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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: 2654/2013

In the matter between:

T H

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

CORAM:

MHLAMBI, J

HEARD ON:

5, 6, 14, 18 & 25 March 2019

DELIVERED ON:

24 June 2019

MHLAMBI, J

- [1] This matter represents a claim for compensation for damages flowing from injuries sustained in a motor collision which occurred on 20 September 2008.

- [2] On 7 October 2014, the trial served before my sister Ebrahim J, and the question of liability was settled 100% in favour of the plaintiff. The aspect of the determination of the award of damages, if any, was postponed for later adjudication.

- [3] At the inception of the trial, the parties made known that the general damages were settled at R600 000.00 (six hundred thousand rands) and that the defendant would provide the plaintiff with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996. The only issue for adjudication was the plaintiff's claim for past and future loss of income or earning capacity.

- [4] The plaintiff filed an actuarial report by Munro Actuaries while the defendant did not file such a report. A direction was sought and granted that the actuary need not testify but that the court would make an order on the contingencies to be applied. The actuaries would be directed, if needs be, to make a re-calculation of the damages suffered by the plaintiff.

[5] The plaintiff's case is based on the evidence of Dr Ziervogel (an orthopaedic surgeon), Dr JA Smuts (a neurologist), Ms Melloney Smith (an occupational therapist), Mr Mallinson (a psychologist with a special interest in neuropsychology), Dr AC Strydom (an industrial psychologist), the plaintiff, Mr Willie Coetzee (a foreman at Lonmin mine). The defendant led the evidence of two experts: Dr Ngqandu (a neurosurgeon) and Dr Rapapali (a clinical psychologist).

[6] It is appropriate, at the outset, to set out the parties' submissions in brief before discussing the evidence as they, in my view, determine the parties' approach to the testimony and the case as a whole. On behalf of the plaintiff, it was submitted that the actuarial calculation of the plaintiff's future income potential was based on the normal retirement age of 62.5 years and that the experts identified the following main risks which could have a negative impact on the plaintiff's future earning capacity:

6.1. As a result of the orthopaedic injuries and the hemiparesis on the right side, the Plaintiff's concussive head injury with associated moderately severe brain injury, the plaintiff was only able to do medium type of physical work. The severe brain injury was likely to affect his performance and it would have an effect on his progression/promotional opportunities, should he seek alternative employment;

6.2. The neuropsychological deficits identified and in particular the Plaintiff's poor auditory and visual attention;

6.5. The plaintiff's neuropsychological difficulties were now known to the employer. The seriousness of his forgetfulness was monitored by the employer and threatened his position as an acting foreman.

6.6. The imminent closing down of the horizontal shaft where the plaintiff currently works, will, in the not so distant future, make it difficult for him to obtain alternative employment as a result of all the risks mentioned. He is also not able to pass the physical examination to work in the vertical shafts. He is therefore in danger of being retrenched and/or dismissed in the near future.

[7] It was submitted on behalf of the defendant that:

7.1 The plaintiff, pre-accident, worked at Lonmin as an apprentice and has since qualified as an electrician and is currently employed as such;

7.2 At the time of the accident, he earned R 8 686.00 per month and his current salary is R 33479.00 per month;

7.3 The plaintiff is HIV positive and receives treatment in that regard;

7.4 His earning capacity quadrupled after the accident. His earning capacity improved significantly instead of decreasing and

7.5 The accident had not resulted in the loss of earning capacity; consequently, there was no diminution of the plaintiff's patrimony.

[8] Dr Ziervogel examined the Plaintiff on 28 October 2011 and on 15 October 2018. He recorded the Plaintiff's complaints as:

“The right side of his body, including the arm and leg feels weak. He sometimes experiences a tremor in the right arm. The right leg feels heavy and he cannot jog anymore”

[9] He concluded that the patient sustained a serious brain injury with hemiparesis. Though this improved, more improvement was unlikely. As at 15 October 2018, the plaintiff still had weakness (4/5) on the right side. No further improvement could be expected. A report by a Neurosurgeon would be of value as he complained about a loss in memory. Reports by a Neurologist and a Clinical Psychologist would be of value. His diagnosis and evidence were not disputed during cross-examination.

[10] Dr Smuts testified that the Plaintiff had a Glasgow Coma Scale (“GCS”) of 3/15 and 7/15 before being intubated. He endorsed the findings of Dr Ziervogel and opined that the plaintiff sustained a significant concussive head injury with an associated moderately severe brain injury.

[11] On the neurological and other sequelae, he reported as follows:

“Right hemiparesis-right arm:

His arm was very weak after the accident. He could not even hold a glass of water. He says he does not use the hand a lot. He cannot pick up objects with both hands as the object will fall out of the right hand. He explains the whole of the right side of his body feeling different from the left side.

Right leg

He was paralyzed on the right side after the accident. He became better but he is still hampered with a very heavy right leg, that is

slow unable to run, kick a ball, walk fast and walking on uneven terrains are difficult. A significant part of the leg weakness is however of upper motor neuron origin.”

[12] With regards to the plaintiff’s memory, he recorded the following in his expert report:

“He forgets quickly and he needs someone to remind him, even when he has a job card in his hand, he will feel uncertain about what he needs to do. He has a supervisor who has to check his work and also sign it off with him.” The report goes on to state that memory impairment and personality change are well-known problems in patients with closed head injury and often very disabling. Insofar as the Plaintiff’s memory and personality problems were concerned, he deferred to the opinions of a psychologist and/or a psychiatrist.

[13] His evidence was largely uncontested. He was cross-examined about the impact of the Plaintiff’s HIV status on his neurological status and the doctor was of the view that there was no specific neurological dysfunction of the Plaintiff as a result of his being HIV positive. He testified that a patient who regularly took his anti-retroviral drugs and who is likely to continue doing so, is expected to live well beyond the normal retirement age. The HIV did not have an effect on the plaintiff and he agreed with the opinion expressed by Dr Ngqandu in his report¹ on life expectancy that the plaintiff’s longevity was not affected.

[14] Having assessed the Plaintiff and ascertained his work history, Ms Smith reported that the physical demands of the Plaintiff’s work as

¹ Para 8.6 on page 325 of the expert notices bundle

an electrician fell into the category of light to heavy work depending on the task he was busy with. She recorded that the Plaintiff worked in a team with one electrical aid and two assistants. He therefore had assistance with load handling if required. His work was supervised by another supervisor and a foreman. When questioned about his work-related problems, the plaintiff informed Ms Smith that the right side of his body continued to tire more easily and he remained forgetful. He also experienced headaches.

[15] When considering the plaintiff's physical abilities, he displayed the abilities to do medium physical work. He presented some features suggesting mild right sided *hemi paresis*, affecting the strength and endurance on the right side. His work-related physical complaints were therefore justified. The plaintiff was therefore likely to be slower than his peers and would be required to put in more effort when assisting with heavy tasks. He was reliant on assistance with heavy tasks in the work environment. From a physical point of view, Ms Smith opined that the plaintiff was best suited to do light to medium type of physical work and accordingly, there has been a loss in physical capacity that affected his job choices and opportunities.

[16] Ms Smith opined that the neuro-cognitive deficits identified by Mr Mallinson and Dr Rapapali and Dr Smuts' diagnosis of a moderate to severe brain injury, are likely to affect the plaintiff's performance and require some form of supervision at work. She agreed with Mr Mallinson that the said deficits will have an effect on the plaintiff's career progression/promotional opportunities and would be a liability were he to seek alternative employment.

[17] Save for some questions on the impact of HIV and Aids on a patient's longevity, Ms Smith was not cross-examined on her evidence in court and/or the findings in her expert report. Ms Smith conceded that HIV is a disease that progresses with time, but she was of the view that a specialist physician should comment on the likelihood when the HIV virus would turn into the Aids syndrome, having regard to the fact that the patient takes the ARV medication.

[18] The plaintiff gave evidence about his physical limitations *i.e.* the weakness of the right side of his body and cognitive limitations. He explained the requirements to obtain a "red ticket" (which he described as a heat tolerant fitness medical certificate) and the fact that he, as a result of his physical limitations, did not qualify to obtain a "red ticket" to work in vertical shafts. He obtained his "red ticket" to work in the horizontal shafts. He pointed out that Lonmin is the only mine in the Rustenburg area that mines horizontal shafts. All the other mines only have vertical shafts. Insofar as his physical limitations are concerned, he explained that he worked in teams and, as an electrician, he had the assistance of electrical aids to help him with the physical components of his work which he was not able to execute, especially when he had to do certain emergency work involving a physical element.

[19] His work was predominantly repetitive in nature. He serviced underground locomotives for which he has to complete a checklist. Insofar as his cognitive limitations are concerned, he testified that he is very forgetful. He would forget his tools on a locomotive having serviced it. He would forget to inform his superior when he

completed certain tasks, and on more than one occasion forgot to switch off the electricity before working on certain equipment. There is a lockdown procedure that one has to follow in order to switch the electricity off before working on certain components underground. He knew the procedure very well, but at times he forgot to follow it. Fortunately, the electrical aids who worked with him, would normally check whether he had indeed followed the lockdown procedure. If he had not done so, they would remind him to first follow the lockdown procedure before working on a certain electrical component.

[20] He testified that his superiors reprimanded him about being forgetful. He started to act as the electrical foreman in the past two weeks. This acting job entails that he has to meet daily with the engineers from whom he receives instructions relating to certain tasks which are to be performed by electricians and electrical aids. It is the Plaintiff's duty to ensure that those tasks are executed by the electrical teams. The tasks involve, amongst others, maintenance of mini-substations, random electrical repair work in the mine, repair and/or maintenance of the ventilation system within the mine shaft. He is also responsible to take delivery of various electrical components from suppliers and ensure that those components reach the electrical teams within the mineshaft in order for them to be able to execute the work. He must ensure that the legal documents and paperwork relating to the maintenance and repairs executed in the mine are up to date.

[21] To overcome his forgetfulness, he testified that he regularly made notes in order to remind him of tasks to be executed. He requested

the mine to provide him with assistance to do the paperwork and Olga Phahlane was allocated to him for such assistance.

[22] According to the Plaintiff, the risks involved with his new acting position are very high. Should he forget to execute an instruction, a mini-substation could explode if it were not maintained; the ventilation system in the shaft could shut down endangering the lives of the workers and if maintenance in the mine is not executed on time, it could cause a shutdown of mine production. He expressed concerns about his job security as the mine superiors indicated in management meetings that the particular shaft would be shut down soon. The shaft at which he works is the only horizontal shaft left at Lonmin, with a life span of only 18 months to 2 years.

[23] He conceded during cross-examination that he noticed that he had contracted the HIV virus while he was at the Pelonomi hospital following the accident. He conceded that he might have contracted the virus prior to the accident even though he tested HIV negative in 2008. He started then to take the ARV medication to date. He confirmed that at the time of the accident he was busy with training to become a stope serviceman. He started training as an electrician during 2010 which qualification he obtained during 2013. He acknowledged that he progressed after the accident and earned more thereafter than before as indicated on the various pay slips.

[24] Mr Mallinson testified that he is a member of Headway, an organization that deals with the rehabilitation of brain injured individuals and he is also a member of the South African Clinical

Neuropsychological Association (SACNA). He testified that SANCA is not a statutory body registered with the Health Professionals Council of South Africa, but it is the only way of claiming accreditation in the field of Neuropsychology because it involves writing exams, submitting papers and a constant peer review of one's colleagues to ensure that one's work complied with the high standard expected of a Neuropsychologist.

[25] The neuropsychological testing of the plaintiff revealed the following difficulties:

- 25.1 Difficulty with working memory;
- 25.2 Poor auditory attention, particularly on complex tasks;
- 25.3 Mild visual attention difficulties;
- 25.4 Psychomotor slowing;
- 25.5 Subtle planning difficulty on unstructured tasks.

[26] He was of the opinion that the difficulties were consistent with a moderate to moderately severe concussive brain injury and they would be considered permanent. Although the Plaintiff was able to return to work, he opined that he still demonstrated neuropsychological difficulties, which would make him less effective and efficient in the workplace as he could be more error prone. This would probably have a negative effect on his career path in terms of receiving promotion and may well be an impediment if he were to seek employment outside of the mining industry. His neuropsychological difficulties should be taken into account by the Industrial Psychologist when determining his post-accident level of employability and earning potential.

[27] Dr Mallinson testified that it was understandable that the plaintiff was able to cope as an electrician, although with limitation, because there were other persons on whom he could rely on to mask his neuropsychological difficulties. An example is when he forgets to turn off the electricity before working on a certain electrical component, the electrical aides would remind him to follow the electrical shut down procedure. However, now that he was responsible for the execution of the instructions from the engineers, he had to ensure that the electricians executed those tasks. He would not be able to hide his neuropsychological difficulties as he would not be supervised. Accordingly, his neuropsychological difficulties, especially his poor auditory and visual attention, would be exposed. He agreed that the difficulties identified by Dr Rapapali would be consistent with the presence of the neuropsychological deficits and were in keeping with his finding as summarized in his report. However, he did not agree with Dr Rapapali's conclusion that: *"from the neuropsychological point of view, the neuropsychological injuries suffered in this accident are not associated with the reduction in competitiveness in the open labour market."* He testified that once the neuropsychological deficits, as identified by him, are present, it automatically has an effect on an individual's competitiveness in the open labour market.

[28] Dr Strydom was of the view, having regard to the Plaintiff's work history, both pre- and post-accident and the opinions of the experts, Dr Ziervogel, Dr Mallinson, M Smith and Dr Smuts that:

28.1 The plaintiff suffered a loss of employability, and subsequent earning capacity;

28.2 He is regarded as less competitive and a vulnerable employee;

28.3 He had probably reached his career ceiling and no further promotional opportunities are envisaged;

28.4 The employer rated his post-accident performance lower compared to before the accident and should he lose his current position for any reason, he is not sure whether the Plaintiff would be able to secure the same employment at another mine where they are not aware of his pre-accident performance levels.

28.5 The plaintiff is at a high risk of losing his job because he is error prone.

28.6 The plaintiff should be compensated for the likelihood of not being promoted to the position of foreman, being a less competitive job seeker and vulnerable employee who would not be able to study further. His current earnings plus normal inflationary increases should thus be considered as his career ceiling.

[29] Dr Strydom commented that the plaintiff was recently moved to an office position. She agreed with Dr Mallinson that the Plaintiff's neuropsychological difficulties would now be exposed and he faced a greater risk of losing his work. If he were to be dismissed or retrenched, he would find it very difficult to obtain work in another

mine as a result of his neuropsychological difficulties, physical impairments and inability to obtain a “red ticket” to work in the vertical shafts. These risks should be addressed by way of applying an appropriate high contingency to the Plaintiff’s future earning capacity.

[30] Mr Coetzee is the plaintiff’s direct supervisor at Lonmin Mine. Until approximately two weeks ago, the plaintiff was his charge hand or direct assistant. He testified that the plaintiff is a very proud and hardworking individual. The plaintiff worked slowly. He had attributed that to the plaintiff’s being diligent. The plaintiff was at times forgetful as he would forget to report to him after completing a task or would forget to inform him of important aspects.

[31] To compensate for his forgetfulness, the plaintiff constantly made notes but, despite the notes, he remained forgetful. He testified that there were various quarrels between him and the Plaintiff as a result of his forgetfulness. On Wednesday, 6 March 2019, he became aware that the plaintiff had, in the past, forgotten to follow the lockdown procedure and he immediately scheduled a meeting with the mine engineer to address the issue. According to him, the seriousness of the Plaintiff’s forgetfulness cannot be overlooked because it endangers the lives of not only the Plaintiff, but also other workers and he does not foresee that the Plaintiff will be able to work in that capacity any longer.

[32] He confirmed that there is a serious risk that the Karee Belt 4 Shaft of Lonmin mine will be closed down in the foreseeable future. In this regard the mine management had already taken active steps to

inform the workers of the fact that there is a real possibility of closure of the shaft. The shaft operated below its expected production. The Plaintiff was appointed as acting foreman because he, Mr Coetzee, was instructed to spearhead a new division. Even in the acting position, he had serious reservations whether the Plaintiff would continue to act in that capacity due to his forgetfulness and the serious risks involved in the event that the plaintiff should forget to execute an instruction.

[33] Dr Ngqandu confirmed that the Plaintiff suffered a severe head injury in the accident. He confirmed that the claimant's post-accident impairments included difficulty in running and forgetfulness which affected his work. In his evidence in chief, he did not testify that the Plaintiff suffered a right-sided hemiparesis. He confirmed during cross-examination that the claimant was at risk of developing seizures as a result of the accident and the risk is 4 to 8 times higher than that of the general population.

[34] Dr Ngqandu accepted that the Plaintiff's memory problem is a cognitive deficit which one expects in the event of a severe head injury, but he, as a neurosurgeon, was not equipped to test the extent of the neurocognitive deficits and accordingly, he deferred to a Neuropsychologist for a detailed assessment. He conceded that he could have missed the diagnosis especially as all the other medical experts diagnosed the Plaintiff with a right sided hemiparesis. Dr Ngqandu also conceded that it was not unusual for brain injury patients to suffer a hemiparesis following a severe traumatic brain injury and that the head injury could cause memory difficulties.

[35] Dr Rapapali testified that HIV has a degenerative effect and that the plaintiff's neuropsychological difficulties were not as a result of the accident but as a result of the plaintiff's HIV status. Consequently, the injuries had no impact on the plaintiff's future earning capacity. However, he was unable to explain why he left out the HIV assessment in his report on which he based his conclusions. He could also not explain why he equated chronic medication to HIV.

[36] He differed with Mr Mallinson on the psychosomatic symptoms and maintained that the plaintiff's slowing down with executive functions was as a result of the HIV. He never observed any serious head injuries on the plaintiff but could not oppose the neurologist's report that the plaintiff sustained a significant concussive head injury with an associated moderately severe brain-injury. He did not speak to the neurologist, Dr Smuts, at all and took note that the latter's evidence in court remained unchallenged. He confirmed that Dr Ziervogel was correct in his diagnosis on *hemi paresis* which was a direct result of brain-injury. He agreed with Mr Mallinson's findings² as to the difficulties revealed by the neuropsychological testing. This assessment was conducted seven years following the injury and, according to Mr Mallinson, would be considered permanent and no further improvement could reasonably be expected. Dr Rapapali agreed fully with Dr Smuts, Mr Mallinson and the other experts but differed with them on the effect that HIV had on the plaintiff.

[37] The legal position relating to a claim for diminished earning capacity is trite. The mere fact of a physical disability does not necessarily

² These are set out in paragraph 6.7 and 6.8 on pages 205 to 206 of the report; See para 25 above.

reduce the estate or patrimony of the person injured³. In **Benjamin Petrus Malan v Road Accident Fund**⁴, Makgoka J (as he then was) expressed the position as follows:

“[12] It is trite that the plaintiff bears the onus of proving on a balance of probabilities that any pathology emanating from the accident explains his current complaints which disables him from continuing with his job as a car sales representative, as he was able to do pre-morbidly. The court must determine first, whether the injury has translated into diminution in earning capacity, and second, the extent of such diminution. In the process of such determination. It must be established with some certainty, among others, what impact the accident had on the Plaintiff in carrying out his duties as a car sales representative; the future opportunities the plaintiff was likely to be presented with, but for the accident; if plaintiff, post-accident, was employed sympathetically; and whether the plaintiff received any warnings for lack of application or performance.

*[13] These are all very important and pertinent considerations in determining whether, in fact, the plaintiff has suffered diminution in his earning capacity as a result of the accident. It is important to emphasise that the mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury which impaired the ability to earn an income that was in fact a diminution in earning capacity. See *Union and National Insurance Co. Ltd v Coetzee* 1970 (1) SA 295 (A) at 300A; *Sanlam Versekering Maatskappy Bpk v Beyleveldt* 1973 (2) SA 146 (A); *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A)”. (Underlining my emphasis)*

³ Union & National Insurance Co. Ltd vs. Coetzee 1970 (1) SA 295 (A) at 300A; Santam Versekering Maatskappy v Bylevedt 1973 (2) SA 146 (A); Dippenaar v Shield Insurance Co. Ltd 1979 (2) SA 904 (A); Krugell vs. Shield Ins. Co. Ltd 1982 (4) SA 95 (T) at 99E; Rudman v RAF 2003 (@) SA 234 (SCA); Prinsloo v RAF 2009 (5) SA 406 (SE)

⁴ Case No: 66248/2012 Delivered on 06 December 2016

[38] Both counsel referred me to various pertinent authorities, some of which I have referred to above. Mr Mopeli referred me to, *inter alia*, two decisions of this Division on which I comment briefly: **Sechogo Josias Mooki v The Road Accident Fund**⁵ and **BC Van Rooyen N.O obo SC Hlatjawa vs. The Road Accident fund**⁶.

[39] The reference to **Mooki vs. Road Accident Fund** is distinguishable from the present case (Mr Mopeli acted as counsel in this matter). The claimant in that matter was a school principal and the core functions as detailed in the industrial psychologist report did not demand of him to engage in extensive physical activities. The extramural activities he engaged in were part of extra work to enhance his score on his employer's integrated quality management assessment. The evidence of the experts showed that the plaintiff's injuries did not affect his ability to perform his core duties as a principal⁷. The court was of the opinion that the pain and suffering (pain on his ankle and wrist) he continued to endure, could be dealt with under the heading dealing with general damages. The loss in work capacity did not directly translate into the diminution his estate.

[40] In **Van Rooyen**, *supra*, the actuary's calculation was based on the evidence that the patient was, at a very young age, already diagnosed as being HIV positive and most probably born as such⁸. The actuary conceded that the patient's HIV status posed a high risk of her falling ill and becoming unemployable, at least intermittently. The court was of the view that that called for a higher

⁵ Case No: 5978/2015 Delivered on 03 December 2018, unreported

⁶ Case No: 216/2016 Delivered on 28 February 2019, unreported

⁷ Paragraphs 18 and 19

⁸ Paragraph 12

contingency to be applied⁹. I agree with Mr Zietsman's argument that this case is distinguishable from the present one especially viewed in the light of Dr Rapapali's evidence as shown below.

[41] In **Thobega Botshelo Mercy vs. The Road Accident fund**,¹⁰ one of the issues for determination was the future loss of income. The industrial psychologists agreed about the plaintiff's pre-accident education and her career path and income up to the date of the accident. The plaintiff's industrial psychologist, after considering her pre and post- accident work history, was of the view that, based on the plaintiff's positive work feedback, her career progress and subsequent salary increments since her employment and even after the accident it seemed that her career and earnings have not been significantly negatively impacted upon. Post-accident she was promoted to a training officer and earned about three times her pre-accident salary as per the industrial psychologist joint minute. Prior thereto, she had completed an education training and development practitioner certificate course on a part-time basis in July 2016 having enrolled for it in February 2014 at the same institution. During 2018, she was enrolled in a ten-month leadership training course.

[42] In dismissing the claim for the future loss of income, the court took into account that the plaintiff currently earned almost three times her pre-accident salary; she had done very well even post-accident in terms of educational advancement and that she should be able to progress further. Her salary would be further increased upon

⁹ Paragraph 13

¹⁰ 74547/2015 Delivered on 30 July 2018 GSI

completion of her ten-month leadership course. The psychological disorder seemed mostly due to her facial disfigurement which could be alleviated by psychological counselling as well as other treatment suggested by the relevant experts. Consequently, on the evidence presented, the disabilities from which the plaintiff suffered or would suffer in future would not, in the court's view, impair her capacity to do her work. The plaintiff was, prior to the accident, employed as a junior process controller at an iron ore mine at Kuruman.

[43] It was submitted on behalf of the plaintiff that the court should consider a direction to the actuary to do a recalculation which should apply the following contingencies:

5% for uninjured past earnings, 15% for uninjured future earnings, 5% for injured past earnings and 47.5% for injured future earnings. The actuaries' report calculated the capital value of loss of earnings as follows:

Capital Value of Loss Earnings (Excluding the RAF cap)

	Uninjured Earnings	Injured Earnings	Loss of Earnings
Past	R 4 529 400	R 4 058 100	
Less Contingencies	5%	5%	
	R 4 302 930	R 3 855 195	R 447 735
Future	R 10 125 300	R 10 125 300	
Less Contingencies	15%	45%	
	R 8 606 505	R 5 568 915	R 3 037 590
TOTAL LOSS OF EARNINGS R 3 485 325			

[44] As stated earlier, the defendant did not consult an actuary and there was no rebuttal of the actuarial methods adopted by the actuary nor were the correctness of the calculations challenged in any way. There is no reason therefore, why the calculations of the actuary cannot be taken into account in order to determine a just, reasonable and realistic amount to represent an amount for those damages in the event of a finding that the applicant did suffer a loss of income or loss of earning capacity as a result of the *sequelae* of the injuries sustained in the collusion.

[45] In **Kleinhans vs. Road Accident fund**,¹¹ the court held on appeal that the court below had committed a misdirection in finding that the appellant had failed to prove a loss of earnings/earning capacity following his inability to continue working as a bus driver. “*The capacity which the appellant had to earn money as a bus driver is now no longer available to him, and this lost capacity, considered in law to be part of the appellant’s estate, must be seen as a loss diminishing his estate in view of the authorities quoted*”¹². The court had therefore erred in not allowing an award in respect of loss of earnings or loss of earning capacity flowing from the truncation of the appellant’s career as a bus driver.

[46] *In casu*, it is clear that the evidence tendered by the plaintiff’s employer stood unchallenged. Mr Coetzee’s testimony clearly set out in an objective manner the plaintiff’s work performance after the accident and disclosed the employer’s views of the plaintiff. All the expert reports are before the court from which it can be deduced that the accident had resulted in a number of psychological and cognitive *sequelae*. The plaintiff’s assertions of memory and

¹¹ *supra*

¹² Kleinhans, *supra*, para 45.

concentration difficulties, are supported by the evidence of the employer and the industrial psychologist, Dr AC Strydom.

[47] The evidence presented by the defendant, instead of opposing or neutralising the plaintiff's, strengthened it. As pointed out by Mr Zietsman, the cross-examination by the defendant's counsel, focused largely on the fact that the plaintiff was HIV positive. The evidence not only suggested that the plaintiff was a healthy individual and that he regularly took his ARV medication, there is absolutely no evidence whatsoever to the effect that the plaintiff had contracted the AIDS syndrome or that his HIV status had progressed to that level. The HIV positive status would not have a negative effect on the plaintiff's life expectancy and future loss of earning.¹³

[48] It is clear from the evidence that the defendant's counsel was influenced by Dr Rapapali's report on the plaintiff's HIV status. Dr Rapapali's opinion is not founded on logical reasoning or based on any evidence, whether of his own or the other competent witnesses.¹⁴ His evidence was unsatisfactory and stood to be rejected in so far as it differed with the evidence of the other expert witnesses. I accept the evidence and findings of Mr Mallinson and deem him a credible expert witness with specialised skill.

¹³ LN v Minister of Safety and Security and another 2011 (5) SA 512 (KZP)

¹⁴ Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A); Michael and another v Linksfield Park Clinic (Pty) Ltd and another 2001 (3) SA 1188 (SCA)

[49] It is also evident from the testimony of the plaintiff, Mr Coetzee and the industrial psychologist that the plaintiff was afforded the services of an assistant to perform some of his administrative tasks because of his failing memory. Having considered the evidence, I am of the view that the disabilities from which the plaintiff suffers or will suffer in the future, will impair his capacity to work. The plaintiff has succeeded to prove that his patrimony has been diminished due to loss of earning capacity. The capacity which the appellant had to earn money as mine worker, is no longer available to him and this lost capacity, considered in law to be part of the appellant's estate, must be seen as a loss diminishing his estate.¹⁵ Furthermore, being error-prone, the plaintiff runs the risk of losing his employment. The industrial psychologist was of the opinion that it was not certain whether the plaintiff would be able to secure employment at another mine where his pre-morbid performance levels were unknown¹⁶. Besides, the employer had indicated the closure of the only horizontal shaft at Lonmin where the plaintiff works.

[49] In conclusion, I am satisfied that the plaintiff has succeeded to prove that he has suffered loss of earning capacity as claimed. Despite being urged to direct the actuaries to do a recalculation as suggested, I am satisfied with the actuaries' computation of the plaintiff's loss of earning capacity and that, all the circumstances taken into account, the plaintiff would be properly and adequately compensated if an award is made accordingly. I therefore exercise my discretion in favour of the plaintiff in the amount as set out in the actuaries' report.

¹⁵ Bailey (spura)

¹⁶ Report: Dr AC Strydom, para 16:Post-morbid potential.

[50] In the circumstances, I see no reason why the costs should not follow the result. On 08 March 2019 the matter was postponed to 14 March 2019 for purposes of leading the defendant's second expert witness. The matter was postponed on that day to another date as the said expert witness was unavailable and the costs stood over. It is appropriate to grant the wasted costs of that day in favour of the plaintiff and it is so ordered.

[51] I make the following order, having taken into account the draft submitted by the appellant's counsel during the proceedings containing the provisions generally found in orders of this nature.

Order

1. The defendant is liable for payment to the plaintiff in the amount of **R 4 085 325.00** (four million, eighty-five thousand, three hundred and twenty-five rands only in full and final settlement, as set out hereunder:
 - 1.1 **R 447 735.00** in respect of past loss of income;
 - 1.2 **R3 037 590.00** in respect of future loss of income;
 - 1.3 **R600 000.00** in respect of general damages resulting from a motor vehicle collision that occurred on **20 September 2008**.
2. The defendant is ordered to furnish to the Plaintiff an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the Plaintiff in

a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the Plaintiff arising out of injuries sustained by him in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate him in respect of the said costs after the costs have been incurred and on proof thereof.

3. The defendant to pay the plaintiff's taxed or agreed party and party costs on the High Court scale which shall include the costs mentioned in paragraph 50 above, until date of this order, including but not limited to the costs set out hereunder:

- 3.1 The costs attendant upon the obtaining of payment of the amounts referred to in this order;

- 3.2 The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:

- 3.2.1 Dr JJ Schutte (General Practitioner);

- 3.2.2 Dr RS Kahn (General Practitioner);

- 3.2.3 Dr JF Ziervogel (Orthopaedic Surgeon);

- 3.2.4 Dr J Smuts (Neurologist);

- 3.2.5 Melloney Smit (Occupational Therapist);

- 3.2.6 Brian Mallinson (Psychologist);

- 3.2.7 Dr AC Strydom (Industrial Psychologist);

- 3.2.8 Munro Actuaries (Actuaries).

- 3.3 The counsels' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's attorneys, the plaintiff's witnesses and the plaintiff's experts;
- 3.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;
- 3.5 The travelling costs occasioned by the plaintiff and the plaintiff's witnesses to attend to necessary consultation with his attorney and expert witnesses.
- 3.6 The reasonable travelling and accommodation fee of the witness, Mr Willie Coetzee, who is declared a necessary witness.
4. The payment provisions in respect of the foregoing are ordered as follows:
- 4.1 Payment of the capital amount shall be made without set-off or deduction, within 30 (thirty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:
- | | | |
|-----------------|---|-------------------------------|
| Honey Attorneys | - | Trust Account |
| Bank | - | Nedbank, Maitland Street, Bfn |
| Branch Code | - | [...] |
| Account No. | - | 1102475912 |
| Reference | - | HL Buchner/J03083 |

- 4.2 Payment of the taxed or agreed costs shall be made within 14 (fourteen) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;
- 4.3 No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;
- 4.4 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.25 % (the statutory rate per annum), compounded.
5. In the event that costs are not agreed, the plaintiff agrees as follows:
- 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 fourteen (14) court days to make payment of the taxed costs.

MHLAMBI, J

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Kenneth Kaundaweg
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