



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: 1024/2012

In the matter between:

PETRUS LEBABO MOTAUNG

Plaintiff

And

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 8 AUGUST 2016

[1] The plaintiff instituted action against the defendant for damages he suffered as a result of a gunshot wound he sustained on 29 January

2011, which shot was fired by a police officer. He sustained a wound to his right groin with a fracture of the right femur. A later radiological examination on or about 21 May 2014 demonstrated a healed fracture of the right femur with internal fixatives in situ.

[2] The parties settled the merits of the claim as a result of which the following court order was issued on 29 October 2013 by agreement between the parties:

- “1. The defendant is liable for 70% of plaintiff’s agreed or proven damages.
2. The trial is postponed *sine die* for determination of the quantum.
3. Defendant is to pay the Plaintiff’s costs.”

[3] The measure of damages claimed by the plaintiff is set out in paragraph 8 of the particulars of claim, which reads as follows:

“As gevolg van die beserings wat die eiser opgedoen het en die behandeling wat hy daarvoor ontvang het, het die eiser skade gely in die bedrag van R2 976 675-00 wat soos volg bereken word:

8.1 Toekomstige mediese en verwante
behandeling (soos bereken deur Munro
Aktuarisse en uiteengesit in hulle
verslag hierby aangeheg gemerk
Aanhangsel “A”)

R 138 950-00

8.2 Reeds gelede verlies aan verdienste
(soos bereken deur Munro Aktuarisse
en uiteengesit in hulle verslag hierby

aangeheg gemerk Aanhangsel “A”) R 273 885-00

8.3 Toekomstige verlies aan verdienste
(soos bereken deur Munro Aktuarisse
en uiteengesit in hulle verslag hierby
aangeheg gemerk Aanhangsel “A”) R2 213 840-00

8.4 Algemene skadevergoeding ten aansien
van permanente pyn en lyding, permanente
ongeskiktheid, permanente skending,
permanente ongerief en tydelike skok R 350 000-00

TOTAAL R2 976 675-00

[4] On 22 May 2015 the parties settled the quantum of the future medical expenses and general damages and it was agreed that the only remaining issue for determination is the plaintiff’s loss of earning capacity. The relevant parts of the court order which was then issued by agreement between the parties, read as follows:

- “1. Die verweerder betaal die eiser ‘n bedrag van R98 000-00 ten aansien van toekomstige mediese uitgawes;
2.
3. Die verweerder aanvaar aanspreeklikheid vir betaling in die bedrag van R175 000-00 ten opsigte van die eiser se eis vir algemene skade. Betaling hiervan staan oor tot en met finale afhandeling en/of beregting van die oorblywende skadeposte en dra rente teen 9% per jaar vanaf datum van hierdie bevel tot en met datum van vereffening daarvan.

4. Die enigste oorblywende skadeposte van die eiser se eis, synde reeds gelede en toekomstige verlies aan verdienste, word uitgestel
5. Die verweerder is aanspreeklik vir betaling van die eiser se getakseerde of ooreengekome verspilde koste (indien enige voortspruitend uit die uitstel.”

[5] The trial therefore proceeded only on the issue of the plaintiff's loss of earning capacity; hence, the quantum of the plaintiff's alleged loss of past income and/or future income. It was also agreed that I am either to award a global amount in respect of the plaintiff's loss of income (past and/or future) or to make a declaration as to the plaintiff's pre- and post-injury career paths and the respective contingencies to be applied in both the injured and uninjured scenarios, whereupon the parties will request an actuary, mutually acceptable to the parties, to calculate the plaintiff's loss of earning capacity (the quantum of the plaintiff's alleged loss of income (past and/or future)) and once same is received, I will once again be approached to make such a determination an order of court. Based on the available evidence, I have decided to follow the second route.

[6] At the commencement of the trial the parties also agreed that the defendant concedes the contents of three expert reports filed by the plaintiff and agrees to them being submitted into evidence. Those are the expert reports of Dr AF Pienaar, an orthopaedic surgeon (exhibit A), Me M Smit, an occupational therapist (exhibit “B”) and Mr P Greeff, a clinical psychologist (exhibit “C”).

- [7] The plaintiff, the plaintiff's erstwhile supervising officer, Captain Ngune, and Me E Auret-Besselaar, an expert witness who is a registered psychologist and HR consultant, testified for the plaintiff. Me Auret-Besselaar's report was accepted as Exhibit "G".
- [8] The defendant tendered the expert evidence of Mr K Jooste, an industrial psychologist. Due to an oversight Mr Jooste's report was not formally admitted into evidence as an exhibit, but it does form part of the paginated bundle of expert notices and reports and was indeed accepted into evidence as such.
- [9] A joint minute concluded between Me Auret-Besselaar and Mr Jooste, dated 14 May 2015, concerning the plaintiff's alleged loss of income, was admitted as Exhibit "H".
- [10] The defendant filed a notice of his intention to further amend his plea, to which there was no objection and I granted the amendment accordingly. In terms of the amendment, the following additional averments were pleaded:

"5.2 In the event that the court may find that plaintiff suffered damages, which is not conceded, defendant pleads that plaintiff failed to take any, alternatively sufficient steps to subject himself to medical treatment, which treatment would have resulted in him functioning optimally and noteworthy;

5.3 Defendant pleads that plaintiff generated income from his services as reservist and from his employment at his father's business and that any loss of income has to be discounted there against;

5.4 Defendant pleads that plaintiff was able to exploit other sources of income and failed to do so, alternatively failed to take reasonable steps and initiative to do so;

5.5 Defendant therefore pleads that plaintiff failed to limit his damages.”

[11] After having considered the totality of the evidence, it is in my view evident that the factual basis upon which this matter is to be considered, is not that much in dispute anymore, but rather the inferences and conclusions to be drawn from it. In the circumstances I do not consider it necessary, nor efficacious, to summarise all the evidence. I will rather concentrate on the pertinent issues at hand and deal with those parts of the evidence directly relevant to the said issues.

BACKGROUND:

[12] The plaintiff was born and bred in Bethlehem. His date of birth is 30 November 2011. He matriculated in 2008 with university exemption.

[13] In 2009 he enrolled at the University of the Free State, QwaQwa Campus for a BA Communication degree. He actually wanted to study B. Education, but his marks were too low to meet certain requirements. Although he qualified for a NSFAS bursary, his parents were struggling financially. At the time the liquor store in Bethlehem which his father owned and managed, went bankrupt

and his father had to rent it out. The plaintiff decided to rather seek employment in order to assist his parents financially.

- [14] At the beginning of 2010 the plaintiff joined the South African National Defence Force (“SANDF”). He signed a service contract on 12 January 2010 (exhibit “F”). In terms thereof he joined the Military Skills Development System (“MSDS”) for a term of 24 months. At the same time he concluded a further service contract, exhibit “D”, in terms of which he undertook to be employed in the Reserve Force of the SANDF for a period of 5 years after the initial 2-year period of full-time training in the MSDS. The reservist position was not on a full-time basis – in terms of the contract he was obliged to render 30 calendar days service per annum. He started his training at Oudtshoorn. He started with basic military training, where after further more specialised training courses followed. He was transferred to 21 SAI Battalion, at Doornkop, Johannesburg during November 2010. There his immediate superior was Captain Ngune. At the time of the incident he was undergoing a driving course, during which he was taught to drive SANDF specialised heavy vehicles, such as the casspir, the samil, etc and which included training in the maintenance of the vehicles. He obtained his military learners driver’s licence, which licence was not valid for driving on a public road in a civilian capacity. However, as a result of the incident and the injury he suffered he was unable to complete the said course. He was hospitalised and underwent surgery. He only returned to work during May 2011. At the time he was on crutches and incapacitated to the extent that he was unable to proceed with his training. He attended roll call in the mornings, where after he had to return to the barracks for the

day. The plaintiff again underwent surgery on 18 July 2011 and only returned to work during approximately August 2011. He was still on crutches. He was still unable to participate in any further training. When he joined the SANDF he was classified as a G1K1 individual, which means that as far as his physical abilities were concerned, he was healthy and fit. However, as a result of the incident his status changed to G3K3, which means that he was physically incapacitated.

[15] He received his full remuneration up until the end of his MSDS contract at the end of 2011. As a result of him joining the Reserve Force, he was called up to perform reservist duties at Kroonstad, Regiment de Wet, as per his contract of employment on the dates which are reflected in the report of Mr Jooste, paginated p. 28 of the expert bundle. (Those dates are not disputed and are accepted as common cause between the parties.) The plaintiff is unable to remember what remuneration he previously received for his reservist duties, but testified that during 2015 it was R440-00 per day. His duties consisted of administrative office duties, which included filing and computer work.

[16] Since he left the full time employment of the SANDF at the end of 2011, he applied for a position at the security services of Transnet. Because he was required to undergo a physical test to qualify for the position, which he could not do as a result of his injury, his application was unsuccessful. He also applied for the position of a train driver/assistant train driver, but received no response and did not follow it up. His application to join correctional services was also not responded to and he did not follow that up either. Since

the beginning of 2012, the plaintiff has therefore not been formally employed on a full time basis (other than by his father, to which I refer *infra*).

[17] The plaintiff is still living in Bethlehem. He is staying with his girlfriend and their child of under two years old. His father has in the meantime during 2011 taken back control over his liquor store. The plaintiff has been assisting him in the said store, for which services he receives approximately R1 500-00 per month. The plaintiff is not receiving any form of social grant.

[18] The plaintiff has since attempted to obtain his civilian driver's licence, but he failed the learner's licence.

[19] During 2013 the plaintiff enrolled at the FET College in QwaQwa, starting the first year of Electrical Engineering. He however had to cease his studies in June 2013 due to a lack of funds.

[20] In his evidence the plaintiff testified that he wanted to join the SANDF and then whilst employed by them, enrol as a part-time student. At that time it was his ambition to obtain a B. Education degree. He explained that according to his knowledge, the more qualifications one obtains whilst being employed by the SANDF, the better one's chances become to be promoted. He testified that he would very much have loved to become a permanent member of the SANDF. He explained that he enjoyed the type of work, as well as the environment. He made reference to the team work and team spirit he enjoyed. The plaintiff explained that he would have done all that was necessary to qualify to become a permanent

member of the SANDF. He showed good discipline, fitness and human relations. He also referred to the fact that during his training he twice received, what was called, officer's positive orders, which was a form of recognition one received when performing extraordinary well. He is convinced that he would have succeeded in becoming a permanent member of the SANDF. On a pertinent question on what he would have done had he been able to complete his two years initial training, but not succeed in becoming a permanent member, he explained that he then most probably would have been employed by Transnet, as they employ physically fit soldiers as security officers.

- [21] According to the plaintiff's evidence he is currently still suffering from pain in his right knee and his right thigh. He walks with a limp and is unable to run. He uses pain medication, called Pain Block, which he usually takes three times per day, although he conceded that there are days when his pain is less. He is unable to sit for long periods of time. When he did his reservist work, the pain he experienced compelled him to get up from behind his desk at certain intervals in order to stretch his legs before he was able to continue with his work.
- [22] Prior to the incident the plaintiff played soccer for the Free State Stars Development Team. As a result of his injury, he is no longer able to participate in sport activities.
- [23] From the evidence of Captain Ngune the relevant process followed by the SANDF became evident. At the end of the two year MSDS training, a member can get elected to proceed to a medium term of

employment (“CSS”) for five years. However, if a member does not get so elected, he only has the option of joining the Reserve Force for five years, which is not full time employment. If a member is successful in proceeding to CSS, a further election process occurs at the end of those five years and if again elected, the member continues in the employment of the SANDF for a further five years. If a member meets all the requirements at the end of the second five-year period, he qualifies for a permanent appointment. If not, such a member may still receive a renewal of his contract for a further three years, but not as a permanent member. During the said ten-year period before a member can qualify for a permanent position, such member can however be selected to undergo courses in order to be eligible for promotion to higher ranks during the ten year period.

A selection board is responsible for the selection of members at the end of the respective time periods referred to above. In the case of the plaintiff, Captain Ngune in his capacity as the commanding officer of the plaintiff was a member of the said selection board. In his capacity as such he had the duty to compile a confidential report regarding the discipline, the leadership and the conduct of the plaintiff. He explained that he is therefore involved in motivating the selection of a particular member, should such member in his view meet the relevant criteria and requirements. In the instance of the plaintiff, he did not qualify to proceed to CSS because of his G3K3 status. A member has to be G1K1 in order to be considered for selection.

- [24] Captain Ngune also testified that he remembers the plaintiff very well. He met him during October 2010 in Oudtshoorn Infantry School where the plaintiff was one of the soldiers under his command. At the time he had direct contact with the soldiers and he oversaw the training every day. When the plaintiff was transferred to Doornkop, Captain Ngune was his direct supervisor. The reason why he remembers the plaintiff clearly is because he experienced the plaintiff to be committed to his work, dedicated, well-disciplined, respectful and well respected by all. Had it not been for the plaintiff's injury, Captain Ngune would definitely have recommended that the plaintiff be selected to proceed to CSS.
- [25] Regarding his own career path, Captain Ngune testified that he joined the SANDF through integration during 1997 and received his training in Cape Town. He was a Lance Corporal. At the end of 1997 he was transferred to Mpumalanga and in 2001 he was promoted to full Corporal. He was responsible for the training and supervising of troops. He was then nominated to attend an officer's course, after completion of which he was commissioned by the President. He then became a two star Lieutenant in 2003. As Lieutenant he was transferred from Mpumalanga to Infantry School as officer instructor, where he was responsible for the rifle training of troops, both in small and big calibre rifles. He was then transferred to the army Gymnasia in Heidelberg as officer instructor, where he presented officers courses and also non-officers training. He was promoted to Captain in 2009 and is currently stationed at Doornkop Military Base.

- [26] Captain Ngune readily conceded that the number of members to be selected to proceed to CSS and thereafter, as well as the rate of possible promotion, is subject to post availability and budget constraints.

PRE-INJURY CAREER PATH:

- [27] Me Auret-Besselaar testified that a military career suited the plaintiff's individual profile very well. He loved the MSDS training. He enjoyed being a soldier and the surrounding circumstances, such as the free training, also suited him well. He was motivated by the presence of his colleagues and peers who made him realize that he is busy preparing for a future career. He did not have any disciplinary problems – he understood and accepted discipline. He easily adapted to the environment. At the age of 20 years he found an organisation that offered him a career opportunity for which he was ready and the possibility of progression and promotion gave him hope to establish a permanent career in the SANDF. The collateral information she obtained from Captain Ngune, which is summarised in paragraph 6.6.1 on paginated page 69 of her report, confirmed that the plaintiff was a very good soldier. The summary reflects the following information she received from Captain Ngune:

- “He says that Rifleman Motaung was a good soldier who obtained excellent results in the theory exam. He displayed good behaviour and discipline. He was a fit and active soldier, able to cope with the strenuous physical demands.

- He is of the opinion that at the end of the training by November 2011, Rifleman Motaung would have most probably have become a permanent member of the SANDF.”

Me Aurret-Besselaar testified that she is of the opinion that in all probabilities the plaintiff would have been selected to proceed to CSS and would have eventually become a permanent member of the SANDF. She also testified that considering her own evaluation of the plaintiff, Captain Ngune’s opinion and impression of the plaintiff as a potential soldier and having listened to Captain Ngune’s curriculum vitae in Court, she is convinced that the plaintiff could have had a similarly successful career path had it not been for his injury. Possible restrictions like limited available posts and budget constraints did not prevent Captain Ngune from accelerating in his career and therefore, in her view, the plaintiff could have been equally successful.

[28] Me Aurret-Besselaar obtained collateral information from Sergeant Major Fourie of the HR Division at the SANDF Headquarters, Pretoria, regarding the promotion system within the SANDF, remuneration packages, benefits, etc. The said information is summarised as follows in paragraph 6.6.2 on paginated pages 69 to 70 of Me Aurret-Besselaar’s report:

- “Sergeant Major Fourie stated that after the completion of the 2-year training contract, depending on the member’s performance, he/she can become a permanent member of the SANDF.

- Promotion to the following positions and corresponding salary are as follows (2014 minimum value):
 - After 1 year: Rifle man – promoted to Lance Corporal, earning a minimum salary of R8 754-00 per month;
 - After 3 years: Lance Corporal – promoted to Corporal, earning a minimum salary of R10 311-00 per month;
 - After 4 years: Corporal – promoted to Sergeant, earning a minimum salary of R12 382-00 per month.
 - After 7 years: Corporal – promoted to Staff Sergeant earning a minimum salary of R15 286-00 per month.
- Sergeant Major Fourie reports that benefits provided by the SANDF to their permanent members include: Annual 13th cheque, medical aid contributions, pension fund contributions, uniform allowance, accommodation and meal allowances; paid annual leave and paid sick leave (21 days within a 3-year cycle) and “danger pay” when working outside the South African borders. The latter is difficult to determine as there are numerous variables applied.
- The retirement age for a permanent employee in the SANDF is 60 years.”

[29] The parties are agreed that the positions in the SANDF and the corresponding salaries and benefits are as expounded in the aforesaid paragraph 6.6.2 of Me Auret-Besselaar’s report. However, the defendant does not accept the rate of progression as proffered in the said paragraph and contends that the reflected

time periods between each level represents the minimum time that a soldier would take to reach each level of progression. It does not mean that a member will automatically or necessarily be promoted to the next rank after the expiry of the required time period.

[30] Based on all the information available to her, Me Auret-Besselaar subsequently opined as follows in paragraph 7.1 on paginated pages 70 to 71 of her report:

“Given the aforementioned information regarding his personal background history and profile, if the incident had not happened, I am of the opinion that in his uninjured state:

- 2011: Complete his final year of the 2-year training as on record, earning the same basic salary, i.e. R4186-70 per month (net) until 31 December 2011.
- From 1 January 2012: Become a permanent SANDF member in the position of Rifle man at that stage, earning a net salary of R4186-70 per month (2011 value) with inflationary adjustments.
- From 1 January 2013: After 1 year, he is promoted to the position of Lance Corporal, earning a minimum salary of R8 754-00 per month (2014 value) plus benefits*, remain in this position for three years;
- Thereafter be promoted to the position of Corporal, earning a minimum salary of R10 311-00 per month (2014 value) plus benefits*, remain in this position for four years;

- Thereafter be promoted to the position of Sergeant, earning a minimum salary of R12 382-00 per month (2014 value) plus benefits*, remain in this position for seven years;
- Thereafter be promoted to the position of Staff Sergeant, earning a minimum salary of R15 286-00 per month (2014 value) plus benefits*.

*Benefits as provided by the SANDF to their permanent members/employees include:

- 13th Annual Cheque: equal to a 100% of his basic salary;
- Medical aid contributions;
- Pension fund contributions;
- Uniform allowance;
- Accommodation allowance;
- Meal allowance;
- “Danger pay” when working outside the South African borders (for calculation purposes an estimation of at least 30% of his basic salary), if working for a full month outside SA).
- Continue in the position of Staff Sergeant in the SANDF, earning R15 286-00 per month (2014 value) with benefits*, as outlined above.
- He may progress further in the SANDF.

- Receive annual inflationary adjustments.
- Retire at age 60.”

[31] Mr Kevin Jooste testified and opined in his report that the plaintiff, but for the accident, would not have been able to secure permanent employment in the SANDF at the conclusion of his two year MSDS contract; differently put, he would not have been elected to proceed to CSS. During cross-examination by Mr Zietsman, appearing on behalf of the plaintiff, Mr Jooste attempted to justify the aforesaid view by, *inter alia*, referring to the collateral information he received from Me Naomi Jansen, Human Resources Clerk for 21 South African Infantry Battalion in Johannesburg, as summarised in paragraph 7.2 on paginated page 108 of his report. In this regard he specifically referred to the following aspects:

“Ms Jansen stated that upon the conclusion of the two years of training, members may at the discretion of their Commanding Officer, be enlisted on a permanent basis in the South African Defence Force. However, Ms Jansen further stated that many candidates are not chosen for permanent employment at the conclusion of their training, as there are often not positions available, or there are simply too many candidates and too few positions available.

Ms Jansen stated that there was nothing on Mr Motaung’s record to indicate that he been the top achiever of his Company, has received any service awards or that he had performed at an above average level in his Company.”

In further cross-examination Mr Jooste conceded that Ms Jansen did not know the plaintiff personally and that he based his opinion purely on the possible shortage of enough available positions.

[32] Mr Jooste referred in paragraph 7.2 on paginated page 107 of his report to the collateral information he obtained from Captain Ngune. The essence thereof is that Captain Ngune confirmed to Mr Jooste that the plaintiff held the rank of Rifleman and at the time of the incident, he was still actively engaged in the MSDS program, which programme runs for two consecutive years. In cross-examination Mr Jooste testified that during his conversation with Captain Ngune, Captain Ngune indicated that although he remembers the plaintiff, he cannot recall any further information regarding the plaintiff's pre-morbid personality, his general standard of conduct, his capacity as potential soldier etc. This, however, had not been reflected in the report, nor was it put to Captain Ngune during cross-examination.

[33] Mr Jooste consequently opined, both in his report and in his evidence that the plaintiff, upon the completion of his MSDS training, would have sought out employment on the open labour market and obtained on-the-job training in order to progress as a semi-skilled worker.

[34] In cross-examination however, when confronted with the gist of Captain Ngune's evidence, namely that the plaintiff was a good soldier, that he was dedicated, that he showed good discipline and that Captain Ngune would have recommended the plaintiff for election to proceed to CSS, Mr Jooste conceded that, but for the

injury, the plaintiff in all probability would have been elected to proceed to CSS and would have secured permanent employment in the SANDF.

[35] Mr Jooste's crucial concession in cross examination was in my view correctly made. Considering Captain Ngune's personal interaction with the plaintiff during his MSDS training and his personal involvement in the election process at the end of the MSDS training, he is pre-eminently the person who is in the best position to have provided factual evidence regarding the plaintiff's conduct, attitude and performance during his training; also whether he (Captain Ngune) as a member of the selection board in his capacity as the plaintiff's commanding officer who was to prepare a confidential report pertaining to the plaintiff's discipline, his leadership abilities, his conduct etc, would have recommended the plaintiff (had the plaintiff's status still been G1K1) for election to proceed to CSS in order to become a permanent member of the SANDF. The defendant did not present any evidence to the contrary and there is no basis upon which I should not accept the evidence of captain Ngune as truthful and reliable. His evidence therefore provides a proper factual basis upon which Me Auret-Besselaar and Mr Jooste drew their final opinions and conclusions on this issue.

[36] Mr Cronje, appearing on behalf of the defendant, referred in his oral argument to the remarks by Me Auret-Besselaar in her report that the plaintiff indicated that he was planning to register for further studies during 2015 to eventually qualify as a teacher. Mr Cronje submitted that it therefore cannot be accepted that the

plaintiff would have necessarily remained in the SANDF, as he considered furthering his studies also as a probable option. This submission, in my view, does not hold water. The defendant's own expert, Mr Jooste, indicated on paginated page 112 of his report that the scenario of the plaintiff engaging in full-time or part-time studies is viewed as unlikely considering the plaintiff's financial constraints which already on two previous occasions necessitated him to abandon his studies. Me Auret-Besselaar holds the same opinion based on the same common cause facts. I definitely accept and agree with their opinions. It is clearly highly improbable that the plaintiff would have followed this career-path.

[37] It is evident from all the evidence that the rate of progression and the ceiling that the plaintiff probably would have reached would have been dependent upon uncertain future events, such as budget constraints, availability of posts, the future performance of the plaintiff, etc. In this regard I however agree with the contention of Mr Zietsman that the best way to account for such uncertain future events, is by way of applying an appropriate contingency factor. I will again deal with this aspect later in my judgment.

[38] I am consequently satisfied that the plaintiff proved that his probable pre-injury career path would have been as suggested by Me Auret-Besselaar in paragraph 7.1 on paginated pages 70 to 71 of her report.

POST-INJURY CAREER PATH:

[39] Me Auret-Besselaar, in her report, provided for two career path scenarios in the injured state, namely, scenario one, that the plaintiff could obtain funding and return to his studies, qualifying as a teacher, and scenario two, that the plaintiff obtain a driver's licence and become a driver, restricted to non-deliveries.

[40] During her evidence Me Auret-Besselaar dismissed the possibility of the plaintiff furthering and completing his studies on the basis that the plaintiff will not obtain funding to further his education. Two previous attempts to study, one before and one after the injury, failed. Mr Jooste also considered this scenario as unlikely for the same reasons. I have dealt with this aspect earlier in my judgment as well when I considered the pre-injury scenario. The relevant facts to be considered remain the same in the post-injury scenario. I therefore maintain my finding of improbability of this career-path also for purposes of the post-injury scenario.

[41] Me Auret-Besselaar summarised the second scenario as follows on paginated pages 73 to 74 of her report:

“Scenario 2: Unable to obtain funding (2 attempts already) obtains a driver`s licence and becomes a driver (non-deliveries):

- “Obtains his driver’s licence in 2015/6: unpaid.
- Undergo surgery and rehabilitation: unpaid
- From 2017: finds a driving job which is restricted to non-deliveries (not required to manage deliveries and heavy loads)

earning between R5 000-00 - R6 500-00 per month (2014 value);

- After 3 to 5 years, earns R6 500-00 to R8 500-00 per month (2014 value);
- Inflationary adjustments throughout his career;
- Retires at age 60.”

[42] She testified that the plaintiff does have residual earning capacity but because of his physical impairment his employability has been significantly compromised by his injury. He cannot compete against able bodied persons in the open market. In Me Aurret-Besselaar`s opinion his earning capacity will therefore be restricted to the medium band of Dr Robert J Koch’s Suggested Earnings Assumptions for Non-Corporate workers as contained in The Quantum Yearbook of Dr Robert J Koch (2015).

[43] The post-injury career path as suggested by Mr Jooste is very similar to that of Me Aurret-Besselaar. Both expert witnesses provided for:

1. An unemployment period of between 1 to 3 years;
2. Employment as a driver in the semi-skilled non-corporate sector by 2016/2017; and
3. Inflationary adjustments throughout his career; and
4. Employment until retirement at age 60 to 65.

[44] The difference between the opinions of the two experts is that Mr Jooste is of the opinion that the plaintiff would progress to the upper band of the suggested earnings for semi-skilled non-corporate workers by the age of 40 to 45 years. In the opinion of Me Auret-Besselaar, it is highly improbable that the plaintiff would progress to the upper band of earnings for semi-skilled non-corporate workers. She explained that it is expected of a driver earning in the upper semi-skilled band to not only do driving, but also to assist with the loading and unloading of vehicles and to manage deliveries. Although the plaintiff might have the strength to help with the loading and unloading of light loads, she is of the view that he will not be able to endure and maintain the work for a full eight hour day.

[45] Me Auret-Besselaar's opinion is supported by that of Dr Pienaar, the orthopaedic surgeon, where he stated as follows on paginated page 12 of his report:

"It is writer's opinion that the sequelae of the injuries he sustained on 29 January 2011 will probably prevent him from doing the most strenuous categories of work. He will however be able to work as a driver or work a similar physical demands."

The opinion of Me Smit, the occupational therapist, also provides support for Me Auret-Besselaar's view, where she stated as follows on paginated page 29 of her report:

“Endurance:

- After 6 to 7 minutes his right sided limp became slightly more prominent.
- After 10 minutes he reported lower back- and right knee pain; He was noted to rub his back;
- At the end of the endurance subsection he reported a stabbing pain in the right thigh and knee and a burning pain in the back.”

On paginated page 37 of her report, under the heading “Residual Work Capacity”, the following was concluded:

“After successful right leg surgery and rehabilitation, Mr Motaung should be able to do work falling in the light and medium parameters that should preferably refrain from participating in heavy to very heavy physical work.

He should be able to work as a driver...”

[46] In addition to the aforesaid, and as correctly pointed out by Mr Zietsman during his oral argument, Mr Jooste himself testified that as a driver the plaintiff will be restricted to non-delivery duties, probably with a light delivery vehicle, which would place him in the semi-skilled non-corporate workers sector. He opined that driving heavier vehicles for which a code 10 or code 14 licence is required, will place more stress on the plaintiff because of the higher level of responsibility. That would even worsen the depression from which the plaintiff is already suffering which will

have an even further debilitating effect on the plaintiff's functioning.

[47] Based on the totality of the aforesaid evidence, including that of the defendant's own expert witness, it is in my view abundantly clear that the plaintiff will be restricted in his career as a driver to performing only non-delivery or light delivery work. That will *mutatis mutandis* restrict his earning capacity to the medium band of earnings for semi-skilled non-corporate workers.

[48] I consequently find on a preponderance of probabilities that the plaintiff's post-injury career path will be as postulated in paragraph 7.2, under the heading "Scenario 2" on paginated pages 73 and 74 of the report of Me Auret-Besselaar. However, certain preceding relevant events and information which have either been reflected earlier in the said paragraph 7.2 but which was not repeated under the heading "Scenario 2", or which are evident from the evidence, should in my view also be provided to the actuary for purposes of his calculation. These are:

1. The injuries were suffered on 29 January 2011.
2. The plaintiff's salary was paid in full until the end of 2011, when his contract expired.
3. Since January 2012 the plaintiff has not been formally employed on a full time basis, but he has received and been receiving an income since his injury, which should be provided for in the

calculation. I will deal with the details hereof in the subsequent paragraph.

[49] On his own evidence the plaintiff has been assisting his father in his liquor store since January 2012 up to date for which he is paid approximately R 1500.00 per month. It is now also common cause that the plaintiff performed reservist duties on the dates reflected per the table on paginated page 119 of the report of Mr Jooste. Although the plaintiff cannot remember the amount of remuneration he used to receive before 2015, he testified that for the 2015 period, he was paid R 440.00 per day. As correctly pleaded in the defendant's further amended plea, the actuarial calculation should therefore make provision for the aforesaid post-injury income of the plaintiff.

CONTINGENCIES:

[50] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in SOUTHERN INSURANCE ASSOCIATION LTD v BAILEY NO 1984 (1) SA 98 (A) at 113G and 116G – 117A:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

...

Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right' (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.

...

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem

that the chance of good fortune might have balanced or even outweighed the risk of bad.”

[51] The usual contingencies applicable to past and future loss of income in the uninjured state are 5% and 15% respectively. These constitute the so-called normal contingencies. These contingencies are over and above the usual provisions which will automatically be incorporated in an actuarial calculation, such as provision for interest, inflation etc.

[52] Mr Cronje submitted that the contingencies in the uninjured scenario should, on the facts of this case, be set at higher percentages. He based his submission on, *inter alia*, the following factors:

1. He pointed out that there was no guarantee that the plaintiff would have been accepted as a permanent member of the SANDF.
2. The plaintiff had aspirations to further his studies and he might very well have followed those aspirations and not remained in the employment of the SANDF.

[53] I agree that there indeed was no guarantee that the plaintiff would have been appointed as a permanent member of the SANDF, but, as was stated in the BAILEY- case, *supra*, “any enquiry into damages for loss of earning capacity is of its nature speculative” – there are never any guarantees. That is why the issues are decided upon on probabilities. Provision cannot be made for each and every

possible eventuality. I have also dealt with the evidence which compelled me to find that it is improbable that the plaintiff would have furthered his studies – which includes the evidence of the defendant's expert witness himself. There is consequently, in my view, no probable evidence which suggests that the plaintiff would not have remained a member of the SANDF until retirement age. He had no medical condition in the uninjured state that would have contributed to an early retirement. There is also no indication of a poor occupational history or poor work ethic; in fact, the evidence of Captain Ngune suggests the contrary.

- [54] The only possible negative or adverse contingency to consider is the possibility that the plaintiff might not have progressed at the intervals suggested by Me Auret-Besselaar. However, this aspect should be considered in conjunction with the fact that she restricted the level of his probable promotion to that of a Staff Sergeant. When considering Captain Ngune's evidence as to his positive experience of the plaintiff as a soldier, read with Me Auret-Besselaar's evidence of her opinion and impression of the plaintiff's erstwhile (pre-injury) enthusiasm of establishing a career in the SANDF with the concomitant possibility of progression and promotion, and her opinion that the plaintiff at the time had the attributes and ability to have been similarly successful in his career as Captain Ngune, even read with the plaintiff's own evidence which speaks of his pride of his performance as a soldier, the limitation to the position of a Staff Sergeant in the instance of the plaintiff, might very well be a conservative projection. In my view the potential negative and positive bearing which these two respective eventualities might have had on the calculation of the

plaintiff's loss of earning capacity, is therefore mutually cancelled out.

[55] In the premises I consider the usual respective contingency deductions of 5% and 15% in the uninjured scenario, to be fair and reasonable.

[56] With regards to the injured scenario, Mr Zietsman submitted that there are cogent reasons why a higher contingency deduction will be fair and reasonable. I have to agree with his submission. Me Auret-Besselaar stated the following relevant factors in this regard on paginated page 75 of her report:

“High post-accident contingencies on future earnings must be applied, given the diminished job options available to him and that he will need to be accommodated in future job rolls – for time off work which as a driver is likely to be unpaid, and not being fully accommodated by an employer given his restricted capacity and chronic pain symptoms.”

I have already mentioned that in her evidence she also referred to the fact that he cannot compete with able bodied persons in an open labour market. At the same time the plaintiff will be entering an oversaturated job seekers market. As evident from the report of Mr Greeff, a psychologist, the plaintiff also suffers from a chronic major depressive disorder which hampers him functionally and occupationally.

[57] When considering all the aforesaid factors, I consider a contingency deduction of 20% as fair and reasonable.

MITIGATION OF DAMAGES:

[58] Mr Cronje submitted that the plaintiff failed to comply with the duty to mitigate his damages. He referred to a number of judgments in this regard, *inter alia*, to MACS MARITIME CARRIER AG v KEELEY FORWARDING & STEVEDORING (PTY) LTD 1995 (3) SA 377 (D), in which judgment the general principles were stated as follows at 381F – 382E:

“The duty to mitigate entails that the party who has suffered damages as a consequence of a breach of contract or in delict is under duty to take reasonable steps to ensure that his original loss is contained. Where the loss is exacerbated by a failure on the part of a claimant to act reasonably, his claim will be proportionately reduced. Compare *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 145C-E; *Mayne and McGregor on Damages* 12th ed para 62; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6th ed at 187. In claiming his damages the claimant need neither allege nor demonstrate that he had taken reasonable steps to contain his loss as the *onus* of proving that he had not acted reasonably in the circumstances rests upon the defendant who alleges that he has not. In *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388-9, Stratford CJ dealt with the nature of the duty and the *onus* of proof as follows:

'This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence - neglect to do what a reasonable man would do if placed in the position of the person claiming damages. The defendant in such claim says "admitting that in fact you suffered those damages, you have only yourself

to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore, me". Both on principle and on precedent the burden of proving that the claimant for damages did not take reasonable steps to mitigate the damage which he actually suffered is upon the one who A asserts that those reasonable steps were not taken. (See *James Finlay & Co Ltd v Kwik Hoo Tong Handel Maatskappy* [1928] 2 KB 604 at 614 and *Roper v Johnsson* 1873 LR 8 CP 167 at 181.)”

- [59] Mr Cronje submitted that the plaintiff failed to take reasonable steps to mitigate his damages. He emphasized that the plaintiff has up to date not made any attempt to seek medical treatment for the physical impairments and the major depressive disorder he has been suffering from since the incident. Mr Cronje contended that because the said conditions have had a debilitating effect upon, *inter alia*, his capacity to function occupationally, the plaintiff had a duty to have sought medical treatment at an earlier stage already. That would have increased his chances of having obtained gainful employment by now which would have decreased the period of his unemployment. Mr Cronje also submitted that the plaintiff has in any event failed to take any proper steps in an attempt to secure proper employment since the beginning of 2012.
- [60] The aforesaid contentions should be considered against the background of the plaintiff’s financial constraints and the lack of any proper evidence that he could have obtained such treatment free of charge or at a nominal rate. His financial constraints are common cause between the parties. The high water mark of the evidence regarding the question on the possible availability of free

or nominal charged treatment, was the plaintiff's confirmation that there is a state hospital in Bethlehem. There is no evidence on the actual availability of the treatment needed by the plaintiff. There is also no evidence as to the period of treatment that would have been required in order to have produced positive, effective results to the extent that the plaintiff would have been able to be emotionally fully functional again. Because of the debilitating effect of his severe depression, it in any event could not in the circumstances where he suffers from depression as a direct result of the incident, have reasonably been expected of him to secure gainful employment whilst in such a bad state of depression. Furthermore, even though his physical condition may improve, I do not understand the opinions of the experts to be that the plaintiff will ever be physically fully functional again, even with surgery and other secondary medical treatment. Therefore, even if it is to be accepted for argument's sake that he could have taken reasonable steps which would have enabled him to return to the open labour market at an earlier stage, he would, because of his physical impairment, still have been faced with the problem of restricted job options and a general oversaturated job seekers market.

[61] In addition to the aforesaid, the plaintiff at least has been receiving a form of income from his reservist duties and his assistance at his father's liquor shop.

[62] Therefore, in the circumstances where the defendant bears the onus of proving that the plaintiff had not acted reasonably, the defendant has in my view not discharged the said onus.

COSTS:

[63] There is no reason why the usual principle that costs follow the result, should not be applied in this matter. In addition Mr Zietsman requested that such costs should include the applicable costs of the plaintiff's expert witnesses pertaining to the quantum of the trial and that the plaintiff and Captain Ngune be declared necessary witnesses. These are reasonable requests in the circumstances and are in accordance with the practice in matters like these.

[64] The following order is consequently made:

1. It is declared that the plaintiff's loss of earning capacity and hence his loss of past and future income must be calculated actuarially, by an actuary mutually acceptable to the parties, on the following basis:

- 1.1 But for the plaintiff's injuries, his pre-injury career path would have been as outlined in paragraph 7.1 on paginated pages 70 and 71 of the report of Me Aurret-Besselaar;
- 1.2 In the uninjured scenario a contingency deduction of 5% in respect of past loss of income and 15% in respect of future loss of income are to be applied;
- 1.3 Having regard to his injuries, the plaintiff's post-injury career path was and will be as outlined in paragraph 7.2 under the heading "Scenario 2" on paginated pages

73 and 74 of the report of Me Auret-Besselaar, read with the following additional relevant events and information:

1.3.1 The injuries were suffered on 29 January 2011.

1.3.2 The plaintiff's salary was paid in full until the end of 2011, when his contract expired.

1.3.3 Since January 2012 the plaintiff has not been formally employed on a full time basis, subject to the determination in paragraph 1.5, *infra*;

- 1.4 In the injured scenario a contingency deduction of 5% in respect of past loss of income and 20% in respect of future loss of income are to be applied;
- 1.5 The actuarial calculation must provide for post-injury income of R1 500-00 per month (before taxation) calculated from January 2012 to December 2016 and further income for the days as per the table on paginated page 119 of the report of Mr Jooste, calculated at R440-00 per day (before taxation);
- 1.6 The actuarial calculation must provide for the normal actuarial assumptions used in determining the capital value of future incomes.

- 2 Upon receipt of the actuarial calculation in terms of paragraph 1, *supra*, the parties are granted leave to approach this Court for a final order in respect of the plaintiff's total loss of income calculated at 70% (the merits apportionment) of the said actuarial calculation, together with such interest (if any) as may be applicable. Such an order will be considered to be an extension of this order.
- 3 The defendant is ordered to pay the costs of obtaining by the plaintiff of the reports of the experts and the reasonable preparation/qualifying and reservation fees (if any), as well as appearance fees (if any) of the following experts:
 - 3.1 Dr AF Pienaar;
 - 3.2 Me M Smit;
 - 3.3 Mr P Greeff;
 - 3.4 Me E Auret-Besselaar;
 - 3.5 Munro Actuaries;
 - 3.6 The actuary to be employed by the parties in terms of paragraph 1, *supra*.
- 4 The Plaintiff and Captain Ngune are declared necessary witnesses.
- 5 The defendant is ordered to pay the costs of the quantum trial.

C. VAN ZYL, J

On behalf of the Plaintiff:

Adv. P.J.J. Zietsman

On instructions of:

Honey Attorneys

BLOEMFONTEIN

On behalf of the Defendant:

Adv. P.R. Cronje

On instructions of:

Office of the State Attorney

BLOEMFONTEIN