experts in their Minute also agreed that the Plaintiff should pursue employment in the security field falling in the light ranges but that he should first attend all the recommended interventions before he becomes employed in a new job.

15. The Plaintiff also presented a report by JJ Prinsloo an Industrial Psychologist. As per his report, the expert postulated the Plaintiff's pre-morbid career scenario as follows:

15.1 The Plaintiff would have continued to function in his pre-morbid position as a general worker (unskilled / entry level semi-skilled), or in a position with similar complexity levels, in the non-corporate sector of the open labour

⁴ Report by Gail Vlok p 13

⁵ Joint Minute Exhibit B p 4-6.

market until normal retirement. However, periods of unemployment cannot be disregarded.⁶

15.2 The Plaintiff reportedly left school after failing Grade 12 and had entered the labour market with a Grade 11 level of education. He was unemployed for 1 (one) year before he commenced working in an unskilled capacity as a Packer in the non-sector of the labour market. He completed Grades E, D and C Security Training and registered with PSIRA in 2010. However, he never functioned within the security industry. Of the possible 10 (ten) years of his work span he only worked 4 (four) years within the unskilled domain of work in the non-corporate sector of open labour market.

15.3 Based on the employability profile, the Plaintiff's age (38 (thirty-eight) years at the time of the incident) and educational attainment, the Plaintiff had already reached his career plateau as general worker.

15.4 He would have functioned in his pre-morbid position as a general worker (unskilled / entry level semi-skilled), or in a position with similar complexity levels, in the non-corporate sector of the open labour market until normal retirement.⁷

15.5 A pre-morbid retirement age of 65 (sixty-five) years is indicated.⁸ There is agreement between the Industrial Psychologists as far as pre-morbid retirement age is concerned.

16. As to the Plaintiff's post-morbid scenario the expert in his report opined as follows:

16.1 The Plaintiff suffers from the following physical *sequelae*:

16.1.1 He wakes up and it feels as if his body is frozen ("locked");

⁶ JJ Prinsloo, page 104.

⁷ JJ Prinsloo, pages 104 to 105.

⁸ JJ Prinsloo, pages 104 to 105.

- 16.1.2 He suffers from constant pain in his lower back;
- 16.1.3 He wakes up at night from pain in his back.
- 16.1.4 Cognitively the Plaintiff is forgetful after the incident.
- 16.1.5 From an emotional point of view, the Plaintiff is anxious when he is on a train, and he becomes angry quickly.
- 16.1.6 He is also less social after the accident.
- 16.1.7 Functionally the Plaintiff becomes tired if he sits for long periods. He avoids walking long distances and he cannot lift and carry very heavy objects. He has also stopped playing soccer post-accident.⁹

17. In as far as the Plaintiff's Post-Morbid career history is concerned, the witness opined as follows:

17.1 After the incident in question, the Plaintiff recuperated for 1½ (one and a half) months. He did not receive remuneration during this time and returned to work on 9 September 2016.

17.2 The Plaintiff's manager reportedly told him that he could not work in the cold freezers with his injuries and that he should request Phakiso Holdings (labour broker) to find alternative employment for him. Based on collateral information received, the Plaintiff left Phakiso Holdings' employ on 30 September 2016. He has been unemployed ever since.

18. In as far as the Plaintiff's Post-Morbid career scenario is concerned, the witness was of the opinion that the Plaintiff has been rendered functionally unemployable for the remainder of his career.

⁹ JJ Prinsloo, pages 105 to 106.

19. As regards to the Plaintiff's Pre-Morbid earnings the witness recorded in his report that on perusal of the Plaintiff's bank statements received from May to June 2006, that the Plaintiff's pre-morbid earnings totalled R2,324.97. This amounted to R53,820.72 per annum.¹⁰ It is postulated that the Plaintiff's actual earnings of R53,820.72 per annum (pre-morbid) would have grown to earnings of scale point 3 for 2017 to 2019 (R55,525.00 – R58,782.00 – R64,072.00) followed by annual CPI percentage increases until retirement at 65 (sixty-five) years of age.¹¹ As set out above the Industrial Psychologists now agree on this pre-morbid scenario. Similarly, at no point during the cross-examination of this witness was it put to this witness that the expert of the Defendant will come and dispute the findings and conclusions reached by this witness.

20. On behalf of the Defendant, Mr Marais an Industrial Psychologist was called as an expert witness. He confirmed the contents of his report and the addendum report which he subsequently compiled. As per his report, the witness opined that as an unskilled worker the Plaintiff had reached his career ceiling. He was further of the opinion, that the Plaintiff with treatment would be able to work again as before. He disagreed with the opinion of his counterpart that as a result of the incident, the Plaintiff has been rendered unemployable.

21. As per the Joint Minute¹² prepared by the Industrial Psychologists it was agreed that:

21.1 There is also agreement between the Industrial Psychologists as far as the Plaintiff's pre-morbid career progression is concerned. In this regard the experts were in agreement that the pre-morbid career scenario postulated by Mr Prinsloo could be used in calculating the Plaintiff's loss of earnings.

21.2 It was accepted by both the Plaintiff's and the Defendant's experts that the Plaintiff lost his job as a result of the accident and that he has suffered a direct loss of income from the day of the accident to date hereof.

¹⁰ JJ Prinsloo, page 118.

¹¹ JJ Prinsloo, page 120.

¹² Exhibit B p 7-14

21.3 The experts however disagreed on the Plaintiff's post-morbid career trajectory and the Plaintiff's post morbid earning capacity.

22. The Plaintiff also presented the evidence of Dr Miller a Neurosurgeon. In his report the expert sets out that at the time of the incident the Plaintiff was working on a poultry farm and was loading crates of chickens onto trucks. He was also loading and unloading chicken food. During this period the Plaintiff was earning R1,100.00 per fortnight.¹³ Further that if the Plaintiff was employed in a sedentary capacity, one would not expect significant pathology, but as the Plaintiff makes his living, lifting and loading heavy bags of chicken day after day or doing similar activity which are the types of occupation that the Plaintiff engaged in then one is going to see deterioration at a younger age and at an accelerated rate. The expert expressed an opinion that the chances of further deterioration in this area would run somewhere between 30% to 50% over time so that one third to one half of the plaintiffs are going to develop significant symptomatic change much more severe and much more florid than is the situation at this point in time, where the Plaintiff copes with a situation. The Plaintiff presently copes with the situation by using medication, although his use of medication and his intake thereof is quite prodigious, running at sometimes up to 20 of Nurofen tablets in a 2 (two) week period. But if his situation were to deteriorate, much more pain and discomfort and muscle spasms is on the cards, not to mention the very rare occurrence and possibility of the onset of neurological signs and symptoms.¹⁴ In this regard the expert opined that between 30% to 50% of patients are going to develop more significant disease, with 80% to 90% treated conservatively. At this point in time, the Plaintiff's pain and difficulties must be treated conservatively. Furthermore, that about 10% to 15% of these cases may come to surgery in the end, particularly if the Plaintiff deteriorates, simply because that 10% to 15% may either have intractable pain which is nonresponsive to conservative measures, or may start to develop neurological signs and symptoms, or there may even be an increase in the amount of collapse of the vertebral wedge compression areas.¹⁵ As for patients who are treated conservatively, or with surgery, 30% will have a bad prognosis and will have to cut short, curtail and/or stop whatever careers

¹³ Dr P Miller, page 24.

¹⁴ Dr P Miller, page 38.

¹⁵ Dr P Miller, page 38.

they are doing and will have stop whatever sedentary activity they are doing. The majority of the 30% of the bad prognosis will develop this problem within 10 (ten) to 20 (twenty) years of continuing with heavy work-related activity or heavy manual labour. Thus 30% of the 30% to 50% subsection of this group of patients is going to have their careers threatened over time.¹⁶ It is for this reason that he expressed the opinion, that he does not see the Plaintiff getting any better as far as the lumbo-thoracic area is concerned. The Plaintiff will stay the same in approximately half of the cases but according to him he sees the Plaintiff getting worse in roughly one third to one half of the cases.¹⁷

23. Following the accident the Plaintiff is much worse off i.e., after the push from the train particularly since he is basically dependent and has been dependent his whole life on manual labour of one type or another.¹⁸ In as far as work related activities are concerned, this is going to be fraught with difficulty for this Plaintiff, not so much now but in the future and the probability is that the Plaintiff would have to give up work in the future, no matter that he copes well now.¹⁹

24. Post the accident, the expert expressed the opinion that the Plaintiff is much worse off after the accident in question in terms of his occupational prospects as he has basically been dependent on manual labour of one type or another for his whole life. With regard to the Plaintiff's future occupational functioning, the Plaintiff remains unemployed following the accident and is likely to have difficulty securing and maintaining any form of employment in the future as a result of the following factors:

24.1 The fluctuations in his simple attention, indications of working memory difficulties, his highly variable psychomotor speed, and the delays in his speed of mental processing which would hamper his efficiency and accuracy in any manner of work;

¹⁶ Dr P Miller, page 39.

¹⁷ Dr P Miller, page 39.

¹⁸ Dr P Miller, page 40.

¹⁹ Dr P Miller, page 41.

24.2 Indications on testing of verbal memory difficulties, which suggest that he will struggle to recall every day conversational content, as well as instructions at work;

24.3 His ongoing pain and discomfort, depressed mood and residual symptoms of anxiety which could hamper his levels of drive and motivation and ultimately his productivity.²⁰

24.4 The Plaintiff has been unemployed since the accident and his future occupational prospects appear to be limited.²¹

25. As previously mentioned the Defendant admitted the report of Dr Miller and had placed no corresponding expert report before this Court in rebuttal. As such the opinion and finding expressed by Dr Miller in his report is accepted by the Court.

26. The Orthopaedic surgeons in the Joint Minute²² recorded the injuries of the Plaintiff as follows:

26.1 Injury to neck, "chip" fractures of neck C2 and C3.

26.2 Soft tissue injury thoracic spine.

26.3 Soft tissue injury to lower back.

26.4 Laceration to chin as well as abrasions.

Although the experts opined that the Plaintiff retained working capacity after the accident, they deferred the quantification of work capacity to the Occupational Therapist and the Industrial Psychologist. As far as future treatment is concerned, they were in agreement that an allowance should be made to cover future conservative treatment.

EXPERTS FINDINGS AND CONCLUSIONS

²⁰ Dr A Pauw, page 66.

²¹ Dr A Pauw, page 66.

²² Exhibit B p 1-3

27. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his experience. It is the duty of an expert to provide an opinion which should be based on the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

28. In the decision *Nicholsan v RAF*,²³ the court warned about experts over-stepping their role and usurping the court's function. When an expert testifies, he or she should base its opinion on all facts that are relied on by the expert must ordinarily be established during the trial. Except those facts which experts draw as a conclusion by reason of his expertise from other facts which have been admitted by the other party or established by admissible evidence.

29. Furthermore, in *Schnieder N.O and Others v AA and Others*, Judge Davis in obiter remarked that:²⁴

“an expert is called to court to give the court the benefit of his expertise. An expert is called by a particular party, presumably because the conclusion of the expert, using his expertise, are in favour of the line of argument of the particular party. That does not absolve the expert from providing the court with an objective and unbiased opinion based on his expertise. An expert does not assume the role of an advocate nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which the expert claims to possess.” The role of expert evidence has been welcomed by the courts however, this role by experts has become abused by experts overstepping their mark and by experts attempting to usurp the powers of the court.

The court should bear cognizance that the role of experts in this matter is to guide the court in reaching a just conclusion to the matter. It is our case that the Plaintiff's experts failed in executing this function.

²³ (07/11453) [2012] ZAGPJHB 137

²⁴ *Schnieder N.O. and Others v AA and Another* 2012 (5) SA 203 (WCC)

30. On behalf of the Plaintiff, this Court was referred to the decision *SARFU*,²⁵ wherein it was held that if a point in dispute was left unchallenged in cross-examination, the party calling the witness was entitled to assume that the unchallenged witnesses' testimony was accepted as correct.²⁶ At no stage during the cross-examination of either Mrs Greeff or Mr Prinsloo was it indicated that the experts of the defendant will dispute any of the opinions of the Plaintiff's experts.

EVALUATION

31. Mrs Greeff and Mr Prinsloo testifying on behalf of the Plaintiff both gave a detailed explanation and logical exposition of how they arrived at their conclusions. The entire evidence of both of them was left unchallenged.

32. As such, and in line with *SARFU* decision, the Plaintiff is entitled to assume that unchallenged witnesses' testimony was accepted as correct.²⁷

33. On behalf of the Plaintiff it was argued that in contrast to the evidence of the Plaintiff's experts, both Mrs van Zyl and Mr Marais testimony was less than satisfactory. Their evidence came across as demonstrably biased in favour of the Defendant. This was evident not only from their one-sided reports, but also from their evidence in court.

34. During their testimony, both failed to make concessions when they should have done so. They also failed to appreciate that they are duty bound to remain objective and neutral. What is concerning is that they both failed to consider the views expressed by experts who filed reports on behalf of the Plaintiff. In doing so, they would have been able to give a more holistic opinion on the plaintiff as a patient. These sentiments expressed by counsel for the Plaintiff, this Court is in agreement with.

FUTURE MEDICAL EXPENSES

²⁵ *President of the Republic of South Africa & Others v South African Football Union & Others* 2000 (1) SA 1 (CC).

²⁶ At par 61, p 37.

²⁷ At par 61, p 37.

35. At the commencement of the hearing, the Defendant formally admitted the plaintiff's reports by Dr Pauw (Neuropsychologist) and Dr Miller (Neurosurgeon). This admission made by the defendant of the two aforementioned reports includes the admission relating to the future medical expenses envisaged by the aforementioned experts.

36. Furthermore, section 15 of the Civil Proceedings Evidence Act 25 of 1965 provides as follows:

"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."

37. From a psychological point of view, Dr Pauw has recommended that, as a result of the severe depression that has developed, the plaintiff will require 30 (thirty) sessions of psychotherapy and motivation for this conclusion reached is set out in the expert's report.²⁸

38. In the case of Dr Miller, the defendant similarly raised arguments at variance with the express findings as reflected in Dr Miller's report. The defendant *inter alia* suggested that the plaintiff was symptomatic prior to the accident in question. This is completely at variance with the findings of Dr Miller. In his report the expert recorded as follows:²⁹

"The previously asymptomatic patient has shown, and x-rays ordered by Dr Engelbrecht, wedging at D11, D12 and even at L1 ... so it may be that we are looking at the end result, at the residual pathology present now, at a later stage as an aftermath of the accident in question."

39. Dr Miller further recorded that:³⁰

²⁸ Caselines 002-195, par 11.4.

²⁹ Caselines 002-165, second paragraph.

³⁰ Caselines 002-155, par 3.

"There is just the upper lumbar back pain, in the place where there was never back pain before. With the back pain, he can't bend, with the back pain he can't stand for a long time, and he can't walk far ..."

40. The plaintiff applied a 50% contingency to all future medical expenses as suggested by Dr Miller. The defendant having admitted the report of Dr Miller, and in the absence of evidence presented on the contrary, the Court is satisfied that the Plaintiff has proven an award for future medical expenses as foreseen by Dr Miller.

41. In addition thereto, the Plaintiff will have to undergo future treatment in the form of conservative treatment for follow-up doctors' visits, physiotherapy and or biokinetic treatment. In addition, the Plaintiff will require follow-up x-rays as well as MRI scans as well as analgesics, anti-inflammatories, and muscle relaxants. In this regard an amount of R35,000.00 has been provided for.

42. In respect of the Plaintiff's future medical expenses, there also exists a (5%) possibility that the Plaintiff will have to undergo future neck surgery in the form of a neck decompression, fusion, and instrumentation. This procedure is anticipated will cost R165,000.00 and a 5% possibility should be catered for. Due to the soft tissue lumbar spine injury, allowance must be made for the possibility of a lumbar spine decompression, fusion, and instrumentation (3% possibility). In addition, 3 (three) months of sick leave should be allowed for.³¹

43. Given the totality of the evidence presented by the Plaintiff in respect of this head of damage and given the admission of the report by Dr Pauw, this Court is satisfied that the Plaintiff has succeeded in proving his claim for future medical treatment. It is for this reason that I am satisfied that an award relating to future medical expenses in the amount of R160,966.00 should be made.

44. This amount is computed as follows in respect of the future medical expenses through the expert reports placed before this Court:

³¹ Joint Minutes, Orthopaedic Surgeons, (Bundle C).

44.1 Orthopaedic Surgeons³² R9,360.00

44.2 Dr P Miller (Neurosurgeon)³³ R98,075.00

44.3 Clinical Psychologist R35,197.00

44.4 Occupational Therapist R18,334.00

Total: R160,966.00

GENERAL DAMAGES

45. In respect of this head of damages, it is common cause that the plaintiff should be awarded general damages. What this court was called upon to determine is the just award to be awarded to the plaintiff for the injuries he sustained and the sequelae suffered as a result thereof.

46. In assessing or quantifying delictual damages or compensation after a damage-causing event, the legal principle applicable is to give to the injured or prejudiced plaintiff(s) the fullest possible compensation by placing them in the same financial position they were in prior to the damage-causing event.³⁴

47. To meet this objective of full compensation, the plaintiff is *inter alia* burdened with the duty to prove the loss he has suffered.³⁵

48. In this regard the parties referred the court to a number of decisions for consideration in as far as this head of damaged is concerned.

³² Even though the amount calculated is R47,724.00, only an amount of R9,360 is allowed. The reason being that the neurosurgeon makes provision for far more comprehensive conservative treatment. R180,883.00

³³ Even though the amount calculated is R180,883.00, a contingency deduction of 50% is made to this amount.

³⁴ Van der Walt Sommeskadeleer 1, 227; Visser et al *Law of Damages* 4.

³⁵ Visser et al *Law of Damages* 125-128, 487.

49. It should however be borne in mind that no two cases are on all fours the same and that previously decided cases are merely used as a guide by a court in making a just determination.

50. In assessing this head of damages, what a court will take into account is the injuries sustained by the plaintiff and how these injuries in turn has affected the quality of life of the plaintiff, such as the pain and suffering endured by him.

51. In respect of this head of damages, the plaintiff's pleaded case was for an amount of R 500 000.00 and in this regard counsel for the plaintiff had placed reliance on the following decisions:

51.1 The matter of *Ramoboleng v Lowveld Bus Services (Pty) Ltd and Another* 2015 (7C5) QOD 29 (GNP) wherein the Plaintiff sustained injuries to the cervical and lumbar spine and a concussion. Here the Plaintiff was initially treated conservatively with analgesics, physiotherapy, and rest. Much later he underwent spinal surgery, an artificial disc was inserted at the levels L3/L4. He was hospitalised for roughly 6 (six) months in total. He wears a lumbar support brace (corset) since the collision and has an 18cm surgical scar over the lumbar area. He suffers from severe erectile dysfunction, which seems to be a cause if the not the major cause of his moderate depression. His low self-esteem and his reluctance to form a relationship with the opposite sex. He is no longer able to play soccer and spends most of his time sleeping at home. He struggles with domestic chores such as gardening, household maintenance as well as with shopping and cooking. Because he is unable to sit for too long, he no longer watches television. He is unable to sleep on his left side. His injuries (and the sequelae thereof) have rendered him unemployable in the open labour market. The court awarded the Plaintiff general damages in the amount of R550,000.00 in 2015, which amounts to R728,000.00 in 2021.

51.2 The court was also referred to the matter of *Oosthuizen v Road Accident Fund* 2016 (7C4) QOD 5 (GNP) where the Plaintiff sustained injuries of his back, ankle and head, compression fracture of the L3 vertebra.

The Plaintiff has resultant pain in the lumbar spinal area. The Plaintiff will have to undergo a lumbar spinal fusion to correct and prevent kyphotic deformity progression, relieve pain, and improve his quality of life. The Plaintiff sustained a soft tissue injury to the right ankle with scarring and equinus deformity of the ankle. The Plaintiff would benefit from surgery to correct the scarring and equinus. The Plaintiff suffers from post concussive syndrome, post-traumatic stress disorder, avoidant personality disorder. The court awarded the Plaintiff general damages in the amount of R550,000.00 in 2015, which amounts to R685,000.00 in 2021.

51.3 The plaintiff also referred the court to the decision of *Jones v AA Mutual Insurance Association Ltd* 1976 2 QOD 793 (W). In this matter the Plaintiff was a 30 (thirty) year old violinist who sustained a neck and lower back injury. The plaintiff suffered from headaches and subsequently numbness of his arm and leg. On him posterior fusion of the fourth and fifth cervical vertebrae was performed. Further fusion operation in near future was recommended due to further injury extending beyond these two vertebrae. The Plaintiff's lower back was placed in a corset. The possibility of further operation becoming necessary to it also. In this matter the plaintiff's medical witnesses were of the view that his neck would break down after about 5 (five) years and that he would be unable to continue his work. The Defendant's medical witnesses however were of the view that successful rehabilitation could be achieved. Assessments were made on a contingency basis. In this matter the court awarded the Plaintiff general damages in the amount of R9,000.00 in 1976, which translates to an amount of R409,000.00 in 2021.

51.4 In addition this court was referred to the matter of *Makeke v The Road Accident Fund*³⁶ wherein the plaintiff lost three teeth and sustained an injury to his jaw and minor injuries to his shoulder and neck. In this matter the court awarded the plaintiff an amount of R387,000.00 in respect of general damages in 2010, which translates to approximately R652,317.28 in 2020.

³⁶ Eastern Cape High Court, case number 611/09 delivered 23 November 2010.

52. These are just but some of the decisions which the court was referred to on behalf of the plaintiff.

53. The Defendant in turn had placed reliance on the following cases in support to substantiate the amount in General Damages that it submitted the Court must consider awarding. The cases referred to are listed as follows:

53.1 K R Mashaba v Road Accident Fund Case N0 (15683/2004) 2006 TPD³⁷

In this matter the plaintiff was a 26-year-old female Internal Communications Specialist. After the first collision ambulances and paramedics arrived and the latter insisted that she should go to hospital for an evaluation. She was still able to take details of the other driver and had what she described as a “blasting” headache and a painful neck. At the hospital she was examined and given a neck brace. She was then taken for X-rays and discharged within two hours. She was also given painkillers and anti-inflammatory medication. The next morning her neck was still sore, and her headache persisted. For the week after the collision, the plaintiff only worked for half a day, each day, and experienced lower back pain, a stiff neck and headaches. In this case, the Plaintiff was claiming R80 000.00 for general damages, however the court awarded R40 000.00. Today this award translates to R 90 000.00.

53.2 Secondly, this Court was also referred to the decision, Smit v Road Accident Fund (277/04, ECJ21/06) [2006] ZAECHC:³⁸ In this matter the plaintiff sustained a soft tissue injury to her lower back and a whiplash injury to her neck. The next day she was aware of pain in the neck and lower back. She began to get severe headaches. She consulted her family doctor within a few days. He prescribed physiotherapy and analgesic medication. Her condition has not however resolved despite her treatment, which, though conservative, had been repeated and prolonged. In 2004 she underwent physiotherapy until the full amount payable by her medical aid fund for

³⁷ K R Mashaba v Road Accident Fund.

³⁸ Smit v Road Accident Fund.

physiotherapy was exhausted and she was obliged to discontinue it. She still suffered severe headaches every day, for which medication was necessary. She still experienced lower back pain and neck spasms regularly. This has a significant effect on the quality of her daily life. Court awarded R55 000.00 in 2006, in current terms this is worth an amount of R122 000.00.

53.3 In addition the Defendant also placed reliance on the decision, *Allie v RAF* 2002 LNQD 1 (C). In this matter the Plaintiff suffered injuries namely, a fracture of the C-6 vertebrae, soft tissue injuries to both knees, soft tissue injuries to the right forearm and a soft tissue injury to the chest³⁹. In this matter the Court awarded the plaintiff an amount of R 80 000.00 for general damages. The current value amounting to R 207 300.00.

54. The Defendant submitted that based on the decision *RAF v Marunga*,⁴⁰ and based on the cases referred to, that an amount of R150 000, would be considered a fair and reasonable compensation for the plaintiff's claim for General Damages. This is so as the injuries in the cases quoted above were more severe as compared to the injuries sustained by the plaintiff in the present case.

55. In addition, counsel for the Defendant had argued that the Plaintiff failed to go for the necessary treatment post-accident and that the Defendant ought not to be held liable as a result thereof.

56. Now it is trite law that a failure to mitigate damages should be pleaded by a litigant.⁴¹ In the present matter the defendant has not only failed to put this to the plaintiff in cross-examination, but has also failed to plead a failure on the part of the plaintiff to mitigate his damages.

³⁹ *Allie v RAF*.

⁴⁰ *Road Accident Fund v Marunga* [2003] 2 All SA 148 (SCA) [27] quoting *Wright case* (Corbett and Honey Vol 4 E3-36) Broome DJP stated: 'I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.'

⁴¹ *Maja v SA Eagle Insurance Co Ltd* 1990 (2) SA 701 (A)

57. The Plaintiff before Court had sustained the following injuries as a result of the incident, namely:

57.1 Fractures of the neck, C2 and C5 (described as "*chip*" fractures).

57.2 A soft tissue injury to the thoracic spine.

57.3 Soft tissue injury to the lower back.

57.4 Lacerations to the chin as well as abrasions.⁴²

57.5 The Plaintiff lost a tooth (a canine in the upper jaw).⁴³

57.6 Severe symptoms of depression.⁴⁴

57.7 The Plaintiff presents with the following scars:

57.7.1 A 3cm scar on the left side of the chin (this is faint and not that visible);

57.7.2 Areas of hyperpigmented scars over both legs anteriorly as well as abrasions scars and lacerations which were sutured.⁴⁵

58. As to his injuries, the Plaintiff testified that following the accident he was hospitalised for a period of two weeks. It was his evidence that as a result of the incident he sustained an injury to his lower back, injured his jaw and lost a tooth. He further received stitches on his right knee and mouth. He suffered a spinal cord injury and was given a hard collar neck brace to wear. Following his discharge from hospital he wore his neck brace for a further two weeks and received physiotherapy.

59. Three years post the accident he still experiences some pain in his lower back especially when he tries to lift heavy objects which he treats with pain tablets and

⁴² Joint Minutes, Orthopaedic Surgeons, page 1 (Bundle C).

⁴³ Dr P Miller, page 22.

⁴⁴ Dr A Pauw, page 60.

⁴⁵ Dr P Engelbrecht, page 10.

analgesics at least twice a week or whenever it occurs. Post- accident, he cannot walk or stand for prolonged periods as a result of his back pain. Before the incident, he used to play soccer which he no longer does, as he can no longer run as fast as he used to. The injury to his back has also affected his quality of sleep at night as he sometimes feels pain during the night.

60. Having regard to the totality of the injuries and the *sequelae* thereof on the plaintiff, and taking into account comparable decisions I am the opinion that an award of R 450 000.00 would be adequate and fair compensation to be awarded to the plaintiff, under this head of damage.

61. From various expert reports filed before this court the following is set out as the treatment received by the Plaintiff.

61.1 The Plaintiff was admitted to the Natalspruit Hospital and was discharged on the 27th of July 2016. The Plaintiff's treatment was conservative, and this included a neck collar as well as physiotherapy.⁴⁶

61.2 The Plaintiff's neck was stabilised by means of a hard collar for a period of 1 (one) week, followed by a soft collar for another 2 (two) weeks. A Physiotherapist attended to the Plaintiff.⁴⁷

61.3 Upon his discharged the Plaintiff was referred from hospital to a local clinic to attend physiotherapy with a last visit to hospital in 2016, which completed the Plaintiff's formal treatment. Presently, the Plaintiff still requires analgesics, mostly used for back pain that the Plaintiff obtains "*over-the-counter*".⁴⁸

61.4 The Plaintiff sustained lacerations which were sutured. He had a laceration below the lip, a scar over the lumbar area, as well as a scar over

⁴⁶ Joint Minutes, Orthopaedic Surgeons, page 2 (Bundle C).

⁴⁷ Dr P Engelbrecht, page 5.

⁴⁸ Dr P Engelbrecht, page 5.

the knee right knee area, or just below the right knee. All 3 (three) of these areas were sutured.⁴⁹

61.5 The stitches were performed by the doctor in the ward.

61.6 He also spent 2 (two) weeks in the ward and then was discharged on medication.⁵⁰

61.7 He attended numerous follow-ups and during the last follow-up in 2017 he still had back pain.⁵¹

61.8 At times he also, experiences pain of the lower back at night,⁵² and presents with mild muscle spasm to the neck as well as tenderness.

62. The Plaintiff also testified that he experiences intermittent symptoms of back pain which localises in the lower lumbar spine. He also experiences pain in the lower back in the mornings. Occasionally, he also experiences a cramp like pain in the posterior aspect of both knees.

63. The expert reports further set out that the Plaintiff presents with lower lumbar spine tenderness,⁵³ but his real and main complaint is back pain which is present from the time that he gets up in the morning, namely upper lumbar pain which does not radiate at all into the lower limbs.⁵⁴ As a result of this back pain, both Dr Miller and Dr Pauw recorded that:

63.1 With the back pain he cannot bend and with the back pain he cannot stand for a long time, and he cannot walk far.

63.2 With the back pain, even sitting in a vehicle for a prolonged period without the Plaintiff driving causes him a lot of pain.

⁴⁹ Dr P Miller, page 23.

⁵⁰ Dr P Miller, page 23.

⁵¹ Dr P Miller, page 23.

⁵² Dr P Engelbrecht, page 8.

⁵³ Dr P Engelbrecht, page 11.

⁵⁴ Dr P Miller, page 26.

63.3 He cannot lift any heavy objects.⁵⁵

63.4 As a result of the Plaintiff's ongoing lower back pain, he is unable to sit for extended periods of time and struggles to get up in the mornings.⁵⁶

63.5 The lower lumbar spine revealed intermittent symptoms of back pain which localised in the lower lumbar spine with lower back pain in the mornings.⁵⁷

63.6 The Plaintiff had cramp like pain over the posterior aspect of both knees.⁵⁸

63.7 X-rays revealed mild anterior wedging of T11 and T12 and there was a loss of curvature at the L1 / L2 level with slight disk space narrowing in L1 / L2 with gross osteophytes anteriorly, with slight anterior wedging noted at T11, T12 and L1.⁵⁹

63.8 The Plaintiff's degenerative change, centre in and around or just below the wedge compression lesions, are first and foremost accident-related lesions, simply because the thoracolumbar tenderness and the pain in the thoracolumbar area started at the time that the Plaintiff was thrown off or pushed off the train, and secondly that the problem may well deteriorate with time.⁶⁰

⁵⁵ Dr P Miller, page 26.

⁵⁶ Dr A Pauw, pages 62 to 63.

⁵⁷ Dr P Miller, page 33.

⁵⁸ Dr P Miller, page 33.

⁵⁹ Dr P Miller, page 34.

⁶⁰ Dr P Miller, pages 37 to 38.

63.9 Dr Miller further recorded in his report that the Plaintiff needs to stop analgesics and anti-inflammatories which can produce an analgesic abuse and withdrawal type of side effects situation, and which can also push the Plaintiff, at this high level and rate of taking the medication, into liver, kidney, and gastrointestinal failure.⁶¹

63.10 As testified to by the Plaintiff, pre-accident he enjoyed playing soccer and this was confirmed in the report of Dr Engelbrecht.⁶²

63.11 Post accident he has not returned to social soccer nor contact sports.⁶³

63.12 On the Beck Depression Inventory, the Plaintiff obtained a score which is indicative of severe symptoms of depression.⁶⁴

63.13 The Plaintiff constantly feels angry and is irritable and shouts at his partner without provocation. His is irritable and gets into arguments.⁶⁵

63.14 The Plaintiff's appetite is poor, and he has lost weight.

63.15 The Plaintiff has difficulty sleeping and frequently wakes up during the night.⁶⁶

63.16 The Plaintiff's neurocognitive profile is indicative of difficulties in the following areas: reduced rote verbal, poor narrative recall, limited perceptual organisation and planning, highly variable simple attention, complex attention and working memory difficulties, double tracking difficulties, significant variability of his psychomotor speed, delays in his speed of mental processing, mildly limited verbal fluency, poor practical planning and problem solving with mildly limited forward conceptual planning

⁶¹ Dr P Miller, page 41.

⁶² Dr P Engelbrecht, page 6.

⁶³ Dr P Engelbrecht, page 13.

⁶⁴ Dr A Pauw, page 60.

⁶⁵ Dr A Pauw, page 51.

⁶⁶ Dr A Pauw, page 51.

and problem solving, reduced verbal reasoning, slowing of his fine motor speed with a loss of manual dexterity on the left and impairment of his stimulus resistance.

63.17 The Plaintiff's neurocognitive profile can be attributed to a combination of the following factors:

63.17.1 His low average pre-morbid intellectual potential;

63.17.2 His age of his status and possible associated neurocognitive deficits;

63.17.3 His limited exposure to paper and pencil tests;

63.17.4 A lack of confidence on testing and indications of physical discomfort and pain;

63.17.5 His ongoing complaints of pain and discomfort and his current reports of significant psychological distress.⁶⁷

63.18 The Plaintiff is also suffering from psychological distress arising from the accident.

63.19 He subjectively reports significant symptoms of depression and also has at least mild symptoms of accident-related anxiety.

63.20 He dejected mood appears to reflect his ongoing pain and discomfort, and his lack of employment following the accident, and this is manifested through his increased irritability and social withdrawal.⁶⁸

64. The injuries sustained by the Plaintiff and the *sequelae* thereof, most certainly has had an impact on his future employment and earning capacity.

⁶⁷ Dr A Pauw, page 65.

⁶⁸ Dr A Pauw, page 65.

PAST AND FUTURE LOSS EARNINGS

65. In order to determine past and future loss of earnings, *"a court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury."*⁶⁹

66. Accordingly, the determination of loss of earnings requires:

66.1 the determination of the plaintiff's hypothetical but likely pre-morbid scenario; and

66.2 the plaintiff's hypothetical but likely post-morbid scenario.

66.3 The plaintiff's past and future loss of earnings will then be determined by deducting the aforementioned pre- and post-morbid scenarios from each other.

67. As testified to, the Plaintiff worked as a Packer or loader at a poultry factory at the time of the incident. His qualifications include a Grade 11 as well as a Security Grades E, D and C (although he never worked in this field at all and his certificate at PSIRA has lapsed). Following the accident, he was unemployed, and he remains unemployed to date hereof. This status remained despite several efforts on his part to obtain employment.

68. He testified that he worked in a poultry factory where pallets were packed, and trucks were loaded. According to him these bags of frozen chicken weighing approximately 20kg each. He worked Mondays to Saturdays, 09h00 until 19h00 and occasionally nightshift.⁷⁰ Upon his return to work, he lost his position as he was unable to cope with the demands of his employment.⁷¹

69. As to the Plaintiff's future employability, the parties requested this court to make a determination as to whether the Plaintiff is functionally unemployable or not.

⁶⁹ Dippenaar v Shield Insurance Company Ltd 1979 (2) SA 904 (A) at 917 B – D.

⁷⁰ Dr P Engelbrecht, page 6.

⁷¹ Dr P Engelbrecht, page 14.

70. In this regard it was the Plaintiff's case that he is no longer employable as a result of his injuries sustained and the *sequelae* thereof.

71. In this regard it was the position of the Defendant that the Plaintiff, has not been rendered functionally unemployable in that the Plaintiff could possibly obtain a job as a security guard. Both witnesses who testified on the Defendant's behalf held this view.

72. In this regard, the witnesses on point were cross-examined by the Plaintiff's counsel. During the cross-examination of the defendant's expert witnesses it became clear that this remains a highly optimistic and at best only a slight possibility as opposed to a probability. It is also an unlikely scenario for a variety of reasons:

72.1 Firstly, the Plaintiff's cognitive difficulties;

72.2 The Plaintiff has ongoing physical sequelae and will not be able to apprehend a criminal;

72.3 The Plaintiff is exceptionally small and will not be a deterrent to any possibly perpetrator;

72.4 The Plaintiff has never worked in the security industry;

72.5 The Plaintiff's PSIRA certificate has lapsed.

72.6 The uncontested evidence of Mrs Greeff was that the Plaintiff with his limited qualifications will normally try to find a job within the heavy to very heavy domain of work. This is where most of the jobs are for individuals with limited qualifications.

73. In addition counsel had argued that the Plaintiff, with his limited educational qualifications and with his limited cognitive ability is unlikely to find any job in the sedentary or light domain of work. It has also now been established that the Plaintiff cannot do work that falls within the heavy or very heavy domain of work. The Plaintiff will only be able to get a job that falls within the medium domain of work.

74. This limitation presents its own challenges, namely:

74.1 Sedentary domain of work – Plaintiff does not have the qualifications to obtain work in this field;

74.2 Light domain of work: - Plaintiff does not have the qualifications to obtain work in this field;

74.3 Medium domain of work: - Plaintiff can do work that falls within this domain of work, but he is unlikely to obtain and maintain a job in this regard as a result of his ongoing *sequelae*.

74.4 Heavy domain of work: - Plaintiff is excluded from this domain of work due to his ongoing physical and other *sequelae*.

74.5 Very heavy domain of work: - Plaintiff is excluded from this domain of work due to his ongoing physical and other *sequelae*.

75. From the aforementioned it is clear that the Plaintiff could only realistically try to obtain work that falls within the medium domain of work. If each domain is allocated a percentage of 20%, it is clear that the Plaintiff will only be able to compete in 20% out of a total of 100% representing the total domain of work.

76. Once the Plaintiff has obtained the work, his next challenge would be to maintain the work. In attempting to obtain this work the Plaintiff will have to disclose his shortcomings from a physical, emotional, cognitive, and psychological level. In addition, the Plaintiff will have to disclose why he lost his previous employment. It is simply unlikely that the Plaintiff will obtain let alone maintain an occupation. For that reason, it has been suggested by counsel and the witnesses for the Plaintiff that the Plaintiff is for all intents and purposes functionally unemployable. These opinions as postulated I could not find reason to detract from, more so in circumstances where the Defendant has been unable to present evidence to refute this.

77. As to the Plaintiff's claim for future loss of earnings the parties by agreement handed into court their respective actuarial calculations without the need to prove same.⁷²

78. On behalf of the Plaintiff two scenarios was presented in his claim for future loss of earnings:

78.1 First scenario – Plaintiff is functionally unemployable;

78.2 Second scenario – Plaintiff is given 20% residual earnings.

79. In as far as the calculations presented before this Court, the Plaintiff provided an updated calculation, by utilising the last court date as the date of the calculation. The Defendant however seeks to rely on an actuarial calculation that is dated February 2021 this is some months before this evidence in this regard was presented and as such a contemporaneous calculation as is the norm had not been presented by the Defendant.

80. In as far as the Plaintiff's calculations presented and for purposes of calculating the Plaintiff's pre-morbid earnings, the Plaintiff placed reliance on its latest actuarial report.⁷³ In this report, the figures in respect of the first scenario is set out as follows:

First scenario: Plaintiff is functionally unemployable. In this scenario the following contingencies have been applied to the loss of earnings calculation:

80.1 Past loss 5%

80.2 Future income (pre-morbid) 15%

80.3 Future income (post-morbid) n/a (Plaintiff is unemployable)

81. If the aforementioned contingencies are applied to the figures the following loss is calculated:

⁷² Argen Actuarial Solutions and Algorithm Consultants and Actuaries.

⁷³ See Bundle p 170-179.

81.1 Past loss of earnings	R191,522.00
81.2 Future loss of earnings	R684,300.15 ⁷⁴
Total loss of earnings	R875,822.15

82. The figure of R684,300.15 in respect of future loss of earnings is calculated as follows:

82.1 The future pre-morbid earnings figure (before the deduction of any contingencies) of R805,059.00 (at page 176);

82.2 Minus a 15% pre-morbid contingency = R684,300.15

82.3 To demonstrate this: $R805,059.00 - 15\% = R684,300.15$

83. As set out above, the plaintiff's Industrial Psychologist agree on the plaintiff's pre-morbid scenario and earnings growth.⁷⁵ In this regard the actuary has calculated the Plaintiff's future pre-morbid earnings as follows:

83.1 Before any contingencies: R805,059.00⁷⁶

83.2 After the application of a 15% contingency, the pre-morbid earnings would be: R 684 300.15⁷⁷

Second scenario: Postulates a scenario where the Plaintiff is given a 20% residual earning capacity. For the sake of being conservative, the plaintiff has made provision for a further and alternative calculation in terms of which future loss of earnings is calculated based on a 20% residual earning capacity (i.e 20% of R684,300.00). If the plaintiff is given a 20% residual earning capacity, then the plaintiff's future loss of

⁷⁴ Actuarial report at page 171 to 179.

⁷⁵ Joint Minute, par 2.5.1,

⁷⁶ Caselines 002-305.

⁷⁷ $R805,059.00 - 15\% = R684,300.15$

earnings will be reduced by 20% and will amount to R547,440.12 (R684,300.15 – 20%).

84. This scenario where the Plaintiff would retain a 20% residual earning capacity, I am of the view that a 20% residual earning capacity has not been properly motivated before this Court. I hold this view for the following reasons:

84.1 With the plaintiff's limited qualifications and limited cognitive abilities, the plaintiff would always have been reliant on his physical abilities to generate an income.

84.2 The plaintiff with his limited qualifications, would ordinarily compete in the heavy to very heavy domains of work.⁷⁸ Furthermore, she testified one would very rarely find such employees competing in the medium or moderate ranges.⁷⁹ This evidence presented by Ms Greeff remains uncontested.

84.3 The conclusion of the evidence of Ms Greeff was that:

"The plaintiff, but for the accident, would normally have worked in the heavy to very heavy domains of work." This evidence was supported by the evidence of the Plaintiff himself.

84.4 According to the report of Dr Miller, the expert opined⁸⁰

"It is difficult to see the patient going back to any type of work ...". This evidence is also undisputed by the Defendant.

84.5 Dr Pauw in his report further observed as follows:⁸¹

⁷⁸ Caselines 005-104, lines 18 to 19. Ms Greeff also testified to this.

⁷⁹ Caselines 005-104, lines 19 to 21.

⁸⁰ Caselines 002-169, par 13 B.

⁸¹ Caselines 002-195, par 11.5.

"With regards to his future occupational functioning, Mr Thaha remains unemployed following the accident, and is likely to have difficulty securing and maintaining any form of employment in the future ..."

84.6 It is for this reason that Mr Prinsloo concluded, after having considered all the evidence and all the views of all the experts, that the Plaintiff is functionally unemployable.⁸² This view, expressed by Mr Prinsloo, was not only supported by the other experts but was also supported by the facts namely that the Plaintiff has tried on more than one occasion to obtain alternative employment without success.

85. For purposes of calculating the Plaintiff's future loss of earnings on this second scenario, provision is made for the following earnings:

85.1	Future pre-morbid income ⁸³ :	R684,300.15
85.2	Future post-morbid income: ⁸⁴	(R138,404.40)
85.3	Future loss of earnings:	R545,895.75
85.4	Plus: Past loss of earnings:	R191,522.00
Total loss of earnings:		R737,417.75

86. The above calculations as postulated by the actuary of the Plaintiff is based on all of the expert reports and the joint minutes prepared by the individual experts.

87. In contrast however the Defendant's actuarial calculation is based only on the defendants' expert reports without taking into account the Plaintiff's expert reports. This taints the evidential value a court can ascribe to the actuarial calculations made by the defendants' expert, and without the witness being called to testify, the findings

⁸² Caselines 002-244, par 8.11.2.

⁸³ After 15% contingency.

⁸⁴ 20% residual earnings based on the Defendant's post-morbid earnings (R692,022 x 20%) at page 97 of Defendant's expert bundle.

set out in this expert report could not be tested against the totality of the evidence presented.

88. As to the appropriate contingencies to be applied by the court, both parties referred the court to the matter of *Southern Insurance Association v Bailey* N.O at 116 G to 117 A where Nicholson JA held:

"Where the method of actuarial computation is adopted, it does not mean that the trial judge is "tide down by inexorable actuarial calculations." He has a "large discretion to award what he considers right" (per Holmes JA in *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at 611 F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the Plaintiff may in the result have less than a "normal" expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or to general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 115. The rate of the discount cannot of course be assessed on any logical basis – the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case."

89. As to the Plaintiff's pre-morbid scenario, the Industrial Psychologists as per their Joint Minute at paragraph 2.5.1⁸⁵ were ad idem, on the Plaintiff's pre-morbid earnings growth.

90. In this regard, actuary of the Plaintiff calculated the Plaintiff's pre-morbid scenario.⁸⁶ After contingencies was applied the totals were calculated as follows:⁸⁷

⁸⁵ Caselines 002-123.

⁸⁶ Caselines 002-302, par 5; Caselines 002-305 (reflecting a total pre-morbid earnings before contingencies in the amount of R1,009,528); Caselines 002-307 where a total pre-morbid earnings after contingencies in the amount of R918,799.00 is calculated.

⁸⁷ Caselines 002-307.

90.1 The plaintiff's pre-morbid earnings from the date of the accident, until day of trial: R194 246.00

90.2 Future pre-morbid earnings: R724,553.00;

90.3 Total pre-morbid earnings: R918,799.00⁸⁸

91. In as far as the Plaintiff's past loss of earnings it was the evidence of the plaintiff supported by his Industrial Psychologist, that he lost his job as a result of the accident in question. This evidence remains uncontested.

92. Mr Marais, the Defendant's Industrial Psychologist conceded as much that the Plaintiff lost his employment as a result of the accident. In as far as calculating the Plaintiff's past loss of earnings, Mr Marais conceded that the past loss can be calculated based on what the plaintiff would have earned (but for the incident) and what the plaintiff actually earned until the date of trial. This amount had been calculated by the actuary⁸⁹ and amounts to past loss in the amount of R191,522.00.

93. In this regard, counsel for the defendant had argued, that the Plaintiff ought to have sued his former employer for wrongful dismissal and as such should also be held liable to the plaintiff in respect of his past loss of earnings as a result of his loss of employment.

94. This argument on point now advanced by the Defendant, is not the pleaded case of the Defendant, nor was the Plaintiff confronted with this stance of the Defendant during cross-examination of the Plaintiff. In the absence thereof, it falls to be rejected by the Court with the result that this Court is satisfied to award the Plaintiff the amount of R 191 522.00 in respect of his past loss of earnings.

95. On the conspectus of evidence presented in regards to the Plaintiff's total loss for past and future loss of earnings I am satisfied that the award of R 875 822.15 should be awarded.

⁸⁸ Caselines 002-307.

⁸⁹ Caselines 002-307.

ORDER

96. In the result the following order is made:

96.1 The Merits are settled on the basis that the Defendant shall pay 90% of the Plaintiff's proven or agreed damages;

96.2 The Defendant shall pay to the Plaintiff the sum of R875 822.15 (Eight Hundred and Seventy Five Thousand Eight Hundred and Twenty Two Rands and Fifteen Cents only) in respect of Past and Future of Loss of Earnings and/or earning capacity;

96.3 The Defendant shall pay to the Plaintiff the sum of R 450 000.00 (Four Hundred and Fifty Thousand Rands only) in respect of General Damages.

96.4 The Defendant shall pay to the Plaintiff the sum of R 160 966 (One Hundred and Sixty Thousand Nine Hundred and Sixty Six Rands only) in respect of Future Medical Expenses.

96.5 In the event of the aforesaid amounts not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 7% per annum, calculated from the 30th calendar day after the date of this Order to date of payment.

96.6 The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto that:

96.7 In the event that the costs are not agreed:

96.7.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

96.7.2 The Plaintiff shall allow the Defendant 30 (THIRTY) Court days from date of allocator to make payment of the taxed costs.

96.7.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

96.8 Such costs shall include but not be limited to:

96.8.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 96.2, 96.3, 96.4 and 96.5 above;

96.8.2 The of and consequent to the employment of Counsel, Senior Junior Counsel Adv. Stefan Maritz, including Counsel's charges in respect of his full day fees for the 13, 14 August 2019, 17 and 18 June 2021 and 17 September 2021, as well as reasonable preparation and drafting of heads of argument;

96.8.3 The costs of all medico-legal, radiological, actuarial, accident reconstruction, pathologist, joint minutes and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles, including, but not limited to the following:

- 96.8.3.1 Dr P Engelbrecht – Orthopaedic surgeon;
- 96.8.3.2 Dr P Miller - Neurosurgeon;
- 96.8.3.3 Dr Annalie Pauw - Clinical Psychologist;

96.8.3.4 A Greeff Incorporated – Occupational Therapist (present at court);

96.8.3.5 JJ Prinsloo & Associates – Industrial Psychologist (present at court);

96.8.3.6 Argen Actuarial Solutions – Actuary

96.8.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the following experts:

96.8.4.1 A Greeff Incorporated – Occupational Therapist (present at court on 13 and 14 August 2019);

96.8.4.2 JJ Prinsloo & Associates – Industrial Psychologist (present at court on 14 August 2019);

96.8.4.3 Argen Actuarial Solutions – Actuary (present at court on 17 June 2021).

96.8.5 The reasonable costs and time spent travelling incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties.

96.8.6 The costs and time spent travelling consequent to an inspection *in loco*.

96.8.7 The costs consequent to the Plaintiff's trial bundles and witness bundles;

96.8.8 The cost of holding all pre-trial conferences, as well as round table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;

96.8.9 The cost of and consequent to compiling all minutes in respect of pre-trial conferences;

96.8.10 The reasonable travelling costs and time spent travelling of the Plaintiff, who is hereby declared a necessary witness:

96.8.11 The reasonable costs for the interpreter MR P MALEKA (present at court on 13 and 14 August 2019)

97 The amounts referred to above will be paid to the Plaintiff's attorneys, Spruyt Incorporated, by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: [...]

Branch code: Hatfield (01 15 45)

REF: SD2702

98 There is no contingency fee agreement between the Plaintiff and Spruyt Incorporated Attorneys.

99 The costs of Adv van der Merwe for the application for absolution from the instance on 12 February 2019, as well as the reasonable costs of preparation of Heads of Argument therefor.

COLLIS J
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	: Adv. S Maritz
Attorney for the Plaintiff	: Spruyt Incorporated Attorneys
Counsel for the Defendant	: Adv. D Mashau
Attorney for the Defendant	: The State Attorneys Pretoria
Date of Hearing	: 12 February 2019, 13 & 14 August 2019, 17 & 18 June 2021, 17 September 2021 & 02 November 2021
Date of Judgment	: 07 November 2022

Judgment transmitted electronically.