

REPUBLIC OF SOUTH AFRICA



OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

CASE NO: 82369/2014

13/2/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
6.2.2017	Hen Fourie
DATE	SIGNATURE

In the matter between

ADV CLAIRE CAWOOD N.O. obo SHAUN ENRICO CLOETE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Fourie AJ

1. This is a claim for damages arising from a motor vehicle collision that occurred on 2 February 2011 when a truck left the N7 roadway and

overturned after the driver had lost control thereof. The initial plaintiff, to whom I will for the most part refer to as Mr Cloete, was a passenger on the back of the truck at the time.

2. At the outset I was informed by counsel that the issue of liability had been settled and that the defendant had agreed to pay 100% of Mr Cloete's proven or agreed damages.
3. I was subsequently informed that agreement had been reached in respect of the following heads of damages:
 - 3.1. The defendant agreed to furnish Mr Cloete with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 to cover his claim for future hospital medical and related expenses.
 - 3.2. The defendant agreed to pay an amount of R 250 000.00 in respect of Mr Cloete's claim for general damages.
 - 3.3. Mr Cloete abandoned his claim for past medical expenses.
4. The issue that remains in dispute is accordingly Mr Cloete's loss of earnings and/or loss of earning capacity.
5. Once the evidence had been led, counsel both requested an opportunity to file written heads of argument and a time frame was agreed upon. The last submissions were received by me on 25 September 2016. Thereafter I

requested a copy of the papers relating to the appointment of the curator *ad litem*, to which reference had been made in the heads of argument. It took several weeks to obtain the papers. Once I was able to commence preparing my judgment, it became clear to me that the issues had not been fully canvassed by counsel in their respective heads of argument. I accordingly requested the Deputy Judge President to set the matter down once again in order that the arguments be completed. Argument was heard on 18 January 2017, hence the delay in preparing this judgment.

6. The parties had agreed to the submission of a number of expert reports as evidence to be adduced for purposes of quantification of Mr Cloete's damages. In addition, each party called an industrial psychologist to give evidence on its behalf and Mr Cloete also called a witness who testified in respect of the status of his claim instituted against the Department of Labour.
7. The minutes of the second pre-trial conference held on 14 June 2016 reflect an agreement in terms of which, should the defendant fail to indicate no later than 5 Court days before the hearing, which of the expert reports delivered by the plaintiff it admits, such report shall be deemed to have been admitted. It is further agreed in paragraph 11 of the said minute that if the defendant does not deny any fact(s) contained in an expert report, the defendant shall be deemed to have admitted such facts. It is common cause that the defendant did not formally dispute any of the expert reports, and neither did the defendant place any facts contained in the plaintiff's expert reports in

dispute as contemplated in the pre-trial minute. The defendant, however, filed a report by an industrial psychologist, Dr Cillie-Schmidt, which was handed in without objection as Exhibit D. The report is undated but it was evidently prepared and provided to Ms Auret-Besselaar prior to the meeting of the respective witnesses on 19 August 2016. The joint minute was handed in as Exhibit A.

8. The parties also handed in the actuarial calculations prepared by Deloitte Consulting on the basis of the two opinions set out in the aforesaid joint minute, as Exhibit B.
9. In addition to the industrial psychologist, Mr Cloete gave notice of his intention to adduce the evidence of the following experts:
 - 9.1. Dr K le Fèvre, psychiatrist;
 - 9.2. Dr JS Sagor, orthopaedic surgeon;
 - 9.3. R de Wit, clinical psychologist;
 - 9.4. R van Zyl, occupational therapist;
 - 9.5. Munro Consulting, actuary.

The plaintiff:

10. Mr Cloete is a 30 year old man who was 24 years old when the collision

occurred in 2011. The injuries sustained by him consist of a severe fracture dislocation right sub talar joint involving the talus, as well as the medial malleolus, and a compression fracture of the L1 vertebrae. At the time of the collision he was employed by Stein Civils CC, but he is no longer employed.

11. Mr Cloete did not testify. Mr Laubscher, who appeared on behalf of Mr Cloete, submitted that his testimony was not required in view of the defendant's deemed admission of the expert reports and the facts therein contained, and that to draw a negative inference from Mr Cloete's failure to testify, would be unfair.
12. The following information in respect of Mr Cloete appears from the report of Ms Auret-Besselaar:
 - 12.1. He was born and has only ever lived in Steinkopf, Northern Cape.
 - 12.2. He attended the Steinkopf Secondary School until mid-grade 10, when he says he left school due to a disagreement with one of his teachers. He did not return to school and did not finish his secondary school education.
 - 12.3. Subsequent to leaving school he had casual employment on the Steinkopf building site for a subcontractor for about 8 months, and during the following 5 years, he did general work when he could find it, such as gardening, cleaning and washing.

- 12.4. From 2008 until the date of his injury some 2½ years later, Mr Cloete was employed by Steyn Civils, initially as a general worker, whereafter he was promoted to excavator operator. He worked in the latter position for about a year.
- 12.5. After his recovery, his previous employer gave him lighter work from time to time, however the company was liquidated in August 2011. Mr Cloete has subsequently remained unemployed.

The experts:

13. Counsel for Mr Cloete, Mr Laubscher, highlighted the following aspects in the additional expert reports filed in respect of Mr Cloete:
- 13.1. Dr Sagor, the orthopaedic surgeon, was of the view that as a result of his injuries, he will be permanently limited with regard to mobility and agility; and *"He needs to do sedentary or semi-sedentary work in future and considering his limited education and lack of skill, he is significantly compromised in this regard."*
- 13.2. Dr le Fèvre, the psychiatrist, states the following in his report: *"Level of changes: considerable. He had a good job and was a breadwinner, partner and parent. Now he struggles with socialising, is stressed as a partner and parent has unrealistic expectations of studying for his matric. It is now 5 years after his accident and he*

has as yet done nothing of the sort.

- 13.3. In her report in respect of Mr Cloete, the clinical psychologist, Ms De Wit, states the following:

"8.1.1. He continues to experience right ankle pain and restricted range of motion, the ankle swells after physical activity, and pain and stiffness is exacerbated by inclement weather. He is no longer able to wear safety boots. He cannot walk for long distances, run or stand for extended periods of time, and the ankle is unstable ...;

8.1.2. He reported that he experiences back pain, exacerbated by physical activity or sitting in the same position for extended periods of time." and "Clinically his level of intelligence appears to be lower than average", and "considering his presentation at this assessment and his pre-accident educational level (Grade 9), from a psychological and neuropsychological perspective he is not suitable for most sedentary types of positions, which typically require a slightly higher intellectual ability and skillset, communication skills and interpersonal skills".

The Industrial psychologists:

14. Ms Auret-Besselaar, who had interviewed Mr Cloete, testified that he had immersed himself in the role of excavator operator, which he did well and

with which he wanted to continue. His attempt to continue working in his injured state showed drive, and his interest in qualifying as a grater operator demonstrated that he is keen and interested. There is no reason why he would not have obtained additional qualifications. He was a good candidate for re-employment on the liquidation of his employer, as his co-workers and friends found employment. He would, in her opinion, have continued working until age 65 as he would have been valued due to his qualifications and as a father, he would have been required to do so.

15. At the time of the accident Mr Cloete was earning a basic salary of R3 800.00 per month, and overtime of between R600.00 and R700.00, equating to total earnings of R4 500.00 per month (February 2011 value).
16. She testified that she had taken a conservative view in considering his work path, but for the accident, and believed that he would probably have continued in the position of excavator operator, receiving inflationary adjustments for 3-4 years, while learning in-service skills and gaining job exposure and experience. Had he done so, he would have been earning, in 2016 terms, at least R 7 140.00 per month.
17. He would 5-6 years thereafter have obtained employment from another employer at an increased basic salary of between R10 000.00 and R 14 000.00 per month (2016 value) due to his work experience, in-service training, his good work ethic and track record. Another employer may have paid him more and provided benefits such as a 13th cheque, employer

contributions to medical aid and provident fund of 7.5% respectively. It could not be discounted that he could have been employed as an experienced operator, earning the equivalent of R 16 500.00 per month plus benefits in the Johannesburg region.

18. In this regard, she had obtained collateral evidence from Ms Heleen Basson, the financial manager at TR Civil Engineering in Kakamas, and Mr Pero Scholtz, manager at Mass Hire in Upington, and advertisements drawn from the internet. The salaries ranged from R 5 940.00 per month (plus overtime, i.e. R 7 140.00), to as high as R 18 000.00 plus substantial benefits. The figures that she relied on to demonstrate employment opportunities and salaries paid included those in the Johannesburg area, because, in her view *"nothing stopped him from moving there"*. Finally, in her view, Mr Cloete's employment as excavator operator falls into the semi-skilled formal labour sector.
19. Under cross-examination, it was pointed out to her that while she had postulated Mr Cloete's future earnings on an initial gross salary of R 4 500.00 per month, equating to R 54 000.00 *per annum*, Mr Cloete's employment certificate reflected a basic salary at the time of the accident of only R 2 736.51 per month, as did his payslip dated 28 February 2011 (and overtime of R 294.00). Ms Auret-Besselaar conceded that she had not been provided any evidence of Mr Cloete's earnings, but he had not impressed her as someone who exaggerates and she accordingly accepted his say-so that

he had been earning R 4 500.00 per month. Her view was that it was more important to look at collateral evidence as to salaries payable, than the actual salary earning by Mr Cloete at the time of the accident. It was put to the witness that it was more appropriate to make use of the tables in Koch, she disagreed as it was not necessary to use the "*default position*" where she had facts. During oral argument, Mr Mashaba also referred to a second salary slip contained in the plaintiff's bundle, dated 30 June 2010, which reflected a basic salary of R1 881.60 plus total overtime of R 690.56. Although I accept that it is dated 8 months before the accident, it is strikingly less than the amount which Ms Auret-Besselaar had accepted as correct.

20. Her evidence was further to the effect that Mr Cloete's prospects of finding alternative employment were limited to non-existent. Insofar as sedentary work is concerned, it required at least matric and the labour market for that kind of work is flooded. According to Ms Auret-Besselaar he is not suited for sedentary work in his personality and the older he gets, further studies become less attainable.
21. Mr Mashaba submitted in his heads of argument on the other hand, that as Mr Cloete had told the clinical psychologist, Ms De Wit, that he sometimes manages to find odd light jobs in his neighbourhood, it appears that he still has a residual earning capacity, even in his injured state. In my view there is no evidence of any real earning capacity on the part of Mr Cloete, and such a view was not supported by the industrial psychologist called to testify on

behalf of the defendant, either.

22. In his heads of argument, Mr Laubscher pointed out that the report of Dr Cillie-Schmidt, Exhibit D, had not been proved when she testified insofar as she was not requested to confirm the report under oath, and neither did she refer to her report during her evidence. On this basis, it was submitted by Mr Laubscher that the report of Dr Cillie-Schmidt has no evidentiary value whatsoever.
23. I have a further difficulty with the evidence tendered by Dr Cillie-Schmidt. She did not purport to testify as an expert witness, no evidence was led in respect of her qualifications and no particulars thereof appear from her report, Exhibit D, from which her expertise could possibly be deduced.
24. Mr Mashaba argued that as her report had been handed into evidence, and her expertise had not been challenged by the plaintiff's counsel, her evidence should be accepted as relevant.
25. I cannot agree with Mr Mashaba. In the matter of **Mkhize v Lourens & Another**, 2003 (3) SA 292 (T) no evidence was led of the qualifications of a witness called as an expert. Objection was made to the evidence as being irrelevant. Webster J upheld the objection and said the following: "*It is my considered view that the objection to Shedden's evidence is well taken. The Rule 36(9)(a) and (b) notice and summary of the evidence to be given by an expert at a trial have no evidential value. Their purpose is to apprise the*

opposition of these facts so that proper and timeous preparation can be made to meet such evidence and to challenge if it is necessary to do so. A party does not waive his right to object to evidence given by someone who is described as an expert if there are reasons for doing so. The Court has to be satisfied that such witness does indeed possess expert and specialised knowledge which the Court does not know or can take judicial cognisance of (Ruto Flour Mills case supra). The failure to have Shedden's qualification and alleged expert knowledge established was accordingly a fatal flaw. His evidence remains mere opinion evidence that is irrelevant."

26. In the absence of the qualifications and expert knowledge of Dr Cillie-Schmidt being established, her evidence is mere opinion, is irrelevant and must be disregarded. It follows that I am left with the evidence of the plaintiff's industrial psychologist only.

Determining the loss of earnings:

27. The premise that Mr Cloete was earning a basic salary of R 3 800.00 per month at the time of the accident, is contradicted by the documentary evidence that was discovered by him and which clearly indicates that he was earning significantly less. Ms Auret-Besselaar's explanation for the discrepancy – that the salary slip shown to her pertains to the month during which he was injured and in respect of which he did not work a full month – is speculative and unconvincing. There was no evidence that Mr Cloete was not paid in full for February 2011. Mr Laubscher suggested that the payslip

and employer certificate were both patently incorrect and should be disregarded in favour of the evidence of Ms Auret-Besselaar, as the defendant had admitted her report.

28. The submission cannot be upheld. The payslip and employer certificate are not patently incorrect. Even if the documents are not correct, it was incumbent on Mr Cloete and his attorney to discover documents in support of his claim and to obtain for this purpose a payslip and employer certificate reflecting the correct amount. Unfortunately, Mr Cloete was not called to testify in respect of his earnings at the time of the accident. The defendant cannot, in any event, be deemed to have admitted the report of Ms Auret-Besselaar and the facts therein contained. The defendant delivered a report of Dr Lydia Cillie-Schmidt, therein described as an industrial psychologist; she met with the plaintiff's expert industrial psychologist and they prepared a joint minute pursuant thereto; she was called to give evidence on behalf of the defendant. The plaintiff's counsel did not at any time either object to either her expertise or to her evidence. Notwithstanding that I may have found that she did not testify as an expert, it is clear that the defendant, in presenting her evidence, timeously disputed the report of Ms Auret-Besselaar as intended in the minute of the pre-trial conference. The defendant's witness disputed, in particular, the methodology used by Ms Auret-Besselaar.
29. It appears therefore that Ms Auret-Besselaar relied on the information supplied to her by Mr Cloete without testing the information with reference to

his payslip or other objective evidence, which could – and should - have been made available to her.

30. In **Ndlovu v the Road Accident Fund**, 2014 (1) SA 415 (GSJ), the Court warned against expert reports or evidence where the expert does not distinguish between objective originating data (such as, in that case, hospital records), and Mr Cloete's say-so or unsubstantiated hearsay. *"An opinion is of little value if the material facts relied upon are flawed."* (at [109]).
31. I accordingly agree with the submission of Mr Mashaba that Mr Cloete has failed to prove that at the time of accident he was earning R 4 500.00 per month. On the evidence before Court, Mr Cloete was earning a basic salary of R 2 736.51. The payslip of June 2010 supports the contention that his overtime amounted to R600.00 to R700.00 per month and I accordingly accept, in his favour, that he was earning a total salary of R3 436.51 per month.
32. Robert Koch's **Quantum Yearbook 2016**, states the following on page 128: *"The best guide to likely earnings is often what the victim was earning at the time of the accident. This is particularly so when there is an extended history of earnings at this level"*.
33. However, the Court is not necessarily restricted to the actual earnings at date of the injury, but must consider the earning capacity by reference to all the evidence available to the Court. **Shield Insurance Co Ltd v Booysen**, 1979

(3) SA 953 (A) at 964. This would include the expert opinions in respect of his earning capacity and the collateral data upon which the plaintiff's expert relied, if accepted.

34. Mr Mashaba submitted that Ms Auret-Besselaar concentrated on the potential earnings of Mr Cloete, rather than the likely earnings. He referred to the statement in the **Quantum Yearbook 2016** at page 128 that "*as the law stands at the moment, compensation for loss of earning capacity is directed at the likely earnings, not possible potential earnings*" and the authority relied upon by the learned author, being **Minister van Veiligheid v Geldenhuys**, 2004 (1) SA 515 (SCA): "*die vraag is nie wat Geldenhuys kon verdien het nie, maar wat hy waarskynlik sou verdien het*".
35. "...An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which reasoning proceeds, are disclosed by the expert." **Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft Für Schadlings-bekämpfung MbH**, 1976 (3) SA 352 (A) at 371F–G.
36. Bearing this in mind, I was troubled by the following aspects of Ms Auret-Besselaar's evidence:

36.1. Mr Cloete had been employed as an excavator operator for a year, and for the same employer for some two and a half years. Prior to that he did "*piece jobs*", the extent of which is not clear. There is accordingly no evidence of "*his good work ethic and track-record evident at that stage*" upon which she then bases her assumptions as to his ambitions and future employment. This is a young man who left school during grade 8 due to an altercation with a teacher, never to return. The position of excavator operator appears to have been the first occasion upon which he was employed in a position requiring any form of skill or responsibility, and he had only been in that position for a year. Unfortunately, there was no evidence from Mr Cloete himself with regard to his ambitions and intentions. I do however accept that he would at some point have enjoyed an increase in his salary as reward for his experience. To this end I assume that such an increase would have occurred in year 10 (to accord approximately with Ms Aret-Besselaar's views), and would have been an additional 12% over and above normal inflation.

36.2. Mr Cloete had lived in Steinkopf in the Northern Cape his whole life, as did his family and the mother of his child, which in itself renders the contention that he would have relocated to Johannesburg most unlikely. Once again, his own evidence would have been valuable. The salaries that may be earned in Johannesburg may accordingly safely be ignored.

- 36.3. The witness accepted that Mr Cloete would have earned benefits comprising medical aid, pension, cell phone allowance and UIF. He was not receiving such benefits at the time of the accident and the only basis upon which she assumes he would have earned such benefits later, is the information obtained from Basson and Scholtz, which is hearsay. Although Mr Laubscher submitted that this evidence should be accepted as the defendant had admitted it, I have already indicated that in my view the defendant did not admit the report, and there was no evidence of the chance that such benefits could have been achieved and no basis upon which I can conclude that Mr Cloete would indeed have earned such benefits at any time in the future.
37. The question therefore arises whether the correct approach would not be to use the tables provided by Robert Koch setting out the estimated earnings to determine Mr Cloete's uninjured career progression. The difficulty that presents itself however is the appropriate table and the appropriate job grading that should be applied.
38. Ms Auret-Besselaar expressed the opinion that Mr Cloete's job description and the typical earnings and fringe benefits associated therewith, place him in the "*formal sector*" of the job market. These factors, she further opined, place him at the Paterson B4/B5 job grading level in the formal sector. She did not provide any basis for placing him on this level, and Mr Laubscher

submitted that I must accept it as a product of her experience. Her view is however contradicted by Koch. He states that earnings and benefits do not determine the job grading. The grading allocated to a particular job must be determined according to the content of the job by way of skills needed and demand for independent decision-making. (See Robert J Koch CC Newsletter 67 of 2007.) I prefer this view.

39. Mr Mashaba did not take the matter any further in his arguments.
40. The result is that I am unable to establish the correct job grading level and the tables do not assist me.

Contingencies:

41. Counsel both submitted that the contingencies to be applied to Mr Cloete's claim for past loss of earnings be 5% and in respect of his future uninjured earnings, 15%. Bearing in mind Mr Cloete's relatively young age, I think that a contingency of 20% would be more appropriate.

The COIDA claim:

42. The plaintiff also called Ms Elize Coetzer to testify in regard to the status of his claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ("COIDA"). Ms Coetzer is a consultant dealing with COIDA aspects from employers / employees. Mr Cloete was at the time of the accident an "employee" as defined in COIDA

and was injured in an "accident" *"arising out of and in the course of an employee's employment and resulting in a personal injury"*. This meant that he was entitled to "compensation" from the Compensation Commissioner.

43. It appeared from a letter she had received from the Department of Labour on 24 August 2016, that Mr Cloete had been paid R 412.00 in respect of medical expenses but that his claim for compensation had not yet been finalised. She testified that it was difficult to say whether he would receive any further payments, particularly as his employer was no longer in business. She testified that he would not be paid for permanent disability, but in respect of temporary disability, he may be paid a small percentage of his salary for six weeks, if the Commissioner receives the required information.
44. Mr Mashaba suggested that payment of the award for past loss of earning capacity only be paid once the award of the Compensation Commissioner has been finalised, and with due regard to such award. Mr Laubscher submitted that it appeared from the evidence of Ms Coetzer that Mr Cloete would receive no further COIDA payments and I am inclined to agree with this view. As pointed out by Ms Coetzer, the outstanding information must be provided by the employer, which was liquidated soon after the accident occurred.
45. Under the circumstances I find that there is no deduction to be made in this regard.

Actuarial calculations:

46. Deloitte Consulting (Pty) Ltd prepared two calculations premised on the opinions of each of the parties' appointed industrial psychologist.

46.1. Scenario 1, based on the views of Ms Auret-Besselaar, provided for the following:

46.1.1. Uninjured income: The claimant would have likely continued working as excavation operator earning at least R 7 140.00 per month (2016 terms). He may have received a 13th cheque and employer contributions to medical aid and provident funds of 7.5% respectively. He would have received inflationary increases for 6 to 8 years (assumed 7 years) thereafter. He would have then started earning R 12 500.00 to R 16 500.00 per month (2016 terms) (assumed R 14 500.00 per month) plus benefits (assumed 13th cheque and employer contributions to medical aid and provident fund of 7.5% respectively). Thereafter, inflationary increased would have applied until retirement at age 65.

46.1.2. Injured income: Following the accident, Mr Cloete is unsuited to compete in open labour market as an operator or to perform sedentary work (which requires skills that he does not possess and is unlikely to acquire). He is considered

unemployable considering his orthopaedic and neurological deficits. She has therefore assumed zero earnings from accident date until retirement age.

46.2. Scenario 2, postulated by Dr Cillie-Schmidt, cannot be considered for the reasons already set out.

47. Having considered the evidence and other factors, the parties are directed to obtain from Deloitte Consulting, a recalculation of Mr Cloete's past and future loss of earnings, to be made on the following basis:

47.1. Mr Cloete was injured in a motor vehicle collision that took place on 11 February 2011;

47.2. As a result of the injuries sustained in the collision, Mr Cloete has been left with no residual earning capacity;

47.3. Mr Cloete was earning a basic salary of R 2 736.51 per month, and overtime of R 700.00 per month, at the time of the collision;

47.4. It is assumed that if Mr Cloete had not been injured, he would have continued working until 65 years of age;

47.5. Normal inflationary increases must be applied;

47.6. An additional increase in salary of 12% should be provided for in year

10;

47.7. Contingencies of 5% must be applied to his past loss of earnings, and 20% to his future loss of earnings.

48. The parties may approach this Court once the calculation has been provided to them, for an order to be made. Written objections to the calculation made by Deloitte Consulting received within 7 days, will be considered.

Costs:

49. The plaintiff is entitled to an order for costs. I was provided with a copy of the contingency fee agreement as well as an affidavit of attorney Jurgens Stephanus Terblanche who confirmed that the schedule of fees to which Mr Cloete agreed, complies with the Contingency Fee Act, and that no monies in addition to that for which provision is made in the said agreement, has or will be received from the curator *ad litem* or Mr Cloete.

The curator ad litem:

50. It is necessary to refer to the issue of the *curator ad litem*.

51. In his heads of argument, Mr Mashaba stated that it appears that one Advocate C Cawood had been appointed a *curator ad litem* to Mr Cloete, but that it did not appear from the Court papers whether such appointment had been granted by this Court, no Order of Court had been brought to his

attention and Mr Cloete was still cited as plaintiff in the Court papers. He referred to rule 57 of the Uniform Rules of Court, and suggested that as the protection of the funds to be awarded to Mr Cloete had not been addressed as envisaged in **Sibusisiwe Ruca v RAF**, Case No: 73012/2013 (Gauteng Division, Pretoria), the appointment of a *curator ad litem* had not been proven to be necessary.

52. Mr Laubscher responded to these submissions by stating that as the relevant Court Order had been provided to all concerned, the submissions of Mr Mashaba are irrelevant and premature. In any event, he proceeded, it is for a Court approached to declare the Patient of unsound mind and to appoint a *curator bonis* or not, to deal with the issues raised in the defendant's submissions.
53. As Mr Cloete had not suffered a head injury, there had not been a *curator ad litem* present in Court, and the Order I am to make would have to take into account the *curator's* recommendations, I requested the application, the Order granted and the curator's report.
54. It is not surprising that Mr Mashaba was unaware of the grant of the Order appointing Adv Cawood as *curator ad litem* for the plaintiff. The application was granted under case number 14567/16 in the Western Cape Division of the High Court on 19 August 2016, just one week prior to the commencement of the trial in this Division. A number of aspects pertaining to this application concern me.

- 54.1. The applicant is Mrs Lena Cloete, Mr Cloete's grandmother, and she states in her affidavit that she lives at 1 River Road, Steinkopf, *Western Province*. This is not correct. Steinkopf is in the Northern Cape Province. She makes the same statement in respect of Mr Cloete. The import of this is that the Honourable Judge hearing the application would have been led to believe that the Western Cape Division of the High Court had jurisdiction to hear the application, while, as a matter of fact, it did not.
- 54.2. She states further that pursuant to the collision, a claim was lodged with the Road Accident Fund. She does not disclose that action had already been instituted against the Road Accident Fund, much less did she disclose that the trial was due to commence in the Gauteng Division, Pretoria, just one week later. While this in itself may seem trifling, it must be considered with the other aspects.
- 54.3. The application was served on the offices of the Road Accident Fund at 8th Floor, 1 Thibault Square, Cape Town. As no case number or claim reference number appears from the papers, one can safely assume that the application would not have received appropriate attention in the Cape Town offices of the Road Accident Fund. The Road Accident Fund has attorneys on record and these attorneys were not notified of the application. The less said about this, the better.

- 54.4. The application was also served on the offices of the Master of the High Court in Cape Town. The Master in Cape Town does not have jurisdiction over Mr Cloete and will not report on the matter as is required by Rule 57(7). The Master having his office at the seat of the Northern Cape High Court in Kimberley is the only Master having the necessary jurisdiction. See section 4(2) of the **Administration of Estates Act**, 66 of 65, *Ex parte Beukes*, 2011 (5) SA 521 (WCC).
- 54.5. I am also concerned by the contentions made by Mrs Cloete to lay a basis for the appointment of the *curator ad litem* and subsequently a *curator bonis*. She states that the serious bodily injuries sustained by Mr Cloete include anxiety/mood disorder and psychiatric injuries, that he is in need of supervision and assistance and that she is particularly worried about the mental consequences of his injuries (whatever this may mean). She continues to state that "*all aspects of his life had been affected by the trauma of the accident, and have rendered him less able to manage his cognitive, executive, emotional and spiritual wellbeing as well as all challenges of life. The various injuries reinforce each other and cannot be perceived independently.*" These contentions are not supported by the reports of either the psychologist or the psychiatrist, and were certainly not attested to by Ms Auret-Besselaar, who, on the contrary, was extremely impressed by Mr Cloete.

55. The Order sought, and indeed granted, was to the effect that the *curator ad litem* be directed to furnish her report to the Western Cape Division of the High Court. The *curator ad litem* informed me that she had not yet provided her report to the Master, and neither had she reported to the Court.
56. While conceding that I had reason to be concerned, Mr Laubscher contended that the Order appointing the *curator ad litem* stands until set aside. He later conceded that his attorney may have to bring an application to set aside the Order. I agree that that would be the appropriate course. Mr Mashaba argued that I should set the Order of the Western Cape Division aside in terms of Rule 42(1) which provides that the Court may *mero motu* rescind or vary Orders or judgments. His primary concern was that the defendant be held liable for the costs incurred in bringing the application in terms of Rule 57. This Court does not, however, have jurisdiction to set aside an Order granted in another Division. Accordingly I make no Order in respect of the appointment of Adv Cawood as *curator ad litem* for Mr Cloete.
57. For the reasons set out in the preceding paragraphs, I intend ensuring that this judgment is brought to the attention of all interested parties, including the Master of the Western Cape High Court, the Master of the Northern Cape High Court, the Judge that granted the order appointing the *curator ad litem* as such, the Registrar of the Western Cape High Court and Mr Cloete personally.
58. Due to the uncertainty surrounding Mr Cloete's status, as well as the status of

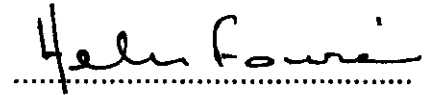
the *curator ad litem*, it will be necessary that the funds payable by the defendant in terms of this Order, be held in trust by Adendorff Attorneys, pending resolution of the issue of curatorship of Mr Cloete.

Order:

1. Shaun Enrico Cloete's claim for loss of earnings is postponed *sine die*, pending the recalculation of Mr Cloete's past and future loss of earnings by Messrs Deloitte Consulting (Pty) Ltd on the basis provided for in paragraph 47 of this judgment.
2. The parties may approach this Court once the calculation has been provided to them, for an order to be made in respect of Mr Cloete's claim for loss of earnings.
3. It is recorded that the defendant has undertaken to furnish Mr Cloete with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to compensate him for 100% of the cost of future accommodation in a hospital or nursing home or treatment of or rendering of a service for supplying of goods to him, due to injuries sustained by him in the collision and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.
4. It is recorded that the defendant has agreed to pay an amount of R 250 000.00 in respect of Mr Cloete's claim for general damages.

5. The defendant is ordered to pay the costs of suit, including the qualifying expenses of the following experts:
 - 5.1. Ms Auret-Besselaar, industrial psychologist;
 - 5.2. Dr K le Fèvre, psychiatrist;
 - 5.3. Dr JS Sagor, orthopaedic surgeon;
 - 5.4. R de Wit, clinical psychologist;
 - 5.5. R van Zyl, occupational therapist;
 - 5.6. Munro Consulting, actuary; and
 - 5.7. Deloitte Consulting (Pty) Ltd.
6. Payments made by the defendant in terms of this Order shall be made into the trust account contemplated in section 78(2) of the Attorneys Act, 53 of 1979 of Adendorff Attorneys, for the sole benefit of Mr Cloete, pending the appointment of a *curator bonis* of Mr Cloete.
7. Adendorff Attorneys shall pay the amount held in its aforesaid trust account, less such amounts that Adendorff Attorneys are entitled to deduct in respect of the accounts rendered by the expert witnesses and counsel employed on behalf of Mr Cloete, and the fees to which Adendorff Attorneys are entitled in terms of the fee agreement concluded with Mr Cloete, directly to Mr Cloete,

should a *curator bonis* not be appointed for Mr Cloete within 3 months of the grant of this Order, or to the *curator bonis*, should such have been appointed.



H R FOURIE
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF:
ADV A LAUBSCHER

ATTORNEYS FOR PLAINTIFF:
ADENDORFF ATTORNEYS, CAPE TOWN

COUNSEL FOR DEFENDANT:
ADV MG MASHABA

ATTORNEY FOR DEFENDANT:
MALULEKE MSIMANG & ASSOCIATES, PRETORIA