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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 No: **5413/2016**

In the matter between:

TEFO OUPA MOTEBELE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CORAM: HEFER AJ

HEARD ON: 13, 14 FEBRUARY 2024 AND 8, 9 APRIL 2024

DELIVERED ON: 4 JULY 2024

[1] The Plaintiff, an adult male, 29 years of age, has instituted action against the Defendant, for damages and ancillary relief arising from a motor vehicle collision which occurred on 1 November 2015. At the time of such accident the Plaintiff was a passenger in one of the vehicles that were involved in the accident.

- [2] In terms of an order of court dated 13 June 2017, made by agreement, *inter alia*:
- (i) the Defendant was held liable to pay 100% of the Plaintiff's proven or agreed damages; and
 - (ii) the issues of merits and quantum have been separated in terms of Rule 33(4) of the Uniform Rules of Court.
- [3] The matter served before me in respect of the quantum of Plaintiff's claim.
- [4] A number of expert witnesses as well as the Plaintiff himself presented the evidence in person before court.

Plaintiff – Mr Motebele:

- [5] According to the Plaintiff, he was in Grade 10 when he incurred the injuries during the accident. After the accident he attempted to return to school and complete his schooling education. However, he was told that he had to re-write an exam which he was not able to do because he was wearing a neck collar. He was told to return to school after he recovered from his injuries. Because of the fact that he fatigued easily and felt dizzy, he eventually dropped out of school.
- [6] After school he looked for work and was able to attain employment during 2017 at Chem Bric Packing. His job entailed packing stock such as cooking commodities.
- [7] The Plaintiff testified that he was not able to continue with this employment for more than a month because of the pain he experienced in his back and spinal cord.

- [8] Later he tried to do gardening but again struggled because of his back pain. He testified that he still experiences pain in his neck as well as left shoulder. He consulted with a doctor who had prescribed certain medications. Currently, he is not looking for work due to the pain which he experiences in the neck and the head.
- [9] The Plaintiff testified further that he has lost consciousness at the scene of the accident and only regained his consciousness at the hospital. In this regard he was extensively cross-examined whereas the relevant hospital records indicate that upon his arrival at hospital, he was fully awake. He was further confronted with the fact that according to the hospital records, he did not incur a head injury during the accident.
- [10] As far as the Plaintiff is concerned, he impressed as a reliable and credible witness. At this stage I wish to commend the Plaintiff for his efforts to obtain employment in spite of the difficulties he experienced in his physical well-being. The fact that according to him he has lost consciousness at the scene of the accident, which is contrary to the hospital records, may be attributed to the state of shock at that stage as confirmed by the Plaintiff himself upon questions put by myself to the Plaintiff. The aspect of loss of consciousness will be dealt with later herein.

Mrs R du Plessis (Neuropsychologist):

- [11] Mrs Du Plessis compiled two medico-legal reports, the one being the original dated 21 February 2020 and the second an addendum thereto, dated 23 January 2024. It appears that the reason for the addendum was the length of time which expired since the first report had been compiled.
- [12] Mrs Du Plessis had been instructed to give an opinion on the extent and severity of any possible neuropsychological *sequelae* resulting from Plaintiff's injuries. The neuropsychological assessment also aims to determine the

presence and the causes of possible deficits in cognitive functioning as well as possible mood and behavioural changes and any future implications.

[13] Mrs Du Plessis referred to the fact that according to Dr Mutyaba, in an addendum medico report dated 18 January 2024 (which will be dealt with hereunder), the Plaintiff suffered a mild concussion / traumatic brain injury (TBI) in the accident. Furthermore, it was indicated that the Plaintiff has sustained a whiplash neck injury as well.

[14] Regarding the nature and severity of the alleged head injury sustained by Mr Motebele in the accident, the following points were considered by Mrs Du Plessis:

- (i) Mr Motebele denied an impact on his head as a result of the accident;
- (ii) Mr Motebele reported a loss of recall of events after the impact until he woke up in hospital (the hospital records from the Pelonomi Hospital indicate that he was treated in the emergency unit only and was discharged home on the same day);
- (iii) The Pelonomi Hospital records do not indicate any need for investigations of the head or brain after the accident;
- (iv) The information made available at the time of the assessment by Mrs Du Plessis was in keeping with the opinion of the neurosurgeon in that Mr Motebele sustained a mild head injury as a result of the accident (an injury of this nature would not usually be expected to lead to significant or long-term changes in neuropsychological functioning).

[15] As far as the Plaintiff's pre-morbid functioning is concerned:

- (i) Mr Motebele indicated that he had not been hospitalized before the accident;

- (ii) The Plaintiff has no family history of illness such as diabetes, heart conditions or epilepsy;
- (iii) He has never been prescribed chronic medication;
- (iv) Mr Motebele indicated that he completed Grades 1 to 7 at school and failed Grade 7 after which he was repeating Grade 7 during 2010 at the age of 16 years;
- (v) Mr Motebele stated that he passed Grade 8 but repeated Grade 9 twice, then failed Grade 10. He was repeating Grade 10 when he was involved in the relevant motor vehicle accident;
- (vi) According to Mr Motebele at the time of the accident he already struggled with concentration and memory difficulties;
- (vii) He indicated that pre-morbid he did not experience significant problems with planning and organising tasks;
- (viii) Before the accident he was a social individual who enjoyed positive interactions with friends and most of his family members;
- (ix) After the accident he became easily irritable, was short-tempered and suffered mood swings; and
- (x) In summary, Mr Motebele described a pre-accident emotional vulnerability that it appears that he had the emotional resilience to cope with the stressors from his environment.

[16] Post-morbid:

- (i) the Plaintiff reportedly had been experiencing pain in his neck, and he explained that the pain extends to his back and shoulders;

- (ii) he reported experiencing pain in his left shoulder and upper back;
- (iii) he experiences fatigue during the day about twice a week (he struggles to sleep at times, due to the pain and his thoughts about the accident);
- (iv) the Plaintiff described headaches since the accident with dizziness that affects his balance;
- (v) he uses analgesic medication when experiencing pain; and
- (vi) in summary, the Plaintiff's objective reporting suggests significant physical pain and fatigue that had an intrusive impact on his everyday functioning and physical ability.

[17] Mrs Du Plessis comments as follows:

“Mr Motebele’s subjective experience of chronic pain appears to have a negative influence on several aspects of his life. It appears that he finds the pain and fatigue unbearable. His pain experience is probably amplified by personal, emotional and situational factors such as stress.”

[18] According to Mrs Du Plessis’ report:

- (i) After the accident Mr Motebele’s concentration and memory difficulties became worse;
- (ii) He reportedly, occasionally forgets instructions;
- (iii) The Plaintiff is forgetful of conversations.

[19] In summary, Mr Motebele subjective reports confirmed with collateral information points to changes in his cognitive functioning.

[20] It also appears that the Plaintiff had also been involved in a motor vehicle accident during 2010. It appears that the injuries which the Plaintiff apparently had sustained during 2010 have been taken into consideration by Mrs Du Plessis in her assessment of the Plaintiff.

[21] As far as the Plaintiff's intellectual and cognitive ability are concerned, Mrs Du Plessis opined:

- (i) Based on the Plaintiff's family background, his educational and work history as well as his performances in the psychometric tests, his pre-morbid intellectual and cognitive potential probably fell in the below average to average ranges;
- (ii) The Plaintiff performed below the expected limits in most domains of cognitive functioning that were assessed – he displayed a poor ability to sustain attention and work memory ability.

[22] According to Mrs Du Plessis' observation the Plaintiff's neurocognitive profile to a large extent reveals pre-existing cognitive difficulties.

[23] Mr Motebele's level of neurocognitive, neurobehavioral and neuropsychiatric functioning was clinically evaluated and assessed using psychometric tests and personal interviews. Collateral information was obtained and was integrated into her report where relevant.

[24] Based on his personal and familiar educational background, and his performances in the psychometric tests, his pre-morbid intellectual and cognitive abilities probably fell in the below average to average ranges. He failed Grade 7, Grade 9 (twice) and Grade 10 before the accident. He struggled

at school and experienced concentration and memory problems already before the accident. At the time of the assessment, Mr Motebele was repeating Grade 10. This was of course in fact post-morbid.

[25] As far as the first previous motor vehicle accident is concerned, Mr Motebele described occasional headaches and pain in his left foot after the first accident. He indicated that he was healthy and physically fit for the most part before the second accident.

[26] Information made available during both assessments by Mrs Du Plessis indicates that Mr Motebele sustained a mild head injury as a result of the accident. This would in general not be expected to result in significant or long-term neuro-psychological changes. This was in keeping to a large extent with Mr Motebele's clinical presentation. His clinical presentation is considered to reflect his pre-morbid cognitive functioning, the impact on physical *sequelae* of the accident and his emotional response to the traumatic event on different areas of his functioning.

[27] Mr Motebele described changes in his cognitive functioning after the accident. Collateral resources also noted forgetfulness and reduced concentration abilities on his part. She however opines that Mr Motebele's post-accident neuro-cognitive profile probably reveals the exaggeration of pre-morbid concentration and memory difficulties.

[28] Mrs Du Plessis opines that the Plaintiff's physical difficulties probably will impact his work speed.

[29] Mrs Du Plessis opined that the Plaintiff has suffered significant psychological distress with permanent losses as a result of the accident. However, his involvement in a previous vehicle accident and a problem of psychological vulnerability related to difficulties in his childhood may have compounded his emotional distress following the accident. Mr Motebele's psychological prognosis is considered related to his physical prognosis and lack of

employment. Ongoing physical complaints will probably serve to obstructive resolution of his psychological distress.

[30] The details about the Plaintiff's physical complaints and their relation to the accident appear in the reports of the medical experts and the medical records according to Mrs Du Plessis. Subjectively, Mr Motebele described ongoing physical limitations and pain in his neck with fatigue, sleep difficulties and headaches that are accompanied by dizziness. He is not able to perform heavy work tasks.

[31] Mrs Du Plessis recommended that an industrial psychologist should evaluate the extent to which the neuropsychological problems of Mr Motebele will be tolerated in his work environment.

[32] According to Mrs Du Plessis, the Plaintiff reports experiencing headaches that causes dizziness and confusion. The pain originates from the back of his neck, travels down his spinal cord and affects his left shoulder. He reports that he rarely experiences headaches that are not associated with neck pain spreading.

[33] According to Mrs Du Plessis, this headaches and associated pains can be associated with the whiplash injury which the Plaintiff has sustained during the accident. The reason for this finding by Mrs Du Plessis is that after the first accident during 2010, the Plaintiff had no complaints of backpain. It was only after the second accident.

Dr D.K Mutyaba (Neurosurgeon):

[34] According to the evidence presented in Court personally, as well as the medico-legal report compiled by Dr Mutyaba, the main complaints of the Plaintiff which started after the accident are:

- (a) neck pain (which worsens in extremes with range of movement);
 - (b) left shoulder pain (he can no longer lift heavy objects overhead);
 - (c) right hand pain (associated with numbness); and
 - (d) headaches (over the occipital region and throbbing in nature).
- [35] Special investigations with reference to X-rays taken on 27 September 2015 of the chest, left upper extremity, left lower extremity, cervical, thoracic and lumbar spine and pelvis revealed no abnormalities.
- [36] Dr Mutyaba reported that the clinical notes reported no loss of consciousness (LOC), but the Plaintiff had informed him that there had been a brief period of LOC as he does not remember how he got to the hospital.
- [37] The Plaintiff was diagnosed with multi soft tissue injuries in particular a painful cervical spine. The initial radiological investigations reported no abnormalities. The Plaintiff was discharged home in a soft neck collar and follow-up reviews followed at the out-patient department.
- [38] The Plaintiff attended several follow-up appointments and Dr Mutyaba reports as follows:
- “Mr Motebele was supposed to have had a CT scan cervical spine on 13/12/2015. The result of the scan is unavailable to me.”*
- [39] Of importance is that the Plaintiff also suffered a whiplash neck injury. Dr Mutyaba opined that the Plaintiff suffered at least a mild concussion / traumatic brain injury (TBI) in the accident. This assessment is based on the history and mechanism of the injury in that the Plaintiff complained of posterior neck pain immediately after the accident which has persisted up until the assessment by the neurosurgeon.
- [40] According to Dr Mutyaba, a diagnosis of concussion can be made even in the absence of LOC. The neck pain of which the Plaintiff is complaining of can be attributed to the whiplash injury suffered in the accident.

[41] Dr Mutyaba refers to the following as contained in the report by Mrs Du Plessis:

“A healthy neuropsychological status requires healthy and unaffected neurocognitive, neurobehavioral and neuropsychiatric functioning. Mr Motebele revealed below average performances in most domains of cognitive functioning which probably reflects his pre-morbid level of functioning. He revealed significantly below average performances which were not anticipated and probably reflect the exacerbation of pre-existing difficulties. His neurobehavioral and neuropsychiatric functioning have been affected by the outcome of the accident and impact his emotional resilience and emotional well being. The cumulative influence of these components leaves him with a compromised neuropsychological status, and more particularly, that he will not function on his pre-accident work level without putting in a deliberate effort. In the long run, his emotional vulnerability, his physical problems and his loss of mental acuity could put at risk his drive, a stable work record and positive interpersonal relationships.”

[42] Dr Mutyaba’s diagnosis of the Plaintiff’s brain injury as a mild traumatic brain injury (TBI) / concussion was based on the alleged “loss of consciousness” and the acceleration / deceleration forthwith in play when the Plaintiff incurred the whiplash injury. This aspect will be dealt with hereinlater.

[43] During cross-examination, Dr Mutyaba was confronted with the fact that according to the hospital records, with reference to the GCS levels of the Plaintiff at the scene of the accident as well as upon arrival at the hospital, the Plaintiff did not lose consciousness but was indeed fully awake. Dr Mutyaba however maintained that even if there was no LOC, the whiplash injury can cause the brain to impact inside the skull leading to a concussion. During cross-examination, Dr Mutyaba was further confronted with the fact that he should have obtained a CT scan himself and that in the absence of the result of

any CT scan at any stage, a diagnosis of a mild traumatic injury cannot be made. To this he responded, a concussion is a clinical diagnosis and that the absence of imaging does not sway his diagnosis. According to Dr Mutyaba, he had “*enough evidence*” to make his diagnosis.

Ms L Pretorius (Occupational Therapist):

[44] According to Ms Pretorius, her assessment of the Plaintiff has shown, *inter alia*, that the Plaintiff has severely restrictive neck range of movement and mildly restricted left shoulder range of movement was observed. The Plaintiff's posture assessment revealed abnormalities, i.e. elevated left shoulder, forward neck flexion and tilting of the neck to the left. His left-hand grip strength tested below the norm for his age and gender.

[45] In terms of sitting endurance, the Plaintiff is restricted to occasional sitting. He would require frequent positional changes from static positions as well as ergonomic seating.

[46] As far as the Plaintiff's physical abilities are concerned, Ms Pretorius opined that based on mobility and postural abilities, the Plaintiff is not suited for work tasks exceeding sedentary to occasional light demands. He is restricted to sedentary load handling demands. The Plaintiff is according to her, physically compromised because of the injuries he sustained in the accident.

[47] As far as the Plaintiff's residual work capacity is concerned, according to Ms Du Plessis, prior to the accident, the Plaintiff reported being healthy with no complaints. Following the accident, he presented with limitations related to the cervical and lumbar spine. His complaints, according to Ms Du Plessis, are consistent with the diagnosis provided by Dr Deacon, an Orthopaedic Surgeon, in his report, i.e.:

“Cervical spine injury with minor compression fractures of C5, C6 and C7 with a high possibility for chronic pain syndrome and a possibility of spondylosis to develop.”

[48] Considering the Plaintiff's work capacity, she opined that the Plaintiff is not suited for his past post-accident work tasks as a general worker (packing stock).

[49] In her opinion therefore, should the Plaintiff obtain employment in future, it is recommended that intermittent rest breaks / positional changes should be allowed to alleviate his neck and back pain while sitting for prolonged periods. However, she notes that rest breaks will influence his work speed and work productivity negatively. Should his work not allow for these accommodations, according to her the Plaintiff's work longevity may be affected.

[50] Furthermore, the Plaintiff displayed decreased work speed / accuracy during the assessments and did not meet the norm for open labour requirements. With reference to the report of Mrs Du Plessis, she opines that the Plaintiff may have difficulty handling stressful or conflict situations or having the motivation to work. He may also have difficulty to remember instructions given to him by a supervisor or manager. Decreased work speed and accuracy may result in the Plaintiff making errors. Other than his decreased physical capacity, such factors may further compromise his future employability.

[51] Based on her assessment findings, the spinal limitations and pathology, the Plaintiff is not suited to perform light, medium, heavy and very heavy physical demand work. Ms Pretorius is of the opinion that the Plaintiff will benefit from successful intervention (which includes conservative, surgical and rehabilitation intervention). This includes optimum pain management techniques, biokinetic intervention and a work hardening / conditioning program to enhance productivity and improve physical endurance. However, she notes that his competitiveness and productivity will be affected as long as the cervical and lumbar spine pain and limitations persist. Furthermore, as the degeneration of

his spine progress, his physical capacity may reduce even further. Ms Pretorius concludes that based on the Plaintiff's residual work capacity, psychosocial and cognitive difficulties, the Plaintiff's prospect for alternative work options have been compromised and he is expected to have difficulty competing for employment with uninjured peers. According to her, the Plaintiff's potential to secure employment in the open labour market is highly unlikely.

[52] In this regard, Ms Pretorius refers to the neuropsychology report of Mrs Du Plessis where the following is stated:

“Mr Motebele revealed below average performances in most domains of cognitive functioning which probably reflects his pre-morbid level of functioning. He revealed significantly below average performances which were not anticipated and probably reflect the exacerbation of pre-existing difficulties. His neurobehavioral and neuropsychiatric functioning have been affected by the outcome of the accident which impacted his emotional resilience and emotional well being.”

Dr Deacon (Orthopaedic Surgeon):

[53] Dr Deacon testified that the Plaintiff sustained a whiplash injury and compression fractures involving the cervical vertebra during the accident. He testified that the degeneration in the cervical spine is progressional and irreversible.

[54] He found that the Plaintiff will probably experience progressively more pain in future.

[55] The accident has resulted in the Plaintiff's inability to perform strenuous physical activity such as picking up and handling heavy objects, performing strenuous physical activities, working with his arms in an overhead position or performing any manual activities associated with mechanical neck pain.

[56] Dr Deacon further opined that the Plaintiff is permanently compromised in his ability to perform strenuous activities.

[57] According to him, the injuries to the cervical area are regarded to be serious orthopaedic injuries as the Plaintiff is at a significant disadvantage in his ability to compete in the open labour market. He will find it difficult to gain employment in the open labour market due to the presence of permanent functional restrictions as a result of pathology in the cervical area.

[58] According to Dr Deacon, it is unclear whether the Plaintiff underwent CT scans in particular of the brain as there are no results of CT scans in the hospital notes. However, Dr Deacon based his diagnosis of the Plaintiff on the X-rays of the Plaintiff's cervical as well as lumbar spine.

[59] Dr Deacon concluded that the Plaintiff has sustained compression fractures to his cervical spine and an injury to his lumbar spine, which is already showing signs of spondylosis. There is a possibility for chronic pain to develop. Furthermore, the Plaintiff will require conservative treatment throughout his lifetime.

[60] As far as the Plaintiff's employability is concerned, Dr Deacon concluded that:

"The patient has become an 'UNFAIR COMPETITOR' in the open labour market with regards to advancement in his current career or gaining future employment.

He will find it difficult to compete with other healthy subjects for work."

Mr B Moodie (Industrial Psychologist):

- [61] According to Mr Moodie, he compiled a second addendum to his original report after he had insight in the report by Dr Van den Bout (an Orthopaedic Surgeon) and that of Dr Van den Bergh (an Occupational Therapist).
- [62] Mr Moodie indicated that at the time of his initial report, he considered and opined in regards to the Plaintiff's progression at school. At that stage he was not aware of the head injury or any consequences thereof. Therefore, his initial report was in regards to the Plaintiff without taking into consideration such injuries.
- [63] He obtained information from the Plaintiff himself to the effect that he was not able to pass the Grade 10 at school. At the time when the accident occurred, the Plaintiff was indeed in Grade 10. However, the Plaintiff persisted and he tried again, but again was not able to pass Grade 10 and therefore dropped out of school. From this, Mr Moodie concluded that the Plaintiff is well motivated and aspired to complete his school education. Mr Moodie refers to several factors and concludes that he is not convinced that the Plaintiff would have been able to pass Grade 12. In this regard, he refers amongst others to the fact that the Plaintiff did not receive his education in his mother tongue but only in the English language. For that reason, he opined that the Plaintiff would only have been able to do physically oriented jobs. He would have been able to obtain employment as an unskilled general worker doing heavy or medium orientated work.
- [64] Post-morbid, Mr Moodie is of the opinion that Plaintiff will not be able to sustain medium- or high load work. The determining factors, according to him, is the Plaintiff slight reduction in cognitive abilities, but more importantly, the Plaintiff's current physical limitations. The Plaintiff made two attempts at employment. Had he not had his physical restraints, he would have been able to do similar work in future.

[65] Mr Moodie stated in particular: *“His head injury played a minor role in what he was supposed to do”* (with reference to the Plaintiff’s post- morbid employment).

[66] Mr Moodie postulated two scenarios in his report which are to be used in determining the Plaintiff’s loss of earning capacity.

[67] The first scenario is based on the non-corporate labour market, keeping an individual starting on the minimum wages making allowance to progress slightly to only R300.00 a day. This is in regards to an individual who completed Grade 11 or below at school.

[68] The second scenario is based on individuals that holds below Grade 12 school qualification. These figures incorporate both the non-corporate and corporate labour market. According STATSSA, below Grade 12 school leavers, the medium early stage of their career is R71,000.00 per annum, mid-state is R94,000.00 per annum and the late career stage is R118,000.00 per annum. Although they can progress to the upper quartile, Mr Moodie plateaued him on the median level. In this scenario, Mr Moodie had a more conservative approach and kept him functioning at somewhere between a non-corporate and corporate sector.

Evaluation of expert evidence:

[69] All the witnesses who testified on behalf of the Plaintiff were subjected to cross-examination by Mrs *Mkhwanazi* who appeared on behalf of the Defendant. None of these cross-examinations were however based on any expert reports or evidence presented to Court by the Defendant.

[70] Mr *Cross*, appearing on behalf of the Plaintiff, argued that the relevant expert witnesses who testified on behalf of the Plaintiff, impressed as credible and reliable witnesses and there is no reason why their evidence should not be

accepted. In this regard, the argument by Mrs *Mkhwanazi* should however be considered. According to her the finding by Dr Mutyaba that the Plaintiff sustained a head injury cannot be accepted as it has no factual basis. No MRI examination was done, therefore there is no basis for his diagnosis.

[71] With this submission I must agree. Dr Mutyaba's diagnosis of a head injury, is not based on any facts. In the report by Ms Du Plessis, she states specifically that the Plaintiff denied an impact to his head and that he only suffered pain in his neck and entire body. This is according to the Plaintiff himself.

[72] Also as far as Dr Mutyaba's diagnosis that the Plaintiff has incurred a mild brain injury / concussion, his diagnosis was merely speculative. He based his diagnosis merely on the alleged LOC as conveyed by the Plaintiff himself and the whiplash injury. As it appeared from the cross-examination of the relevant expert witnesses, with reference to the hospital records, to which there were no objection during the hearing by Mr Cross, there were no loss of consciousness of the Plaintiff as a result of the accident. In Dr Mutyaba's report he himself mentions that the Plaintiff reports a brief period of LOC although it is not documented in the clinical notes. It can also not, on the facts before Court, be held that purely due to the whiplash injury which the Plaintiff has sustained, the Plaintiff has sustained a mild brain injury / concussion. In the words of the Neurosurgeon himself a whiplash injury can cause the brain to impact inside the skull leading to a concussion. It cannot be held that the Plaintiff indeed incurred such brain injury / concussion.

[73] This is also of relevance in regards to the report by Ms Du Plessis whereas she stated:

"According to a neurosurgeon, Dr D K Mutyaba, Mr Motebele sustained a mild head injury as a result of the accident with no neuropsychological or neurocognitive sequelae."

In effect Ms Du Plessis relied upon the diagnosis by Dr Mutyaba relating to the head injury. However, in favour of the Plaintiff, I take into consideration the finding by Ms Du Plessis that Mr Motebele's subjective reports confirmed with the collateral information point to changes in his cognitive functioning. Cognisance is also taken that he reported concentration and memory difficulties already before the accident. The Plaintiff's emotional difficulties and his experience of pain probably served to further disrupt optimal cognitive functioning.

[74] Based on the evidence of Dr Deacon, the Plaintiff has succeeded in proving on the balance of probabilities that the Plaintiff had indeed incurred a whiplash injury as well as injury to the spine during the accident.

[75] Based on the evidence by Mrs Du Plessis, Ms Pretorius and Mr Moodie the Plaintiff has also succeeded in proving on the balance of probabilities that his cognitive capabilities have been negatively affected by the injuries which he sustained which also impacts negatively on the Plaintiff's employability.

Contingencies:

[76] I will now deal with the contingencies to be applied in calculating the Plaintiff's loss of earning capacity.

[77] It is trite law that in respect of contingencies, a Court is to make a reasonable allowance for "*contingencies, the result of which it is impossible accurately to assess*". See: **Smit v Road Accident Fund**¹.

[78] Deductions used in practice range from 0% - 60%; with 10% - 20% being the most common; whilst recognition have been given to the principle that a short

¹ 2013 JDR 0902 (ECG) at par. [15]

period of exposure to the risk of adversity justifies a lower deduction than would be appropriate to a longer period.²

[79] In determining what percentage of contingency deductions should be applied, the guideline of the sliding scale of a half percent per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in regards to a middle-aged person may be appropriate.³

[80] In **Southern Insurance Association v Bailey NO⁴** the Supreme Court of Appeal stated that where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that a trial judge is “*tied down by inexorable actuarial calculations*”. The trial court has “*a large discretion to award what he considers right*”. One of the elements in exercising that discretion is the making of a discount for “*contingencies*” or “*vicissitudes of life*”. These include such matters as a possibility that a Plaintiff may in the result have less than a “*normal*” expectation of life; and that he/she may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.

[81] In **Road Accident Fund v Guedes⁵**, Zulman JA stated the following:

“The Court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the *quantum* of damages. Even then the trial court has a wide discretion to award what it believes to it is right. (See, for example, the Bailey case and Van der Plaatz v South African Mutual Fire and General Insurance Company Ltd).”

² Smit *supra* par. [22].

³ Smit *supra* par. [32].

⁴ 1984 (1) SA 98 (AD)

⁵ 2006 (5) SA 583 (SCA)

- [82] According to Mrs *Mkhwanazi*, with reference to the postulations by Mr Moodie, she submitted that the first scenario by Mr Moodie should be used in calculation of the Plaintiff's loss of earning capacity.
- [83] Mr *Cross* on the other hand, however suggested that the median between the two scenarios be used in calculation of the Plaintiff's loss of earning capacity. According to him, with which Mrs *Mkhwanazi* agrees, as far as past loss of earnings is concerned, it is generally accepted and the norm to apply that a contingency of 5% should be used and there is no reason to deviate from this. There is also no reason why the Court should not accept the calculations of Mr Sauer as contained in his updated actuarial report.
- [84] According to Mr *Cross*, with reference to the so-called "*sliding scale*", referred to in the matter of **Goodall v President Insurance Company Ltd**⁶ a contingency of 20% should be applied to the Plaintiff's claim for future loss.
- [85] According to Mrs *Mkhwanazi* however, a contingency deduction of 40% for pre-morbid future earnings should be used having regard to the evidence that the Plaintiff had pre-existing cognitive abilities. She also refers to the evidence by Dr Deacon to the effect that some of the recommended treatment more specifically Rhizotomy, to the effect that the Plaintiff can only get treatment in managing the pain and recover in time which would enable him to return to the open labour market.
- [86] As far as the Plaintiff's pre-morbid cognitive abilities are concerned, I agree with the submission on behalf of the Defendant. However, as far as the treatment referred to by Mr Deacon is concerned, it cannot be taken as a fact that the Plaintiff will indeed be able to return to the open labour market even with treatment in future. I do however agree with the submission by Mrs *Mkhwanazi* that the first scenario is to be used in calculation of the Plaintiff's loss of earning capacity.

⁶ 1978 (1) SA 389 (W)

[87] Taking into consideration the submissions on behalf of both legal representatives, I consider that a 24% contingency deduction to the Plaintiff's total loss of income is to be applied. This means that in respect of Mr Motebele's total amount of loss of income when the 24% is then applied to the total amount as calculated by the Actuary, it amounts to an amount of **R1,963,887.89**.

[88] In **Road Accident Fund v Duma and 3 similar cases**⁷ the Supreme Court of Appeal ruled as follows:

"... The decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages were conferred on the fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the fund will only be obliged to pay general damages if the fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF4 form as serious. Unless the fund is so satisfied the plaintiff has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the fund, not the court, that his or her injury was serious."

[89] In the matter of **K obo M v RAF** (*supra*) the second question posed to the Full Bench by the then Acting Judge President, was whether a Plaintiff is entitled to pursue the adjudication of general damages at trial in a default trial court in instances where the Fund has not accepted the serious injury assessment report. The Full Bench came to the following conclusion:

⁷ 2013 (6) SA 9 (SCA)

“It is declared that plaintiffs in actions against the Road Accident Fund are not entitled to pursue the adjudication of non-pecuniary damages in the absence of either the Road Accident having accepted the injuries in question as constituting serious injury as contemplated in section 17(1A) of the Road Accident Fund Act 56 of 1996, or of assessment of such injuries as constituting serious injury by the Appeal Tribunal contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008 (as amended).” (own emphasis)

[90] In accordance with the findings in both the **Duma** as well as the matter of **Kobo M v RAF**, the Plaintiff is therefore not entitled to pursue with the adjudication of non-pecuniary damages in the absence of the Defendant having accepted such injuries as constituting serious injuries.

[91] In the unreported case of **Justine Phiri v RAF**⁸, in which it was also a matter that the Fund had not accepted or rejected the Plaintiff's RAF4 form. In that matter Judge Nichols indicated that it is now trite that an agreement on whether the injury is to be regarded serious or not cannot be assumed and a Court which proceeds with the claim for general damages on this basis will be exceeding its powers. The Court indeed held that there was no basis in which it could conclude that the RAF has accepted the Plaintiff's injuries as serious, thereby entitling him to a claim for general damages. The Plaintiff's claim for general damages was thus postponed.

[92] It is therefore evident that in both the **Duba**-matter as well as the **Justine Phiri**-matter, the Court postponed the Plaintiff's claim for general damages. In the circumstances of the present matter, I deem it just and equitable that the same route should be followed in regards to the general damages.

Therefore, I make the following order:

⁸ Case No: 3448/2018, delivered by Judge T Nichols (Gauteng Division – Johannesburg)

Order:

1. Defendant is ordered to pay the Plaintiff the amount of **R1,963,887.89** in respect of Plaintiff's future loss of earnings.
2. The aforesaid amount is to be paid into the following bank account:

Name of account holder:	VZLR Inc.
Name of Bank:	Absa Bank
Account No:	0[...]
Branch code:	632005
Reference:	88790

3. Defendant is to furnish the Plaintiff with an undertaking in term of Section 17(4)(a) of the Road Accident Fund Act, 1996 for payment of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home, or treatment of, or rendering of service or supply on goods to the Plaintiff arising out of the injuries that he sustained in the motor vehicle collision which occurred on 1 November 2015 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.
4. In the event of the capital amount not being paid within **180 (one hundred and eighty) days** from date of this order, the Defendant shall be liable for interest on the amount at the prevailing interest rate at 11.75%, calculated from the 15th calendar day after the date of this order to date of payment in line with prevailing legislation.
5. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on a High Court scale in respect of both the merits and quantum up to and including **9 April 2024** and notwithstanding and over and above the costs referred to in paragraph 5.2.1 below, subject thereto that:

5.1 In the event that the costs are not agreed:

5.1.1 the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

5.1.2 the Plaintiff shall allow the Defendant **180 (one hundred and eighty) days** from date of allocator to make payment of the taxed cost; and

5.1.3 should payment not be effected within **180 (one hundred and eighty) days** from date of allocator, the Plaintiff will be entitled to recover interest at the prevailing interest rate on the taxed or agreed costs from **15 (fifteen) days** from date of allocator to date of final payment.

5.2 Such costs will include, as allowed by the Taxing Master:

5.2.1 the costs incurred in obtaining payment of the amounts mentioned in paragraphs 1 and 3 above;

5.2.2 the costs of and consequent to the appointment of counsel, including but not limited to the following: For trial, including, but not limited to counsel's full fee for **13 and 14 February 2024 and 8 and 9 April 2024**;

5.2.3 the reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the below experts:

5.2.3.1 Dr M.B Deacon – Orthopaedic Surgeon;

5.2.3.2 Ms Rita du Plessis – Clinical / Neuropsychologist;

- 5.2.3.3 Ms Liné Pretorius - Rita van Biljon Occupational Therapist;
- 5.2.3.4 Mr Ben Moodie – Industrial Psychologist;
- 5.2.3.5 Mr J Sauer – Actuary;
- 5.2.3.6 Dr D Mutyaba – Neurosurgeon.

5.2.4 the Plaintiff is declared a necessary witness and therefore the Plaintiff's reasonable traveling expenses to attend the trial, as allowed by the Taxing Master.

5.2.5 the reasonable attendance fees of the following experts:

- 5.2.5.1 Dr M B Deacon – 14 February 2024;
- 5.2.5.2 Ms R du Plessis – 14 February 2024;
- 5.2.5.3 Dr D Mutyaba – 8 April 2024;
- 5.2.5.4 Ms L Pretorius – 14 February 2024 and 8 April 2024;
- 5.2.5.5 Mr B Moodie – 8 April 2024.

6. Plaintiff's claim for general damages is postponed *sine die*.

J J F HEFER, AJ

Appearances on behalf of the Plaintiff: Adv C.G Cross

Instructed by: VZLR Incorporated
Du Plooy Attorneys
Bloemfontein

On behalf of the Defendant: Mrs K Mkhwanazi

Instructed by: State Attorney
Bloemfontein