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: 5053/2011

In the matter between:

SENTLE JOHN LEKHEHLE Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: SNELLENBURG, AJ

HEARD ON: 27, 28 & 30 JUNE 2017

DELIVERED ON: 24 AUGUST 2017

"The web of our life is of a mingled yarn, good and ill together."

William Shakespeare's All's well that end well, 1600's, Act IV, scene 3, line 80.

[1] The plaintiff would understand this better than most. He has had his fair share of challenges and sorrow, having had to endure the passing of his wife before the unexpectedness of life again cast a shadow over him.

[2] On 23 November 2008 at the intersection of Church and Vooruitsig Streets, Bloemfontein, the plaintiff sustained serious injuries as result of a motor vehicle accident whilst being a passenger in one of the vehicles involved in the collision.

[3] The plaintiff ultimately issued summons against the defendant in terms of the provisions of the Road Accident Fund Act, 56 of 1996, as amended from time to time [the Act], to claim damages suffered as result of the collision.

[4] The merits and quantum of the plaintiff's claim were separated. The defendant conceded the merits of the plaintiff's claim and is liable to compensate the plaintiff for 100% of any proven damages arising from the collision. In terms of the court order and apart from the aforesaid the defendant tendered an undertaking in terms of s 17(4)(*a*) of the Act in respect of the plaintiff's past medical and hospital expenses.

[5] As result of the defendant's rejection of the RAF4 serious injury assessment report lodged by the plaintiff, that issue was referred

to an Appeals Tribunal constituted by the Health Professions Council of South Africa which determined that the plaintiff's injuries were serious in terms of the narrative test and the plaintiff therefore qualifies to claim and be awarded general damages.

[6] The matter ultimately served before me for determination of:

6.1 past hospital, medical and related expenses;

6.2 past and future loss of income / reduced earning capacity; and-

6.3 general damages.

[7] The plaintiff presented the following evidence:

7.1 His own viva voce evidence;

7.2 The viva voce evidence of Dr Le Roux (orthopaedic surgeon) and Dr Wohlman (psychologist);

7.3 The plaintiff accepted and admitted the reasoning, conclusions and opinions contained in the Rule 36(9)(*b*) summary of the defendant's occupational therapist, Ms Success Moagi which was

filed by the defendant as part of its expert bundle without the need of the relevant expert to testify. The defendant, insofar as it is relevant, did not object;

7.4 The defendant accepted and admitted the reasoning, conclusions and opinions contained in the Rule 36(9)(*b*) summaries of Dr Richard Hunter, industrial psychologist and Dr Theo Le Roux, orthopaedic surgeon, both of whom the plaintiff intended to call as expert witnesses during the trial.

7.5 The defendant admitted the actuarial methodology adopted by plaintiff's actuaries, Messrs Munro Forensic Actuaries contained in the plaintiff's Rule 36(9)(*b*) report.

[8] The plaintiff moved for an amendment of the amounts claimed for past hospital and medical expenses; past and future loss of earnings and / or earning capacity and general damages. The amendments were not opposed and was granted. As amended the plaintiff claims the following amounts:

8.1 Past hospital and medical expenses R90 712.79;

8.2 Past and future loss of income / reduced earning capacity R1 642 370.00; and-

8.3 General damages R575 000.00.

[9] For sake of completeness the following documents were handed in as exhibits during the trial, namely:

9.1 The pleadings bundle as Exhibit A;

9.2 The expert reports bundle as Exhibit B;

9.3 An evidentiary document bundle as Exhibit C;

9.4 A bundle consisting of past hospital, medical and related documents as exhibit D;

9.5 Diagrammatic sketch of an image of the human pelvis as exhibit E;

9.6 Updated actuarial report, dated 29 June 2017, by Messrs Munro Forensic Actuaries as exhibit F.

[10] None of the viva voce or documentary evidence presented by the plaintiff during the trial were contested by the defendant. The defendant at the conclusion argued only the quantum of the general damages that it submits should be awarded.

[11] Regarding the viva voce evidence which was presented I have no hesitation in accepting the evidence of the plaintiff and the expert witnesses who testified on his behalf, namely Dr Le Roux and Dr Wohlman.

[12] The plaintiff made a very good impression on me. He was indeed a very candid witness. I agree with the plaintiff's counsel that the plaintiff did not seek to embellish or exaggerate his symptoms or the impact of his injuries on virtually every aspect of his life. The plaintiff's testimony leaves little doubt of the gravity of his injuries and the continuous consequences thereof. He very candidly explained the symptoms and impact of his injuries in his own words. His evidence brought to mind the quote from William Shakespeare's play I quoted in the introduction.

[13] The court is called upon to evaluate the expert evidence to satisfy itself that the evidence satisfies the criteria. The fact that the defendant has not challenged the evidence is also a factor weighing in the plaintiff's favour. I have had the benefit of witnessing both experts whilst hearing their testimony. I have also had the benefit of their evidence in addition to the summaries of their conclusions and the reasons therefore. I have no hesitation in accepting their evidence. To this end I am satisfied that both the experts assisted the court in an objective manner and that the court received appreciable help from the witnesses on particular

issues by reason of their special knowledge and skill where they are better qualified than the trier of fact.

[14] The general damages was ultimately argued on the uncontested and undisputed evidence presented by plaintiff by means of viva voce evidence and expert reports of the witnesses who testified as well as those admitted without the need for evidence and the documentary evidence referred to above.

[15] The plaintiff was born on 7 August 1969. He is presently 47 years of age. Although the plaintiff apparently 'failed' grade 1 the plaintiff ultimately matriculated in 1989 and obtained the distinction of serving as prefect in his school during his matric year. The plaintiff got married during 1998 but sadly lost his wife to illness during 2003. The plaintiff became involved again and has a special female friend who travels from Lesotho every two weeks to visit him in Bloemfontein. The plaintiff has one biological daughter presently studying at a tertiary institution by means of a bursary. The plaintiff also cares for his late sister's children. He is on all accounts the primary care giver of these children which he refers to as his children.

[16] The plaintiff initially followed the footsteps of his father after matriculating by doing general work at various construction sites in Bloemfontein for approximately a year. The plaintiff then joined the South African National Defence Force [SANDF] during 1991 (at

that time it would have still been called the South African Defence Force, but nothing turns around this). Soldiers were (and still are) classified when joining the Defence Force. The plaintiff was classified during 1991 as G1K1. 'G' actually stood for "Gesondheid", health and 'K' for "Klimaatsaanwending", climate application). G1 simply meant that a soldier (plaintiff) is healthy and can participate in any physical activity whilst a K1 classification meant that the plaintiff could be deployed anywhere at any time without any limitations. Other classifications, for example K2 would mean that the soldier had to be within an appropriate vicinity to medical care for whatever reason which would obviously impact his ability to be deployed. In short the plaintiff was in good physical health. As member of the permanent force the plaintiff progressed to the rank of corporal. He left the SANDF in 1998.

[17] During this time the plaintiff also obtained a diploma in Traffic Science for which he studied part time.

[18] The plaintiff was, not surprisingly, active in various sports including boxing and road running. During his stint in the SANDF he would have been subject to fitness tests and activities in the normal course.

[19] On 28 October 1998 the plaintiff was appointed by Simba (Pty) Ltd (Simba) as sales representative in Bloemfontein. During 2001 he

was promoted to Business Development Representative. The position of Business Development Representative was done away with by Simba after approximately 3 years. The plaintiff then became a Route Sales Representative. He remained in this position until the termination of his employment by Simba on 24 June 2014. I will revert to the termination below. It needs little debate that the plaintiff's career advanced in a substantially different manner than that of his parents or siblings.

[20] The plaintiff's earnings were proved by means of payslips and a Certificate of Service forming part of Exhibit C to which I will revert in due course.

[21] It will suffice to say that the plaintiff's work as Route Sales Representative involved a lot of physical activities. He was responsible to load and offload stock in boxes, walking, standing, sitting and being able to drive variable distances, lifting and carrying the boxes and obviously, as pointed out by the plaintiff's counsel getting into and out of the truck he was driving. He would obviously do ordinary every day physical activities that we pay no or little heed to, for example kneeling, sitting or standing for extended periods without any discomfort, or put differently, with the normal discomfort associated with such activities.

[22] The description of the accident and the immediate aftermath, to borrow the plaintiff's counsel's words, are harrowing and very real.

Save for the fact that the plaintiff thought he would die when he felt the gash to his scalp, the plaintiff suffered severe discomfort and pain when strapped to the stretcher by the paramedics. This we now know was caused by the traumatic injuries to his pelvis. The main injuries suffered by the plaintiff, in addition to the pelvic injuries were lacerations to his scalp and left arm and a fracture of his left ankle.

[23] It is apposite, before continuing, to record that the plaintiff suffered what is commonly known as an open-book type pelvic injury which, according to Dr Le Roux who eloquently explained the injury with assistance of the diagram of a human pelvis, comprises of a traumatic disruption of the plaintiff's symphysis pubis with the dislocation of the left *sacro-iliac* joint. Dr Le Roux also identified the plaintiff's injury to his left ankle as an un-displaced fracture of the medial malleolus of the left ankle. Dr Le Roux testified that the plaintiff in addition suffered lacerations on his head and elbow. I will revert to Dr Le Roux's evidence.

[24] The plaintiff was initially taken by ambulance to the Pelenomi Provincial Hospital as the attending medical staff were unaware that the plaintiff was in fact covered by a medical aid fund. The plaintiff's stay at the provincial hospital was limited to a week on all accounts. The plaintiff testified that he does not recall receiving any meaningful medical treatment whilst being in the hospital. He was transferred to the Netcare Universitas Private Hospital due to the fact that he was covered by a medical aid fund. The plaintiff received surgery to his pelvis and was later discharged. He was

however readmitted before Christmas for treatment of an infection which had developed at the location of the pelvic surgery. This culminated in a second surgery to treat the septic wound.

[25] The plaintiff's mobility was severely limited initially. The evidence shows that the plaintiff initially used a wheelchair. He was then able to move around with the aid of a walking frame. He continued to receive treatment culminating in his ability to move around with bilateral crutches. He was later able to use only one crutch. The plaintiff was however confined to his house for several months as result of his limited mobility.

[26] The plaintiff spent 6 months at home after his discharge. He received 75% of his basic (standard) income from Simba. He obviously did not receive any commission. The plaintiff returned to work during July 2009 and was assigned light duties due to his limited mobility. He continued to receive his basic salary without commission. He had to resume his 'normal' activities with his employer approximately 6 months later.

[27] Although his employer was sympathetic to his situation at first this did not last. The plaintiff experienced various problems in performing the tasks he was able to perform before the accident and resulting injuries. He was no longer able to load and offload boxes, nor carry them. The plaintiff has severe discomfort in sitting for extended periods. He had difficulty getting into and out of his

truck. He was dependent on pain medicine and his productivity and performance were greatly reduced. In short, the plaintiff could no longer make his monthly targets. This eventually, and understandably, caused his employer to initiate steps which ultimately lead to the official termination of the plaintiff's employment.

[28] The plaintiff has not been able to remain employed gainfully since the termination of his employment by Simba.

[29] The plaintiff has not been idle. Notwithstanding his inability to secure permanent employment the plaintiff has rented out his garage for R900.00 per month. He also rents out his 'bakkie' when he can. He may earn a few hundred rand per month, depending on the demand. The plaintiff also receives R1300.00 per month as result of his former affiliation with the SANDF. This benefit accrued before the collision and has nothing to do with the collision.

[30] The plaintiff received 36 stiches to close the scalp laceration and 3 stiches to close the laceration to his left elbow. The scalp laceration left a very significant and obvious scar which was visible and could readily be observed by me during the proceedings.

[31] The plaintiff experiences discomfort when lying down, sitting for an extended period or standing for long periods. This unfortunately

impacts on the plaintiff's ability to get a meaningful night's rest. The plaintiff testified that he cannot sleep comfortably and needs to sit upright or even get up from the bed after short intervals. This is an ongoing problem which also culminated in his inability to concentrate and perform when he resumed his responsibilities at Simba. It remains a problem.

[32] The plaintiff testified that in his opinion the symptoms of his pelvic injury had worsened over time or at least he felt that it had become more unbearable. The plaintiff also testified that he could no longer properly satisfy his female friend's sexual needs as he suffers from a low libido. This makes him feel inadequate as man and impacts on his self-esteem.

[33] The plaintiff's life in general has been drastically altered. He testified that he experiences constant pain in the pelvic region and lower back. As will appear, this is confirmed by the expert evidence tendered on his behalf. He testified that he generally feels depressed and has no motivation. He mainly stays at home. Where he tended to his own washing, gardening and maintenance work around the house, he is no longer able to do so. He needs assistance.

[34] Dr Le Roux put the plaintiff's injuries and the consequences thereof in perspective. His evidence confirmed the difficulties and discomfort that the plaintiff testified about after the collision. Suffice

it to say that Dr Le Roux, with assistance of the plaintiff's medical reports, confirmed that he underwent clinical and radiological examinations. A plaster cast was applied to the plaintiff's left leg. The medial malleolus ankle joint fracture was treated conservatively. The plaintiff underwent surgery which involved the open reduction and internal fixation of the open-book pelvic injury. During the procedure double plates were inserted and affixed in position. The surgery was done on 2 December 2008 and the plaintiff was discharged shortly before Christmas.

[35] Dr Le Roux also confirmed that the plaintiff was readmitted shortly after his discharge because the wound had become septic. This appears to be possible consequence as result of the type of injury and treatment. It however necessitated debridement of the wound sepsis and closure of the wound. The plaintiff was admitted on 26 December 2008 and discharged on 6 January 2009. The plaintiff had to be readmitted for treatment of infection of the wound on 16 January 2009 and discharged on 22 January 2009. The plaintiff had to use a wheelchair and made use of bilateral churches for a period of approximately 6 months.

[36] Of specific relevance Dr Le Roux confirmed the merits of the plaintiff's ongoing complaints regarding the inability to stand for long periods; remain sitting for periods exceeding 30 minutes; sleep comfortably; walk for long distances; maintain bent over postures and jump without pain. The plaintiff's pain and discomfort will increase in cold weather. As for the left ankle, the injury

compromised the plaintiff's left ankle permanently and left him susceptible to further injury. I must add that the plaintiff in fact testified that he presently does not experience substantial discomfort of the ankle injury. This is but one of the reasons for my finding above that the plaintiff was an honest witness who did not seek to embellish his injuries or consequences thereof. It is however a fact that the condition of the plaintiff's left ankle has been comprised and he is susceptible to future injury.

[37] Dr Le Roux testified that the plaintiff's evidence regarding the worsening of the discomfort and pain, experienced as result of the pelvic injury was probable and probably as result of his physical constitution and weight gain as result of the fact that he was no longer physically active. The increase in weight places the pelvic structure under additional stress. In addition, the plaintiff's complaints were typical of the type of injury as result of the manner in which the injury heals. The plaintiff's complaints are real and to be expected in light of the injury. Dr Le Roux also testified that in his opinion both the pelvic and ankle injuries had stabilized and the symptoms experienced by the plaintiff would on probabilities not improve or deteriorate. I would add that the opinion regarding possible deterioration must clearly be subject to the plaintiff's weight gain as this put additional stress on the pelvis.

[38] As far as further treatment of the plaintiff's pelvic injury is concerned Dr Le Roux explained that although there is a possibility of arthrodesis of the plaintiff's *sacro-illiac* joint, he would consider

this as a last resort. The procedure could diminish the level of pain and thus discomfort constantly suffered by the plaintiff, but has other reactions which could probably create other complications as result of the nature and extent of the fibrous tissue that will manifest in the pelvic region due to the procedure. At present Dr Le Roux would not advise this procedure.

[39] Dr Le Roux opined that future employability of the plaintiff would be subject to various accommodations by the employer such as that the employment should not involve walking, standing or sitting for extended periods of time. The employment should also not entail the plaintiff to be in a bend-over position or having to lift anything of substantial weight. As I understood the plaintiff's evidence he encounters severe discomfort in lifting objects which can not necessarily be labelled to have substantial weight. It appears that the accommodations that would be necessary entails ordinary activities which are part and parcel of normal everyday activities.

[40] Dr Le Roux does not share Dr Wohlman's view that the multi-disciplinary approach would yield a positive improvement in the plaintiff's condition, specifically with reference to the symptoms experienced by the plaintiff as result of the pelvic injury. Dr Le Roux's scepticism is based on the fact that a substantial period of time has already passed since the injuries were sustained and treated and the history of the plaintiff's symptoms and pain.

[41] Dr Wohlman conducted a follow-up assessment (in addition to his previous assessments which forms the basis for his expert reports) of the plaintiff on the morning of the first trial day. Dr Wohlman recorded that the plaintiff complained of suffering chronic pain; having a depressed mood; encountering sleep difficulty, vocational uncertainty with future employment; financial difficulties and associated anxiety; a low libido; weight gain; forgetfulness and lack of ability to concentrate; a fear of and hyper vigilance when travelling and dependency of pain medication after the collision and the consequent injuries.

[42] Dr Wohlman testified that the plaintiff's complaints are authentic complaints and this conclusion is confirmed and supported by the findings and conclusions of Dr Le Roux. I have no doubt at all that the plaintiff's complaints are sincere.

[43] Dr Wohlman diagnosed the plaintiff during clinical evaluation as presenting distress with underlying symptoms relating to chronic pain disorder with accompanying symptoms of mixed depression and anxiety. Dr Wohlman administered a mental state examination which included the Beck Depression Inventory, Beck Anxiety Inventory and a Pain Disability Questionnaire. I summarise the results. The plaintiff was found to suffer from moderate to severe degree of depression and anxiety. The impairments were measured as follows: functional impairment of 64/90 and a

psychological impairment of 52/60. This totals to a cumulative score of 116/150. The assessment during the morning of the first trial day revealed that the plaintiff's symptoms pertaining to anxiety had to some extent abated but the symptoms of depression had intensified and become more severe. This was not unexpected.

[44] In short, the plaintiff is caught up in a vicious cycle. The continuous pain which the plaintiff experiences results in the depression and the depression in turn restricts the plaintiff's drive and motivation to become engaged, insofar as he is able to do so, in vocational, recreational and social activities which obviously contributes to the depression in turn.

[45] The plaintiff's symptoms effectively restrict his ability to secure and being able to maintain gainful employment in the open market. As touched upon above, Dr Wohlman advocates a multi-disciplinary treatment approach for the plaintiff involving psychotherapy, counselling, medication, orthopedical management, physiotherapy, biokinetical training and weight control management. Dr Wohlman however qualified his opinion by reiterating that the plaintiff's symptoms are deeply entrenched in the person he has become as result of the chronic nature and consistency of the pain he experiences.

[46] The defendant's occupational therapist, Ms Moagi concluded in her report that the plaintiff, at date of her assessment being 17

June 2014, did not satisfy the open labour market physical requirements for the full scope of light, medium, heavy or very heavy type of work or work requiring prolonged standing or walking; bilateral carrying or lifting of heavy loads; dynamic working postural patterns; climbing stairs or optimum mobility. According to the report Ms Moagi found the plaintiff to meet sedentary (with some aspects of light) requirements of physical work in terms of his vocational abilities. She also, as Dr Le Roux, found that the plaintiff would require reasonable accommodations that have to be made by an employer as well as a sympathetic employer, in other words, the employer would have to understand the plaintiff's unique circumstances and be willing to make accommodations to enable the plaintiff to perform his duties.

[47] Ms Moagi in a joint minute (with Ms Raats) considered the plaintiff to require 10 sessions of occupational therapy and in addition 3 to 5 hours of occupational therapy after any future surgery; domestic assistance of 10 to 15 hours per week for home management tasks; handyman assistance of R2 000.00 per year and provision for assistive devices such as a bucket on wheels, shopping bag on wheels, high chair, low chair, low bench, crutches, raised toilet seat, hip kit consisting of easy-reacher, dressing stick, shoe horn, washing aid and stock puller, wheelchair and 2 grab rails.

[48] Dr Hunter concluded that the plaintiff's earning capacity has been significantly and adversely affected (impaired) as result of his injuries and the sequelae. Dr Hunter's report concludes that the

plaintiff would have experienced difficulty in performing the tasks he performed before the accident and resultant injuries. The plaintiff will not be able to compete with able bodied workers seeking employment and he is likely to suffer long extended periods of unemployment between jobs. He is likely not to be able to work until he reaches retirement age. Dr Hunter opined that the plaintiff's loss of income or reduced earning capacity would be best assessed by applying differential contingency deductions. Dr Hunter also recommended that the plaintiff be compensated for the period that he was absent from work as result of his injuries during which period he only received 75% of his basic wage.

[49] The plaintiff has suffered disfigurement. He has retained the scar on his scalp, referred to previously, but also the surgical scars, including a scar anterior to his pelvis.

[50] The plaintiff's condition, as stated, leads to memory loss and poor concentration. The plaintiff has also gained significant weight as result of his lack of exercise. This will however detrimentally affect the underlying injury.

[51] The court is guided by the principles which were aptly summarised by Zulman JA in **Road Accident Fund v Guedes** 2006 (5) SA 583 (SCA) para 8 *et seq*:

"It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example President Insurance Co Ltd v Mathews).[1] The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO).[2] The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial Court has a wide discretion to award what it believes is just (see, for example, the Bailey case[3] and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd).[4]"

[52] It is by now well established that the court exercises a discretion when awarding damages and that this discretion needs to be exercised judicially. It is equally established that the court needs to discount for vicissitudes of life, more commonly referred to as contingencies. These contingencies may vary from case to case and the discount may vary depending of the facts of the matter and is to large extent dependant on the trial Judge's impression of the case. By its very nature the enquiry into damages is speculative

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[1] 1992 (1) SA 1 (A) at 5C - E.
[2] Supra.
[3] Supra at 116G - 117A.
[4] 1980 (3) SA 105 (A) at 114F - 115D.

and involves a prediction of the future.[5] The Supreme Court of Appeal has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached.[6]

"The accepted approach is the flexible one described in the often quoted statement of WATERMEYER JA in Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case."[7]

From the afore-going it is clear that contingencies are intrinsically related to the facts and circumstances of the case. The trial Court applies a contingency in its discretion having regard to those facts and circumstances and its overall view of the matter. Also see **De Jongh v Dupisanie** NO [2004] 2 ALL SA 565 (SCA) para 47.

[53] The actuarial report of Munro applied deductions of 5% and 10% for contingencies to the plaintiff's past and future earnings. The plaintiff's counsel argued that in terms of the sliding scale approach, bearing in mind that the accident occurred almost 9 years ago, it would equate to a contingency deduction of

[5] Southern Insurance Association Ltd v Bailey NO, supra.
[6] Southern Insurance Association Ltd v Bailey NO, supra 119G.
[7] Southern Insurance Association Ltd v Bailey NO, supra 119 G-H.

approximately 4.5%. If the plaintiff's age is considered (47 years) he is approximately 18 years from retirement age. On the sliding scale approach this would equate to a future contingency deduction of approximately 9%.

[54] The defendant did not take issue with the calculations or the contingency deductions argued for by the plaintiff.

[55] I am satisfied that these contingency deductions are reasonable in the circumstances of this case. The uncontested evidence indeed shows that the plaintiff was in good health prior to the accident and his employment was not in any way in jeopardy.

[56] The plaintiff's parents have both passed away. His late father was a construction worker and his late mother earned her living as domestic worker. The plaintiff's brother is a general labourer. The evidence however shows that the plaintiff cut his own path to a destiny quite different to that of his immediate family. Obviously this was possible as result of his parents' sacrifices. Suffice it to say that the employment history of his parents and siblings is not decisive in this matter.

[57] There can be no debate that the plaintiff's employability and earning capacity has been greatly reduced post-accident. I agree with the plaintiff's counsel that although the plaintiff has retained

certain marketable skills and limited residual earning capacity, his scope of prospective employment options are significantly diminished. This was not disputed by the defendant. As pointed out above, the experts are not ad idem regarding the future success of suggested treatments. Dr Le Roux's scepticism was well reasoned and when taking the plaintiff's evidence and the general impression I got from him into consideration I am inclined to share Dr Le Roux's scepticism.

[58] I have no doubt that the plaintiff's prospects of re-entering the open labour market is to the lower end of the scale. 9 years have passed since the accident. During this period the plaintiff lost his employment as direct result of the injuries and its consequences and he has not been successful in obtaining any gainful employment. It must be borne in mind that the plaintiff's psychological disability as result of the constant pain and the resultant effects coupled with the impairment in rendering normal tasks make it very unlikely that the plaintiff will in fact find employment. To this end the defendant's own expert witnesses opined that any prospective employer would have to be willing to make accommodations in order for the plaintiff to be able to render services.

[59] The revised actuarial report has taken into consideration the income the plaintiff currently generates. The assumption is also made that the plaintiff will continue to receive the sum, increased by way of inflation, for 60% of the balance of his career, periods he

is not likely to be employed. The actuary also assumed that the amount has been earned from date of his dismissal from his employment at Simba at the present rate (2017 terms). Lastly the actual earnings gathered from the plaintiff's payslips were taken into consideration as well as the plaintiff's losses during the period of absence from his employment and the placement on light duty.

[60] The actuary calculates, with the contingency deductions and taking the aforementioned into consideration, the capitalised value of the plaintiff's accrued and prospective losses to the amount of R1 642 370.00.

[61] As far as the claim for past medical, hospital and related expenses goes, this issue can be disposed of without much ado. The plaintiff's evidence in this regard is uncontested. I am satisfied that the plaintiff has proven the past medical, hospital and related expenses to the amount of R90 712.79.

[62] The only issue disputed by the defendant relates to the issue of general damages.

[63] The plaintiff claims R575 000.00 whilst the defendant argues that an amount between R300 000.00 and R350 000.00 will be a reasonable award taking the facts of the matter into consideration.

Both parties relied on previous awards by courts in matters which are comparable to the facts in this matter.

[64] I am alive to the fact that general damages are not granted as measure of retaliation and punishment for injury suffered as result of negligence. It has a salutary purpose. Moseneke DCJ explained in **Van Der Merwe v Road Accident Fund And Another (Women's Legal Centre Trust As Amicus Curiae)** 2006 (4) SA 230 (CC) para 56:

"What is crucial for the present purpose is that the law of damages recognises special and general damages to afford the fullest possible redress for delictual harm. Both classes of damages seek to redress the deterioration or reduction of the quality or usefulness of a legally protected interest. In both cases the injured party loses something and receives money as reparation. Stated differently, the principal object of damages, whatever the kind, is to 'neutralise loss through the addition of a new patrimonial element'."[8]

[65] Farlam, J, as he then was held In **Van Wyk v Santam Bpk** 1998 (4) SA 731 (C) 735c-h:

"....., an award of money cannot really compensate a plaintiff for pain and suffering, loss of amenities, disfigurement, etc. There is indeed no norm for determining in monetary terms the extent of such general damages. As was said by Windeyer J in Papanayioutou v Heath (1970) ALR 105 at 112 (quoted by Luntz Assessment of Damages 2nd ed at 158 n 6):

[8] Visser et al Visser en Potgieter's Law of Damages 2nd ed (Juta & Co Ltd, Lansdowne, 2003) at 165.

"What is a reasonable sum for general damages for personal injuries cannot be measured and tested as a reasonable price can be, by the experience of the market-place."

It follows that there may be even amongst lawyers a marked difference in their assessment of the monetary value to be placed on loss of a non-pecuniary nature. It is for this reason that a Court of appeal will not interfere with an award of general damages made by a trial court merely because it is considered to be too high or too low. And in making such an award a court does not have regard only to the interests of the plaintiff; it also bears in mind that too heavy a financial burden should not be placed upon the defendant. In consequence it cannot be said that a plaintiff is over-compensated if, when assessing his general damages, no regard is had to an extraneous benefit conferred upon him for the purpose of ameliorating pain and suffering, loss of amenities, disability, etc."

[66] Previous awards serve a useful purpose. **De Jongh *supra*, para 64.** They remain a useful guide. When considering previous comparable awards it must be borne in mind that the court making the award did so taking into account the facts and circumstances of the specific case whilst also being guided by the specific Judge's general impression formed when hearing the specific matter.

[67] The 'comparable'[9] cases to which the parties respectively referred me proof this point. Whilst the cases are all fairly comparable to

[9] **TM Kgopyane, case number: 43235/2014, ZAGPHC** (unreported); **Muller v Road Accident Fund (2473/05) [2007] ZAECHC 95 (30 October 2007); Hendricks v Road Accident Fund**, reported in Corbett and Honey, The Quantum of Damages in Bodily and Fatal Injury Cases, Vol 5 at F3-1; **Hartzenberg v SA Eagle Insurance**, reported in Corbett and Honey, The Quantum of Damages in Bodily and Fatal Injury Cases, Vol 4 at F3-7.

the facts of this matter, whilst also not being exactly on all fours with the facts in this matter, the awards differ substantially from case to case. To this end the awards differ from R354 000.00 to R600 000.00 in present day (2017) terms. I have also considered the awards referred to by the respective Judges regarding cases they considered before making the awards.

[68] I am guided by the approach explained by Brand JA in the **De Jongh** matter in **para 56**:

> "Rabe is geregtig op billike kompensasie vir hierdie verlies. Die bedrag van sodanige kompensasie moet egter ook billik wees teenoor die verweerder. Dit is juis in 'n geval soos hierdie waar die hof moet waak teen die menslike geneigdheid om te oorkompenseer. Of, soos Innes HR dit gestel het in *Hulley v Cox* 1923 AD 244.246 'we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment'."

[69] The plaintiff's injuries and the consequences thereof have been dealt with above and appear more fully, of course, from the evidence and the expert reports that have been canvassed.

[70] In my view an award for general damages that will compensate the plaintiff appropriately and also be reasonable towards the defendant, all facts and circumstances of this matter taken into consideration and also whilst taking the guidelines in the

comparable matters into consideration, is payment of the amount of R550 000.00.

[71] The defendant is therefore liable to pay to the plaintiff the amount of **R2 283 082.79**, which consists of the following amounts, namely:

70.1 Loss of income / reduced earning capacity **R1 642 370.00**;

70.2 Past hospital, medical and related expenses **R90 712.79**;

70.3 General damages **R550 000.00**.

[72] I request both counsel to prepare heads of argument to facilitate the argument. Counsel for the plaintiff prepared heads of argument dealing in detail with the issues which greatly assisted me. I am also indebted to both counsel for the heads and argument regarding the issue of general damages. The cost order granted in the plaintiff's favour should be understood by the taxing master to include specifically the drawing by plaintiff's counsel of the plaintiff's heads of argument.

[73] Accordingly, **IT IS ORDERED THAT**:

1. The defendant shall pay the plaintiff the amount of **R2 283 082.79**;

2. The aforesaid amount shall bear interest at the rate prescribed in terms of the provisions of the Prescribed Rate of Interest Act 55 of 1975, from a date fourteen days after the date of this order to date of payment;

3. The defendant shall issue an undertaking in favour of the plaintiff in terms of Section 17(4)(*a*) of Act 56 of 1996 to pay the costs of:

   (a) future accommodation of the plaintiff in a hospital or nursing home;

   (b) treatment of or rendering of a service to the plaintiff;

   (c) supplying of goods to the plaintiff,

   arising from the injuries sustained by the plaintiff;

4. The defendant shall pay the plaintiff's costs of suit, which are to include the following:

   4.1 the qualifying expenses and preparation fees of the plaintiff's expert witnesses, namely:

      4.1.1 Dr Hunter;

4.1.2 Mr Wohlman;

4.1.3 Dr Le Roux; and

4.1.4 Munro Forensic Actuaries,

as well as the plaintiff's aforesaid expert witnesses' reasonable travel, accommodation and subsistence costs in respect of their attendance at trail and the costs of their expert reports including the costs attached to the procurement of the said reports;

4.2 Costs of the plaintiff's counsel including the reasonable travel, accommodation and subsistence costs in respect of his attendance to trial.

5. Interest on the costs at the rate prescribed in terms of the provisions of the Prescribed Rate of Interest Act 55 of 1975, from a date fourteen days after date of allocator to date of payment thereof.

N. SNELLENBURG, AJ

On behalf of the plaintiff: Adv AD Branford
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent:	Adv CJ Hendriks Instructed by: Maduba Attorneys BLOEMFONTEIN