

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1681/2014

Heard on: 08/06/2021

Delivered on: 17/09/2021

In the matter between:

REINIER STEPHANES JANSEN VAN VUUREN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAMOSEBO J

[1] This is an action for damages in respect of bodily injuries suffered by the plaintiff in a motor vehicle collision on 8 July 2010. The parties agreed to a separation of the merits of the case from the quantum. Matlapeng AJ granted the order on 29 August 2016 in terms of Rule 33(4) of the Uniform Rules of Court. The defendant, the Road Accident Fund (RAF), would also be liable for 100% of all proven damages. The trial proceeded on the claims for past medical expenses,

estimated future medical expenses, loss of earnings/earning capacity and general damages.

[2] At the commencement of the trial on 8 June 2021, there was no appearance for the RAF despite the matter having been set down for trial with its full knowledge. The matter stood down until 12:00 midday in order to hear from the RAF. Upon resumption, I ordered that the proceedings continue in terms of Rule 39(1) of the Uniform Rules of Court, which stipulates:

“(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.”

[3] The plaintiff himself, Mr Renier Stephanes Jansen Van Vuuren and Mr Niël du Plessis, a Chartered Accountant testified. The latter presented evidence on the plaintiff's pre-accident income potential. The following affidavits and reports were presented: Mr du Plessis' report exhibit “B”; that of Ms Susan Van Jaarsveld, an Industrial Psychologist, exhibit “C”; the actuarial report by Munro Forensic Actuaries, exhibit “D”; Dr Louis Oelofse, Orthopaedic Surgeon, exhibit “E”; Dr Katinka Botha, Psychiatrist, exhibit “F”; Juan Raats, the Occupational Therapist, exhibit “G”, the Schedule of MVA Medical Expenses exhibit “A”, supported by an affidavit of Ms Illizima Muller, exhibit “H”. The remaining issues fell to be decided on the pleadings, the aforementioned medico-legal reports and the joint minutes in which the agreed findings and opinions of the experts are recorded. See *Havenga*¹.

[4] The following background is relevant. The plaintiff is a self-employed 48-year old building contractor mainly focusing on plumbing, electrical and carpentry work as well as home renovations. He testified that as a result of the collision he sustained serious bodily injuries: a fracture of the right femur, an open fracture of the right tibia,

¹ *Havenga v Parker* 1993 (3) SA 724 (TPA)

a right foot fracture, a hip injury and left hand (wrist) fracture. He was hospitalised for 49 days of which the first 7 days were spent in the Intensive Care Unit (ICU).

[5] The plaintiff received the following treatment: underwent five medical operations (surgery), a pin was inserted in his femur, which was later removed and replaced with a bottlebrush and a new pin in the hip. He mobilised on a wheelchair for his first few weeks and later on crutches for a period of 18 months. Kirschner-wires commonly known as K wires were inserted in his right foot. He suffers from constant pain on his lower back, neck, hips, knee and ankle. He experiences headaches daily as well as spasms in his neck. He depends on sleeping tablets prescribed by Dr Elna Barnard who is treating him for depression. In the morning, he struggles with body stiffness and takes Tramazac 200 SR pain tablets every morning and evening which he was subjected to for the past eight years.

[6] Before the collision, he was an active sportsman involved in marathons, cycling, tenpin bowling, squash and competed in five or six iron man competitions. Post the accident he has not been able to resume any of these sporting activities or to assume his hands-on role at the construction sites.

[7] The plaintiff lost a lucrative contract at the Mooihawe Old Age Home where he had performed maintenance work since 2001 as he could not deliver quality work. His employees had repaired the roof at Mooihawe but he was unable to check the quality of their work which was sub-standard and led to the cancellation of the contract. Although he tried to do some work after being off crutches, he was unable to crouch or squat due to intolerable pain and stiffness to his right hip and knee.

[8] He now walks with an antalgic gait. The foot with K wires is completely flat on the ground and without a bridge. Long distance travelling causes his legs to become numb and leads to a sore back. The business is not as profitable as it was before the accident. It needs a multi-skilled supervisor familiar with the different aspects of construction but such employees are rare to find and unaffordable.

[9] The amount of the damages claimed as recorded in the amended particulars of claim is R6 536 638.56 which is made up as follows:

(a)	Past medical and hospital expenses	R 270 247.23
(b)	Estimated future medical expenses	R 954 691.33
(c)	Loss of earnings/earning capacity	R4 111 700.00
(d)	General damages	<u>R1 200 000.00</u>
		R 6 536 638.56

[10] A realistic starting point is the joint minute of the parties' orthopaedic surgeons, Dr L.F. Oelofse for the plaintiff and Dr F.J.D Steyn for the RAF dated 8 May 2017 and marked exhibit "C". Dr Oelofse saw the plaintiff on 2 February 2016 and Dr Steyn on 17 October 2016. Dr Oelofse qualified his report that since there were no hospital records available for perusal, his report is based on the verbal account of the patient, letters from his orthopaedic surgeon and the medico-legal report from Dr JF Ziervogel dated 28 September 2012.

[11] Both the orthopaedic surgeons agree that the plaintiff sustained the following injuries: (i) right hip injury, (ii) right femur injury, (iii) right lower leg injury and (iv) right foot injury. Dr Oelofse also mentioned these additional injuries: (v) cervical spine injury, (vi) lumbar spine injury, and (vii) psychological trauma. Dr Steyn also mentions (viii) fracture of the 2nd left metacarpal.

[12] The initial treatment received by the plaintiff as it appears in the joint minute and the doctors' reports is to this effect. The plaintiff was transported to the Colesburg Hospital by ambulance and then transferred to the Bloemfontein Mediclinic where he underwent an open reduction and internal fixation of the right femur and right open tibia fractures by intra-medullary nails. The fracture of the right 5th metatarsal head (right foot) was reduced by the insertion of the K-wires. Both doctors agree that the plaintiff suffered acute pain, including post-surgical pain, for approximately two weeks. Dr. Oelofse opined that the plaintiff still suffers from chronic pain in multiple joints. Regarding the lumbar spine injury, Dr Oelofse diagnosed an injury of pre-existing spondylosis for which he apportioned 50% thereof as accident related.

[13] In respect of the right hip and femur injury, the intra-medullary nail was inserted and later removed and replaced with a new one which included a hip screw.

Both doctors agree that right femur fracture is united. Dr Oelofse also diagnosed post-traumatic osteoarthritis of the right hip joint and urges that provision must be made for Total Hip Replacement (revision every 12 – 15 years).

[14] Regarding the right lower leg injury, both doctors agree on the diagnosis and the treatment as follows: United right tibia/fibula fractures with post-traumatic osteoarthritis of the knee joint, which will require medication/physiotherapy/biokinetics. They recommended provision be made for a Total Knee Replacement with revision replacement every 12 – 15 years.

[15] Both doctors agree on the diagnoses of the right ankle and foot injury as follows: Right ankle joint injury with resultant post-traumatic osteoarthritis and united foot fractures with talo-navicular osteoarthritis. Both doctors agree that provision be made for an ankle replacement procedure. Dr Oelofse is of the opinion that provision be made for a midfoot arthrodesis. While Dr Oelofse has further diagnosed Post-traumatic Stress Disorder (PTSD), he defers with the opinion of a Clinical Psychologist/Psychiatrist for future treatment and costs.

[16] Both doctors agree that the plaintiff's loss of amenities of life have been affected by the injuries sustained in the accident. The opinion by Dr Oelofse is that, but for the accident, the plaintiff would have been able to work until the normal retirement age of 65 years. In his view the injuries have disadvantaged him in the open labour market and he will never be able to do manual labour again. However, both doctors agree that he will need to be accommodated in a light duty or sedentary position as determined by the Occupational Therapist. They have also agreed to defer to the opinion of the Occupational Therapist and Industrial Psychologist regarding retirement.

[17] In as far as the Whole Person Impairment (WPI) and Narrative Test are concerned, both doctors agree that the injuries sustained by the plaintiff did not result in a WPI of more than 30%. They further agree that he qualifies for the Narrative Test under section:

5.1 Serious long-term impairment or loss of a body function.

The injuries sustained, however, will not have any detrimental effect on the plaintiff's life-expectancy as agreed by both doctors.

[18] At the end of Dr Oelofse's report, there is a validity clause which states:

"This report will remain valid to be used in a court of law for a period of two years from the date of first consultation. If this matter has not been settled within two years from date of the first consultation, an updated Medico-Legal Report will have to be prepared."

The plaintiff was examined by Dr Oelofse on 2 February 2016. Two years from that date would have been 2 February 2018. We know that the trial only commenced on 8 June 2021, five years later. It remains unknown what Dr Oelofse would have revised in the report because there is no supplementary report filed.

[19] I have taken note of the report by Dr J.F Ziervogel, the orthopaedic surgeon who examined the plaintiff on 28 September 2012 that is before Doctors Oelofse and Steyn. It is not only necessary but also significant to highlight some aspects noted by Dr Steyn, based on the findings in Dr Ziervogel's report which reads.

*"The patient stated that he sustained an injury of his left shoulder joint. However, he reported to Dr. Ziervogel, who examined him in 2012 that the pain commenced 1 year after the accident. **Onset of pain that long after the accident cannot be causally related to the accident.***

*The patient reported to Dr Ziervogel that he sustained injuries on his neck, thoracic spine, and lumbar spine. **When examined by myself he made no reference to spinal injury.***

The patient states that he sustained an injury of his left wrist. However, he made no mention of having sustained an injury of his left wrist when evaluated by Dr Ziervogel."

I shall now deal with the issues each under a separate heading.

Past medical and hospital expenses

[20] The plaintiff claims R270 243.23 under this head, which was supported by a schedule marked exhibit "A" handed in during his testimony. The breakdown of this amount comprises hospital expenses in the amount of R182 768.59 and other medical expenses in the amount of R87 478-64. In her affidavit marked exhibit "H", Ms Illizma Muller, Chief Operational Officer of Batsumi Claims Management Solutions (Pty) Ltd confirmed the schedule as the plaintiff's past medical expenses paid by Liberty Medical Scheme. The Court is asked to award the full amount of R270 243.23. In the absence of any opposition by the RAF the claim stands to succeed.

Future Loss of earnings/earning capacity

[21] Mr du Plessis, a qualified Chartered Accountant (SA) holding a BComm and a BComm Hons degrees as well as a Certificate in Theory of Accounting with 24 years' experience in practice, of which 16 years were after qualifying as a CA in March 2002, compiled a report dated 22 August 2019 marked exhibit "B" and gave oral evidence. He has conducted several forensic investigations over the years with a diverse clientele ranging from the public and private sector. The plaintiff is one of his clients.

[22] In conducting the investigation pertaining to the plaintiff he assessed the performance of the business pre- and post-morbid, that is, before and after the accident to determine change in the loss of earnings after the accident and to assess the profitability of the plaintiff's business. Du Plessis used the financial statements for the years 28 February 2007 to 28 February 2010 to determine the financial situation before the accident. Revenue of the plaintiff's business is driven by three main factors (i) sales amount, (ii) material costs as a percentage of sales and (iii) wages as a percentage of sales. His findings reflected growth in sales in excess of the average CPI inflation. He has graphically demonstrated the net income of the business growth preceding the year 2010. In his compilation of financial information after the accident, from financial year ending 2011 to 2018, he could not split financial year for Feb 2010 to 2011 and regarded it as part of the accident. From Feb 2011 the period was included as post-accident.

[23] Du Plessis' findings for the period post-accident was that the sales growth dropped by 27.11% from 29% to 2% for the next eight financial years after the accident. Average Net income as a percentage of Sales dropped by 10.64% from 16.36% to 5.72% for the eight financial years after the accident; Material cost average increased by 8.22% from 32% to 40% and average wage cost as a percentage of sales increased by 9.46% from 27.29% to 36.75%. Average wage cost as a percentage of Gross Profit increased by 21.90% from 40.31% to 62.21% for the eight financial years after the accident.

[24] Du Plessis awarded the difference in performance of the business to the plaintiff's absence and later lesser involvement in the business. What is gathered is that post the accident the business was less profitable. There was no sales growth but material cost and wages increased. In estimating the future loss of earnings he applied the strategy of adjusting the financial results from after the accident using three scenarios for the financial years ending 28 February 2011 to 28 February 2018.

Scenario 1- Sales grow at 15% year-on-year and the business maintains a constant net income as a percentage of the sales ratio:

"In my opinion, the most likely scenario. In this scenario Mr Jansen van Vuuren suffered a historical loss of R1 100 397 and would have earned R322 687 (net profit from the business) for the financial year ending February 2018";

Scenario 2- (worst case scenario) Sales grow at 10% year-on-year and the business maintains a constant net income as a percentage of the sales ratio

"In my opinion the worst-case scenario for the business based on the results achieved prior to the accident. In this scenario, Mr Jansen van Vuuren suffered an historical loss of R762 169 and would have earned R226 121 (net profit from the business) for the financial year ending February 2018";

Scenario 3- (best case scenario) Sales grow at 15% per year, but expenses only grow at 13% leading to an increase in net income as a percentage of sales.

“In my opinion the best- case scenario for the business based on the results achieved prior to the accident. In this scenario Mr Jansen van Vuuren suffered an historical loss of R1 524 478 and would have earned R446 695 (net profit from the business) for the financial year ending February 2018.”

[25] Du Plessis suggested that since the business continued to be profitable despite the challenges, the three scenarios should be considered in determining future loss of earnings. Regard also being had to the plaintiff's possible early retirement as a result of the accident, an aspect he deferred to the relevant experts. Du Plessis considered 3 options:

25.1 Where the plaintiff continues with the business without appointing a senior manager. He recommends that the actuary calculates the anticipated future loss of earning by deducting the R73 160 from the calculated R322 687 adjusted net income for the financial year ending February 2018.

25.2 Where the plaintiff continues with the business and appoints a senior manager. The senior manager performs the job that the plaintiff cannot perform. The opinion is deferred to the Industrial Psychologist to determine the annual cost of employing a suitably skilled person. An actuary must be engaged to calculate the present value of the net cost of taxation adjusted for inflation and contingencies as determined by the court.

25.3 Where the plaintiff cannot continue with his business as a direct result of the accident. This aspect was deferred to the opinion of the Industrial Psychologist. Du Plessis opined, however, that in this scenario, the plaintiff's future loss of earnings would be calculated by deducting any possible anticipated earnings (from alternative employment) from the calculated R322 687, adjusted net income for the financial year ending February 2018. The derived answer can be used by an actuary to calculate present value of his future loss of earnings adjusted for inflation, taxation and contingencies as determined by the court.

[26] In du Plessis' opinion, the most likely scenario among the three is the first scenario at para 25.1 (above). According to him it is also the most conservative which he recommends this court to consider.

[27] Ms Susan van Jaarsveld, the Industrial Psychologist, examined the plaintiff on 31 August 2015 and filed a report dated 1 November 2019. She referred to the report by Dr Ziervogel for the injuries sustained by the plaintiff. The objective of her report was to assess the impact of the accident and subsequent medical treatment on the plaintiff's present and future employability and the type of work he will be able to perform. No psychometric assessment was conducted because, as explained by Ms van Jaarsveld, the plaintiff is well established in his career and is already 43 years old. She conducted a structured interview with him to obtain his educational and family background, work experience, health and hobbies.

[28] Van Jaarsveld agrees with the opinions of the other medical experts that due to the plaintiff's physical limitations as a result of the accident, he will not be able to perform his work as a self-employed Construction Manager and Construction Worker. The distinction between the two was based on the Occupational Network Information, 2019. Van Jaarsveld considered three possible scenarios:

(i) **Scenario 1 where the plaintiff is self-employed as a Building Contractor continuing with his business.** She highlighted that he will, in all probability, have to go on early retirement. Opinion of the relevant expert is required. Should he ineluctably go on early retirement, he must be compensated for his loss of income until retirement. A contingency calculation caused by the fact that the plaintiff will not be able to work at the same rate as before the accident. She suggests a higher contingency calculation to accommodate the possibility that the plaintiff might be forced to close his business in future.

(ii) **Scenario 2: where the plaintiff appoints a supervisor to assist him with the physical part of the construction.** Van Jaarsveld raises a concern that Ms Raats, the Occupational Therapist, suggests that the plaintiff may train his employees to perform the physical part of the work, but in Van

Jaarsveld's opinion, he still requires a supervisor to perform the quality control function before a project is finalised. Of relevance will be a Grade II Paterson Level 4 (basic salary) supervisor. A contingency must be made for the appointment of a supervisor.

(iii) **Scenario 3 considers the possibility where the plaintiff's business will stop to operate for whatever reason.** Should this happen, he may need to consider alternative employment of a light to sedentary nature in the labour market. The plaintiff's alternative career after the accident limits him to work of a sedentary nature, e.g clerical work in the non-corporate sector with earnings equivalent to a semi-skilled worker. Chances of securing this type of work is reduced because he has limited administrative experience, is not computer literate, is already 46 years old and will have to compete in an open labour market. Chances are, he may, as indicated by Dr Oelofse in his report², take early retirement at the age of 55 years.

[29] It is significant to note the following remarks by Ms van Jaarsveld at para 6.10 of her report under the head '**Career opportunities and future loss of earnings**' having referred to Dr Ziervogel's as well as Ms Raats', Occupational Therapist reports:

"Although Mr Jansen van Vuuren continued with his work as a self-employed Building Contractor after the accident, he experience[s] difficulties in performing his work and to properly supervise his employees. Mr Jansen van Vuuren cannot work at the same tempo as prior to the accident and already lost several contracts which included the maintenance contract at the Mooihawe Old Age Centre. As Mr Jansen van Vuuren is self-employed as a Building Contractor it is proposed that he appoint a supervisor to assist him with the physical part of his work. Although Ms Raats (Occupational Therapist) indicates that Mr Jansen van Vuuren can train his employees to perform the physical part of his work, he still needs a supervisor to perform a quality control function before a project is finalised in order to ensure that the

² Page 298 at clause 16.3

work is of a high standard. According to SAFCEC a Supervisor (Grade II) can be linked to Paterson level B4 (basic salary of the lower quartile). A broad conception of remuneration on Paterson level B4 (estimated for 2015), is approximately as follows (see Appendix A, Correlation of Major Job Evaluation Systems):

Paterson	Basic salary			Total Package		
	Lower	Medium	Upper	Lower	Medium	Upper
B4	145000	170000	195000	184000	223000	260000

[30] The plaintiff's actuaries, Munro Forensic Actuaries, compiled an actuarial report dated 3 February 2020. The report was reviewed and approved by Mr Willem Hendrik Boshoff, a Fellow of the Institute of Actuaries in the UK in 2007, who confirmed that the figures were calculated in accordance with standard actuarial principles and correctly reflects his opinion in this matter.

[31] The figures in the actuarial report were calculated as at 1 March 2020. The report estimates the capital value of the potential loss of earnings suffered by the plaintiff due to the accident. The actuaries' sources of information were the reports of the Industrial Psychologist, Ms Susan van Jaarsveld and the Chartered Accountant, Mr Niël du Plessis. Munro's calculations considered the four scenarios:

- (i) **Scenario 1** showing loss assuming the claimant will continue as a self-employed building contractor;
- (ii) **Scenario 2** shows the loss assuming the claimant will continue as a self-employed building contractor and will appoint a supervisor to assist him;
- (iii) **Scenario 3** shows the loss assuming the claimant will find alternative employment in the non-corporate sector (from the date of calculation); and

(iv) **Scenario 4** shows the loss assuming the claimant would have worked as a site manager and will find alternative employment in the non-corporate sector (from the date of calculation).

[32] Having assumed that the plaintiff earns a reduced income after the accident and is not expected to reach the suggested pre-accident potential, and having factored in contingencies and the RAF cap, the calculations per scenario are the following:

	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Past	R1 188 000	R1 190 900	R1 188 100	R776 700
Future	R2 923 700	R2 561 400	R2 921 300	R1 775 365
Total	4 111 700	R3 752 300	R4 109 400	R2 552 065

[33] Dr Katinka Botha, the Psychiatrist examined the plaintiff on 4 April 2017. The plaintiff has been depressed and anxious since the accident in 2010 with one interrupted suicide attempt. He has lost friends and his marriage is strained. He has lost contracts due to loss of productivity and physical impairment and limitations on his supervisory role. Dr Botha recommends that the plaintiff continues with at least 4 follow up sessions of psychiatric treatment and 24 sessions per year with a psychologist. She has also factored in a possible 2-week hospitalisation.

[34] Ms Juane Raats, the occupational therapist, compiled a report dated 07 July 2015. The purpose of the report is to review the plaintiff's residual abilities and the demands placed on his activities such as recreation, personal care, work and interpersonal relations. She recorded the injuries as segmental fractures of right femur, open fracture of right tibia and dislocation of talonavicular joint of right foot. Fracture of left second metacarpal.

[35] Ms Raats opined that, the plaintiff should train his workers to do the manual work so that he, the plaintiff, can supervise the work done. This view is countered by Ms van Jaarveld at para 29 (above). According to Ms Raats the plaintiff may require

a future back operation and hip and knee replacements; based on the other medical reports for which a recovery period will be necessary and that he should still be able to run his business with the suggested adaptations. She points out he will in future need assistive devices from the age of 60 years. Her report has specified the required devices, replacement periods and their estimated costs. He will also require physiotherapy and a Life and Business Coach.

[36] With regards to the plaintiff's loss of earning capacity, the reports diagnose that he is disabled from earning a living as a building contractor and his efficiency is adversely affected as he can no longer do the maintenance and supervisory work which he did before the accident. In terms of the pleadings as a result of the injuries sustained in the collision, the plaintiff is suffering loss of earning capacity and will have to retire early. But for the accident, he would have continued to perform all his construction duties and supervised his labourers until the age of 65 years. An amount of R4 111 700.00 (Four Million One Hundred and Eleven Thousand and Seven Hundred Rand) is claimed under this head.

[37] Rumpff JA articulated the following principle in *Dippenaar*³:

"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:

'In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage, and as it would have been if the act had not been committed (Greuber at 269). Any element of

³ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B - D

attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.'

See also Union and National Insurance Co Ltd v Coetzee 1970 (1) SA 295 (A) where damagers were claimed and allowed by reason of impairment of earning capacity."

[38] I am satisfied that the plaintiff's earning capacity has been compromised. That earning capacity constitutes a loss. I must, however, emphasise that the compensation must be limited to the extent that his patrimony has been diminished. In *Rudman*⁴ Jones AJA made the following enlightening remarks:

"A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss. Thus, in Union and National Insurance Co Ltd v Coetzee [1970 (1) SA 295 (A)], which is referred to in the passage quoted above from Dippenaar's case and which deals with a lump sum award for loss of earning capacity, Jansen JA makes the point that

' 'n (b)epaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie – dit hang af van die sort werk waarteen die gebrek beoordeel word'.

(Loosely translated: However, a particular physical defect does not necessarily entail a reduction in earning capacity or always a reduction in equal extent - it depends on the type of work against which the defect is assessed).

[39] Dr Oelofse, Dr Steyn and Ms Van Jaarsveld are of the opinion that the plaintiff will need to be accommodated in a light/sedentary working environment where he will not be expected to perform manual labour. Dr Oelofse and Ms van Jaarsveld expressed the opinion that the plaintiff will not be able to compete in an open labour market. Ms Jaarsveld qualified that finding based on the facts that he

⁴ *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 241H – 242B

was already 43 years of age at the time of the report, now 48 years, has mainly worked as a contractor, has limited administrative experience, is not computer literate and the current unemployment rate which stood at 25% (Statistics SA, July 2015). However, should he be accommodated in a light/sedentary environment, he will be able to work until the age of 55 years.

[40] I find that the plaintiff has lost a number of clients including the Mooihawe Old Age Home because of his absence from work and insufficient or no supervision on his return. Du Plessis made the point that the plaintiff's business took a turn for the worst at the end of the financial year in which the accident occurred, 28 February 2011 in that, the net income dropped from R105 473.00 to R43 884.00, the material cost as a percentage of sales increased by 3.68% and the ratio of wages to sales increased from 29.89% in the previous year to 39.27%, resulting in an increase of 9.38%. This effectively saw the plaintiff's business increase in material and wage costs as a percentage of sales to 13.06%.

[41] I have considered the four scenarios as contained in the actuarial report. Regard being had to the medical reports substantiating this claim, it is clear to me that the opinions of the experts is that the plaintiff will not be able to function optimally. In scenario 3: regarding the alternative employment in the non-corporate sector, there is no evidence to suggest that the plaintiff would resort to recourse to the open labour market to earn a living. It is unlikely that the plaintiff would have resorted to deploying his labour elsewhere. None of his experts have supported that possibility. The reasons as articulated by Ms Van Jaarsveld supports the view that it would be unreasonable to require him to do so. The evidence indicates the contrary. Scenario 3 and 4 will therefore not be sustained.

[42] In his testimony, the plaintiff stated that he requires the services of a supervisor to do the work that he did himself before the accident so that his construction company can continue to render good quality services but he cannot afford one. But for the plaintiff's injuries, he would have continued to work until

retirement age. Ms Van Jaarsveld has recommended that a supervisor be appointed at Paterson level 4. Taking cue from *Mathews*⁵ where Smalberger JA remarked:

“There is no reason in principle why, in an appropriate case, the cost of employing a substitute should not form the basis of a claim for damages arising from a plaintiff’s inability to carry on his pre-collision trade or profession. See Luntz Assessment of Damages for Personal Injury and Death 2nd ed at 259. Thus a doctor who has been temporarily incapacitated and thereby prevented from conducting his practice could recover the cost of employing a locum tenens, assuming always that the cost of employing such locum tenens would be less than the loss of income or profits he would otherwise have sustained. By adopting such course he is effectively mitigating his damages, as he is obliged to do. He would, however, be precluded from claiming compensation for loss of profits over the same period unless he can prove that by reason of his personal absence his personal profits have fallen below their proper level.”

[43] Regard being had to the totality of the evidence as expatiated in the different reports, it seems that the cost of employing a supervisor is an eminently sensible way of measuring the decrease in the plaintiff’s future earning capacity. It has the effect of restoring him to a position he would have been in had he not suffered such injuries. The employment of a supervisor will compensate for the areas which are inaccessible to the plaintiff, for example, the roof. I therefore find it appropriate, and the facts and evidence in this case support it, that an award for future loss arising from the plaintiff’s incapacity to work or earn as before can be made on the basis of the cost of substitute labour. I also find that the plaintiff would in effect be mitigating his losses by employing substitute labour. In that way, his (plaintiff’s) limited participation at the construction sites is likely to increase his income or reduce the level of expenditure. There is no evidence to the contrary that he will not be able to visit sites and give direction to his employees and the supervisor.

⁵ President Insurance Co Ltd v Mathews 1992 (1) SA 1 (AD) at 5E - G

[44] The actuarial report sought to establish capitalised value of loss of earnings (past and future), after contingencies. The actuary in scenario 2 was asked to assess what the plaintiff's loss would be if he had to employ a supervisor to assist him. Since the RAF did not present countervailing evidence, there was no challenge directed at the method employed by the actuaries to make the calculations or dispute correctness thereof. The report reflects a past loss of R1 190 900 and a future loss of R2 561 400, all to the total amount of R3 752 300. There is no basis or cogent reason for me not to accept these calculations or to interfere with the amount computed.

It therefore follows that the plaintiff stands to succeed in his claim for past and future loss of earnings/earning capacity in the amount of R3 752 300.

General Damages

[45] What remains is the consideration of the last head of damages, namely, General damages. In the pleadings (amended particulars of claim), the plaintiff claims general damages in the amount of R1 200 000.00 in respect of pain and suffering, disfigurement, disability and loss of amenities of life.

[46] Counsel relied on three cases in this regard to substantiate the claim, namely, *Roe v Road Accident Fund, Quantum of Damages, Volume 6 at page J2-59*; *Dicks v Union and National Insurance, Quantum of Damages, Volume 2 at page 211*; *Coetzee v Union and National Insurance, Quantum of Damages, Volume 2 at page 55*.

In his written heads of argument and relying heavily on *Roe*, counsel submitted that since the plaintiff's injuries and residual disability are more comparable with the case of *Roe*, the plaintiff's injuries and its *sequelae* being more serious than those suffered by the plaintiff in *Roe*, an award of R1.2 million for the plaintiff's general damages will be just and equitable. I do not agree.

[47] The following remarks by Navsa JA in *Marunga*⁶ are instructive:

⁶ *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 169 para 23

“[23] This Court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial Court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. This Court will interfere where there is a striking disparity between what the trial Court awarded and what this Court considers ought to have been awarded: See Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A) at 535A – B and the other cases cited there.”

See also *Wright v Multilateral Vehicle Accident Fund* ⁷ which is very helpful in determining general damages.

[48] The plaintiff was 37 years at the time of the accident and 48 years when he testified. He is married but has no children. He is a self-employed businessman as stated. He was the driver of the motor vehicle. His injuries have already been elaborately dealt with by the orthopaedic surgeons in the preceding paragraphs. The focus now specifically falls on pain and suffering, disfigurement, disability and loss of amenities of life.

[49] This is the plaintiff's current position with regards to **pain and suffering**. Dr Oelofse opined that the plaintiff is still suffering chronic pain in multiple joints. The plaintiff testified that he suffers from constant pain on a daily basis, particularly on his back, neck, ankle and his right side of the body, which makes him dependant on pain tablets. He described the pain as a “pepper grinder”. He also experiences headaches as well as shoulder and neck muscle spasms on a daily basis. He has undergone five surgical procedures. The degree of pain and discomfort when undergoing surgical procedures causes anxiety. This also happened two years later, in 2012, when he underwent surgery to remove the pins that were inserted in his femur and tibia. Inclement weather increases his pain. He is also struggling to sleep and takes sleeping tablets for depression post the accident. The plaintiff's mobility was impaired for a substantial period of about 18 months. He has had to mobilise on crutches and was unable to continue with his operational responsibilities of his

⁷ *Wright v Multilateral Vehicle Accident Fund* Corbett and Honey The Quantum of Damages in Bodily and Fatal Injury Cases vol 4 at E3-31 (N)

business. He can neither sit or stand for long periods nor walk for long distances. He cannot travel over long distances without suffering body aches and stiffness.

[50] In respect of **permanent disabilities and disfigurement** the following needs mentioning. The plaintiff walks with an antalgic gait. K-wires were inserted in his right foot. He has signs of post-traumatic osteo-arthritis of the knee with a high probability of reaching final stage arthritis which will require a knee replacement. At the end of each day the plaintiff's ankles are swollen. He could develop adjacent level osteo-arthritis that will require mid-foot arthrodesis. Dr Oelofse says he will never be able to do manual labour again. He also struggles to climb stairs and ladders. He struggles to bend, cannot squat or climb to roof tops. He finds it difficult to wear socks and shoes. He has stopped taking a bath for fear of slipping and uses a shower.

[51] In as far as **loss of amenities of life** is concerned I considered the following: His quality of life has been adversely affected, he has a lowered sex drive. His wife is considering a divorce. He has withdrawn from friends. Pre-accident, he was an active sportsman but has not been able to participate in any of the sporting activities.

[52] Undoubtedly, one can never find a case which is on all fours with the other. It has long been accepted that the past awards serve as a useful guide of what the courts considered as appropriate. Almost eleven years have passed since the accident. What is significant is that whereas the plaintiff sustained severe orthopaedic injuries, his femur and tibia fractures have united. What remains are the possible hip and knee future replacements, constant pain and the inability to lift heavy objects, squat or climb roof tops, simply put, the inability to perform manual labour. Other than walking with a gait with his right foot completely flat without a bridge, the other disabilities are not conspicuous.

[53] The *Roe* case is in the broadest terms close to the facts of this case. The plaintiff in *Roe* was a 44-year old male working in a family business with extensive travelling. His injuries were : soft tissue injuries to the neck, facial injuries with fracture of the cheek, some of his teeth came loose, had a comminute fracture of the right femoral shaft, comminute fracture of the right tibia and fibula, a fracture of the right patella, a fracture of the left humeral shaft, a supra-intra fracture of the left

distal humerus, a degloving injury over the lateral aspect of the right foot and a fracture of the upper incisor tooth.

[54] The difference between the plaintiff in *Roe* and the plaintiff *in casu* is that Van Vuuren was taken by ambulance to Colesburg Hospital, stabilised and transferred to mediclinic in Bloemfontein, whereas in *Roe* the plaintiff was sedated and remained sedated for four to five days regaining consciousness only then, in hospital. They both underwent several surgical procedures. The difference comes in the period for rehabilitation. *Roe* spent two months in rehabilitation, was wheel-chair bound for the first two months was mobilised on crutches and was off work for about six months. Whereas Van Vuuren was wheelchair bound for the first few weeks then mobilised on crutches for about 18 months. While the injuries are not identical they are comparable.

[55] Potgieter JA made the following illuminating remarks in *Protea*⁸:

“Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[56] I am, however, not persuaded by the amount of R1.2 million claimed for general damages and am of the view that it is too high. Having considered all the factors and circumstances referred to earlier in this judgment, past awards as well as the *Wright* judgment approach to the award of damages, I consider the amount of R800 000 to be an appropriate award of damages.

⁸ *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 536A -

[57] I regard the following expert witnesses as necessary for purposes of this trial: Niël du Plessis, Dr LF Oelofse, Susan van Jaarsveld, Juané Raats, Charl du Plessis and Dr K Botha. No motivation or submission was made either orally or in the written heads for Dr Franco Colin and FR Kleynhans. Their evidence never featured in the trial and their reports did not form part of the reports that were handed in and admitted as part of the plaintiff's case. I will therefore be silent in that regard.

[58] In the result, the following order is made:

1. The defendant shall pay the plaintiff the amount of R 4 822 547.23 which amount is arrived at as follows:

- 1.1 The sum of R800 000.00 in respect of general damages;
- 1.2 The sum of R3 752 300 for loss of income;
- 1.3 The sum of R270 247.23 for past medical expenses.

Payment into the following bank account:

Bezuidenhouts Inc.

ABSA Brandwag

Branch Code 334334

Account No [....]

2. Interest on the aforesaid amount at the prescribed rate within 14 days of this order.

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 1996, for payment of 100% of the costs for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service services or supply of goods to him, arising from the injuries he sustained in the motor vehicle collision which occurred on 08 July 2010 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale to date of this order, which shall include the reasonable qualifying, preparation, reservation and appearance fees (where applicable) of the following expert witnesses:

- 4.1 Niël du Plessis Chartered Accountant
- 4.2 Dr LF Oelofse Orthopaedic Surgeon

- | | | |
|-----|---------------------|--------------------------|
| 4.3 | Susan van Jaarsveld | Occupational Therapist |
| 4.4 | Juané Raats | Industrial Psychologistt |
| 4.5 | Charl du Pleassis | Actuary |
| 4.6 | Dr K Botha | Psychiatrist |

5. In the event that costs are not agreed:

5.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and

5.2 The plaintiff shall allow the defendant (14) days to make payment of the taxed costs.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the plaintiff:

Instructed by:

Adv. MDJ Steenkamp

Bezuidenhout Inc

c/o Elliot, Maris Wilmans & Hay Inc

For the defendant:

No appearance