

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 2170/2011

In the matter between:

ADV L POHL NO

Plaintiff

on behalf of

BENJAMIN JOHANNES VAN NIEKERK

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT:

DAFFUE, J

HEARD ON:

12, 13, 15 en 26 MARCH 2013

DELIVERED ON:

5 JULY 2013

INTRODUCTION

[1] Plaintiff is adv Louis Pohl, a member of the local Bar, who acts herein in his representative capacity as curator ad litem to Benjamin Johannes van Niekerk ("the patient") in a delictual claim for damages against the defendant arising from injuries sustained by the patient in a motor vehicle collision on 30 March 2010 ("the collision").

[2] It is plaintiff's case that defendant is liable to compensate the patient in terms of the provisions of the Road Accident Fund Act, 56 of 1996, ("the Act") for his damages arising from the collision on the grounds that the patient's injuries were

sustained as a result of the wrongful and negligent driving of the insured driver, a certain Mr Shaun Davies.

[3] As a consequence of the collision the patient has suffered damages in the form of past and future medical, hospital and related expenses, accrued and prospective loss of earnings/earnings capacity and general damages.

[4] The matter was originally set down for hearing on 27 November 2012 on which day the following orders were issued by the Acting Judge President:

- “(1) The matter is postponed *sine die*;
- (2) The defendant pay the plaintiff’s wasted costs on an attorney and client scale, inclusive of the qualifying experts of the plaintiff’s expert witnesses as well as travelling and subsistence costs of all witnesses;
- (3) The attorney of the defendant Mr W Bloem must furnish reasons on the first date of trial why he should not be ordered to pay the wasted costs *de bonis propriis*;
- (4) That defendant’s attorney is ordered
 - (a) to attend a rule 37 conference on a date to be arranged by the plaintiff’s attorney for a meeting to be held by Friday, 7 December 2012;
 - (b) to give his full co-operation in order to obtain instructions from the defendant to arrange the proceedings and to respond to the admissions sought by the plaintiff, failing which leave is granted to plaintiff to approach the court for appropriate relief.”

The matter was subsequently re-enrolled for hearing and evidence was led on 12, 13 and 15 March 2013. On 26

March 2013 I heard oral argument whereupon I reserved judgment.

THE ISSUES

[5] Liability and *quantum* are both in dispute. Furthermore defendant filed two special pleas, both dealing with s 17(1A) of the Act read with reg 3(3) and 3(4) to 3(14) of the 2008 regulations to the Act, *inter alia* relating to the defendant's obligation to compensate the patient for non-pecuniary loss in respect of "*serious injury*" only, plaintiff's alleged non-compliance with the procedure set out in the regulations for the establishment of "*serious injury*" and that the issue of the alleged "*serious injury*" had not been finally determined in terms of the regulations.

[6] By agreement between the parties I made the following order in terms of High Court rule 33(4) pertaining to separation of issues:

"All issues still in dispute on the pleadings shall be adjudicated during the hearing, except plaintiff's claim for non-pecuniary loss, including the two special pleas which shall stand over for later adjudication."

Consequently the hearing proceeded solely to determine the defendant's liability and the *quantum* of plaintiff's claim for special damages (pecuniary loss).

[7] During the hearing the following were settled:

7.1 Past hospital, medical and related expenses in the amount of R375 055,69;

- 7.2 In relation to future hospital, medical and related expenses, defendant agreed to furnish plaintiff with an undertaking in terms of s 17(1)(a) of the Act in full and final settlement of all amounts claimed on behalf of the patient under this head of damages;
- 7.3 Plaintiff's *locus standi* as the patient's duly appointed curator *ad litem* was eventually conceded on the third day of the hearing notwithstanding the fact that it should have been crystal clear to defendant and its legal representatives that Rampai J had appointed adv Pohl as curator *ad litem* to the patient under application number 2170/2011 on 1 November 2012 already. I shall deal later in this judgment in more detail with the unprofessional manner in which the defendant and its attorneys approached the litigation *in casu*.

DOCUMENTATION

- [8] At the commencement of the hearing plaintiff handed up:
- 8.1 A bundle of documents admitted as exhibit "A". The parties agreed that the documents contained in the bundle, except for the clinical notes of Dr De Bruyn, could be admitted into evidence as being what they purport to be without admission as to the truth of their contents;
- 8.2 A bundle of photographs of the scene of the collision which were admitted as exhibit "B" without objection by the defendant;
- 8.3 A bundle of documents containing the notices and reports of plaintiff's expert witnesses in terms of rules 36(9)(a) and (b) which were admitted as exhibit "C".

It is apposite to remark at this stage already that defendant failed to file any notices in terms of rule 36(9)(a) or expert summaries and/or reports in accordance with the provisions of rule 36(9)(b).

THE EVIDENCE RELATING TO DEFENDANT'S LIABILITY

- [9] Before dealing with the evidence it is necessary to make the following observations with reference to the pleadings. I have no hesitation to state that defendant and its attorneys did not investigate the plaintiff's claim pertaining to the merits (and possibly *quantum*) at all. In response to the averments relating to the collision and negligence, defendant pleaded in the same pro-forma manner which has now become custom of defendant's legal representatives in RAF litigation. First of all the collision was denied and this was followed up by the customary alternative pleas. What is amazing *in casu* is that defendant pleaded in the final alternative that the collision had been caused by the contributory negligence of the patient who was negligent in one or more or all of the very same respects relied upon by the plaintiff. These grounds of negligence were pleaded in exactly the same order and what is more, it is alleged that the patient executed a turn when it was inappropriate to do so. Defendant copied plaintiff's particulars of claim by what can be described as "a cut and paste job". As will be seen from the evidence, the patient travelled with his motorcycle in a straight line through a robot controlled intersection – this was never in dispute - whilst the insured driver, Mr Davies, executed a right-hand turn causing the motorcycle to collide with his vehicle.

[10] I fully agree with the sentiments expressed by Satchwell J in **Motswai v Road Accident Fund** 2013 (3) SA 8 (GSJ) at paras [26] - [36], relating to the duties of legal representatives and officers of the court preparing and signing pleadings known to be based on untrue allegations. When an attorney or advocate appends his signature to a pleading he confirms that he has been scrupulous in preparing the pleading and that it is not a fabrication. Practitioners should not misrepresent facts to the court. If Mr Bloem, defendant's attorney or his client perused the police docket or held a mere ten minutes' interview – even telephonically – with the insured driver, the plea on the merits would have been drafted totally different. In fact the merits would probably be conceded. Unfortunately this is not an isolated incident and over the years the Road Accident Fund's attorneys and counsel have become known to draft standard pleas in order to play for time, only to fully concede the merits on the first day of trial in the majority of cases. The wasted financial resources are too ghastly to contemplate.

[11] If it was not for the endeavours of the plaintiff's legal team, Mr Davies would not be in court to testify in the proceedings. He was subpoenaed by plaintiff and Mr Branford, acting for plaintiff, placed it on record that Mr Davies was so subpoenaed, that he was at court and that he was made available to defendant's counsel, Mr Moeti for consultation purposes. Mr Branford indicated at that stage that it was not plaintiff's intention to call this witness. I have reason to believe that Mr Davies' attendance was secured in an

attempt to persuade defendant to concede the merits, but unfortunately this did not eventuate.

- [12] Two constables in the employ of the South African Police Service, constables Molaoa and Moloi, testified that on 30 March 2010 they received notification of a collision at the intersection of Pres Boshoff Street (which becomes Kolbe Avenue at the other side of the intersection) and Victoria Road, Bloemfontein ("the intersection"). They went there and came across the aftermath of a collision. They confirmed each other's evidence in material respects.
- [13] Constable Molaoa testified with reference to the customary SAPS Accident Report (AR form) and accompanying sketch, filled out and prepared by him, as well as photographs of the scene. Whilst at the scene he identified that two motor vehicles had been involved in a collision, being a motorcycle driven by the patient bearing registration number CTJ483FS and a Volkswagen Beetle motor vehicle driven by Mr Shaun Davies bearing registration number DKX521FS. He observed damage to the left-mid-front-side of the Volkswagen Beetle as indicated in the AR form. From his recollection the two vehicles were positioned more or less as depicted on the sketch when he arrived at the scene. His impression was that Mr Davies had been travelling in a northerly direction prior to the collision whilst the patient had been travelling in a southerly direction. The collision occurred in the patient's lane of travel when Mr Davies executed a right-hand-turn across the patient's path of travel at a time when the patient had been travelling straight through the intersection.

During his cross-examination Mr Moeti put it to him that the driver of the Volkswagen Beetle will testify that he would have seen the motorcycle if it was not driven at an excessive speed. This statement is in direct contrast with defendant's pleaded grounds of negligence and as mentioned it merely copied the grounds relied upon by plaintiff.

- [14] Constable Moloi testified that she deposed to her statement as contained in the police docket on the day of the collision, noting her observations on the scene and setting out what Mr Davies had informed her about the events giving rise to the collision. She confirmed the contents of her statement and testified that she had indeed conducted an interview with Mr Davies who informed her that he had approached the intersection at the time when the traffic lights were green, that he checked to see if there were any approaching vehicles and having satisfied himself that it was clear, he proceeded to turn right at the intersection whereupon the collision occurred. He did not see the patient's motorcycle prior to the collision.

Again in the cross-examination of constable Moloi, Mr Moeti put it to her that it was his client's view (presumably Mr Davies with whom he had consulted at court) that the speed of the motorcycle was the major factor contributing to the collision and that Mr Davies told the constable as much at the scene. She denied that and said that she could not recall anything about excessive speed communicated to her.

[15] Mr Davies testified for the plaintiff hereafter. He confirmed that he was travelling in a northerly direction whilst approaching the intersection and that he intended to turn right at the intersection. Whilst approaching the intersection the traffic lights were green for him and as he did not see any approaching vehicles and considered it safe to turn, he proceeded to turn right. The next thing he heard and felt a crash that jolted his vehicle to the side. He did not know what had happened. He did observations at the scene whereupon the ambulance and medical personnel arrived as well as two members of the South African Police Service. He remembers that one of the SAPS members, a female, conducted an interview with him regarding his knowledge of the collision. He informed her what had happened and that he did not see the patient's motorcycle prior to the collision. He later on received notice to appear in court on criminal charges relating to the collision in respect of which he eventually paid an admission of guilt fine. It was never put to the witness in cross-examination by Mr Moeti that he made either a written or oral statement pertaining to the alleged excessive speed of the motorcycle and that this was the major cause of the collision as put by Mr Moeti to the police constables. It is clear from Mr Davies' evidence that he conceded negligence and that he could not put any blame whatsoever on the patient.

It should also be recorded that the collision happened during the day. On the AR form constable Molaoa noted that the collision occurred approximately 11 o' clock the morning, it was daylight, the weather conditions were good, visibility was clear and the road surface was good and dry.

As I'll indicate *infra* defendant closed its case without calling any witnesses.

ANALYSIS OF THE RELEVANT LEGAL PRINCIPLES AND EVIDENCE PERTAINING TO LIABILITY

[16] In order to succeed plaintiff must establish that the collision occurred as a result of the causal negligence on the part of Mr Davis, the insured driver.

[17] It is the duty of every road user to keep a proper lookout. This duty involves not only the physical act of looking, but also a reasonably prudent reaction to what might be seen. It is clear from the evidence of both police constables, as well as the insured driver, that immediately prior to the collision the patient was proceeding along President Boshoff Street in a southerly direction, whilst the insured driver was travelling along the same road in the opposite and thus a northerly direction. The collision occurred when the insured driver executed a right turn in the intersection and thereby cutting directly across the path of travel of the patient who was travelling straight at the time. The patient had an undisputed right of way whilst entering and proceeding through the intersection. Under these circumstances the notional reasonable man in the position of the insured driver would not only have observed the patient's approach if a proper lookout was kept, but would also have respected the patient's right of way and allow him to pass through the intersection before executing a right turn. If this was done, no collision would have occurred.

[18] It has been stated in a long line of cases that to turn across the line of oncoming or following traffic, is an inherently dangerous manoeuvre and that there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so. See **AA MUTUAL INSURANCE ASSOCIATION LTD v NOMEKA** 1976 (3) SA 45 (AD) at 52E.

[19] Mr Moeti submitted that

“both drivers are somehow negligent and each party should be held responsible to the extent of degree of his liability to the damage caused and apportionment ought to be applied (sic).”

I accept that Mr Moeti is of the view that contributory causal negligence on the part of the patient was shown to exist. The onus of establishing such negligence rests with the defendant. See **Solomon and Another v Mussett and Bright Ltd** 1926 AD 427 at 435. The defendant should have adduced or elicited sufficient evidence to support a finding of negligence on the part of the patient as well as a causal connection to the collision if it is to succeed with establishing contributory negligence. Mr Moeti submitted that “the indication is that the cyclist (sic) was also negligent because he failed to apply brakes or avoid a collision with the insured driver’s beetle in the circumstances as it was crossing in front of him.” As indicated no witnesses were called by defendant in support of its case and no evidence was elicited from the plaintiff’s witnesses to assist defendant in its plight. There is no factual basis for Mr Moeti’s submission of contributory negligence. There is no evidence as to the distance between the motorcycle and the

motor vehicle at the stage when the insured driver started to execute the right hand turn and whether sufficient opportunity was available for the patient to brake or take other measures to avoid the collision. The insured driver failed to observe the patient and his motorcycle at any stage prior to the collision and could therefore provide no indication as to whether or not the patient had any opportunity to take any meaningful action to avoid the collision. It must be emphasised that the collision occurred just after the insured driver started executing his turn. Even if it could be found that a reasonable person in the shoes of the patient would have recognised that the insured driver was not going to yield and would have reacted, whilst the patient failed to do likewise, which finding is not possible *in casu*, defendant failed to establish that such culpable omission was causally connected with the collision. See **Diale v Commercial Union Assurance Co of SA Ltd** 1975 (4) SA 572 (AD) at 578 C – H and **Guardian National Insurance Co Ltd v Saal** 1993 (2) SA (CPD) at 163 D – G.

- [20] Consequently no apportionment should be applied and I find that the patient is entitled to 100% of the damages to be proven. The insured driver's conduct in executing a right-hand turn in the face of oncoming traffic was clearly unlawful and negligent and it was the direct and sole cause of the collision. I wish to emphasise that if defendant had undertaken a careful investigation in respect of the merits before summons was issued, it should have come to the same conclusion. Costs have been wasted by disputing liability in circumstances where the insured driver fully supported plaintiff's version of the collision.

**“SERIOUS INJURY”, GENERAL DAMAGES AND RELEVANT
CASE LAW**

[21] Section 17 of the Act has been amended by the introduction of the Road Accident Fund Amendment Act, 19 of 2005 which took effect on 1 August 2008. It now limits the Road Accident Fund’s liability to compensate a claimant for general damages, referred to as “*non-pecuniary loss*” in the amended section, to instances where the claimant suffered “*serious injury*” within the meaning of the section read with s 17(1A) of the Act. It is apposite to quote these two subsections:

“17 Liability of Fund and agents

- (1) The Fund or an agent shall-
 - (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
 - (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
 be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be

limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

(1A) (a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

(b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974).”
(Emphasis added)

[22] Reg 3(3) stipulates that a claim for compensation for non-pecuniary loss in terms of s 17 of the Act shall be submitted in accordance with the Act and these regulations. It is unnecessary to quote the regulations, but it is clear that the process to be followed is peremptory and consequently it is, unlike the position prior to 1 August 2008, no more the court’s prerogative to award general damages for non-pecuniary loss. See in this regard the detailed exposition of Brand JA in **Road Accident Fund v Duma** [2013] 1 ALL SA 543 (SCA), paras [4] – [10] at 546E – 548G. In **Duma** the SCA specifically found in para [19] that the approach of the High Court in the four judgments considered on appeal that it is ultimately for the court to decide whether a plaintiff’s injury was serious so as to satisfy the threshold requirement for an award of general damages is fundamentally flawed. The decision whether or not an injury is serious has now been conferred on the RAF and eventually the Appeal Tribunal established in accordance with the statutory mechanism the legislature chose to adopt. In **Duma** the SCA upheld all four appeals, set aside the orders of the High Court and replaced

them with its own orders. The special pleas of the defendants in all instances were upheld and the plaintiffs' claims for general damages were postponed *sine die*. In two of the four matters the court ordered the defendant to pay the respective plaintiffs certain amounts in respect of loss of earnings. It is not clear from the judgment of the SCA, but it appears as if these were the amounts that were originally granted by the High Court in respect of loss of earnings suffered by the plaintiffs. A discussion of the effect of the regulations can also be found in **Road Accident Fund v Lebeko** (802/110 [2012] ZASCA 159 delivered on 15 November 2012).

- [23] In **Bvuma v Road Accident Fund** case no 17220/2010 (GSJ), an unreported judgment delivered on 14 December 2012, Satchwell J dealt with a loss of earnings claim where the merits had been settled and the issue of general damages had been held over until the question of "*serious injury*" had been determined by the Appeal Tribunal constituted in terms of reg 3(8)(b) & (c). Although the claim for damages in respect of future loss of earnings was eventually dismissed, it is apparent that the learned Judge was prepared to adjudicate the claim, notwithstanding that a "*serious injury*" still had to be determined by the Appeal Tribunal.

I find it an awkward position to adjudicate claims for special damages such as *in casu* which can only be done having considered the evidence of a number of experts in various fields, *inter alia*, a neuro-surgeon pertaining to the brain damage the patient sustained. Although it is not necessary

for me to find that a “*serious injury*” has been sustained as I am not dealing with general damages or non-pecuniary loss, I eventually have to make a finding about the seriousness of the injuries sustained and in that regard I might pre-empt the decision to be taken by the Fund or the Appeal Tribunal. However I am mindful that I should not enter the arena reserved for others in the regulations. Having considered the above judgments it appears that I am fully entitled to adjudicate the *quantum* of plaintiff’s claim insofar as it does not relate to non-pecuniary loss.

EVIDENCE PERTAINING TO THE QUANTUM OF PLAINTIFF’S CLAIM

[24] Plaintiff gave notice to call nine expert witnesses whose expert summaries and reports were duly filed in terms of High Court rule 36(9)(b). Eventually five of these experts testified. In addition to the expert testimony of the experts four lay witnesses testified on behalf of the patient. I shall deal with the testimony of the lay witnesses first, although not in the same order as they were called, whereafter the experts’ evidence will be summarised.

Mr Gavin Potterton (“Potterton”)

[25] He is employed at Electro Vroomen in Bloemfontein as a salesman. Previously he was a store manager. At the time of the collision the patient was employed by Electro Vroomen as a stock puller (store assistant) and Potterton was his direct supervisor. The patient worked for this employer for approximately 1½ to 2 years prior to the collision. Potterton gave a detailed overview of the patient’s job description as

stock puller and testified that he had been a very competent, capable and a fast worker. They experienced no problems with the patient prior to the collision. He was regarded as one of his best workers and was it not for the collision he would be one of the first to be promoted to salesman if he remained in the employ of Electro Vroomen. In such case he would be earning in the region of R12 000,00 to R15 000,00 per month in today's terms.

- [26] Potterton testified that upon his return to work after the collision, the patient was not the same person. There were numerous problems with his work and it would have led to disciplinary action being taken against him for poor work performance, was it not that he resigned of his own free will shortly after returning to work.

RIAN DE LANGE (“De Lange”)

- [27] He is currently in the employ of Dreems Transport CC (“Dreems”) where he works as a truck driver. The patient is his brother-in-law and is known to him for approximately five years. Although he has not spent much time with the patient prior to the collision (he met him approximately 2 years prior to the collision), they did spend time together during weekends and family gatherings. He did not identify any problems, behavioural or otherwise, with the patient and there had been no problems in their relationship.
- [28] During the latter part of 2010 and whilst he was in the employ of Dreems, the patient also start to work there as a driver's assistant. He was on probation for three months and

worked directly under the owner, Mr Deon van Rhyn, who acted as truck driver at the time.

- [29] De Lange left the employ of Dreems at a stage for better prospects but returned in January 2012. Following consultations and negotiations the patient also returned to work at Dreems from this point in time and it was agreed that he would work as De Lange's assistant truck driver. Although De Lange took pity on the patient, it became clear as time passed that the patient's conduct at work and his general behaviour caused numerous problems. He had memory loss, was generally slow and forgetful at work and had regular outbursts of anger. He also fell asleep on the job on a regular basis and required instructions to be repeated to him often. De Lange referred to various e-mails between him and Mr Van Rhyn relating to the extent of difficulties experienced and it appeared as if De Lange had reached the point where he could no longer tolerate the patient's behaviour and conduct. He regarded the patient's employment as of a sympathetic nature insofar as he is married to the patient's sister. He testified that he could not see that the patient would continue with his current employment any longer than the end of 2013 and that he would not be able to hold a job in the open labour market. He concluded his evidence by testifying that the only reason he had tolerated the patient working with him for so long was because they are related and he felt sorry for him. However the patient's conduct has created significant stress at home and has created problems within his own family. He held the view that the patient is not the same person as he was prior to the collision and that he is basically unemployable. He

testified that from his experience and knowledge the patient would have had the potential and capacity to work as a truck driver, were it not for the problems experienced. He confirmed the correctness of his salary slips as truck driver which form part of exhibit "A".

Mr Deon van Rhyn ("Van Rhyn")

[30] He is the owner of Dreems which existed for many years as a family business and which was previously known as Van Rhyn's Transport. The patient was unknown to him prior to the collision and he met him in September 2010 when he started to work for him on probation. The patient started to work as assistant to Van Rhyn who was at that stage working as truck driver. He experienced the same problems with the patient as testified to by De Lange, i.e. memory problems, falling asleep on the job and frequently requiring instructions to be repeated.

[31] The patient was not appointed after termination of his probationary employment, but returned to working for him in January 2012 at which stage he was employed as assistant truck driver to De Lange, and this is currently still the situation. He indicated that he felt sorry for the patient, that he regarded his employment as sympathetic in nature and how he persuaded De Lange to continue working with the patient despite the fact that De Lange indicated that he no longer wished to do so.

Mrs Mariana van Niekerk

[32] She is the patient's mother and currently runs a day care centre in Gauteng. She gave a detailed exposition of the

patient's childhood days and the period until the collision as well as the patient's behavioural problems thereafter. As a young boy the patient was growing up mainly in Gauteng. His grade 1 schoolteacher informed her that she was experiencing problems with the patient whereupon the patient was examined by an expert who indicated that he suffered from Tourette Syndrome. The patient was placed on Ritallin for a period of three to four years, but medication was stopped thereafter as he had learned to manage and control his concentration and attention difficulties. Although he was held back and repeated grade 3 the patient progressed reasonably well at school and she assisted him during that time to manage his difficulties associated with his Tourette Syndrome. The patient left school after completing grade 8 as he wanted to start working. By that time he had managed to bring his Tourette Syndrome symptoms under control and according to the witness the patient was a caring and loving child with no problems relating to memory, aggression or anything of the like.

- [33] The first company that he worked for closed down after three months. He worked there as a casual and did packing. His father worked at the same company as a machine setter. Subsequently he obtained work as a forklift driver at a company for which she and her husband also worked at the time. After a while the patient indicated that he wanted to move to Bloemfontein. He obtained employment as a stock puller (store assistant) at Electro Vroomen, a company for which his aunt and uncle also worked at the time. According to Mrs van Niekerk she was satisfied that the plaintiff had become completely independent and that his earlier

symptoms from childhood were under control. She had full confidence in his ability to independently move to Bloemfontein and work there. He worked as far as she knows without any problems for Electro Vroomen for approximately 1½ to 2 years prior to the collision.

[34] After the collision the patient was never the same person again. She confirmed that he presented with significant difficulties in the form of forgetfulness, disorientation and anger outbursts. He is very easily upset, unpredictable, intolerant of crowds and often depressed. He also has general mood swings and he behaves as a person much younger than him. According to her he is a vastly different person to the person whom she knew prior to the collision when he had been stable and coping well at work and with life.

[35] Prior to the collision the patient had loved animals and had been in charge of feeding the chickens on their smallholding. After the collision he could not tolerate the sound of chickens, so much so that they eventually had to get rid of all the chickens. He has become completely intolerant of any noise and he is unable to cope in crowded places. She is of the view that he would not be able to live independently without regular assistance and monitoring.

Dr Domingo (Neurosurgeon)

[36] He examined the patient on 21 September 2011, approximately 18 months after the collision and subsequently compiled a report dated 14 March 2012 as well as a serious injury assessment report (RAF4). He confirmed the contents

of his report and expressed the opinion that the patient sustained a severe brain injury as assessed by an initial Glasgow Coma Scale of 7/15 upon admission to the Rosepark Hospital, Bloemfontein, coupled with a prolonged period of post-traumatic amnesia of approximately two to three weeks. He also testified about a CT scan taken on admission which showed evidence of a shearing injury and that subsequent scans showed *inter alia* the development of a frontal contusion and structural damage to the brain. He also referred to the significant force that had been levelled at the head of the patient with reference to the fractures of facial bones and according to him the patient sustained a diffused injury.

- [37] In his opinion the patient sustained a severe brain injury which resulted in significant neuropsychological deficits which adversely affect his employability in the open labour market. Aspects that impact on employment are cognitive deficits such as the inability to concentrate and behavioural problems insofar as such patients are unpredictable. In the doctor's opinion the effects of the patient's brain injury were permanent and no further improvement could be expected over the balance of his life. He was also of the view that neither therapy, nor medication would meaningful assist the patient's employment prospects or his ability to sustain employment, but indicated that treatment may assist the patient and his family in coming to terms with the deficits and make it more manageable in the home environment.

- [38] She assessed the patient on 12 June 2012 and compiled a report dated 20 June 2012. She confirmed the contents of her report. She has been practising in her field for 30 years and has vast experience in the special schools system although her speciality is the rehabilitation of adults. She works on social reintegration with the socially marginalised in order to teach them how to adjust.
- [39] She was of the view that as a result of the *sequelae* of the patient's brain injury his clinical presentation revealed darting attention span, marked insecurity and uncertainty and an infantile manner. The patient's disinhibited outbursts, lack of judgment in certain social settings, fatigue and excessive moodiness are all a function of both an acquired brain injury superimposed on a vulnerable pre-trauma neuropsychological make-up. The patient is not employable in the open labour market and needs to be part of a rehabilitation programme or community workshop where he will be able to socialise with his peers. According to her the brain injury involved both the frontal and parietal regions of the brain. The damage caused by the brain injury was permanent as were the effects thereof including the deficits relating to his frontal lobe. Treatment in the form of medication or therapy would not meaningfully improve the patient's employability or ability to sustain employment in the open labour market.

Dr De Bruyn (General Surgeon)

- [40] He examined the patient at the Rosepark Hospital immediately upon his admission after the collision and prepared clinical notes which form part of exhibit "A", which notes he confirmed in evidence to be correct. These notes

provide a description of the injuries suffered by the patient and the Glasgow Coma Scale reading of the patient which was 7/15 at the time of his admission. This recording was performed prior to the patient having been intubated or sedated. Based on his assessment of the patient he classified the patient's brain injury as severe.

Dr Ogilvy (Speech and Language Therapist)

[41] She interviewed the patient together with his mother on 13 June 2012 and prepared a report dated 7 October 2012 the contents which she confirmed in her evidence. She highlighted the following deficits with which the patient presented:

- 4.1 Reduced tolerance for noise, suggestive of a significant central auditory processing difficulty, resulting in the patient withdrawing socially;
- 4.2 Difficulties in multitasking across modalities;
- 4.3 A word retrieval deficit;
- 4.4 Difficulties in the recall of detailed auditory verbal information;
- 4.5 Substantially increased pragmatic impairments including interrupting conversations, reduced socio-linguistic sensitivity and significantly increased verbal abuse, poorer control of his verbal outbursts, increased distractibility which at times negatively impacts upon his ability to convey his thoughts and ideas effectively.

[42] Based on collateral information provided, she stated that the patient was coping well with his disorder of Tourette Syndrome prior to the collision to the extent that it was not having any significant negative effect on his socio-

communicative interactions or on his work performance. It is apparent that he was able to sustain employment, was committed to his work and was able to cope well with his work functions. He was pleasant, talkative and interactive. However since the collision, the patient has suffered from marked behavioural, psychological and cognitive communicative changes and difficulties which have had a significant negative impact on his work performance and his interpersonal relationships.

- [43] Dr Ogilvy testified that it would appear that the patient is currently working very much in a sheltered position of employment whereby he has his brother-in-law, De Lange, supervising and monitoring him. She expressed the opinion that would it not be for the sheltered work arrangements, the patient would have severe difficulties sustaining any form of employment due to his behavioural difficulties, his poor pragmatic skills and his memory problems to the extent that he would in essence be unemployable. Treatment in the form of therapy or medication would not meaningfully assist him in regard to his employment prospects. Despite treatment he would remain essentially unemployable particularly due to the implications and permanency of his frontal lobe fallout.

Mr Hunter (Industrial Psychologist)

- [44] He assessed the patient on 8 October 2012 and subsequently prepared a report dated 7 November 2012, the contents which he confirmed in his evidence. Insofar as the patient's pre-morbid career path was concerned, he considered it reasonable to conclude that had the patient not

been injured he would probably have worked at a similar level as present until retirement age of 65. However he may have progressed to a higher earning level beyond this. This was the opinion contained in his report after having interviewed several people, including Van Rhyn and Potterton. This viewpoint was confirmed in his *viva voce* evidence when he referred to the testimony of Van Rhyn and De Lange. He also indicated that it was possible, would it not be for the collision, that the patient would by now have progressed to beyond his current level of earnings. He then indicated that the patient would currently be earning a salary that fell somewhere between his current income and that of De Lange, as a truck driver. He estimated that this would be at the level of between 20% and 30% of the difference between these two income levels (i.e. between the employment level of a truck driver and an assistant truck driver).

- [45] Mr Hunter was of the opinion that the patient's current employment is sheltered and that it was most unlikely that he would remain employed for many much longer. Should the patient lose his current employment within the near future he might obtain work on a limited basis, but would not sustain such employment. This might happen on a few occasions but he would soon be unable to secure any form of work anywhere and would then be deemed entirely unemployable within the open labour market. Given the presence of frontal lobe deficits it was not reasonable to expect treatment to assist the patient's employability given that such symptoms were notoriously problematic within the open labour market.

Mr Alex Munro (Consulting Actuary)

[46] Mr Munro confirmed the contents of his report dated 24 November 2012. In terms thereof he calculated the loss of income to be R2 119 600.00, being R72 800.00 in respect of past loss and R2 046 800.00 in respect of future loss. He accepted that the patient would not earn any further income from 1 January 2013 and onwards. No provision was made for contingencies. I asked him to provide the court with a fresh report, taking into account the evidence led at the trial and the salary slips of the patient and De Lange contained in exhibit "A". He did that and I was presented with his second report when the matter was argued. Mr Branford submitted that I may consider using scenario 4 of Mr Munro's report for purposes of adjudicating the claim for future loss of income. In terms of this scenario Mr Munro accepted that the patient would continue earning his present income for a further period of 12 months. The total loss of income, so calculated, without taking into consideration any contingencies amounts to R4 333 500,00, being R91 200.00 in respect of past loss and R4 242 300.00 in respect of future loss.

DEFENDANT'S APPLICATION FOR POSTPONEMENT

[47] Prior to dealing with defendant's application for postponement it needs to be emphasised that I, already in chambers before the trial commenced, enquired from Mr Moeti whether defendant intended to call any expert witnesses as no notices or reports of expert witnesses had been filed in accordance with the provisions of rule 36(9)(a) &(b). He indicated that there was one such witness and that his report was probably not filed by mistake. This report never surfaced. By the end of Wednesday, the second day

of the hearing, I again enquired from Mr Moeti whether he intended to call any experts. He indicated that his witness might be coming through to Bloemfontein on Friday, the third day of the hearing (the court did not sit on Thursday) and he believed that the necessary arrangements had been made by his attorneys in that regard. I must mention that throughout the proceedings Mr Moeti single-handedly conducted the trial without the assistance of either the attorney of first instance, the Bloemfontein correspondent, or a clerk and in particular, no expert witness or witnesses attended the trial to assist counsel in cross-examination of plaintiff's experts.

- [48] When plaintiff closed its case Mr Moeti applied from the Bar for a postponement on the basis that his expert witness did not turn up at court. I was not presented with a formal application for postponement and consequently no affidavit setting out the reasons why a postponement was sought. Mr Moeti could not enlighten me as to where his expert witness was at that stage, why he did not come to Bloemfontein and in particular, what this witness would testify about. I must say that the firm impression was created that Mr Moeti was left in the dark by his attorney right through the trial. I was not satisfied that proper reasons for postponement were advanced and dismissed the application, whereupon Mr Moeti closed defendant's case.

ADJUDICATION OF THE CLAIM FOR LOSS OF INCOME / EARNING CAPACITY

- [49] I am mindful of the fact that the court exercises a wide discretion in assessing the quantum of damages as a result

of loss of earning capacity. See Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at 586J – 587B. There is no doubt that in order to adjudicate the *quantum* of the claim the actuarial computations presented to me should be employed as a useful basis for determining such. Even if this is done, it will have to involve some guesswork.

[50] Notwithstanding attempts by Mr Moeti to obtain concessions from the expert and lay witnesses, he did not succeed, firstly because he did not have the backing of expert reports and expert opinions which differed from the opinions of plaintiff's experts and secondly, because the information relied upon by the lay witnesses pertaining to the patient was within their own personal knowledge and Mr Moeti did not have any witnesses that could contradict the evidence of these lay witnesses.

[51] I must say that it is evident that the patient is employed in sympathetic circumstances, but it is also apparent that the lay witnesses were sympathetic towards him and to a certain extent subjective in their assumptions with reference to his future employment progression in an uninjured state. I explain my viewpoint in para [53] *infra*. An aspect that cannot be disregarded totally is that the patient has been working for more than a year for his present employer and that he was in fact working during the trial and not attending trial. It was Mr Branford's prerogative to call him as a witness which he declined to do, but I don't think a negative deduction can or should be made from such failure. The point that I want to make is that although it is predicted that the patient will resign or be forced to resign shortly or within a

year from now, this may not necessarily be so. Having said this, I have to accept the evidence of the experts that the patient is not employable in the open labour market and that his brain damage is permanent. His present employment is sheltered and may at any time terminate.

[52] Mr Moeti quoted extensively from **Lawson v Road Accident Fund** 1566/2006 [2010] ZAECPHC 6 (4 March 2010) in which case a brilliant sportsman and medical doctor was the plaintiff and submitted that the patient *in casu* could not be favourably compared with Dr Lawson. Mr Moeti relied heavily on the fact that the patient left school at the end of grade 8 and averments to some of the experts that “he did not like school and was unhappy at school” and “always seemed to be in trouble due to his problems with attention”. He further on submitted that the patient’s experts “failed to take into account the total picture of his child’s (*sic*) developmental history in the main”. Notwithstanding this criticism he failed to make any submissions as to what a reasonable award in respect of loss of future income and/or earnings capacity should be.

[53] The point that Mr Moeti tried to make with reference to the **Lawson** judgment is not without merit. Prior to the collision the patient always worked for employers who employed his relatives, parents or uncle and aunt, as well. He did not progress in any of his jobs. He had three jobs in a short space of time. He never worked as either a salesman or a truck driver. He is a white male with a grade 8 certificate. He cannot, to give one example, be regarded in the same vein as the plaintiff in **Torres v RAF** QOD vol 6 at A4-1, who

came from a long line of jewellers and who upon acceptable evidence proved that he had the talent to join his father in his well-established jewellery business, was it not for the brain injuries sustained. Although the uncontested assumptions contained in the evidence of Messrs Potterton, De Lange and Van Rhyn are to the effect that he might have progressed to either salesman or truck driver, these are possibilities and not necessarily probabilities. Their versions in this regard are obviously not primary factual evidence, but mere assumptions, the veracity which I doubt notwithstanding Mr Hunter's acceptance thereof and his evidence in this regard. The position of a forklift driver who operates in a yard or confined private space cannot be equated to that of a heavy vehicle driver that is confronted with busy roads and skills of a totally different kind. Also, a stock puller (store assistant) may be good at his job, but the skills required by a salesman are totally different. The first position does not require much communication skills, whilst a salesman works directly with the public and requires such skills. Mr Potterton's example of the petrol pump attendant that was promoted at Electro Vroomen to salesman in order to bolster his version that the same could happen to the patient cannot be accepted as proof that the same would have happened to the patient in due course. He could not achieve that in the about two years that he worked there prior to the collision. The witness is not the owner or human resources manager of the business and it is unknown what motivated the promotion. The particular employee might have been an excellent candidate, or received promotion based on the fact that he was a previously disadvantaged individual. It is not necessary to speculate, because what we

know is that the patient had three different jobs in a short space of time and notwithstanding his good employment record at Electro Vroomen, he was not promoted. Mr Potterton's version that an employer is not so much concerned with an employee's education as long as he can do the job, loses sight of reality. It might be so in the case of labourers, but cannot be true throughout the workplace. It cannot be disregarded that the unemployment rate in this country is extremely high and bearing in mind the pressure on employers to achieve employment equity in the workplace, career progression of uneducated white males is not that rosy.

- [54] I have referred to Mr Munro's two reports. Mr Munro indicated in his second report that 5% and 20% contingency deductions respectively should be applied in relation to the patient's past and prospective uninjured income values. Mr Branford submitted that the 20% in respect of prospective income might be increased to 25%. In making this concession he submitted that the reasonable value of the patient's loss of income/reduced earnings capacity is R3 238 610,00. I have given serious consideration to the revised figures which are based on the patient's assumed future earnings as truck driver and not that of truck driver assistant previously taken into consideration. Anything is possible, but I am not convinced that the patient in his pre-morbid state would have progressed to that level, or to the level of salesman for that matter. I am therefore not prepared to accept the second report, but have no reason not to base my judgment on the calculations contained in the

first report. In doing so, I take cognisance of Mr Hunter's suggestion that it would be a pessimistic view – the low water mark - to conclude that the patient would remain at the same employment level. It must be reiterated that Mr Munro's calculations are based on permanent unemployment as from 1 January 2013 while we know that the patient was still employed during the trial in March 2013. Regarding contingencies I am of the view that no contingency deduction should be applied to past loss and that 15% in respect of future loss should be applied. This is less than the 21% that might have been applied, to wit ½% per year to retirement age in accordance with the generally acceptable sliding scale. See **RAF v Guedes** *supra* at 588 A-F. The patient is 23 years old and his undisputed retirement age was regarded as 65. In allowing a lower deduction, I to an extent compensate for the conservative, if not pessimistic approach in Mr Hunter's words, followed in arriving at the *quantum*.

DUTY OF LEGAL REPRESENTATIVES

[55] I have referred *supra* to the duty of legal representatives and to some instances in which the defendant's legal representatives failed their duty. Notwithstanding Mr Bloem being called upon by the court to explain why a cost order *de bonis propriis* should not be made against him, he failed to turn up. Mr Moeti was specifically requested to explain Mr Bloem's absence, but he merely mentioned that as far as he was aware, this attorney (who was handling the matter until two months prior to the hearing) had been taken off the case. He could not explain his whereabouts. Defendant's legal representatives failed to make admissions reasonably sought by plaintiff's legal team which admissions should have been

made in order to save unnecessary legal costs. Such admissions would be unavoidable if a timeous and proper preparation for trial had been undertaken. Defendant should have been prepared for trial in November 2012. In December 2012 a rule 37 conference was held via telephone. By that time defendant was still not prepared to admit adv Pohl's appointment as *curator ad litem*, or that a collision had taken place, or that the insured driver's negligence caused the collision, or that he had admitted guilt and paid the required fine, or that the patient suffered injuries. It was invited to accept the correctness of the numerous expert reports, but declined to do so. This remained the situation until the matter was eventually heard. From defendant's side hardly anything was done to cast doubt on these reports and the findings of the experts. It was apparently in possession of a report of a dr Earle, but to the best of my knowledge the patient was not requested to avail him to examination by other experts. The ineffective cross-examination by counsel who did not receive any assistance whatsoever speaks volumes of defendant's attitude towards the matter. At no stage was it put to any witness that his or her evidence was challenged based on evidence to be tendered on behalf of defendant. No attorney or employee of the two firms involved attended the court proceedings. There is no reason why either the attorney of first instance or the local correspondent should claim any fees in respect of preparation for trial and attendance of the trial proceedings. This judgment will be sent to the Law Society of the Northern Provinces and the Chief Executive Officer of the Road Accident Fund to consider appropriate measures to be taken,

not only in the public interest, but also in the interest of the legal profession in particular.

THE RELIEF

[56] As indicated *supra* the issue of general damages stands over for later adjudication, if necessary. The claim in respect of past hospital, medical and related expenses has been settled and defendant has offered to furnish an undertaking in respect of future hospital, medical and related expenses in accordance with s 17(1)(a) of the Act. The claim in respect of past and future loss of income/reduced earnings capacity has been adjudicated and I have arrived at the figure of R1 812 580.00, being past loss of R72 800.00 plus future loss of R1 739 780.00 (R2 046 800.00 less 15% contingency deduction, to wit R307 020.00). Plaintiff is entitled to its costs including the costs of the expert witnesses as more fully set out in the order *infra*.

ORDER

[57] Therefore the following orders do issue:

57.1 Defendant is liable to compensate the patient for 100% of the patient's damages arising from injuries sustained in a motor vehicle collision on 30 March 2010;

57.2 The following amounts are awarded to plaintiff on behalf of the patient:

57.2.1 Past hospital, medical and related expenses as agreed: R375 055,69;

57.2.2 Past and future loss of income: R1 812 580,00;

Total: R2 187 635,69

- 57.3 Defendant shall be liable for interest at the rate of 15,5% per *annum* on any unpaid amount from a date 14 days after judgment to date of payment;
- 57.4 Defendant is ordered to issue an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 56 of 1996 to plaintiff as agreed;
- 57.5 The defendant is ordered to pay plaintiff's costs which include:
- 57.5.1 Costs of the reports of all plaintiff's expert witnesses as well as the reasonable costs attached to the procurement of such reports;
 - 57.5.2 The qualifying expenses of all plaintiff's experts;
 - 57.5.3 The travelling and subsistence costs of plaintiff's expert and lay witnesses who attended and testified at the trial;
 - 57.5.4 The costs of plaintiff's counsel including counsel's attendance at an inspection *in loco*, all consultations as well as counsel's travelling and subsistence costs relating to the trial.
- 57.6 The following witnesses are declared necessary witnesses:
- 57.6.1 Dr Madden;
 - 57.6.2 Dr Domingo;
 - 57.6.3 Dr Ogilvy;
 - 57.6.4 Mr Hunter;
 - 57.6.5 Dr De Bruyn;
 - 57.6.6 Mr Munro;
 - 57.6.7 Mrs Van Niekerk;
 - 57.6.8 Mr Van Rhyn;
 - 57.6.9 Mr De Lange;

- 57.6.10 Constable Moloi;
- 57.6.11 Constable Molaoa;
- 57.6.12 Mr Davies;
- 57.6.13 Mr Potterton.

J. P. DAFFUE, J

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