



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

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

CASE NO.: 378/2009

**Date heard: 15-03-2018
Date delivered: 08-03-2019**

In the matter between:

Erasmus Albertus Schutte

Plaintiff

And

The Road Accident Fund

Defendant

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiff, who at the time was 20 years old, sustained certain bodily injuries as a result of a motor vehicle accident which occurred on 6 March 2004. The merits of the plaintiff's claim were settled on the basis of a 50% apportionment of liability. The only issues left to be determined relate to the quantum of general damages and the plaintiff's claim regarding loss of earnings.

2. At the time of the accident, the plaintiff was in his second year as an apprentice electrician with the Department of Water Affairs in Jan Kempdorp, having matriculated in 2002. Before the accident he had achieved his N1 qualification, but was unsuccessful thereafter in achieving either the N2 or N3 qualification. He did however pass the electrician trade test during 2009 and obtained his tradesmanship licence. He thereafter left the Department of Water Affairs and attempted to do electrical work for his own account, but after about a year he took up employment as an electrician with Olam SA, a factory processing peanuts and pecan nuts. After about 3 years at Olam SA, the plaintiff obtained employment at the Pokwane Municipality (the Municipality), where he worked as an electrician for about 3 years – from 2014 until March 2017, when he resigned from that position. At the time of the quantum trial which commenced during August 2017, he was employed as general foreman, at a much reduced salary, at a construction firm. His duties included *inter alia*, transporting the workers, placing orders and minor electrical work. The plaintiff attributes the downward spiral in his career path to the injuries he sustained in the motor vehicle accident – more specifically injuries to his brain and back. I will revert to his evidence in this regard in due course.
3. Whereas the brain injury and its sequelae are largely common cause, the plaintiff's back injury is the major bone of contention between the parties as the defendant denies its causal link to the motor vehicle accident. At this stage I turn to the treatment of the plaintiff, as can be gleaned from the hospital records.

4. After the accident the plaintiff was admitted to the Jan Kempdorp hospital with head injuries and lacerations. There he was stabilised and transferred to the Kimberley Medi-Clinic. The notes of the neurosurgeon who assessed him there shows that he had a Glasgow coma count of 11/15. He was referred for a CAT scan of which the reported findings were of left hemisphere swelling and a subarachnoid haemorrhage. X-rays of the plaintiff's lumbar spine were also taken. The plaintiff was treated in the intensive care unit of the hospital for four days while he was in a coma. When he regained consciousness he was transferred to a general ward after which he was discharged.
5. The following witnesses testified on behalf of the plaintiff: Dr H Relling, a neurosurgeon; Mr Ben Jannecke, a clinical psychologist; Ms Mia Vermaak, an occupational therapist; Dr Everd Jacobs an industrial psychologist; the plaintiff; and Mr Lucky Domingo.
6. On behalf of the defendant the following witnesses testified: Ms Esther Cloete an occupational therapist; Dr Shafik Parker, a neurosurgeon; Mr Piet Crous, an industrial psychologist; Prof Alan Bryer, a neurologist; and Mr Joseph Ndlazi.
7. I proceed with the evidence of the plaintiff. At the time of the trial he was 33 years old and had been married for some 3½ years. He cannot remember anything about the accident or the time he had spent in hospital. His first memory after the accident is when he returned home after his discharge from hospital. At that stage he experienced pain over his body

generally and had a headache. He returned to work at the Department of Water Affairs after about 6 weeks.

8. The plaintiff states that he was never the same person after the accident. He had become emotional and aggressive, suffered from headaches on an almost daily basis and had also become forgetful. At present, some 13½ years after the accident he still becomes very emotional and experiences aggression, especially while driving and towards other motorists.
9. He had become engaged to a young lady some time after the accident but she ended the relationship a few years later because she refused to put up with his aggression and rudeness. He started dating his wife during 2009, a relationship which has endured.
10. The plaintiff testified that he suffered from backache during the first year after the accident. The backache dissipated but returned during about 2012/2013. Initially he took painkillers to alleviate the pain but during 2013 his general practitioner started giving him a painblock injection between the vertebrae, which lasted for about 4 to 6 months.
11. The plaintiff testified further that he has become forgetful after the accident and has difficulty in concentrating. He wrote his N2 test after the accident, during 2004, but failed even upon rewriting the test. He managed to obtain his tradesmanship licence during 2009, which consisted of completing five practical tasks. During 2012/2013 he wrote the N3 test since it was a requirement for issuing the electrical certificates of compliance which financial institutions require for the purposes

of home loans, which was a field he was interested in. He however did not manage to pass the N3 test.

12. During 2010 the plaintiff left the Department of Water Affairs to set out on his own as an independent electrical contractor. This endeavour was unfortunately not successful and in 2011 he joined Olam SA as an electrician. There he was the only electrician and his work entailed climbing up ladders to get to the pecan nut and peanut holding bins, which were kept on a platform above ground, to check on a daily basis that the motors, cables and switchgear were safe and in order. He testified that he experienced discomfort and pain in his right hip when carrying his toolbox and cables up the ladder, but that he managed to perform his duties with the help of his assistants. His salary at Olam SA amounted to R12 000, 00 per month.
13. Three years later and after becoming aware that Olam SA was experiencing financial difficulties, the plaintiff applied to the Municipality for employment as an electrician. He was successful and in March 2014 started working at the Municipality. The electrical team at the Municipality consisted of a senior electrician, Mr Lucky Domingo, the plaintiff and 4 or 5 assistants.
14. The plaintiff testified that the work at the Municipality was particularly difficult and stressful for him. He had to regularly climb ladders to get to power cables and dynamometers. The pain he experienced in his lower back and right hip made it difficult for him to climb and work on ladders since he had to use both legs to balance himself, whereas he is more comfortable, with the pain in his right hip, to put his weight on

- his left leg. The work at the Municipality also entailed climbing down into trenches which he found difficult to do. He testified that the assistants were not keen to help him with the functions that he as an electrician was paid to perform.
15. The plaintiff also testified that his lack of concentration and forgetfulness not only posed a danger to himself when he had to work with high voltage electrical power cables and the like, but also got him into trouble with Mr Domingo, his superior. He would forget to perform allotted tasks and had on occasion forgotten to reconnect faulty pre-paid electricity meters at households where he had affected a temporary bridging mechanism. The result was that the Municipality lost revenue from those sources for months before the problem was detected.
 16. Since Mr Domingo and the plaintiff were the only qualified electricians at the Municipality, they took turns being on stand-by every second week. So for instance the plaintiff would be working normal hours one week and in addition be on standby throughout the night and weekend. The following week Mr Domingo would have the same responsibility. This meant that the plaintiff had to often travel and work on his own at night to effect electrical repairs.
 17. The plaintiff testified that he had become so despondent and stressed out with his work situation at the Municipality, that he had of his own accord, without Mr Domingo instituting any disciplinary charges against him, decided to resign and seek less strenuous employment.

18. The pain and discomfort which he has been experiencing has not only affected his ability to perform his work properly but has also spilled over into his private life. So for instance he used to enjoy repairing tractors in his free time but does not do so anymore since he cannot pick up and place parts onto a tractor on his own anymore. He also enjoyed fishing, but the strain on his back had become too much for him. He also cannot sit for very long before his hip and back starts paining. Long distance driving has therefore become unbearable for him.
19. According to the plaintiff he had suffered no injuries to his back prior to the accident in 2004, nor thereafter. He suffers from asthma and had never played any strenuous sport like rugby.
20. Mr Lucky Domingo, the plaintiff's supervisor at the Municipality also testified. Mr Domingo who is still the senior electrician at the Municipality testified that the plaintiff's performance at work was problematic from the start. The plaintiff was at the doctors more than what he was at work. His main complaints were about pain in the hip and back, particularly after he performed work involving climbing up and down ladders. Mr Domingo stated that he could see the pain in the plaintiff's face after climbing ladders and the plaintiff would often after doing such work, visit a doctor.
21. Mr Domingo also testified that the plaintiff was forgetful and recalled an instance when the plaintiff had forgotten to switch off the main switch while preparing to connect a high voltage cable. Mr Domingo who was supervising the job, fortunately had the foresight to check whether the main power feeder had been switched off right before the plaintiff was about to cut the

cable. The plaintiff was given a written warning for the incident. He also confirmed the incident relating to the bridging of the pre-paid electricity meters as testified to by the plaintiff, and added that about three more of such mistakes were discovered after the Plaintiff had left the Municipality.

22. Mr Domingo stated that he had discussed with his unit manager whether the plaintiff could not rather be transferred to the Municipality's water department, but since electricians were hard to come by in such a small place as Jan Kempdorp they had decided to retain the plaintiff in the electricity department and try to cover for plaintiff by giving his assistant the same instructions as him, so that the assistant would be able to remember what needed to be done. At some stage however, Mr Domingo and the manager decided to make his working conditions difficult, by insisting for instance that the plaintiff climb ladders, despite doctors order to the contrary, so that the plaintiff could resign of his own accord.
23. Mr Domingo also testified that the plaintiff had been off sick so often that he had exceeded the 80 sick days allowed within a 3 year period and had to take a cut in his salary for the sick days additional to the 80 days allowed.
24. Before turning to the expert evidence, I deal briefly with the evidence of Mr Joseph Ndlazi, the human resources manager at the Municipality. Mr Ndlazi was appointed in this position during November 2017, after the plaintiff had left the employ of the Municipality. He testified at the hand of the plaintiff's personnel file with the Municipality and the attitude generally of the Municipality in accommodating staff health issues.

25. According to Mr Ndlazi the plaintiff had worked at the Municipality for exactly 3 years and 1 month and had during that time been on sick leave for 89 days. He confirmed that no disciplinary action had been taken against the plaintiff during that time. His reason for leaving the employ of the Municipality was stated in his resignation letter as having found more suitable employment elsewhere.
26. Mr Ndlazi furthermore explained that if an employee, due to health issues, was considered not to be suited for the position appointed to him, the Municipality makes provision for transfers to either other departments within the Municipality or work more suitable, for example, clerical or computer related within the same department at no reduction in salary. In severe cases the process of being permanently boarded was also an option.

The experts

27. The experts on both sides are mainly in agreement that the plaintiff sustained a moderately severe traumatic brain injury during the accident. Although Mr B Janecke, the neuropsychologist for the plaintiff, states in his report that the plaintiff sustained a moderate brain injury, he signed a joint minute with his counterpart Ms C De Villiers, wherein he agrees that the plaintiff suffered a severe diffuse brain injury in the accident. Ms De Villiers did not testify, but Mr Janecke explained during his testimony that he agreed with Ms De Villiers on this point since she had examined the plaintiff some 10 years after his own examination, and had been in a position to pick up signs of more serious damage than what he had. Be

that as it may, the other points of agreement between these two experts are as follows:

- “2. We agree that the radiological findings reported in the clinical notes were of left hemisphere swelling and a subarachnoid haemorrhage.
 3. We agree that we both found executive functioning deficits on our respective examinations of Mr Schutte, Mr Janecke in 2006, and Ms de Villiers in 2016. There were impairments of conceptual reasoning, error monitoring, abstract reasoning, sustained visual processing, working memory and cognitive flexibility, and letter fluency.
 4. We agree that executive dysfunction is primarily dependent on the integrity of the frontal lobes.
 5. Ms De Villiers also found impairment of semantic fluency consistent with temporal lobe pathology.
 6. We agree that there were complaints and collateral of behavioural changes, in that he had episodes of rage.
 7. We agree that he was unable to complete his National Certificate post-injury, as a result of his cognitive deficits.
 8. We agree that he did obtain a Tradesman Licence and that his employment record has been steady.
 9. We agree that he be offered psychological assistance on a needs basis.
 10. We agree that he consult a Psychiatrist for psycho-pharmacological management.”
28. Mr Janecke has however in the copy of the joint minute which he had signed, included under point 8 above the following:

“He, however, could not sustain his own business when he started one. According to his wife he was stressed back at work after holidays and he does not like his current job and they were looking for other employment for him.”

29. According to Mr Janecke, he had obtained the information which caused him to insert the above in the joint minute from Ms De Villiers’ report and considered it important to be included since it corroborated his own assessment made during 2006 that the plaintiff would have difficulty maintaining his employment due to his cognitive deficiencies.
30. I turn now to the main dispute between the parties - the plaintiff’s back problems. Drs Relling and Parker and Prof Bryer gave evidence in this regard.
31. Dr Relling, the neurosurgeon for the plaintiff, performed his examination of the plaintiff during March 2016. He obtained the relevant history from the plaintiff and also had available the hospital records. The plaintiff complained of headaches which he started experiencing immediately after the accident and which have persisted to the point where it has become chronic. Dr Relling describes the headache complaint as a true complaint since it is compatible with the nature of the head injury sustained in the motor vehicle accident. The memory loss, aggression, sleeplessness and weak concentration ability which the plaintiff also complained about and which impacts on his work performance are, according to Dr Relling all part of the bigger picture of the head injury.

32. The plaintiff has also complained to him of mild back pain which he started experiencing after the accident. There were however periods of time where the plaintiff had no back problems, but that he reported that for the previous four years before the consultation (i.e. from about 2012), the backache had escalated to such a degree that it impacted on his physical abilities.
33. The plaintiff also complained of pain spreading down his right leg. With clinical examination Dr Relling was able to illicit the pain. Upon examination Dr Relling found the plaintiff's right leg to be slightly weaker than the left leg and visually the calf area of the right leg presented thinner than that of the left leg. He measured the calves and found the plaintiff's right calf to be about 1cm thinner than the left. The thinner calf was an indication of atrophy of the muscle, suggesting a weakening in the nerve supply to that particular muscle. The most probable cause of this problem would, according to Dr Relling, be a pinching of the nerve from where it has its origin in the bone marrow and moves down through the spine to the lower limbs.
34. The nature and anatomical position of the backache, which Dr Relling had found isolated to level L4/5, correlates with the pinching of the nerve which caused the weakness and pain which the plaintiff experiences in his right leg.
35. It is Dr Relling's opinion that taking into account the age of the plaintiff, the fact that he had no history of backache before the accident, that there were no reported work inflicted injuries or any other physical cause for the backache occurring after the

accident, it is probable that the plaintiff's current back problems are as a result of the motor vehicle accident in 2004.

36. Dr Relling explained that what had probably happened was that the whiplash nature of the accident had caused a small tear to develop on the edge of the disc, which caused fluid leakage. This leakage would cause the cushion between the vertebrae to desiccate which would impact on its ability to act as a shock absorber. The vertebrae on either side of the cushion would then move closer together causing a strain on that level of the back. The result is that the plaintiff is suffering from progressive lumbar spondylosis with progressive worsening of lower back pain.
37. Spondylosis is described as degenerative changes in the spine which everyone eventually suffers from with the onset of old age, but is not normal in a person 30 years old, as the plaintiff was at the time of the examination. Dr Relling also discounted a genetic origin for the degeneration since it would have been more diffuse had it been genetic and not confined to the L4/5 region.
38. According to Dr Relling a tear in the disc or cushion would not have shown up in the X-ray taken of the plaintiff's spine after the accident since an X-ray does not reflect fluid specifically, which an MRI would. No MRI was done on the plaintiff at any stage after the accident.
39. Dr Relling explains that the interval (approximately 8 to 10 years) before the onset of the plaintiff's back pain is not all that long a period as far as spinal degeneration is concerned and in the absence of any other known cause, he has to conclude that

the motor vehicle accident is the probable cause of the plaintiff's back problems.

40. Dr Parker, the defendant's neurosurgeon, examined the plaintiff around the same time as Dr Relling, during 2016. He agrees with Dr Relling that the plaintiff suffered a moderately severe brain injury in the motor vehicle accident and that the plaintiff's complaints regarding headaches, loss of memory, aggression, lack of concentration and so forth are related to the brain injury.
41. With regard to the plaintiff's back injury Dr Parker testified that he was in obvious pain on the day of the consultation. The pain was mechanical in nature, that is, it was caused by movement. The plaintiff explained to Dr Parker that he experienced a pain shooting down his right leg, to the level of his calf. This pain is associated with parasthesia (pins and needles) in his foot. The plaintiff also mentioned that he started experiencing the backache 4 to 5 years before the consultation (between 2011 and 2012) and that it has become more frequent and persistent in the last 2 years (from 2014).
42. According to Dr Parker, the plaintiff's symptoms are suggestive of a nerve root compression in the lumbar spine. This happens when the disc (the cushion between the vertebral bodies), ruptures close to where the nerve passes, which then compresses the nerve root. A particular nerve root goes to a particular part of the leg. Therefore, if there is pain going down the inside of the leg, it is the L3/L4 nerve root which is compressed.
43. Dr Parker agrees with Dr Relling that the plaintiff suffers from spinal degeneration or spondylosis, the degree of which is not

normal in someone as young as the plaintiff. He does however not agree with Dr Relling's opinion that the spinal degeneration was accelerated by the motor vehicle accident.

44. Dr Parker explains that given the reported initial backache experienced by the plaintiff after the accident, with no spinal damage picked up on X-ray, the plaintiff must have suffered a soft tissue injury to the back during the accident. The plaintiff may have suffered a tear to the disc, but that such an injury had progressively healed to the point where he was free of pain. The fact that the plaintiff was from thereon painfree and asymptomatic for about 4 to 5 years before the consultation is suggestive of a new incident which occurred. Dr Parker's opinion of a new incident having occurred some years after the motor vehicle accident is in his view bolstered by the fact that the current complaint includes a pain in the leg, which was not present after the accident or with the initial backache.
45. The disc herniation, which in the opinion of Dr Parker the plaintiff is currently suffering from, could be caused by something as simple as turning around in bed or something more obvious like picking up a heavy object.
46. Whereas Dr Parker agrees with Dr Relling that an injury could cause an acceleration of spinal degeneration, he disagrees that the accident in 2004 could have caused accelerated spinal degeneration since such a theory does not account for the years when the plaintiff was asymptomatic.
47. Prof Bryer, the defendant's neurologist, consulted with the plaintiff on 10 February 2016. He asked the plaintiff to list his complaints in order of severity. The plaintiff listed as his most

prominent complaint headaches thereafter lower back pain and lastly forgetfulness.

48. Prof Bryer administered the Montreal Cognitive Assessment Test to see whether there were any sequelae that could be attributed to the head injury sustained in the accident. He explains the test to be a “*bedside test*” used widely to detect different domains of cognitive impairment. The test covered the areas of *inter alia* memory, *visio spatial* perception, language delayed recall and orientation. Prof Bryer states that the plaintiff had a score of 28 out of 30, which is better than the average score of 27 for people with mild traumatic head injuries. Memory problems were not detected on what he called his basic testing. He deferred to the clinical psychologists who did a more in-depth assessment for the more subtle deficits and executive difficulties.

In his opinion the plaintiff sustained a moderately severe close traumatic injury to the brain. That without the brain injury, the plaintiff may very well have been able to obtain the N3 qualification and that the injury may limit future work promotions.

49. As far as the plaintiff’s back problems are concerned, it is Prof Bryer’s evidence that the plaintiff reported experiencing back pain from about 2 years before their consultation. He tested the plaintiff’s motor function, muscle tone, muscle strength, reflexes, sensory loss and co-ordination. His task as a neurologist would be to see if there is any motor deficit, any evidence of spinal cord injury or any nerve root injury (radiculopathy). Prof Bryer states that the plaintiff had normal

muscle strength, muscle tone, he had normal and symmetrical reflexes, no sensory loss, and that his co-ordination and gait were above normal. In short his assessment could not show any objective evidence of either a nerve root entrapment or any spinal cord injury.

50. When confronted with Dr Relling's evidence that he found slight weakness of the plaintiff's right leg and atrophy, Prof Bryer conceded that he had not measured the circumference of the plaintiff's leg and could therefore not dispute Dr Relling's finding of atrophy.
51. According to Prof Bryer the only possible cause for atrophy of that particular muscle in this specific context, is nerve root compression. Other causes for atrophy would be immobility on that side of the body or other spinal cord injuries, which causes are both excluded in this particular instance.
52. Prof Bryer states however that injuries to the disc, which would cause nerve root compression, happen fairly rapidly and tend to present acutely. This means that the pain would present immediately and be intense. Had the plaintiff therefore incurred an injury to the disc in the accident, he would not have expected the plaintiff to be able to walk out of the hospital 5 days later. He also states that many disc injuries resolve spontaneously without the need for surgical intervention.
53. Prof Bryer also testified that spondylosis occurs naturally after the age of 40 but that he has seen it in younger people. People who hyperextend repeatedly such as dancers, rowers and gymnasts, who have repeated ongoing flexion of the spine, may also exhibit spondylosis at an early age.

54. As to the possibility that the plaintiff sustained an injury to the back in the accident, that it cleared up and years later flared up again, Prof Bryer was unequivocal that this would only happen in two scenarios. Firstly, if there had been a significant injury at first, such as a little fracture to part of the spinal base which would render the joint unstable. Therefore, with repeated movement symptoms, would reappear. The second scenario is what would occur in people engaged in certain sports e.g. contact sports and the athletes referred to above where an injury is not allowed to heal and a succession of minor events occur over a period of time and they end up with a chronic syndrome.
55. In the case of the plaintiff however Proff Bryer is adamant that without proof of an injury incurred at for instance L4 level in the accident, and subsequent repeated reports of pain and progressive worsening of the problem, it would be speculative to link the problem experienced at L4 level years later to the accident.
56. At this stage I need to mention that despite Prof Bryer's evidence that his assessment of the plaintiff failed to show any evidence of nerve root entrapment or spinal cord injury, it is not in dispute that the plaintiff's back problem is a true complaint. Prof Bryer's assessment in my view was obviously superficial. The only issue between the parties relating to this aspect is whether or not the accident is the cause of the back injury.
57. Confronted with the conflicting opinions of the parties' experts regarding this issue, it is useful to have regard to the approach set out by the Supreme Court of Appeal in *Michael and Another*

Linksfield Park Clinic (Pty) Ltd and Another 2001(3) SA 1188 (SCA) at paragraph 24 thereof, that

“As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court’s reaching its own conclusion on the issues raised”;

and at paragraph 26 thereof, that *“. . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.”*

58. The challenge with which the plaintiff is faced is the lack of radiographical evidence relating to the back injury. Although the hospital records show that an X-ray had been taken of the plaintiff’s lumbar spine, the X-ray did not form part of the hospital records before court and none of the experts who have testified have had sight of the X-ray which is presumed to have gone missing. In the absence of the X-ray or any further reference to it in the hospital notes, the assumption by the experts, that the X-ray probably showed no abnormalities, is in my view a sound assumption.
59. The fact that the X-ray is assumed to have shown no abnormalities does however not detract from either of the scenarios propounded –i.e. that of Dr Relling, of a small tear to the disc resulting in leakage of fluid which would not be picked up on an X-ray and on the other hand, the view held by Dr Parker and Prof Bryer, that the plaintiff could have sustained a

soft tissue injury in the accident which would have resolved itself naturally over time.

60. What does favour the one theory regarding the plaintiff's current back problems over the other, is the subsequent course of events. On the plaintiff's own evidence his initial back pain cleared up a year after the accident. There is no evidence during this first year after the accident of accompanying pain and discomfort in the right hip and leg.
61. After 7 to 8 pain-free years the plaintiff then experiences the onset of back pain with the additional complaints relating to his hip and right leg, which by all accounts point to a nerve root impingement.
62. If one tests Dr Relling's theory of a disc herniation incurred during the accident, which then caused spondylosis or the acceleration of spondylosis, the 7 or 8 years during which the plaintiff was pain free or asymptomatic, stands unexplained and does not fit the picture of the progressive worsening of spondylosis until it manifested itself in the current back pain experienced by the plaintiff.
63. I may just mention at this stage that Dr Relling, during his evidence in chief and while explaining the history of the back pain experienced by the plaintiff, mentioned that the plaintiff had experienced mild backache after the accident whereafter he experienced periodic back pain which did not initially impede his functioning, but that the pain progressively worsened to the extent he started to experience physical impairment.
64. During cross-examination however, Dr Relling conceded that his report does not mention a progressive worsening of the

backache over the years since the accident and that his reported history of the plaintiff's back problems refers only to the onset of back pain during 2013, nine years after the accident.

65. Mr Abrahams for the defendant contended that when regard is had to assessing the plaintiff's condition, due weight should be given to the report of Dr P Repko, the plaintiff's erstwhile and now deceased neurosurgeon, dated 28 July 2008, wherein he states the plaintiff's reported history regarding his back problems as follows:

*“Wat die rugbesering aanbetref het die pasiënt nadat hy sy volle bewyssyn herwin het, bewus geword van rugpyn in die lumbale gebied. Rontgen fotos van die werwelkolom is na toelating tot die hospitaal geneem en het geen afwykings getoon nie. Daar was uitwendig geen tekens van kneusing of ander tekens van besering, maar nadat die rugpyn aanvanklik geleidelik verbeter het, het hy periodiek daarna steeds las van rugpyn gekry en sy huisdokter, Dr Van Niekerk geraadpleeg wat medikasie voorgeskryf het en soms inspuitings gegee het. Met verloop van tyd het die rugpyn minder en minder voorgekom en die afgelope jaar (**since 2007**) verskyn dit nie meer nie. “*

(Own insertion)

66. Dr Repko's report was apparently attached to the plaintiff's initial particulars of claim but was removed after his subsequent passing, by an amendment replacing his report with that of Dr

Relling. With the exception of Dr Relling and Mr Janecke, all the experts who testified in the trial somehow were furnished with Dr Repko's report and referred to it in their own reports. On the basis thereof I allowed limited reference to Dr Repko's report during examination of the witnesses, exclusive of his opinions and conclusions.

67. Mr Abraham's request that I have regard to Dr Repko's report regarding the plaintiffs' back problems, can in my view not prejudice the plaintiff, since it accords to a large extent with the plaintiff's own evidence i.e. that he experienced back pain for a period after the accident, but that it eventually subsided. However for this very reason it is not necessary to take into account the report of Dr Repko, since the plaintiff's own version is that he had not experienced back pain for a number of years until his back started bothering him again around the time he started working for the Municipality.
68. Dr Relling's evidence in court of the plaintiff having intermittent back pain since the accident, which gradually worsened to culminate into his current condition is not only undocumented, but the origin of this information is not explained.
69. In *Regent Insurance Company t/a Imperial Commercial Insurance v DMJ Transport CC (A57/06) [2006] ZAWCHC 31* (28 July 2006), Van Zyl J held as follows at paragraph 17;
"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond

reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.” :

(and at paragraph 19 thereof);

“When use is made of expert evidence, it must be remembered that an expert, however impressive his expertise and experience may be, cannot, in expressing however strong an opinion, elevate conjecture or speculation to justifiable inference, unless it is borne out by the objectively ascertainable facts.”

70. *In casu* and in the absence of radiographical proof (whether X-ray or MRI) of injury to the plaintiff's back in the L4/5 lumbar area after the accident and the long period of time during which the plaintiff experienced no back problems, there are no objective facts justifying an inference that the accident during 2004 is the cause of the plaintiff's current back problems which apparently emanates from the L4/5 region.
71. It follows thus that I have to reject the evidence of Dr Relling in this regard and accept the evidence of Dr Parker and Prof Bryer that the plaintiff's current back problems have most likely been caused by an incident years after the accident and which could have been as insignificant as turning around in bed.
72. Which now brings me to the evidence of the occupational therapists. Both Ms Mia Vermaak for the plaintiff and Ms Esther Cloete for the defendant, have performed extensive tests on the plaintiff with regard to his back related problems. Being of the view that the plaintiff's back problems have not been shown to have been caused by the accident, I do not

intend to deal to any extent with the back related assessments, save to state that the resultant poor work attendance and productivity as demonstrated during his term of employment with the Municipality, will necessarily impact on the plaintiff's future employment and earning capacity.

73. With regard to the assessment of the plaintiff's cognitive abilities, Ms Vermaak found slight problems regarding memory, concentration and insight and that the plaintiff's *"prospects of promotions might be affected due to his physical impairments and behavioural problems (i.e. forgetfulness and tendency to display anger)*. Ms Cloete confirms the findings of poor concentration, memory, learning and behavioural problems and that even if the plaintiff's back and right lower limb symptoms resolve *"resulting in improved attendance and productivity, he will still need somewhat sympathetic employment, to accommodate his residual cognitive difficulties. With Mr Schutte not having managed to obtain a wireman's license and him now battling to learn and retain new skills, any employment he obtains and sustains is expected to be at a lower level, with an associated lower income, than would have been the case, had he been able to improve his qualification and skills."*
74. As part of her assessment of the plaintiff, Ms Cloete had consulted with some of his previous employers and colleagues. Plaintiff's manager at Olam SA had informed that although they were aware that the plaintiff suffered some back and lower limb problems since he sometimes limped, it did not impact on his work performance or attendance. The plaintiff also did not display any untoward outbursts of anger or irritability and

performed his work functions satisfactorily. In this respect the manager had mentioned that Olam SA had very structured and routine procedures which had to be followed and which according to Ms Cloete may have helped the plaintiff in coping with his cognitive related problems. Ms Cloete was of the view that the plaintiff would perform better in a position with regular repetitive work such as what Olam SA offered.

75. The industrial psychologists to a large extent agree with Ms Cloete's above assessment and in a joint minute have agreed to the plaintiffs post-accident earning capacity as follows:

“(1) He will probably not progress beyond his present level.

(2) We take note of the medical opinions and agree that his career is at risk in terms of deteriorating performance, safety risks, not being competitive, losing his current job due to his mental and physical impairments, and restricted career progressions.

(3) Future loss of income be addressed by means of contingencies.”

76. It must be noted that at the time the joint minute was signed on 16 May 2017 by Dr G Jacobs for the plaintiff and Mr PC Crous, the defendants industrial psychologist, they were not aware of the fact that the plaintiff had resigned from his job at the Municipality.

77. With regard to pre-accident earning capacity the relevant points of agreement in the joint minute are as follows:

77.1 The job evaluation of an electrician's position is at Paterson level C2;

77.2 The plaintiff's career most likely would have followed more or less the same up to the present (electrician at the Municipality);

77.3 That he earned R171 804, 00 during 2016;

77.4 In the case of the plaintiff remaining with the Municipality he will remain at this level with CPI increases;

77.5 In the case of the plaintiff obtaining a position with an employer that remunerates according to the Corporate Survey Earnings it is foreseen that during the following 8 to 10 years he will obtain a position with an employer that remunerates according to the Corporate Survey Earnings Paterson Level C2;

77.5.1 With the necessary experience, skills and aptitude he will progress to Paterson C3/C4 (senior electrician/foreman) in 2034;

77.5.2 Remain at this level with CPI increases; and

77.6 The plaintiff's likely retirement age is 63.

78. The industrial psychologists also agreed that there was no past loss of income.

79. As pointed out by Mr Abrahams, there are only two issues in dispute between the industrial psychologists and both relate to the plaintiff's post-accident earnings i.e.:

79.1 The extent of the plaintiff's residual earning capacity; and

79.2 Whether the plaintiff's cognitive difficulties are of such a nature that it disqualifies him from working as an electrician at the Municipality or elsewhere.

80. I start with the second issue. There can be no doubt that the plaintiff could not fulfil his duties as an electrician at the Municipality. Apart from the physical challenges and the absenteeism as a result of his back problems, the evidence of Mr Domingo is clear and compelling that the plaintiff was a liability as far as his cognitive abilities were concerned. The defendant's stance that the plaintiff could have been accommodated by being given lighter duties, or by serving in an advisory position with an assistant doing the heavy work or by being moved to a different department within the Municipality, is in my view highly speculative and hypothetical. The evidence does not bear out any such option as being suitable for the plaintiff within the Municipality.
81. Mr Domingo's (as well as the plaintiffs') evidence as to the staff composition within the electrical department – there being only two qualified electricians who were expected to perform their duties in the Jan Kempdorp and outlying areas – the difficulty experienced in attracting electricians to that specific municipality, the attitude of the assistants within the department and the plaintiff's cognitive difficulties, are not circumstances conducive to the plaintiff being given lighter duties within the electrical department of the Municipality or serving in an advisory position. Moreover it is common cause that the plaintiff has no other skills and his inability to learn new skills would no doubt have hampered his transfer to a different department within the Municipality.

82. The argument that the plaintiff was in no danger of losing his job, that his resignation was voluntary and that therefore his loss of income is self-inflicted, loses sight of the evidence of Mr Domingo that he and the manager of the department had, once they had realised that they could not dismiss the plaintiff because of his disabilities, decided to put pressure on him by making his working conditions difficult in order for him to resign on his own. Dr Jacobs described this attitude of the Municipality as being tantamount to constructive dismissal. I agree with such a sentiment.
83. The question in my view should rather be whether the plaintiff can be employed as an electrician elsewhere than the Municipality. In this regard I agree with Mr Abrahams for the defendant, that the plaintiff's past employment history should act as a guideline and inform his possible future career path. There can be no pussyfooting around the fact that the plaintiff obtained his qualification as an electrician and his employment experience as such after the accident. In light hereof the plaintiff's current employment as a contractor's foreman at a salary of ± R3000, 00 per month cannot be construed as a reflection of his capabilities and is unrealistic in assisting in the assessment of the extent of the plaintiff's residual earning capacity.
84. The plaintiff successfully sustained employment as an electrician at Olam SA for 3 years without any complaint about his work performance. He left Olam SA voluntarily for reasons unrelated to either his cognitive or physical impairments. An argument that the plaintiff would be a risk employed as an

electrician, can in these circumstances not be sustained. The statement may apply to the work of an electrician at a municipality, which appears to be particularly hazardous, but not necessarily to the repetitive and structured electrical work which the plaintiff engaged in at Olam SA. I see no reason why the plaintiff would not be able to take up repetitive and similarly structured electrical work in the future.

85. That being said the experts appear to agree, taking into account the fact that an electrical qualification is a sought after skill, the great number of mines in the local area where electricians are actively pursued, that the plaintiff would likely pre-accident have progressed from working at the Municipality in accordance with the scenario set out in paragraphs 77.5 to 77.5.2 above. Having found that the plaintiff's back problems have not been shown to be accident related, a higher contingency must be applied to the plaintiff's pre-accident earning capacity to account not only for the speculative nature of his pre-accident earnings but also for the added risk of him not realising his potential due to his back problems.
86. As far as his post-accident earning capacity is concerned, the experts agreed that the plaintiff would probably not achieve earnings exceeding the R171 804, 00 per annum which he received at the Municipality. The issue between the parties in this regard relates to the level the projected future earnings should be pegged at. The plaintiff is of the view, at the hand of the evidence of Dr Jacobs, that though the plaintiff can do better than the position he currently occupies, he will probably not be able to obtain anything better than a semi-skilled

position in the non-corporate sector, despite him being a skilled worker.

This contention is rather vague and Dr Jacobs would not commit to a specific salary. The position taken by the defendant, following upon the approach of Mr Crous, is that the plaintiff's highest paying job as an electrician after the accident be used to determine his earning capacity. The income of R171 804, 00 per annum earned by the plaintiff at the Municipality during 2016 would according to Mr Crous in any event more or less equate, actuarially calculated, with the plaintiff's income at Olam SA during 2013.

Damages

General Damages

87. This brings me to the plaintiff's claim for general damages. Initially the plaintiff had claimed R200 000, 00 for general damages. Mr Steenkamp, who appeared for the plaintiff, during argument contended that an amount of R900 000, 00 be awarded to the plaintiff in general damages. Mr Abrahams on the other hand postulated amounts of R300 000,00 alternatively R500 000,00 depending on whether it is found that the accident also caused the plaintiff's current back problems.
88. Whilst preparing judgment in this matter, I realised that although over the course of time certain other amendments were made to the particulars of claim, the claim for general damages had remained at R200 000,00. I alerted the legal representatives to this obvious oversight whereafter the plaintiff delivered an amended claim for general damages in the

amount of R1 million. The defendant did not object to this amendment.

89. That being said and having found that the plaintiff's back problems were not caused by the accident, the plaintiff's claim for general damages will obviously be negatively affected. Counsel for both sides have referred me to previous comparable cases as is the norm. I do not intend to deal with each case specifically save to state that they are mainly distinguishable from the present because the injuries and consequences in those cases were either more severe or less so. So too do the personal circumstances of the plaintiffs in those cases differ from that of the plaintiff *in casu*. However they do serve as a helpful guideline.

As Brand JA said in *De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA)* at 477 paragraph 64:

“By die uitoefening van die hof se diskresie is vergelyking met toekennings in vorige sake 'n nuttige hulpmiddel omdat dit darem vir die hof die breë parameters oftewel 'n patroon aandui waarbinne sy toekenning tuisgebring moet word. Dit is ook 'n nodige riglyn omdat konsekwentheid in toekennings 'n inherente vereiste van billikheid is. Nietemin bly dit steeds 'n riglyn. Dit vervang nie die hof se diskresie met 'n letterknegtige gebondenheid aan die aangepaste waarde van vorige toekennings nie.”

90. The plaintiff was 20 years old at the time of the accident – at the threshold of his adult life and career. I have set out herein the nature and sequelae of his brain injury, which no doubt has limited his quality of life. He suffers from severe headaches; his personality has changed in that he has become aggressive and

rude. He suffers from memory and concentration impairment. His career prospects have been limited and his ability to learn new skills have been compromised. I have given all the above factors due consideration and have concluded that an award of R350 000, 00 would reflect a fair compensation for general damages.

Loss of Earnings

91. I have not been asked to calculate the plaintiff's loss of earnings, but merely to decide the basis on which such calculation be made by an actuary. The parties seem to agree that Dr Robert Koch be tasked with the actuarial calculation.
92. For the sake of clarity for calculation purposes I propose that the amount of R171 804, 00 per annum be used in calculating plaintiff's post-accident earning capacity subject to the application of a contingency allowance necessitated by the plaintiff's cognitive impairments.
93. The assessment of necessary adjustments to be made for the "*vicissitudes of life*" or contingencies, is not a matter which can be accurately calculated, as Nicholas J so aptly stated in *De Jongh v Gunther and Another* 1975 (4) 78 (w) at 80F.

"In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office."

94. That being said, on consideration of all the factors and evidence, I am of the view that a contingency adjustment of 30% to plaintiff's pre-accident earnings and 50% to his post-accident earnings would be appropriate in the circumstances.

Costs

Having being substantially successful there is no reason why plaintiff should not be entitled to his costs, inclusive of the qualifying costs of his experts.

The following order is made:

- a) The defendant is ordered to pay general damages to the plaintiff in the amount of R175 000, 00. It is noted that a 50% reduction has been effected to the award for general damages in accordance with the parties agreement relating to the defendant's liability for compensation
- b) The plaintiff's loss of earning capacity is to be calculated on the basis that:
 - i) Plaintiffs pre-morbid earnings be calculated in accordance with the career path agreed upon by the industrial psychologists Dr Jacobs and Mr Crous in points 9 and 10 of their joint minute dated 16 May 2017, subject to a 30% contingency deduction;
 - ii) Plaintiffs post-morbid earnings be calculated based on the amount of R171 804, 00 per annum, subject to a 50% contingency deduction.

- c) The defendant is ordered to pay 50% of the plaintiff's loss of earnings as calculated in terms of paragraph (b) above, in compliance with the agreement reached by the parties regarding defendant's liability to compensate the plaintiff.
- d) The defendant is ordered to pay interest on the above mentioned amounts at the prescribed legal rate from a date 14 days after date of this judgment to date of payment.
- e) The defendant is ordered to pay the plaintiff's costs, which costs are to include the qualifying, attendance and travelling expenses (where applicable) incurred by the following experts:

Dr H Relling, Mr Ben Janecke, Ms Mia Vermaak; Dr Everd Jacobs.

CC WILLIAMS

JUDGE

For Plaintiff:

Adv MDJ Steenkamp

Elliot, Maris, Wilmans & Hay Attorneys

For Defendant:

Adv R Abrahams

Robbert Charles Attorneys