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**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GQEBERHA)**

**NOT REPORTABLE**

Case no: 2734/2020

In the matter between:

**JONATHAN PETER KREBS**

**Plaintiff**

and

**ROAD ACCIDENT FUND**

**Defendant**

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**JUDGMENT**

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**Govindjee J**

**Background**

[1] The plaintiff was involved in a motor vehicle collision on 30 November 2017, resulting in the present litigation. Following a court order dated 2 February 2022, the issue relating to future loss of earnings / earning capacity was separated from the remaining issues in terms of Uniform Rule 33(4). Other than the question of costs, this is the only issue requiring determination.<sup>1</sup>

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<sup>1</sup> The defendant was ordered to pay the plaintiff the sum of R761 751 in full and final settlement of plaintiff's claim for general damages and past loss of income.

[2] The plaintiff has a grade 10 education and has completed the N1 and N2 qualifications in Electrical Theory. He is computer literate and holds a driver's licence. At the time of the accident, the plaintiff was 35 years of age and employed as a Branch Manager at Elf Rentals, an 'electronics security solution' company ('the company'). He returned to work at the end of February 2018 and was subsequently promoted to the positions of Area Manager and General Manager.

[3] It is common cause that the plaintiff suffered a fracture of his L1 vertebral body, together with other fractures, an abrasion and bruising, because of the collision. He underwent, inter alia, a laminectomy, fusion and insertion of transpedicular screws and was discharged with a lumbar brace. It is accepted that he presents with restricted lumbar spinal movements in all directions, especially when forward bending. He also experiences back pain which radiates down to the back of his thighs on a daily basis and which is aggravated by prolonged standing and prolonged sitting. He has also suffered a persistent Adjustment Disorder with anxiety and intermittently depressed mood, presents with a persistent Somatic Symptom Disorder with predominant pain and with features of Post-traumatic Stress Disorder.

[4] Various medical records were admitted into evidence by agreement, without the need for formal proof.<sup>2</sup> It was also agreed that the plaintiff's actuary would place certificates of value before the court without the need for testimony. The calculations forming the basis of such certificates were accepted as being actuarially sound.

[5] The plaintiff earned R20 300 per month as well as commission at the time of the accident. The crux of the dispute is whether he will be able to continue in his present role successfully given the injuries caused by the collision and their *sequelae* and, if unable to do so, whether he has any residual earning capacity. On the plaintiff's version, he is a vulnerable employee and, should he lose his current employment, he

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<sup>2</sup> These documents include the RAF1 medical report by Dr J Leeching (28 February 2018); the hospital records from Life St George's Hospital (2017); Gardmed Ambulance report (30 November 2017); clinical records compiled by neurosurgeon, Dr FJ van Aarde (2017); clinical records of orthopaedic surgeon, Dr HJ de Jongh (2018); clinical record of physiotherapist, H Elkington (2018); radiology report by Dr D Meintjies (undated); radiology report of Dr E Rabe (undated) and radiology report by Dr H Vawda (undated).

will be unlikely to secure similar work that will provide him with the necessary accommodation, and will probably remain unemployed. The plaintiff pleads further that he is unlikely to continue working until retirement age, given his physical compromise, and that he is likely to suffer a truncation in his career.<sup>3</sup>

[6] The industrial psychologists reached agreement regarding much of the plaintiff's pre-morbid career path and earnings, in particular that he would have continued to function as general manager until the end of 2028, thereafter being promoted to managing director until the age of retirement (in 2047). It was further agreed that:

'The claimant will have significant difficulty in securing similar employment that will provide him with the necessary accommodation. When considering the previous positions he held, these were all more physical in nature and not suited to his current condition. Further, given his level of education, specific skills and experience, it is improbable that the claimant will be in a position to secure accommodative sedentary employment, accommodating the necessary restrictions to his sitting endurance. When taken with his persistent psychological difficulties which will significantly impact on his ability to secure or sustain employment, the claimant will in all probability remain unemployed once his current employment is terminated.'

[7] The defendant pleaded no knowledge to the plaintiff's claim. An additional pre-trial minute reflects that the defendant does not admit the pre-morbid career path and earnings as agreed to by the industrial psychologists. It also does not admit various aspects of the claimed post-morbid career path and earnings, as will become evident.

## **The evidence**

[8] Mr Ian Meyer ('Meyer'), a registered clinical psychologist specialising in various areas of psychology, testified about various reports he had prepared following his interviews and assessments of the plaintiff.<sup>4</sup> He had spent approximately ten hours assessing the plaintiff in total. The plaintiff's situation had not improved from their first

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<sup>3</sup> The particulars of claim add that the plaintiff's future post-morbid earnings will, at best, be similar to his current earnings of around R50 000 per month, plus commission and a 13<sup>th</sup> cheque.

<sup>4</sup> These assessments were conducted on 9 January 2020 and 7 May 2021. A 'refresher' consultation during the afternoon of 8 February 2023 did not result in a report given distress and pain experienced by the plaintiff at that time. Meyer also consulted with the plaintiff's wife on all occasions, and had regard to the various medico-legal reports available at the time.

consultation during January 2020 and his mental state appeared to have slightly deteriorated. His initial report referenced physical deficits, notably insomnia and pain, and included notes about the plaintiff's alcohol consumption, cognitive and socioemotional deficits. In particular, Meyer noted the relentless pain experienced by the plaintiff, albeit at fluctuating levels of intensity, challenges with the plaintiff's concentration span and productivity as well as the plaintiff's irritable and angry mood.

[9] Meyer concluded as follows:

'Nevertheless, despite a laminectomy, rhizotomy and facet block, the plaintiff continues to experience chronic, intrusive and limiting pain that has had a significant and pervasive effect on his functional ability that affects all aspects of his life. Based on his orthopaedic prognosis, it is probable that the plaintiff will continue to experience significant, persistent and intrusive pain and functional limitation with anticipated deterioration with normal ageing. Briefly stated, the plaintiff is a case of failed orthopaedic rehabilitation.

... since his MVA [he] has been promoted to a position of general manager, which has pushed him to the subjective limits of his coping skills, owing to a combination of pain, functional limitations, anxiety and altered mood. Furthermore, owing to the synergistic interaction of his pain and loss of function, the plaintiff is no longer able to perform certain jobs that require physical labour, which has limited his ability to perform previous aspects of his job description...

[10] Meyer initially opined that the plaintiff presented with an Adjustment Disorder with mixed anxiety and intermittently depressed mood with features of PTSD, in addition to a persistent Somatic Symptom Disorder with predominant pain:

'In the examiner's opinion, it would appear that the plaintiff's pain has become severe and intractable, albeit that there are fluctuations in intensity. Furthermore what is persistently distressing to the plaintiff is that he is aware that his pain will probably continue to remain a chronic, lifelong problem with probable intensification with normal ageing and deterioration. In the examiner's opinion, the plaintiff should be referred to a physician specialising in pain management. A combination of pain, loss of function and the inability to return to his full premorbid productivity, have predisposed the plaintiff to developing a Mood Disorder, considering the positive epidemiological correlation between chronic pain and depression...the synergistic interaction between the plaintiff's orthopaedic injuries and comorbid mental state, combine to limit his ability to function...the pleasure and meaning associated with the performance of his job has virtually disappeared.'

[11] When the plaintiff was reassessed by Meyer during May 2021, Meyer noted a deteriorating condition based on the plaintiff's intensification of pain and increase in functional disability, concluding as follows:

'...the synergistic interaction of various factors, inter alia, consisting of cognitive socioemotional and physical deficits, has compromised the plaintiff's long-term employability within his current job and, ipso facto general employability in the open market...the plaintiff's mental state has deteriorated. He [now] presents with a Persistent Depressive Disorder and a comorbid Somatic Symptom Disorder with persistent pain. He also presents with features of PTSD...[this] will probably result in a truncation of his working life, and [he] is considered a vulnerable employee.'

[12] Work for the plaintiff, according to Meyer, had become a grind, which would affect his motivation to remain in his job. The implications of the Persistent Depressive Disorder were that the plaintiff's mood would be depressed on most days, with accompanying symptoms including insomnia and fatigue. To make matters worse, the prescribed anti-depressant had resulted in side-effects such as excessive drowsiness, so that the plaintiff had not adjusted to the medication. During cross-examination, the witness indicated that even sedentary work, with opportunities to stand and stretch during working hours, would not be a panacea given the chronic back pain suffered by the plaintiff and considering that effective pain management had proven elusive.

[13] Mrs Annemarie van Zyl ('Van Zyl'), an occupational therapist, testified on the contents of a report she had prepared during 2020, with specific reference to the impact of the plaintiff's accident on his work and his ability to perform work from a functional perspective. She also explained the contents of a joint minute she had signed together with Ms Nandipa Maka ('Maka'), dated 24 January 2022. Following independent assessments, the therapists agreed as follows:

- The plaintiff's work as general manager was classified as having light physical demands (rather than being classified as sedentary) due to the frequent travel obligations and the amount of walking and standing required during site visits.
- The plaintiff demonstrated the residual physical capacity to manage a complete sedentary job with accommodation, given his limited sitting endurance and

need to change his posture between sitting and standing or walking in order to manage his pain.

- The plaintiff struggled in his current position with postures such as sitting, stooping and crouching, as well as with standing and walking due to his injuries.
- The plaintiff experienced cognitive difficulties which could potentially affect his productivity and accuracy at work, and was not best suited to his current position.
- His pain would worsen, which could affect his concentration, memory, productivity and accuracy, and he would find it increasingly difficult to perform even sedentary duties optimally.
- The plaintiff was a vulnerable employee who presented with significant psycho-emotional difficulties. It was unlikely that he would remain employed for much longer due to the consequences of his injuries.<sup>5</sup>

[14] Van Zyl testified that the therapists had subsequently been furnished with the orthopaedic report of Dr Aslam. They had agreed that there was no need to revisit their joint minute.<sup>6</sup> Despite that agreement, Maka, who was not called to testify, had subsequently filed a further report deviating from her earlier position and holding that the plaintiff was 'eligible for semi-skilled work in the open labour market'. Van Zyl steadfastly maintained the position she had indicated in a supplementary report dated 12 March 2021, and as partly reflected in the joint minute:

'He is not best suited to his present job and alternative placement is highly unlikely due to his limited level of education and experience. It seems highly unlikely that Mr Krebs will remain employed for much longer.'

[15] Van Zyl added that she had reservations about the extent to which the plaintiff's employer would be willing to continue to accommodate him in future, and noted her

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<sup>5</sup> The therapists agreed to defer to the Clinical Psychologists in respect of the plaintiff's psycho-emotional difficulties, and to the Industrial Psychologist regarding his work potential and loss of earnings.

<sup>6</sup> The additional pre-trial minute filed on 10 January 2023 reflects that Van Zyl had had sight of the joint minute prepared by the orthopaedic surgeons (dated 30 August 2022) and did not intend amending the therapists' joint minute. It was agreed that the defendant would revert as to whether Maka had had sight of the orthopaedic surgeons' joint minute and whether she wished to add anything further to the joint minute she had signed with Van Zyl.

academic and professional experience suggested that the disability legislation, as she termed it, was typically not implemented.

[16] Dr Brian Perry and Dr Mahmood Aslam, orthopaedic surgeons, had both examined the plaintiff and furnished their expert reports. They signed a joint minute on 30 August 2022. That minute reflects their agreement that, from a functional perspective, the plaintiff is ill-suited to perform any physical demanding work. While the surgeons agree that most patients can return to performing sedentary and light duties (managerial / administrative / supervisory) after thoraco-lumbar spinal fusion for a period of time, they disagreed regarding the plaintiff's future employability. In Dr Perry's opinion, the plaintiff was ill-suited to perform his current duties / occupation, even though it was considered to be sedentary and having only light physical demands. In his view, the plaintiff was suited to perform sedentary work as long as adaptations and ergonomic adjustments could be made, which were not present in his current work environment.

[17] In Dr Aslam's opinion, the plaintiff would probably be able to continue his current job as a general manager (or a similar type of managerial job / supervisory job) in future until the age of between 58-60 years. Both experts testified at the trial. Dr Perry highlighted that the plaintiff would probably experience progressively more pain in his thoraco-lumbar spine in the future. When he examined the plaintiff, he noted signs of Adjacent Segment Disease and Adjacent Segment Degeneration and opined that 'the degeneration is likely to progress and that his pain and discomfort is unlikely to improve'. He also testified as to his observations of the difficulties experienced by the plaintiff at the time of his examination. The plaintiff operated with discomfort and lacked easy movement. Dr Perry explained the way in which degeneration would occur in the areas around the L1 fracture point in the plaintiff's back, and the lack of a clear correlation between degeneration, pain and disability. Degeneration would typically not have been expected as soon as it occurred after the accident. The likely outcome would be the progressive increase of pain in the thoraco-lumbar spine in the future, with intensified symptoms and a high probability of further spinal surgery in the future. Surgery would not, however, remove the pain completely and the likelihood of improvement after surgery was not good. This would contribute to a shortening of the period that the plaintiff might be expected to continue working.

[18] Dr Perry was influenced by the fact that the plaintiff was still experiencing significant pain after a relatively lengthy period of time post-surgery. Most people would, he suggested, not experience such pain 18 months after the procedures the plaintiff had undergone. He reiterated the conclusion expressed in his initial report:

‘In summary, the claimant sustained a severe injury which has left him with permanent chronic pain and suffering, a permanent loss of amenities of life, and some permanent disablement. The level or degree of change is considered intrusive. On the balance of probabilities, the injuries sustained, and ongoing symptoms are consistent with the mechanism of injury.’

[19] These views were expanded by way of a supplementary medico-legal report dated 9 March 2021. Without examining the plaintiff again, Dr Perry expanded upon his views as to the likely truncation of employability and future loss of earning capacity, in the following terms:

‘The plaintiff is presently struggling to perform even his sedentary duties at work which he reports involves six out of eight hours of sitting / standing. As he does not have control as to the times that he is able to sit and stand, he is struggling to cope with his employment. I believe that the plaintiff is not suited to his present occupation, as explained to me.’

There are no studies that I am aware of dealing with persons in the plaintiff’s age group with similar injuries indicating the progression rate of degeneration and I am thus unable to predict a truncation period with any medical certainty. I am nevertheless of the view that from an orthopaedic perspective, the plaintiff’s condition will continue to degenerate and that his functional restrictions are considered to be permanent in nature.

In my opinion, given client’s present physical condition and the nature and requirements of his employment, I would be surprised if he was able to continue in his present employment for much longer.’

[20] Dr Perry conceded that it may have been appropriate for him to have re-examined the plaintiff prior to preparing this supplementary report. He did, however, do so prior to preparing a second supplementary report during June 2022. The plaintiff’s condition had not deteriorated in the period of 27 months since the previous examination. Dr Perry noted the positive consequences of Covid-19 on the plaintiff’s ability to cope with work, and the subsequent return to experiencing significant back



pain symptoms, based on his consultation with the plaintiff. His conclusion was expressed as follows:

'From a purely functional perspective, the plaintiff is suited to perform duties of a sedentary nature or light work at most. His current job, as explained to me by the plaintiff, consists of sedentary duties and light duties (when travelling).

The plaintiff has difficulties in performing these duties and when performing these duties, his symptoms are exacerbated causing a sequence of reciprocal cause and effect.

Therefore, I am of the opinion that the plaintiff is not suited to perform his present occupation but rather to perform a (less stressful) sedentary occupation that will allow him more freedom to change posture and to rest when needed (similar to what he performed during Covid-lockdown period).'

[21] The additional pre-trial minute reflects that the defendant does not admit, in the event of Dr Perry's opinion being accepted, that the employment with the company will not continue beyond the immediate short-term future; that the plaintiff will have significant difficulty in securing similar employment; that it is improbable that the plaintiff will be in a position to secure accommodated sedentary employment, accommodating necessary restrictions to his sitting endurance; and that the plaintiff will in all probability remain unemployed once his current employment is terminated. During cross-examination, the witness indicated that he remained surprised that the plaintiff had managed to remain in employment given his condition. However, he confirmed that the plaintiff would be able to continue working if the employer accommodated him even more. That would, however, imply that the plaintiff's travel should cease and the witness was concerned that that may not be practically possible. 'Complete' accommodation, as Dr Perry put it, would enable the plaintiff to work painlessly, but that was not the present scenario and the plaintiff continued to battle in the workplace.

[22] The consequences of those difficulties, along with the realities of the plaintiff's lived experience, was articulated by his wife in testimony. Mrs Krebs testified openly about the plaintiff's constant pain and inability to assist in the home and the impact of his condition on his mood, which adversely affected his family life, particularly his relationship with his children and wife. The plaintiff would immediately lie down to

relieve his pain on return from the workplace, routinely consuming alcohol to ease his condition.

[23] Work-related travel also presented with various difficulties, which the plaintiff again eased by resorting to alcohol. The working week affected the plaintiff's ability to relax over the weekend. The plaintiff's concentration and memory had also been negatively affected. As Dr Perry had reported following his consultations, the plaintiff continued to work only due to the need to earn an income. He had tried various medication to reduce his pain without success.

[24] Those efforts were expressed in convincing detail by the plaintiff when he testified. The medication he had taken after the accident had left him dazed. He had been taking prescription medication when he returned to work, but side-effects included an aggravated stomach ulcer. Swimming was not possible due to the consequent pain and back spasms he had experienced. The plaintiff had sought a range of advice, also from family members who were medical practitioners, and tried various alternatives, including combinations of alcohol and cannabis, without success. Alcohol had proved to be the only tonic to numb his pain.

[25] Consequently, the plaintiff had a negative outlook towards his future rehabilitation. He had taken anti-depressant- and sleep-medication, without improvement. The plaintiff was tired at work and would eagerly await the end of the working day so that he could lie down at home.

[26] Yet he remained of the view that work was good for him and enabled him to provide for his family. He adopted a hands-on approach and insisted on being part of site visits to do a proper job. This could be physically demanding, involving walking around the perimeter of a site. The challenge was accentuated when the terrain was undulating. The plaintiff explained the importance of personal attendance at site meetings to build rapport with his clients. The company had accommodated him in various ways, including an ergonomic chair, and permitted him to lie down on the boardroom table in Gqeberha when he needed to do so. His colleagues were also sympathetic to his predicament. This manner of operating, including regular walk-arounds and breaks, affected his concentration and performance. His pain would

accentuate towards the end of the working day. He found working to be emotionally strenuous and felt drained. Rest, and alcohol, would be his comfort when he returned home. Being unable to perform chores or fully enjoy a normal home life negatively affected his sense of worth. Nevertheless, he had gritted his teeth and persevered to retain his salary.

[27] The plaintiff also explained how his situation and mindset deteriorated as the week went on. He enjoyed aspects of his work and was passionate about the industry he served, but his ailments made it difficult to continue. For various reasons, there was a greater need for the company to operate in Johannesburg. The plaintiff had sensed an opportunity after his accident and taken it for greater financial gain for his family. The downside of this had been increased travel to Johannesburg. While this was required approximately once per week pre-Covid, travel was now restricted to once or twice a month, for four to five days at a time. But, according to the plaintiff, the negative consequences of the reduced travel included a disconnect with clients and loss of feel for the work to be undertaken. Photographs, for example, would not provide the complete picture in determining the appropriate security installation. The resultant errors would have a detrimental impact on the business.

[28] The challenges of operating in Johannesburg were described at length by the plaintiff. It may be accepted that, for the plaintiff, the additional physical and mental demands of working in that city, compounded by logistical challenges, the average size of the client's premises and the like, are more onerous than working in Gqeberha. In consequence, the plaintiff was forced to rely on extra medication to cope. The situation was complicated by the added pressures being placed on the plaintiff by the company Chief Executive Officer ('CEO'), due to declining sales and the need for the plaintiff to justify his salary. The evidence led was that it would not be possible for the plaintiff to operate exclusively from Gqeberha.

[29] During cross-examination, the plaintiff accepted that the CEO was fully aware of his struggles and wanted to work around his limitations, also being impressed by the plaintiff's knowledge and experience. He conceded that site visits were not required on each of the days he was in Johannesburg.

[30] Mr David Williams, an employment consultant, testified that the plaintiff's prospects for successful employment, outside of his current work, had been significantly curtailed due to the accident. He would be at a distinct disadvantage when competing for employment on the open labour market and the possibilities of obtaining alternative employment were bleak. The opinion was premised on the likelihood that prospective employers would prefer able-bodied applicants for work, compounded by the current economic climate and limited job opportunities post-Covid in the Eastern Cape. In addition, Mr Williams noted that transformation and employment equity policies, which afforded employment preference to persons from previously disadvantaged communities, would further impact on the plaintiff's prospects for new work. In Mr Williams' opinion, the plaintiff benefited from sympathetic employment and a different employer would probably not accommodate the workplace challenges he experienced.

[31] Dr Michelle Nobre, an industrial psychologist, testified with reference to a joint minute she had signed with Mr T Kalanko on 27 January 2022. The experts agreed that, but for the accident, the plaintiff would likely have been promoted to managing director with effect from 1 January 2029 until he retired in 2047, with the commensurate earnings being applicable. That information was obtained from the company CEO. Their joint conclusion was summarised as follows:

'Ongoing employment at ELF Rentals beyond the immediate short-term seems improbable:

TK: Scenario 2: Claimant has remained employed since the accident and has been promoted in his injured state. As long as he remains an asset to the business and is accommodated, he will rely on the empathy of his employer who accommodates his shortcomings. His professional growth may be limited. He is likely to continue earning on par with his current earnings.

The claimant will have significant difficulty in securing similar employment that will provide him with the necessary accommodation. When considering the previous positions he held, these were all more physical in nature and not suited to his current condition. Further, given his level of education, specific skills and experience, it is improbable that the claimant will be in a position to secure accommodative sedentary employment, accommodating the necessary restrictions to his sitting endurance. When taken with his persistent psychological difficulties

which will significantly impact on his ability to secure or sustain employment, the claimant will in all probability remain unemployed once his current employment is terminated.'

[32] A revised joint minute dated 12 September 2022, prepared after receipt of the joint minute between Drs Perry and Aslam, confirmed this position:

'Dr Perry as well as both occupational therapists are of the opinion that the plaintiff is not suited to his current occupation, and it is unlikely that he will remain employed for much longer.

**This being the case, it is our opinion that** ongoing employment at ELF Rentals beyond the immediate short-term seems improbable...the claimant will in all probability remain unemployed once his current employment is terminated.

Dr Aslam is of the opinion that the plaintiff will probably be able to continue his current job as a general manager (or similar managerial / supervisory job) up till the age of about 58 – 60 years. It is noted that the claimant has remained employed since the accident and has been promoted in his injured state. **In the event of Dr Aslam's opinion being accepted, it is our opinion that** as long as he remains an asset to the business and is accommodated, he will rely on the empathy of his employer who accommodates his shortcomings. His professional growth may be limited. He is likely to continue earning on par with his current earnings until the age of about 58 – 60 years. He does however remain a vulnerable employee considering his physical compromise and psychological difficulties. As such higher-than-normal post-morbid contingencies are suggested...'

[33] Dr Nobre highlighted, during her testimony, that the shared opinion was that the plaintiff's employment at the company beyond the immediate short-term seemed improbable. The chances of alternative employment were negatively impacted by the combination of continued physical and psychological challenges that the plaintiff would experience.

[34] Dr Nobre clarified that the 'second scenario' reflected in the original joint minute would be possible provided that the plaintiff could remain an asset and was fully accommodated. The plaintiff would, even if that scenario was accepted, lose income because of the likely loss of earnings by commission, which explained his motivation to continue working. She added, however, that it was unlikely that the requisite level of accommodation would remain sustainable for the duration of the plaintiff's career, given his age and due to the prognosis of the medical experts who had examined him.

In addition, given the importance of travel to the job, she opined that it may be unreasonable and impractical to expect the employer to extend accommodation to the extent that the plaintiff be allowed to operate exclusively from Gqeberha. The chances of the plaintiff securing alternative work were compromised by his low level of education, coupled with the impact of his injuries.

[35] Dr Aslam was the only witness called by the defendant. He emphasised that the plaintiff was still employed and acknowledged the difficulties associated with predicting the likely future course of events. He referred to anecdotal evidence of people who had undergone spinal fusion procedures and who had continued performing supervisory or managerial functions until the age of 65 or beyond. Dr Aslam emphasised the fact that the plaintiff had been promoted. He expressed the strong view that early retirement would be unjustified.

[36] *Mr Frost* emphasised, during cross-examination, that Dr Aslam had not been present in court to hear the evidence of the plaintiff, his wife and expert witnesses. He had also not had sight of either of Meyer's reports when he prepared his own report. While he had seen the reports of the industrial psychologists and occupational therapists, he was unable to comment whether Meyer's reports might have influenced his view. He had also not seen the psycho-emotional reference, linked to the plaintiff's ability to remain in employment, in the joint report produced by the occupational therapists and conceded that this might have altered his thinking. He emphasised that some of the post-surgery leisure activities attempted by the plaintiff, such as mountain biking, suggested that the injuries were not very serious. Dr Aslam maintained the view that the plaintiff would, given his experience, be employed elsewhere if necessary, or be able to start his own business. He took issue with various aspects of the reports submitted by the industrial psychologists and occupational therapists.

### **The appropriate approach**

[37] Any claim for future loss of earning capacity typically requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter, the loss being the difference between the monetary

value of the earning capacity immediately prior to the injury and immediately thereafter.<sup>7</sup> The enquiry is incapable of mathematical precision, involving some speculation and estimation regarding the present value of expected future loss.<sup>8</sup> The joint minutes reflect a large measure of agreement among the various experts who examined the plaintiff. The most important differences were those between the orthopaedic surgeons.

[38] The SCA has confirmed that where experts have met and filed joint minutes, the contents of the minutes will be understood as limiting the issues on which evidence is required.<sup>9</sup> The following approach of Sutherland J in *Thomas v BD Sarens (Pty) Ltd*<sup>10</sup> has largely been endorsed:<sup>11</sup>

- a) Where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts.
- b) Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement unless it does so clearly and, at the very latest, at the outset of the trial.
- c) In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference.
- d) Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare.

[39] In *Bee*, the SCA added that trial courts would be entitled, if not bound, to accept matters agreed by the experts.<sup>12</sup> In cases where expert testimony is contested, a court

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<sup>7</sup> *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) ('Kerridge') para 40.

<sup>8</sup> *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 113F-114A.

<sup>9</sup> *Bee v The Road Accident Fund* [2018] ZASCA 52 ('Bee') para 66.

<sup>10</sup> *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 paras 9-13.

<sup>11</sup> See, for example, *Bee* op cit fn 9 para 64.

<sup>12</sup> The position may be different if a trial court is for any reason dissatisfied with the agreement and alerted the parties to the need to adduce evidence on the agreed material: *Bee* op cit fn 9 para 73. Wallis JA, in a separate concurring judgment in *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) ('HAL') para 229, explains the position as follows: 'In accordance with *Bee*, if they agree on issues of fact and the appropriate approach to technical analysis, the litigants are bound by those

must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning.<sup>13</sup> Courts are not permitted to simply accept the assumptions and figures provided by expert witnesses in personal injury matters without proper evaluation.<sup>14</sup> In a field where medical certainty is virtually impossible, a court must determine whether and to what extent the opinions of experts are founded on logical reasoning, in that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.<sup>15</sup>

[40] These sentiments have usefully been expanded upon by a full bench of this Division in *JA obo DMA v The Member of the Executive Council for Health, Eastern Cape*:<sup>16</sup>

'[12] ...a conflict in the expert opinion may lie in the analysis of the established facts and the inferences drawn therefrom by opposing expert witnesses. A proper evaluation of the evidence in this context focuses primarily on "the process of reasoning which led to the conclusion, including the premise from which the reasoning proceeds..." ...This requires an assessment of the rationality and internal consistency of the evidence of each of the expert witnesses...The source for the evaluation of this evidence for its cogency and reliability are (i) the reasons that have been provided by the expert for the position adopted by him / her; (ii) whether that reasoning has a logical basis when measured against the established facts; and (iii) the probabilities raised on the facts of the matter. It means that the opinion must be logical in its own context, that is, it must accord with, and be consistent with all the established facts, and must not postulate facts which have not been proved...

[14] Other considerations relevant in this context are (i) the qualifications and experience of the expert witnesses with regard to the issue he or she is asked to express an opinion on; (ii) support by authoritative, peer-reviewed literature; (iii) the measure of equivocality with which the opinion is expressed; (iv) the quality of the investigation done by the expert; (v) and the presence or absence of impartiality or a lack of objectivity. What is ultimately required is a

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agreements ... If the experts have reached agreement on a common opinion on a matter within their joint expertise, that is merely part of the total body of evidence. The court must still determine whether to accept the joint opinion.'

<sup>13</sup> *Bee op cit* fn 9 para 73.

<sup>14</sup> *Kerridge op cit* fn 7 para 50.

<sup>15</sup> See *HAL op cit* fn 12 para 53. Also see *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA); [2002] 1 All SA 384 para 36.

<sup>16</sup> *JA obo DMA v The Member of the Executive Council for Health, Eastern Cape* [2022] 2 All SA 112 (ECB); 2022 (3) SA 475 (ECB) ('*JA obo DMA*') para 12 and following.



critical evaluation of the reasoning on which the opinion is based, rather than considerations of credibility.’ (original emphasis omitted).

[41] A court must determine the probative value of expert evidence placed before it and make its own finding regarding the issues raised. This requires consideration of the nature of the conflict in the opinion, and the context provided by all the evidence and the issues the court is asked to determine.<sup>17</sup> A court’s preference for the view of one expert over another, in cases where there is a clash of opinions, must be justified following careful and critical examination.<sup>18</sup> It is not the task of the court to develop its own theory or thesis and to introduce on its own accord evidence that is otherwise founded on special knowledge and skill. The court’s function is restricted to deciding a matter on the evidence placed before it by the parties, and to choose between conflicting expert evidence, or accept or reject the proffered expert evidence.<sup>19</sup>

[42] It is the duty of the court to make the final decision on the evaluation of expert opinion. Expert evidence must be weighed by assessing where the balance of probabilities lies on the totality of the evidence. The SCA has recently had occasion to remind courts to bear in mind that isolated statements made by experts should not be too readily accepted when dealing with a field where medical certainty is virtually impossible.<sup>20</sup>

## Analysis

[43] The joint minute of the occupational therapists confirmed the significant physical, cognitive and psycho-emotional difficulties experienced by the plaintiff which made him a vulnerable employee. They advanced the opinion that he was not best suited to his current position and would find it increasingly difficult to perform even sedentary duties optimally. For this reason, the experts concluded that it was unlikely that he would remain employed for much longer due to the consequences of his injuries. Maka’s altered opinion remained untested and, Maka not being called to

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<sup>17</sup> *JA obo DMA* ibid para 17.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *MF v Road Accident Fund* 2023 (1) SA 52 (SCA) para 35.

testify, the defendant was not allowed to simply depart from what the occupational therapists had agreed to in their joint minute.<sup>21</sup> Van Zyl amplified her views convincingly with reference to the plaintiff's limited education and experience, and there is no basis for the court not to accept the facts underpinning the joint minute and the opinion advanced therein.

[44] The industrial psychologists agreed that the plaintiff would have been promoted to managing director had it not been for the accident, operating in that position from 1 January 2029 until the age of retirement. Referring to the restrictions to his sitting endurance, combined with psychological difficulties resulting from the accident, they opined that he would remain unemployed once his current employment was terminated. It was improbable that he would secure similar accommodative sedentary employment given his level of education, skill and experience. As will be indicated, there is no basis for this court to depart from that shared opinion. As to his present employment, ongoing employment beyond the immediate short-term appeared improbable. But, assuming that the Aslam opinion was preferred, provided the plaintiff could remain an asset and was fully accommodated, he could remain employed, likely without any advancement and with declining earnings by commission, in his present position.

[45] It is apparent, from the testimony of Meyer, Mrs Krebs and the plaintiff himself, in particular, that pain is now a feature of the plaintiff's life. As an aside, this was also readily apparent from the plaintiff's physical difficulties experienced in completing his evidence in court. He had to alternate frequently between sitting and standing and was in clear discomfort for much of the time. The nature of the pain, and its consequences, are such that it must be accepted that his workplace and personal functionality has been adversely affected. Meyer's opinion in that regard is logically associated with the evidence of the plaintiff's condition as presented and observed in court, and with the probabilities. In sum, as he put it, 'the synergistic interaction between the plaintiff's orthopaedic injuries and comorbid mental state combine to limit his ability to function'.

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<sup>21</sup> See *JA obo DMA* op cit fn 16 para 42.

[46] It is equally clear that the plaintiff has been coping with the demands of his present position through clenched teeth, stoically dragging himself to work in Gqeberha and enduring the challenges of travel when his work takes him to Johannesburg. His tenacity notwithstanding, the relevant expert views presented explain that he is operating at the limits of his subjective ability to cope, due to a combination of physical and mental consequences of his injuries. The evidence reveals a sound platform for that conclusion. He is now a clock-watcher at work operating sub-optimally and, as Dr Nobre indicated, less productive than what may be expected of a senior employee in his position, with no real prospects of his situation improving significantly. Based on the evidence, it would be over-optimistic to find otherwise. This accords with Van Zyl's concern as to the prospects of the plaintiff's employer accommodating him in future and on an ongoing basis to the full extent required.

[47] The accepted evidence as to the plaintiff's condition necessarily impacts on the probabilities assessment of his ability to continue to demonstrate the necessary fortitude to sustain his present employment and to earn commission. The noted deterioration of the plaintiff's mental state and the onset of Persistent Depressive Disorder supports this outcome, as does the revised joint minute signed by the industrial psychologists (leaving aside the Aslam approach, which is considered below). He and his wife were both good witnesses who testified openly and cogently about the reality of the consequences of the accident on their day-to-day lives.

[48] The view that the plaintiff is ill-suited to perform his current duties, even though they may be largely sedentary in nature, is endorsed by Dr Perry, who emphasised the various adaptations and adjustments that would be required to the present modus operandi to make continued employment sustainable. Dr Perry was an impressive witness whose opinion was grounded on a sound foundation supported by the evidence. The starting point for the opinion was the fact that the plaintiff continues to experience significant pain despite a lengthy time-lapse from the time of his surgical procedures. This was unusual and the condition was chronic and intrusive. Degeneration would continue with progressively more pain in the spine and the future surgery anticipated by Dr Perry would not remove the pain or improve the situation.

The expert view that the plaintiff's functional restrictions were permanent in nature was properly reasoned and cogently explained.

[49] The reality of the plaintiff's situation, and the debilitating pain that he experiences, was abundantly clear from his own testimony and that of his wife. He has, for example, literally been driven to drink having failed to find a suitable alternative pain management strategy. Dr Perry's opinion was logical and anchored by a solid scaffolding of supporting evidence, including other expert testimony, and accords with the probabilities. It might be added for the sake of completeness that Dr Nobre also impressed the court with her explanation of the reasons underpinning her conclusions, which included appropriate reflection on and proper consideration of the bulk of the evidence that was presented in court.

[50] The same cannot be said for Dr Aslam's view, which was grounded on a generic platform buttressed by anecdotal evidence and isolated facts pertaining to the plaintiff's attempts to lead a normal life after his accident. Even accepting that Dr Aslam's opinion was based on his recollection and notes following a one-hour consultation (and not a 30-minute consultation), the quality of investigation performed was lacking given the failure to consider either of Meyer's reports. The opinion was based on an incomplete foundation and appeared to assume an over-optimistic level of future accommodation on the part of the employer without due consideration of all the facts. He also omitted to note the psycho-emotional reference in the joint report of the occupational therapists, which may have altered his opinion. The consequence is that the opinion is not consistent with all the established facts and is thereby undermined. His view that the plaintiff would be able to continue in his current position (i.e. without the need for additional accommodation) until a year or two before his normal retirement date cannot be accepted when matched against the overwhelming evidence presented to the contrary and when viewed in the light of the probabilities and subjected to the appropriate level of critical evaluation of the reasoning.<sup>22</sup>

[51] The court must, following careful consideration, therefore express preference for the opinion of Dr Perry. In essence, the picture that emerges is that fully sedentary

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<sup>22</sup> See *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) para 27.

work, if accommodated in a workplace, might be sustainable, but that it would be unreasonable to expect an employer to accommodate the plaintiff to such an extent on an ongoing basis. It must be accepted that periodic travel to Gauteng is an inherent requirement of the plaintiff's job. Expecting the employer to accommodate the plaintiff to the extent that such travel would not be required in future would be unreasonable. This is supported by the industrial psychologists and Dr Nobre's evidence that the level of accommodation that was necessary was simply not sustainable:

'I don't believe that accommodation will be sustainable for the remainder of his career, given his current age ... [with] another 25 years to go. [He is] struggling physically and psychologically ... the surgeons agree that [there has been a] decline ... [also] considering Meyer's report ... [he is] in a worse category of mental disorder than he was initially. Based on that decline, and practically, if you look at the emotional energy [it takes him] to get through the day, that won't improve. It will worsen [and] he may reach a point where he won't cope and of his own accord be forced to resign.'

[52] The accepted evidence reveals that the stresses and strains of work-related travel, including increased site visits, would push the plaintiff's work beyond the realm of sedentary work, and that, given various work-related developments, the plaintiff could not expect his work to be restricted to his home city. Continued employment in the present occupation, beyond the immediate short-term, was therefore unlikely. Considering the plaintiff's education, experience and skills, alternative placement in the open labour market was unlikely. The inability to settle on appropriate pain management strategies and the resultant psychological difficulties experienced by the plaintiff in pressing through the various challenges required to commence and complete each working day and week, reinforce this conclusion.<sup>23</sup>

[53] *Mr Dala*, for the defendant, argued in further submissions that the plaintiff should 'be able to push through' with accommodations in the workplace and 'push on' with his employment. Borrowing from the language in *Bee*, while an outcome of no compensation for damage to earning capacity might result in the plaintiff having no choice but to 'soldier on', it is clear on a conspectus of the evidence that it would not

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<sup>23</sup> For a similar analysis and conclusion on the probabilities, see the judgment of the full court of this Division in *Prince v Road Accident Fund* [2018] ZAECHC 20 para 61 and following.

be reasonable to expect him to do so.<sup>24</sup> The evidence of the reality of the plaintiff's situation, emanating from his own testimony and that of his wife, and overwhelmingly supported by the accepted medical evidence, is that the plaintiff is continuing in his present occupation to pay the bills and that life has become a burdensome struggle for him. As in *Bee*, much of that evidence was uncontested and must be accepted as truthful.<sup>25</sup>

[54] There is, in sum, a sufficient evidential foundation to conclude that the plaintiff's bodily injuries suffered in the accident will result in his inability to earn the income he would have earned but for those injuries, and that the reduction in earning capacity gives rise to pecuniary loss.<sup>26</sup> The defendant's argument that the plaintiff has failed on a balance of probability to demonstrate that he would suffer a truncation of his working life must be rejected.

[55] Given the contents of the joint minute of the industrial psychologists, as well as the evidence presented when considered in its entirety, I have no difficulty in concluding that loss of earning capacity has been established. As Klopper has noted, where a claimant's injuries do not totally preclude him to earn by pursuing his former job, profession or career but his ability to effectively and effortlessly perform tasks required by his job or profession has been impaired, provision has to be made for this aspect as well as the fact that due to his injuries he may not be assured of continued employment.<sup>27</sup> At the very least it is clear that, due to a combination of physical and psychological factors following the accident, the career advancement the plaintiff, including progression to managing director, would have expected had he not been injured, as detailed in the industrial psychologists' joint minute, will no longer materialise.<sup>28</sup> The consequences of this conclusion have been described as follows:<sup>29</sup>

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<sup>24</sup> *Bee* op cit fn 7 para 111.

<sup>25</sup> *Bee* op cit fn 7 para 112.

<sup>26</sup> See JM Potgieter *et al Visser and Potgieter Law of Damage* (3<sup>rd</sup> Ed) (Juta) (2012) at 464-465.

<sup>27</sup> HB Klopper *The Law of Third-Party Compensation* (4<sup>th</sup> Ed) (LexisNexis) (2020) at 217.

<sup>28</sup> The industrial psychologists agreed that pre-morbidly, the plaintiff would have progressed to function as a managing director by January 2029. Dr Nobre and Mr Kalanko agreed that for purposes of the plaintiff's pre-morbid earnings as a managing director a basic salary of R80 000 per month, average annual commission of R250 000 and a thirteenth cheque in December (in 2020 terms) increasing in line with CPI plus 1% to 2% until retirement was to be used.

<sup>29</sup> *Kerridge* op cit fn 7 para 25, quoting *Hersman v Shapiro & Co* 1926 TPD 367 at 379, these aspects of the minority judgment seemingly being unanimously agreed to by the bench: para 39. Also see *Southern Insurance Association Ltd v Bailey* NO op cit fn 8 at 113F – 114E.

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.’

### **Determination of contingencies**

[56] This is not to suggest that the plaintiff’s condition is such that he has no residual earning capacity or that the present form of employment is only due to the employer’s sympathy or benevolence. As was the case in *Kerridge*, there is no basis for the conclusion that the plaintiff has no residual earning capacity whatsoever. Given the plaintiff’s continued employment, and double promotion, such a finding would be absurd. *Kerridge* also considered the expert testimony of Meyer, who had suggested that Mr Kerridge ‘is unemployable on the open market in a competitive position, although he may be able to continue in his current capacity for some time yet’, along with other evidence presented, before concluding as follows:<sup>30</sup>

[53] None of the above is suggestive of an individual who is unable to work in any capacity. Even his wife agreed that Mr Kerridge “handles [himself] very well ... [and] has learnt to live with [the situation] and adapted to his shortcomings”. As a result of the Fund’s all or nothing approach, no expert evidence was led on its behalf as to the claimant’s residual earning capacity. Had this been done, the court would have been in a more favourable position to assess the damages suffered by comparing the monetary value of the pre-morbid earnings with those of the post-morbid scenario. The shortfall, once the relevant contingencies had been applied to both hypothetical scenarios would be the total sum of Mr Kerridge’s damages for future loss of earnings capacity.

[54] Instead we are faced with a situation where our only option is to apply random contingencies to the pre-morbid scenario on an ad hoc and uninformed basis to compensate for any possible post-morbid residual earnings capacity ...[by applying] higher general contingency deductions to allow for any residual earning capacity.’

[57] Both *Mr Frost* and *Mr Dala* initially agreed that the ‘*Kerridge* approach’ should be applied, in the sense that it would be appropriate to apply higher contingencies to

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<sup>30</sup> *Kerridge* op cit fn 7 para 53.

the pre-morbid scenario to compensate for any possible post-morbid residual earnings capacity. *Mr Dala* subsequently withdrew that concession, persisting in supplementary heads of argument with the view that the plaintiff had failed to demonstrate (any) truncation of his working life as pleaded, and seemingly resorting to the ‘all or nothing’ approach referred to in *Kerridge*.

[58] The court must use the best evidence produced to arrive at a conclusion based on the information, even if it is inconclusive and precise mathematical calculation is elusive.<sup>31</sup> Following *Kerridge*, various factors impact on the appropriate contingency deduction, including the plaintiff’s age, limited education, extensive working experience in the security installation industry, the normal negative contingencies relevant to a wage earner, including employability and loss of employment. To this must be added the residual earning capacity.<sup>32</sup>

[59] There was no expert evidence led by the defendant as to the plaintiff’s residual earning capacity. The realisation of that earning capacity may materialise in various ways considering the plaintiff’s work history (including the senior position he occupies and the network he would likely have established in the industry); good relationship with his present employer (which might facilitate continued reasonable accommodation or even greater forms of accommodation for a period of time); fortitude and determination to provide for his family (which has seen him persevere with his work, including work-related travel, for an extended period of time despite significant pain and discomfort). In sum, the probabilities favour that the plaintiff will find ways to continue to earn an income, whether through his existing employer or by leveraging his connections for his own account.

[60] The accepted medical opinions make it clear that the work must be sedentary and accommodated, in the sense that there should be appropriate flexibility, to be sustainable. This will reduce the plaintiff’s future income-earning possibilities substantially. As indicated, the evidence was that the plaintiff’s present work does not fit the bill, given the present travel and site visit requirements. Bearing in mind the

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<sup>31</sup> *Esso Standards SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970D-H.

<sup>32</sup> See *Kerridge* op cit fn 7 para 55.



prognosis that his condition, including his mental state, will deteriorate, and the effort that is required for him to perform his present duties, the probabilities are such that the plaintiff will not be able to persevere in his present role until close to retirement age, as already explained. The plaintiff cannot be expected to perpetually bite the bullet, so to say, in circumstances where he repeatedly feels worse as the working day goes on, and as each week progresses.<sup>33</sup> The precise duration of the present form of employment is uncertain, as is evident from Dr Perry's testimony and the joint minute of the occupational therapists. Following the industrial psychologists, ongoing employment with the company beyond the immediate short term is improbable. As the employer was not called by either party to testify, the extent to which the plaintiff might receive greater forms of accommodation, possibly with an accompanying salary sacrifice or demotion, is unpredictable.

[61] It is this unpredictability in terms of establishing the likely future income generation on the part of the plaintiff (including the precise nature of the work, its extent and the consequent remuneration generation) that triggers the '*Kerridge* approach' as appropriate, even though it appears as if adopting the 'traditional approach' would, in this instance, result in the same outcome. I am fortified in my decision to follow the *Kerridge* approach when considering various decisions of this Division in similar situations, as submitted by *Mr Frost*, including *Van Eeden v The Road Accident Fund*.<sup>34</sup> In that matter the plaintiff was 37 years of age and possessed the 'residual ability to do some kind of sedentary work...', having in fact worked for two years after the accident. The court noted that he had the ability to drive an automatic vehicle, which contributed to his potential employability, although it was found that the plaintiff would probably find it physically impossible to cope with a whole variety of sedentary positions. Importantly, the court did not have any evidence of the employment positions that the plaintiff would be able to cope with, what his chances would be of being appointed in such positions and what his potential income would be from such positions.<sup>35</sup> Although the court on the facts of that matter went as far as to find that he had been rendered permanently unemployable in the open labour market, even in a sedentary position, as a result of his injuries, the following factors were considered as

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<sup>33</sup> *Bee* op cit fn 9 para 111.

<sup>34</sup> *Van Eeden v The Road Accident Fund* (Unreported case no. 2069/2011) ('*Van Eeden*').

<sup>35</sup> *Van Eeden* op cit fn 34 para 62.

part of the appropriate contingency deductions to be applied in assessing the claim for future loss of earnings.<sup>36</sup>

- a. The fact that the plaintiff did have a theoretical ability to do some sedentary work in the future;
- b. The possibility that the plaintiff might possibly in the future be favoured by a stricter application of the provisions of the Employment Equity Act, 1998 ('the EEA'); and
- c. The fact that the plaintiff was in fact able to do some limited work, and did earn some income, after the accident, albeit with great difficulty.

[62] Noting that the provision for contingencies falls squarely within the subjective discretion of the trial judge to determine what is reasonable and fair, and that there are no fixed rules in this regard,<sup>37</sup> the court applied an increased contingency deduction (of 25%) in respect of the plaintiff's pre-morbid future earning capacity. That approach finds support in the earlier decision of *Krugell v Shield Insurance*,<sup>38</sup> a case where it was found that the plaintiff would in fact be able to work again in the future, albeit on a limited and inconsistent basis, and which applied a contingency deduction of 35% of the pre-morbid earning capacity. The comments of Van Dijkhorst J resonate with the facts of this matter:<sup>39</sup>

'Op die getuienis is dit nie uitgesluit dat die eiser weer 'n betrekking sal bekleed nie, al is dit van 'n mindere aard, en al is dit vir onderbroke tydperke...Ek is egter nie in staat om met enige mate van sekerheid die tipe werk, die tydsduur daarvan of die vergoeding in verband daarmee te bepaal nie. In die woorde van Dr Froman: "We are asked to be totally prophetic." Op hierdie aspek van die saak kom ek terug by die behandeling van 'n toelating vir gebeurlikhede...Daar moet egter in die berekening voorsiening gemaak word vir inkomste uit hierdie bron...Dit is 'n onwetenskaplike manier van doen, maar myns insiens die enigste om reg tussen die partye te laat geskied.'

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<sup>36</sup> *Van Eeden* op cit fn 34 para 64.

<sup>37</sup> *Van Eeden* op cit fn 34 para 67. Also see *Kerridge* op cit fn 7 para 40; *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) para 8: the court enjoys a large discretion to order what it deems appropriate even where actuarial calculations are available to assist the enquiry. Also see *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H - 393A.

<sup>38</sup> *Krugell v Shield Insurance* 1982 (4) SA 95 (T) ('*Krugell*') at 100B.

<sup>39</sup> *Krugell* op cit fn 38 at 99G-H; 100B-C; 105E-F.

[63] In *Dolf v Road Accident Fund*,<sup>40</sup> Roberson J considered the situation of a plaintiff who had worked after the accident and obtained a higher level of employment, demonstrating that, as is the case with the present plaintiff, he was not the type of person who would 'sit and do nothing'. The learned judge also applied an increased contingency deduction from the normal 15% for future loss of earning capacity.

[64] In the circumstances, and particularly because of the uncertainties in determining the nature, extent, and remuneration of the plaintiff's future work, I am of the view that a similar approach is warranted. This requires an assessment of the probabilities on consideration of the totality of evidence.<sup>41</sup> As already indicated, I have specifically considered, distinct from the facts in *Kerridge*,<sup>42</sup> the plaintiff's experience and standing in the industry in which he is presently employed, as demonstrated by the senior position he has occupied and maintained even after his accident. It must be accepted that the fortunes of life are not always adverse, so that there is a possibility that the plaintiff will be able to secure and settle into the ideal form of sedentary work.<sup>43</sup> This is offset somewhat by his limited qualifications and considering that his recent experience has been restricted to a single industry and employer.<sup>44</sup> His grit, determination and eagerness to provide at the maximum possible level for his family also play a role in assessing the probable extent of his future income generation, bearing in mind the plaintiff's duty to mitigate damages.<sup>45</sup> I have considered both the spirit and tenor of the Employment Equity Act, including the categorisation of persons with disabilities as a 'designated group' deserving of affirmative action measures on the part of designated employers, including preferential treatment,<sup>46</sup> as well as the evidence relating to the limited application of equity principles in practice at the present

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<sup>40</sup> *Dolf v Road Accident Fund* [2014] ZAECPHC 99 para 15. Also see *N D B obo J W K v Road Accident Fund* [2023] ZAEQBHC 7 para 57.

<sup>41</sup> See *MF v Road Accident Fund* op cit fn 20.

<sup>42</sup> *Kerridge* op cit fn 7 para 55. In *Kerridge* the plaintiff had a limited work history, no real work record and no good prospects of achieving success in his field.

<sup>43</sup> See *Southern Insurance v Bailey* op cit fn 8.

<sup>44</sup> The joint report between the industrial psychologists, dated 27 January 2022, reflects that his full employment history includes 'unqualified electrician, technician, senior technician and also self-employed for a short period.'

<sup>45</sup> For a recently reported instance where this factor was considered as part of a contingency assessment, albeit in distinct circumstances, see the judgment of Kroon AJ in *PE v Dr Beyers Naude Local Municipality and Another* 2022 (1) SA 560 (ECG) para 145.

<sup>46</sup> See s 15 of the EEA.

time.<sup>47</sup> I add a further comment in this respect at the end of the judgment. It must also be appreciated that the possibility of future work is severely limited by the restriction that the type of work should be sedentary, and then with proper accommodation. I consider a 35% contingency deduction to the pre-morbid earnings to be appropriate in the circumstances. Following the accepted actuarial calculation provided for this scenario, the consequence is that the plaintiff's loss in respect of future earnings, after application of the statutory limit, is assessed at R6 525 683.<sup>48</sup>

## **Costs**

[65] As for costs, the matter was sufficiently complex to warrant the use of two counsel, also considering the extent of the claim for damages.

## **Expert witnesses and employment legislation**

[66] Finally, it should be noted that courts may expect expert witnesses testifying about likely future employment in the South African labour market to demonstrate due appreciation of the nuances of the ever-changing employment equity landscape, rather than simply resorting to over-generic expressions of existing practices which emphasise only the racial dimensions of employment. This is particularly necessary in presenting a careful analysis of the likely position of persons with disability. These persons fall within the EEA's designated groups even though they may be white males. Persons with disability may not be unfairly discriminated against, inter alia on the basis of their disability, would enjoy special protection in terms of the Labour Relations Act,

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<sup>47</sup> There was no evidence or argument on whether the plaintiff's employer was a designated employer, as defined in the EEA, or on the implications of the EEA's emphasis on 'duties of designated employers' and the implications of this on the plaintiff's future employment prospects.

<sup>48</sup> It is interesting to note that, based on actuarial calculations provided in the present matter, even assuming that the plaintiff would retain employment with his current employer, but on a demoted basis as a sales representative and work in that capacity until an early retirement age of 60, this would be the amount payable to the plaintiff for future loss of earnings capacity applying a 15% pre-accident contingency and irrespective of whether 25%, 35% or 45% is used as a post-accident contingency figure. The reason for this is the application of the statutory limit to the total net loss in each instance, assuming the plaintiff's future income (even in his injured state) to be in the region of R5,4 million, which is equal to R450 000 per annum from 1 April 2023 until the age of 60, with inflationary increases. The similar loss is established, according to actuarial calculations provided, assuming demotion to Area Manager earning R737 162 per annum from 1 April 2023 until the age of 60, applying a 50% contingency deduction given the poor prospects.

1995 in the event that they are dismissed, including reinstatement as a primary remedy, and may be the beneficiaries of affirmative action measures on the part of designated employers. Various legislative efforts and pronouncements must affect their chances of obtaining future employment positively, and relevant expert witnesses should integrate these considerations, where appropriate, in their investigations and testimony.

## Order

[67] The following order shall issue:

1. Defendant shall pay to plaintiff the sum of R6 525 683 for the plaintiff's claim for future loss of earning capacity.
2. Payment of the aforesaid amount in paragraph 1, above, shall be made directly to plaintiff's attorney of record, PBK Attorneys' Trust Account, details of which are as follows:
 

Name:	Pierre Kitching Incorporated
Bank:	[...]
Branch Code:	[...]
Account No:	[...]
3. Defendant shall pay interest on the aforesaid amount in paragraph 1, above, at the prevailing prescribed interest rate calculated from a date 14 days after the granting of this Order, in accordance with section 17(3)(a) of the Road Accident Fund Act, 1996 (Act 56 of 1996), as amended.
4. Defendant shall pay plaintiff's party and party costs of suit on the High Court Scale from 3 February 2022 to date hereof, as taxed or agreed, such costs are to include:
  - 4.1 The costs of all the supplementary reports and joint minutes, to date, of:

- 4.1.1 Dr B N Perry;
- 4.1.2 Mr I Meyer;
- 4.1.3 Ms A van Zyl;
- 4.1.4 Dr M Nobre;
- 4.1.5 Mr D Williams;
- 4.1.6 Mr G Whittaker.

- 4.2 The qualifying fees, expenses and reservation fees as well as the attendance and testifying fees of:

- 4.2.1 Dr B N Perry;
- 4.2.2 Mr I Meyer;
- 4.2.3 Ms A van Zyl;
- 4.2.4 Dr M Nobre;
- 4.2.5 Mr D Williams;
- 4.2.6 Mr G Whittaker.

- 4.3 The reserved costs arising out of the trial postponed for the previous hearing, 7 June 2022, and subsequent trial days including any qualifying fees, expenses and reservation fees of all of plaintiff's expert witnesses.

- 4.4 The costs arising out of the trial set down for hearing on 13 February 2023 and subsequent trial days.

- 4.5 The costs of plaintiff's attorney and counsel on attending at court on the days on which the matter was argued in court, including 6 March 2023 and 12 April 2023.

- 4.6 The reasonable costs of consultations between plaintiff's counsel, plaintiff's attorney, plaintiff and witnesses in preparation for the trial.

4.7 The costs of attendances at case management and roll call proceedings as well as the costs of trial preparation checklists, in respect of plaintiff's claim.

4.8 The costs of two counsel, where so employed.

5. Defendant is directed to pay interest on plaintiff's said taxed or agreed costs at the prevailing prescribed interest rate per annum calculated from a date 14 days after *allocator* or written agreement to date of payment.

6. The contingency fee agreement between plaintiff and Pierre Kitching Incorporated t/a PBK Attorneys concluded on 1 February 2018 be and is hereby declared invalid and set aside.

7. Plaintiff's attorneys shall be entitled to recover from plaintiff his taxed attorney and own client costs on the High Court Scale.

**A GOVINDJEE**  
**JUDGE OF THE HIGH COURT**

**Heard:** 13 – 17 February; 6 March; 12 April 2023

**Delivered:** 25 April 2023

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