Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: **1786/2019**

In the matter between:

MOLLER, ANTON Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Neutral citation: *A Moller v The Road Accident Fund* (Case No: 1786/2019)

Coram: Nxumalo J

Date of Judgment: 11 July 2025

Summary: Delict – Claim for damages – Road Accident Fund – Past and future loss of earnings – Allegation of double compensation – Plaintiff previously compensated for 'partial loss of earnings' in earlier accident – Whether further compensation in respect of second accident constitutes double compensation – Plaintiff injured in second motor vehicle accident, resulting in total unemployability - Court finding that the plaintiff's replication is not only in answer to or as a result of the allegations contained in the amended plea, it is also consistent with the allegations contained in the particulars of claim. It further does not contain any new cause of action – Court also finding that earlier settlement was for partial, not total, loss of earning capacity – No evidence by defendant to prove prior settlement covered total future loss – Actuarial evidence accepted – Plaintiff entitled to damages for residual earning capacity lost due to second collision – Award made for loss of past and future earnings.

ORDER

1. The defendant shall pay to the plaintiff an amount of R3 990 624.00 (Three Million Nine Hundred and Ninety Thousand Six Hundred and Twenty-Four Rand) in respect of the plaintiff's loss of past and future earnings.

2. Payment of the said amount shall be made into the account of the plaintiff's attorney of record by means of direct electronic funds transfer into the said attorney's account.

3. The defendant shall pay the plaintiff's taxed and/or agreed party and party costs on Scale C, which shall include but not limited to:

   3.1. the costs of trial for 05 and 06 August 2024.
   3.2. the costs of obtaining all medico-legal reports; actuarial reports from the plaintiff's experts furnished to the defendant, including the RAF1 and 4 forms of all the expert reports delivered on behalf of the plaintiff in these proceedings.
   3.3. the costs of preparation and reservation fees and costs to attend the trial of the following experts, who attended the trial; to wit: (a) Dr Barlin, the orthopaedic surgeon; and (b) Ms Rossouw, the industrial psychologist.

4. The following shall apply with regards to the determination of the aforementioned taxation of costs:

   4.1. the plaintiff shall serve the notice of taxation on the defendant's attorney of record; and
   4.2. the plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs from the date of taxation.

5. The plaintiff shall be entitled to recover interest at the rate of 7% (seven percent), from the expiration of the 14 (fourteen) court days after taxation.

JUDGMENT

INTRODUCTION:

[1] This is a claim for compensation instituted by the plaintiff on 13 August 2019, for damages against the Road Accident Fund,[1] as a result of certain bodily injuries caused by a motor-vehicle accident, as regulated by Section 28 of the Road Accident Fund Act 56 of 1996 (***the "Act"***). The plaintiff is one Anton Moller, a major male born on 13 June 1967 and residing within the jurisdiction of this Court. The defendant is a legal person incorporated in terms of Section 2(1) of the Act, with its principal place of business situate at Centurion, Pretoria.

[2] The plaintiff alleged that on 13 December 2014 he was a passenger in a certain motor vehicle travelling between Barkly-West and Delportshoop, in the Northern Cape. The said motor vehicle was there and then being driven by one Ronnie Van Der Merwe. The cause of the collision was due to the negligent driving of the said driver.[2]

[3] As a result of the foregoing, the plaintiff suffered the following bodily injuries; to *wit*: multiple abrasions to the head, resulting in a head and brain injuries with loss of consciousness; multiple abrasions on the chest and the left arm; complete transverse distal humerus fracture of the right arm with displacement and shortening; and a sub-capital NCF fracture of the right hip, complete and transverse with a displaced femoral head with shortening. As a result of the said injuries, the plaintiff was hospitalised, treated and discharged from hospital on or about 24 December 2014.

[4] It is common cause that the said injuries are serious as contemplated in Section 17 of the Act. The plaintiff now claims damages, interest thereon at the prescribed rate per annum, *a tempore mora*, calculated from 14 days

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[1] Hereinafter referred to as "*the defendant*"
[2] Hereinafter referred to as "*the second collision*"

after the date of judgment, until final payment; costs of suit on a party and party scale, and further and/or alternative relief.[3]

[5] The plaintiff specifically alleged that he has suffered damages in the total of R5 260 624.00, made up as follows: R20 000.00 for estimated past hospital and medical expenses; R200 000.00 for estimated future hospital and medical expenses; R3 990 624.00 for estimated past and future loss of earnings and earning capacity; and R1 050 000.00 as estimated general damages. The amount claimed for future loss of earning capacity allegedly follows from the significant bodily injuries suffered by the plaintiff, which has affected his working capacity.[4]

[6] The defendant conceded 100% (one hundred percent) liability in favour of the plaintiff. The latter would therefore be entitled to hundred percent of his proven loss or damages emanating from the collision, as contemplated in Section 17(1) of the Act. The plaintiff's claim for general damages and future hospital and medical expenses were also settled between the parties.

[7] The foregoing notwithstanding, the defendant persisted with its denial of any indebtedness to the plaintiff in the sum claimed or any portion thereof.[5]

<u>SALIENT BACKGROUND FACTS</u>:

The first accident:

[8] It is so that during 2007 the plaintiff was involved in a motor vehicle collision.[6] In this regard, the plaintiff instituted legal action against the

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[3] Pp15-16, Pleadings, Vol 1

[4] Hereinafter referred to as "*the second/current claim*"

[5] Pp22, Paragraph 9.3, *Ibid*

[6] Hereinafter referred to as "*the first collision*"

defendant under the Act, before it was amended *vide* the Road Accident Fund Amendment Act 19 of 2005.[7] It is so that prior to being amended in 2005, the Act had no limitations in respect of loss of earnings.

[9] It is common cause that the plaintiff sustained the following injuries in the first collision; to *wit*: soft tissue injury with a ligament tear of the left knee; fracture of the right hip; dislocation of the left shoulder; and a head injury.

[10] The following is also common cause; to *wit*: the plaintiff's first claim was settled by one Josephs Incorporated, his erstwhile attorneys, the plaintiff has no knowledge of how and for which damages he was compensated for by the defendant, the claim for past and future loss of earnings was settled in the amount of R2 266 977.52 on 07 January 2011.

[11] It is against this backdrop that on 05 August 2024 on the day the trial commenced, the defendant amended its plea in terms of Rule 28. In relevant part, the said amendment alleged as follows, with regard to paragraph 11 of the particulars of claim, which deals with the plaintiff's alleged loss and damages:

8.

"Ad paragraph 11 and sub-paragraphs:

8.1 The defendant has no knowledge of the damages which the plaintiff allegedly suffered, accordingly does not admit same, puts the plaintiff to the proof thereof and reserves the right to lead evidence in rebuttal thereof.

8.2 ***The plaintiff lodged a claim against the defendant as a result of injuries sustained in a motor vehicle accident [that] occurred in the year 2007.[8] The plaintiff's claim was for general damages, past and future loss of earnings and past and future medical expenses.[9]***

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[7] Hereinafter referred to as "*the Amendment Act*"
[8] Hereinafter referred to as "*the first collision*"
[9] Hereinafter referred to as "*the first claim*"

8.3 ***The claim was settled on the 07th of January 2011. The settlement was on the basis that the injuries sustained by the plaintiff were serious and permanent in nature. And further, that the injuries sustained affected the plaintiff's ability to work until retirement. Thus, the plaintiff would not be able to continue working.***

8.4 ***As a result, the amount of R550 000.00 for general damages and R2 266 977.52 for past and future loss of earnings was paid to the plaintiff.***

8.5 ***The plaintiff has already been compensated for loss of earning until retirement age. Defendant avers that paying the plaintiff's claim for loss of earning again in this matter will amount to double compensation and therefore the claim should be dismissed with costs."***[10]

[12] No objection with regard to the foregoing was raised by the plaintiff. Instead, on the same day, in lieu of making consequential adjustment as contemplated in Rule 28(8), the plaintiff replicated as follows to the foregoing, without any objection by the defendant:[11]

"Ad paragraph 8.1 to 8.5:

1. *The plaintiff denies all the allegations contained in these paragraphs, save for the admissions made herein below:*

   1.1. The plaintiff lodged a claim for the defendant in respect of the collision that occurred during 2007 ("the 2007 collision");

   1.2. The plaintiff lodged a claim with the defendant in respect of the collision that occurred on 13 December 2014 ("the 2014 collision");

   1.3. That the defendant made an offer of settlement for past and future loss of earnings to the plaintiff in respect of the 2007 collision in an amount of R2 266 977.52 which offer of settlement the plaintiff accepted ("the settlement");

   1.4. The plaintiff's claim in respect of the 2007 collision was settled on 07 January 2011;

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[10] Emphasis supplied

[11] This rule expressly stipulates as follows:

"(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him and may also take the steps contemplated in rule 23 and 30."

> ***1.5. The settlement was paid to the plaintiff;***
>
> ***1.6. The settlement was made a settlement of a partial loss of earnings of the plaintiff, and the plaintiff still being able to earn an income on a lower level and at a different company than he would have had, had the 2007 collision not occurred;***
>
> ***1.7. The settlement was made on the basis that he plaintiff will continue to have a residual earning capacity although not on the same level than he would have had, had the 2007 collision not occurred;***
>
> ***1.8. The settlement was at no stage made to compensate the plaintiff for a total loss of earnings and having no residual earning capacity;***
>
> ***1.9. The plaintiff on 24 July 2024 obtained an actuarial calculation, calculating the plaintiff's probable total loss of earnings due to the 2007 collision. This calculation is attached hereto as Annexure "A";***
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> ***1.10. Annexure "A" shows that after contingency deductions, the plaintiff would have suffered a total loss of earnings in the amount of R8 941 682.00 had he been compensated for a total loss of earnings with no residual earning capacity; and***
>
> ***1.11. When the 2007 collision occurred, the settlement was made in terms of the Road Accident Fund Act 56 of 1996, no limitations on loss of earnings were applicable.***
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> 2. *The settlement pleaded by the defendant for past and future loss of earnings suffered by the plaintiff due to the 2007 collision confirms that:*
>
> *2.1. There was no reduction in the total amount claimed for loss of earnings (as per the Road Accident Fund Amendment Act 19 of 2005);*
>
> ***2.2. The settlement was made for a partial loss of earnings and there was at no stage an intention between the parties to settle the plaintiff's claim on the basis that the plaintiff will never be able to earn an income again; and***
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> ***2.3. The plaintiff always had a residual earning capacity after the 2007 collision."***[12]

[13] By agreement between the parties, on 06 August 2024, this Court granted the plaintiff leave to adduce various expert evidence by way of affidavits in

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[12] Emphasis supplied

terms of Rule 38(2) of the Uniform Rules of Court.[13] Consequently, the following expert reports were admitted on affidavit, to *wit*: orthopaedic report, clinical and neuropsychologist report, industrial psychologist report, occupational therapist report, neurologist report, clinical psychologist report, and actuarial calculation report. Accordingly, the facts and opinions contained in the said reports constitute incontrovertible evidence without any further proof thereof. No further evidence was thus led at the trial, by either party.

[14] The parties closed their cases in turn and delivered written closing arguments. The plaintiff's main closing argument was delivered on 05 August 2024. The defendant thereafter delivered its main closing argument on 16 August. Thereafter, the plaintiff supplemented its main argument on 29 August 2024.

ISSUE FOR DETERMINATION:

[15] Regard being had to the foregoing; the following singular issue fell for determination by this Court; to *wit*: whether the plaintiff is entitled to an award for past and future loss of earnings because of the injuries sustained by him in the said collision, regard being had to the settlement of same by the defendant in January 2011, as part of the settlement agreement entered into between the parties, arising from the plaintiff's first collision. Coterminous to this is whether the impugned settlement of 2011 was for total loss of earnings or for partial loss of earnings.

[13] This rule provides as follows:
"(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

<u>COMMON CAUSE FACTS</u>:

[16] What follows is common cause. The plaintiff completed the equivalent of grade 10 and thereafter completed his apprenticeship in 1989 at AfriSam. In 1990, he obtained a certificate in fitting and turning. He also has a valid code EB driver's license. The plaintiff was then employed as a qualified fitter and turner with Anglo Alpha Cement Factory until the first collision in 2007. The plaintiff then farmed with his father and later sold his shares in the farm. He thereafter remained unemployed until he obtained employment as a fitter and turner in July 2014 through one Swift Human Resources subcontracted to one Jormid in Kathu. He remained employed as such until the second collision occurred on 13 December 2014.

[17] The plaintiff in *casu* earned as follows: (a) 31 October 2014, he earned a total amount of R35 214.00, consisting of the following: R28 898.00 basic salary; R6 168.00 overtime; R1 338.00 overtime during public holidays; and R810.00 shift allowance; (b) 30 November 2014, he earned a total amount of R28 440.00, consisting of the following: R21 516.00 basic salary; R5 004.00 overtime; and R1 920.00 overtime; and (c) 31 December 2014, he earned a total amount R25 994.40, consisting of the following: R18 200.00 basic salary; R5 924.40 in lieu of leave; and R3 370.00 overtime.

[18] The average estimated total earnings of the plaintiff during 2014 was R29 882.86. It is probable that the plaintiff would have continued with his employment, receiving inflationary increases until retirement at the age of 65. The injuries the plaintiff sustained in the 2014 collision have rendered him unemployable and incapable of returning to his previous employment. It is unlikely that he will find employment of any nature in future. The plaintiff is accordingly unemployable as a result of the injuries sustained in the second collision.

THE PARTIES' CONTENTIONS, IN SUM:

Defendant's:

[19] For the defendant, Mr MA Mogano contended that the legal principle in respect of a claim for diminished earning capacity is trite, *viz*: the plaintiff must be placed in the position he would have been in had the injuries not occurred. To succeed in the claim for loss of income or earning capacity, the plaintiff has to establish on a balance of probabilities that as a result of the accident, he has lost future earning capacity – ***Rudman v RAF*** [14]

[20] That the plaintiff was "reportedly" found medically unfit to work due to the injuries he sustained in the first collision; declared disabled and lost his total income; or could not generate any income as a fitter and turner. Consequently, and whilst he was still on disability and not generating any income, the plaintiff was compensated to the total sum of R2 816 977.52, which was made up of R550 000.00, for general damages and R2 266 977.52, for past and future loss of income.

[21] Prior to the second accident, the plaintiff had sustained serious and permanent fracture of the hip, fracture dislocation of the shoulder, and knee injury. He was already disabled and unfit to work as a fitter and turner due to the hip injury.[15] The plaintiff lost capacity to generate income as a fitter and turner, left employment. He received no income and therefore suffered total loss of income. When his claim was assessed and settled by the Road Accident Fund in the year 2011, the plaintiff was still disabled and not working. He had to be compensated for all damages he suffered.

[14] 2003 (2) SA 234 (SCA)
[15] Page 41 – Clinical Neuropsychologist Report, and page 91 – Occupational Therapist Report, Vol 8

[22] It was further submitted for the defendant that the injuries sustained by the plaintiff in the first accident were serious and permanent; rendered him disabled, and consequently, he lost his total income as a fitter and turner, as indicated by experts. That the court should accept that the compensation was paid on the same basis by the defendant. The plaintiff had no other qualification or remarkable work-related skills. He was a severely disadvantaged job seeker who was essentially functionally unemployable. The physical requirement of a fitter and turner in general fall into the heavy physical demand range. Ms Kim Kaveberg stated in her report that the plaintiff was placed on disability benefits, thereafter, he bought a farm and farmed for approximately five years. Due to drought, the farm experienced difficulties, and he had to look for work. He resumed work in June 2014 through Swift.

[23] That whilst it is within the claimant's personal rights to seek employment, or continue working despite having been compensated for total loss of income until retirement age, however, should the claimant be involved in another collision while working as such, the plaintiff is not entitled to loss of income as he had been previously compensated for total loss of future income. The defendant accepted the Occupational Therapist's opinion that the defendant had to look for work because his farm business experienced difficulties. It was not because the plaintiff had the capacity to work as a fitter and turner, so the argument went.

[24] That the plaintiff was already declared medically unfit to work as such. Due to financial difficulties, the plaintiff elected to ignore the medical opinions and hunted employment as a fitter and turner, despite being declared medically unfit to work as such. That whilst the defendant does not have any legal provision that prohibits the plaintiff to seek employment or continue working despite having been compensated for his total loss of income until retirement age, it is so that since the plaintiff was compensated for total past and future loss of income, he is not entitled to

claim past and future loss of earnings in the second claim as same will amount to "double compensation".

[25] In sum, it was submitted for the defendant that to the extent that the injuries sustained by the plaintiff in the first accident were serious and permanent, as a result, he was declared disabled and found medically unfit to work and subsequently left employment, he suffered total loss of income, and he was compensated as such.

[26] The plaintiff therefore ignored the fact that prior to the second accident, he was disabled and declared medically unfit to work as a fitter and turner. To this extent, he had already lost his total past and future income, and the defendant had compensated him as such. The plaintiff's claim for past and future loss of earnings in this matter will therefore amount to "double compensation".

[27] The defendant referred this Court to the provisions of Section 7 of the Act, which states that the resources and facilities of the defendant shall be used exclusively to achieve, exercise and perform the object, powers and functions of the defendant, respectively. The defendant also referred this Court to ***Busuku v Road Accident Fund***[16], where it was pointed out that the defendant relies entirely on the fiscus for its funding, and it should be protected against illegitimate and fraudulent claims.[17] Reference was also made to ***Road Accident Fund v Sheriff of the High Court, Pretoria East and Others***[18] where it was stated that the defendant has the duty to protect funds and ensure that they are used efficiently.[19]

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[16] [2016] 3 All SA 498 (ECM)
[17] Paragraph 7
[18] (028726/2022) [2023] ZAGPPHC 746 (28 August 2023)
[19] Paragraph 75; see also paras 77-78

[28] In conclusion, it was submitted for the defendant that the plaintiff has failed to prove on a balance of probabilities that he has suffered past and future loss of earnings. In light thereof, the plaintiff's claim for this head of damages stands to be dismissed with costs.

***Plaintiff's*:**

[29] For the plaintiff, Mr JC Prinsloo contended that the defendant's averment in paragraph 8 of its amended plea that the injuries of the plaintiff in the first collision were serious and permanent and that same rendered the plaintiff to be unemployable as a result whereof the plaintiff suffered a total loss of earnings; remain mere allegations and cannot be accepted as evidence until such time as the defendant proves same. That it is so since no evidence was adduced by the defendant in this regard. Accordingly, these allegations cannot be accepted as the defendant failed to relieve itself of its burden of proof.

[30] That the defendant's argument is not supported by any evidence, as the defendant failed to prove that the amount of R2 266 977.52, was for a total loss of earnings suffered by the plaintiff due to the injuries in the first collision. That to the contrary, the plaintiff has clearly shown that any award for a total loss of earnings due to the first collision would have been in the region of R8 900 000.00. There is no evidence before this Court of any double compensation, illegitimate or fraudulent claim in respect of the plaintiff's claim for loss of earnings due to the second collision.

[31] The reference by the defendant to Section 7 of the Act and ***Busuku v Road Accident Fund*** (2016) 3 All SA 498 (ECM) has no application to the facts of this matter as the defendant failed to prove that the plaintiff's claim for loss of earnings due to the second collision results in an illegitimate or fraudulent claim. No such evidence was ever placed before the Court.

[32] The defendant's reliance on ***Rudman v RAF*** is misplaced. That on proper construction of the facts in ***Rudman***, the case actually confirms the plaintiff's claim for loss of earnings due to the second collision. The evidence before this Court is clear that at the time of the second collision, the plaintiff: (a) was employed as a fitter and turner; (b) derived an income from this employment; (c) the income he earned was a lot lower than the income he earned at the time of the first collision (which was expected considering the injuries he sustained in the first collision); and (d) as a result of the injuries sustained in the second collision, the plaintiff is unable to be employed.

[33] There is no evidence before this Court that the settlement in respect of the first collision was made for a total loss of earnings. There is also no evidence to sustain the defendant's defence of double compensation. The allegation that the plaintiff was compensated in the first collision for a total loss of earnings must be proved by the defendant, which the defendant failed to do. The evidence before this Court clearly shows that the settlement of loss of earnings suffered due to the first collision was for a partial loss of earnings.

[34] The plaintiff obtained an actuarial calculation dated 24 June 2021.[20] It was submitted for the plaintiff that the actuarial calculation was done on the correct evidence and principles and that same could be relied upon by this Court for the benefit of the defendant, as an updated calculation will increase the plaintiff's damages; that should recent calculations be obtained, the damages of the plaintiff will increase. In the premise, the defendant's defence should be dismissed with costs and the plaintiff compensated for his loss of earnings due to the second collision in the amount of R3 990 624.00, with costs on scale C as per the order handed up.

[20] Pp76-82, Vol 8

DETERMINATION:

[35] Whilst the plaintiff makes no mention in his original or amended particulars of claim of the first accident or any diminished earning capacity arising therefrom. This only emerges in replication. Regard being had to this, the following is of significance, with regard to the foregoing. First, it is so in our law that a replication must not only be consistent with the allegations in the particulars of claim, but may also not increase the ambit of the claim. Second, a replication must be in answer to or as a result of the allegations contained in the plea. Third, it may not contain a new cause of action. If it does, the defendant may ignore it.[21]

[36] The plaintiff's replication is not only in answer to or as a result of the allegations contained in the amended plea, it is also consistent with the allegations contained in the particulars of claim. It further does not contain any new cause of action.

[37] The nub of the dispute between the parties is therefore whether the plaintiff's claim for loss of past and future earnings in *casu* would amount to double compensation, regard being had to the fact that his first claim, settled in January 2011, was inclusive of his past and future loss of earnings. In this regard, the defendant referred this Court to ***Rudman***, without more.

[38] Whilst ***Rudman's*** claim was also about loss of income, allegedly suffered by the appellant (*Rudman*), who was involved in two accidents at the time he was examined by the relevant experts. A careful scrutiny of the facts of that case would have revealed that questions on which the court had to decide were: Firstly, whether the appellant had suffered loss of income as a result of the fact that a maintenance manager had to be employed by the

[21] ***Extel Industrial v Crown Mills*** 1999(2) SA 719(SCA)

company. Secondly, whether there was any loss of future earning capacity as a result of the appellant's permanent incapacity from earning a living as a professional hunter.

[39] If the answer to the last question was in the affirmative, the question of quantification of the loss of earning capacity would arise. According to the pleadings, he would have hunted for 150 days per year at R600 per day until the age of 65, and he was also partially incapacitated as a farmer. In this regard, there was evidence to the effect that the company, which he was the majority shareholder of, would have to employ a maintenance manager at a salary of R8 000 per month for the next 10 years to supplement this incapacity.

[40] The trial judge (whose decision was confirmed on appeal) dismissed both claims on the ground that the plaintiff failed to prove that his patrimony was diminished due to any loss of earning capacity past or future resulting from his injury, and consequently, he has failed to prove any entitlement to be compensated. This decision was reached because, according to the court a quo (Liebenberg J), *"[a]ny loss which may have occurred as a result thereof (the injuries suffered by the plaintiff) is a loss to the company and not to the plaintiff's private estate*" (as quoted by Jones AJA at 239H).

[41] The two accidents appeared to have been very serious, with the first keeping him out of his job for at least three months, while the next one kept him away for about nine months. The following can be gathered from a proper reading of ***Rudman***, which is distinguishable *vis-à-vis* the matter in *casu*. The Supreme Court of Appeal[22] upheld the Court *a quo's* decision to dismiss ***Rudman's*** claim on the ground that, although he had proved disabilities which, potentially, could give rise to a reduction in his earning capacity, ***Rudman*** failed to prove that this had resulted in patrimonial loss

[22] Hereinafter referred to as "*the SCA*"

to him. That it is so since the loss of earnings and/or earning capacity the appellant had allegedly suffered was actually a loss to the company in which he was a majority shareholder and not his private estate.

[42] The defendant's main contention that, having been paid compensation for past and future loss of earnings in settlement of his first claim, the plaintiff is not entitled to compensation as that would amount to double compensation is very tenuous. It is so simply because whether compensation payable by the defendant to the plaintiff in *casu* will amount to a double compensation essentially depends on it being established by the defendant that the first payment made to the plaintiff by the defendant was in respect of the same injuries for which the payment in *casu* is sought against the defendant.

[43] It is not so in *casu* because whilst the defendant in its plea reserved the right to lead evidence in rebuttal of the nature, degree and extent of the plaintiff's injuries, it has not done so. To the contrary, in paragraph 7.2 of the pre-trial minute, dated 24 April 2023, it is recorded that the defendant admitted the plaintiff's injuries pertaining to the second collision and the seriousness thereof. Significantly, as alluded above, it was only contended for the defendant that prior to the second accident, the plaintiff had sustained serious and permanent fracture of the hip; fracture dislocation of the shoulder and knee injury. The defendant has therefore failed to establish that the first payment made to the plaintiff by the defendant was in respect of the same injuries for which the payment in *casu* is sought against the defendant.

[44] A mere allegation of settlement of loss of earnings up to the retirement on the part of the defendant, without more, is also insufficient to sustain the defendant's double payment defence. The mere statement of an amount paid towards loss of earnings arising from the first collision, without more, also does not take its case any further. The defendant has therefore failed

to establish an essential element pertaining to the principle of "double compensation", i.e. that the initial payment was in respect of the same injuries. Compounding this challenge is the defendant's failure to evince the plaintiff's lack of residual earning capacity, post 2007 collision.

[45] Another aspect that routs the defendant's double compensation argument is the fact that the defendant did not adduce any jot of evidence to prove that the 2011 settlement was entered into between the parties on the basis that the injuries sustained by the plaintiff were serious and permanent in nature; or that the plaintiff would not be able to continue working.

[46] The defendant's reliance on Section 7 of the Act; ***Busuku*** and ***Sheriff of the High Court,*** also does not enrich the discussion. Reliance on the foregoing clearly evinces that the defendant has completely misconstrued the true basis of the plaintiff's claim and the effect of the evidence relevant thereto.

[47] It is trite that in claims for unliquidated damages, the plaintiff is expected to lead evidence to prove its loss. This is the norm irrespective of whether the claim is defended or not. Regardless of the pleadings or concessions, the Plaintiff has a duty to prove damages by leading evidence. Conterminously, it is also so that to succeed in the claim for loss of income or earning capacity, the plaintiff has to establish on a balance of probabilities that as a result of the accident, he has lost future earning capacity – ***Rudman v RAF*** [23]

[48] It was submitted for the plaintiff that the amount pertaining to loss of past and future earnings with regard to the first claim proves that the said claim was settled on the basis that the plaintiff still had a residual earning

[23] 2003 (SA) 234 (SCA)

capacity. That it is so, regard being had to the actuarial report attached to the plaintiff's replication as annexure A. Whilst it is so that actuarial calculations only provide a guideline to a court and does not bind it,[24] the following has been well said about the role of actuaries by Fisher J in ***MS v Road Accident Fund***:[25]

"Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, inter alia, from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff's position using various assumptions and scenarios which should properly be gleaned from proven facts.

The general approach is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions as to his state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff in both states. The loss would then be calculated as the difference in earnings derived between the pre- accident (or pre-morbid state as it is often called) and post-accident or post morbid state.

In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and countless other factors unconnected with the plaintiff's injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of "contingency" allowances. Given the purported mathematical and percentage-based inquiry of the actuarial assessment, these contingencies are expressed in percentages which are brought to bear on the mathematical reflections which have been derived from the assumptions used. In essence the platform for assessment is no more than one a technique which is offered to the court in a bid to allow it to exercise its discretion. This mechanism should not be understood as being prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition, and general right-thinking."[26]

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[24] ***Lambrakis v Santam*** 2002(3) SA 710(SCA)

[25] [2019] 3 All SA 626 (GJ) para 39-41

[26] Emphasis supplied

[49] In claiming compensation for the loss of past and future earnings, the plaintiff in effect claims to be compensated for the diminution of his residual earning capacity which, but for the second collision, could have been commercially exploited in his field of employment. The fact that the defendant settled the plaintiff's first claim for past and future earnings from a different cause of action did not, in my opinion, without more, result in the extinction of his residual earning capacity.

[50] This Court finds that regard being had to the facts and circumstances of this case; the plaintiff has suffered serious and permanent disabilities as a result of the second collision. These disabilities are of a kind which resulted in him suffering pecuniary damages in respect of past and future loss of earnings.

[51] It is so that in our law, if it is certain that pecuniary damage has been suffered by the plaintiff, this Court is bound to award damages. It is, however, incumbent for the plaintiff to be awarded such damages to lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The plaintiff has obtained an actuarial calculation dated 24 June 2021. It has been submitted for the plaintiff that this report could be used because an old actuarial calculation normally benefits the defendant, as opposed to a current one. The plaintiff has handed up a draft order to this effect. Nothing has been put up by the defendant to second guess the foregoing.

[52] This Court finds that the actuarial calculation dated 24 June 2021, submitted by the plaintiff, is adequate to enable this Court to quantify the plaintiff's damages and to make an appropriate award in his favour. This Court is therefore inclined to grant an order in concert with what is foreshadowed in the draft order.

[53] The amounts and legal questions involved are substantial and complex. The appointment of a senior-junior counsel on behalf of the plaintiff was therefore meritorious. Costs will be awarded commensurately.

ORDER:

[54] In the premise, the following order issues:

1. **THE DEFENDANT SHALL PAY TO THE PLAINTIFF AN AMOUNT OF R3 990 624.00 (THREE MILLION NINE HUNDRED AND NINETY THOUSAND, SIX HUNDRED AND TWENTY-FOUR RAND) IN RESPECT OF THE PLAINTIFF'S LOSS OF PAST AND FUTURE EARNINGS.**

2. **PAYMENT OF THE SAID AMOUNT SHALL BE MADE INTO THE ACCOUNT OF THE PLAINTIFF'S ATTORNEY OF RECORD BY MEANS OF DIRECT ELECTRONIC FUNDS TRANSFER INTO THE SAID ATTORNEY'S ACCOUNT.**

3. **THE DEFENDANT SHALL PAY THE PLAINTIFF'S TAXED AND/OR AGREED PARTY AND PARTY COSTS ON SCALE C, WHICH SHALL INCLUDE BUT NOT LIMITED TO:**

    3.1. **THE COSTS OF TRIAL FOR 05 AND 06 AUGUST 2024.**

    3.2. **THE COSTS OF OBTAINING ALL MEDICO-LEGAL REPORTS; ACTUARIAL REPORTS FROM THE PLAINTIFF'S EXPERTS FURNISHED TO THE DEFENDANT, INCLUDING THE RAF1 AND 4 FORMS OF ALL THE EXPERT REPORTS DELIVERED ON BEHALF OF THE PLAINTIFF IN THESE PROCEEDINGS.**

    3.3. **THE COSTS OF PREPARATION AND RESERVATION FEES AND COSTS TO ATTEND THE TRIAL OF THE FOLLOWING EXPERTS, WHO ATTENDED THE TRIAL; TO WIT: (A)**

DR BARLIN, THE ORTHOPAEDIC SURGEON; AND (B) MS ROSSOUW, THE INDUSTRIAL PSYCHOLOGIST.

4. THE FOLLOWING SHALL APPLY WITH REGARDS TO THE DETERMINATION OF THE AFOREMENTIONED TAXATION OF COSTS:

4.1. THE PLAINTIFF SHALL SERVE THE NOTICE OF TAXATION ON THE DEFENDANT'S ATTORNEY OF RECORD; AND

4.2. THE PLAINTIFF SHALL ALLOW THE DEFENDANT 14 (FOURTEEN) COURT DAYS TO MAKE PAYMENT OF THE TAXED COSTS FROM THE DATE OF TAXATION; AND

5. THE PLAINTIFF SHALL BE ENTITLED TO RECOVER INTEREST AT THE RATE OF 7% (SEVEN PERCENT), FROM THE EXPIRATION OF THE 14 (FOURTEEN) COURT DAYS AFTER TAXATION.

[redacted]

NXUMALO J
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION,
KIMBERLEY

For the Plaintiff:	**ADV JC PRINSLOO** CN Sweetnam Attorneys, Johannesburg c/o PGMO Attorneys, Kimberley
For the Defendant:	**MR MA MOGANO** Office of the State Attorney