IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NUMBER: 85129/14

DATE: 17 June 2020

E SCHOEMAN Plaintiff

V

ROAD ACCIDENT FUND Defendant

JUDGMENT

MABUSE J

[1] All that this Court was initially required to decide in this matter in which the Plaintiff claimed payment of money from the Defendant were:

1.1 general damages; and

1.2 loss of earnings.

The Court was informed that the Fund had conceded liability:

1.3 on the merits at 100%;

1.4 to pay for past medical and hospital expenses at R8,256.90;

1.5 the Fund submitted to an order that it furnish an undertaking to pay all future medical and hospital expenses as and when they are incurred by way of a

certificate in terms of s 17(4) of the Road Accident Fund Act 56 OF 1996 ("the Act").

[2] The Plaintiff, Mr Emile Schoeman, is an adult male of number [….]. He sues in this action in his personal capacity in respect of certain injuries that he claimed he sustained on 6 September 2012 around Walter Sisulu and Oranje Streets in Middelburg. The Defendant, the Road Accident Fund (the Fund), is a juristic person established as such in terms of the provisions of the Act.

[3] In terms of s 17(1)(a) of the Act, the Fund is obliged to compensate any person who sustains injuries arising from the negligent driving of motor vehicles on public roads.

THE BACKGROUND

[4] On 6 September 2012 at about 09h20 in Walter Sisulu and Oranje Streets, Middelburg, a collision took place between motor vehicles […] (hereinafter referred to as the insured motor vehicle) which was at all material times thereto driven by a certain Kabwe Musangu (hereinafter referred to as the insured driver) and FGN 904

MP, which was at all material times thereto driven by the Plaintiff. The Plaintiff's motor vehicle was hit from behind by the motor vehicle of the insured driver. The said collision led in the course of time to a claim by the Plaintiff for compensation in terms of the Act as amended. The amount of damages the Plaintiff claimed was R3,797,33+9.00 computed as follows:

4.1 past medical expenses R10,000.00;

4.2 estimated future medical expenses undertaking in terms of Section 17(4)(a);

4.3 estimated Loss of earning capacity R3,287,339.00;

4.4 general damages R500,000.00

TOTAL R3,797,339.00

The particulars of claim do not set out the period during which the Plaintiff sustained the estimated loss of earning capacity.

[5] It is alleged by the Plaintiff that the said motor vehicle collision was caused by the negligent driving of the insured driver, he being negligent in one or more or all of the respects mentioned in the Plaintiff's particulars of claim. Because of the said

collision, the Plaintiff sustained certain bodily injuries, to wit, neck injuries and back injuries.

THE EVIDENCE

[6] In support of the Plaintiff's case, Adv F Diedericks (SC), counsel for the Plaintiff, led the evidence of four witnesses namely Dr Louis Francois Oelofse ("Dr Oelofse"), Hanri Meyer ("Ms Meyer"), the Plaintiff and Ms Karen Kotze (Ms Kotze):

EVIDENCE OF DR OELOFSE

6.1 Dr Oelofse is a qualified medical doctor and a specialist orthopaedic surgeon. He holds the following qualifications MBChB; (Stell) FSCA (SA) Ort; M. Med(Pret) Ort. Over and above, he did a two-year fellowship to specialise in spinal injuries. He is therefore a spinal surgeon and practises exclusively in spinal injuries. That he is an expert is not in dispute;

6.2 he testified that he compiled two medical reports on the Plaintiff. The first report was compiled on 25 September 2015 while the second report was compiled on 7 March 2018. In the first report he recorded that the Plaintiff sustained injuries on 6 September 2012 and that X-ray photos were taken in

the same year of the accident. The plaintiff consulted with his General Practitioner (GP) a few days after the said collision where he complained of severe neck pain and muscle spasm. He was treated conservatively with medication and physiotherapy. Two months after the first consultation he again consulted with his GP who referred him for an MRI scan. According to Dr Oelofse, X-ray photographs must be taken immediately after the accident. The purpose of taking X-rays immediately after the accident is to establish if there are any pre-accident conditions, like for instance osteoarthritis which is called 'spondylosis of the neck', or pre-accident injuries. This is the wear-and-tear, degeneration, arthritis, or spondylosis. He saw proof of the degeneration of the Plaintiff's neck. To establish such degeneration, it was not necessary for him to use an MRI scan. Accordingly, to detect the degeneration a specialist does not require an MRI scan. The X-ray photographs are sufficient for that purpose. He did not see the X-rays himself, but the 2015 X-ray report showed a normal spine, in other words, there was no spondylosis or osteoarthritis in the cervical spine;

6.3 on 25 September 2015, as I have indicated earlier, and at Central Professional Suites, Kempton Park, this witness examined the Plaintiff, and having done so,

compiled the first of his two reports. To compiling the first of the two reports, he did not have new X-rays taken. The purpose of this exercise was to determine:

6.3.1 the serious long-term impairment or loss of body functions;

6.3.2 whether there was permanent serious disfigurement;

6.3.3 severe long-term mental or severe long-term behavioural disturbance or disorder;

6.3.4 loss of foetus.

6.4 From the Plaintiff himself the witness obtained the following details; that at the time of the accident in question the Plaintiff was the driver of his own motor vehicle; that he was stationery at the stop sign when he was hit from behind by another motor vehicle. He was not taken to the hospital immediately. The Plaintiff further told the witness that he did not have neck pain immediately after the accident but notwithstanding he decided to consult with his general practitioner ("GP") just to be safe. He was treated conservatively with anti-inflammatory and pain medication. On 25 September 2015, he had definite proof of the degeneration of the Plaintiff's neck. He could prove that a young

man like the Plaintiff who had no history of neck problems had sustained serious injury.

6.5 Later treatment

The Plaintiff told the witness that a few days later he went to see his GP with severe neck pain and muscle spasm. He was treated conservatively with medication and physiotherapy. The Plaintiff told him furthermore that he consulted with his GP about two months later when he was referred for an MRI scan and stress review of the cervical spine. Through this MRI he was diagnosed with facet injury of the neck and treated conservatively with pain medication. He also continued with physiotherapy sessions;

6.6 the witness compiled his first report from three documents, namely:

6.6.1 the Account statement;

6.6.2 the RAF1; and,

6.6.3 radiologists' report from Burger Radiologists Inc.

His task was to make a diagnosis of the Plaintiff's injuries by interpreting the radiologists' report. Before dealing with the report from Burger Radiologists it is apposite at this stage to point out that according to the current symptoms

and complaints the Plaintiff told the witness that he had pain in his neck, especially after a long day at work. He got neck and shoulder muscle spasm, and this was more noticeable on the left side. According to the Plaintiff at times his left hand felt weaker and had less power in it than before the accident. The Plaintiff told the witness furthermore that the range of motion in his neck was slightly restricted and he struggled to turn his head to look over his shoulder. He could not drive long distances as the pain in his neck increased and he needed to stop regularly to stretch his neck. He got headaches once or twice a month. According to the Plaintiff at the time he had not radicular symptoms in his upper extremities. He took over-the-counter pain medication which offered temporary pain relief. He continued to have pain over the midline of the cervical spine. His pain increased with certain activities such as sitting or driving for long periods of time. He continued with physiotherapy sessions and visited his general practitioner, as necessary. His symptoms correlate with his X-ray report.

[7] The Radiologists' or X-ray report prepared by Burger Radiologists Inc recorded the following:

"There is early generalised disc space narrowing from the intervertebral discs at all levels. There are early spondylotic changes with early neuro-central joint degeneration with early sclerosis of the facet joints most pronounced at levels C3-4, C4-5 and C5-6. The C1-2 level is normal.

There is no evidence of bony cervical ribs.

There is a previous internal fixation of a shoulder with early neuro-central joint degeneration.

There is early bony impingement of the exit foramina at levels C3-4, C4-5 and C5-6."

[8] In his capacity as an expert he made the following diagnosis based on the radiologists' report.

8.1 C2-C6 facet joint injury with:

8.1.1 chronic pain and spasm;

8.1.2 C3-C4, C4-C5 and C5-C6 osteoarthritic changes; and

8.1.3 soft tissue injuries of the cervico-thoracic junction with chronic pain and spasm.

8.2 He recommended that the Plaintiff should, for the aforementioned injury, be treated as follows:

8.2.1 C2-C6 facet joint injury with;

8.2.2 chronic pain and spasm;

8.2.3 C3-C4, C4-C5 and C5-C6 osteoarthritic changes be soft tissue injury of the cervico-thoracic and spasm with non-steroid anti-inflammatory drugs and analgesics physiotherapy and biokinetics.

8.3 He opined furthermore that there is, however, the possibility that the abovementioned treatment will not help for the Plaintiff's pain. In that case, if this should be the case, the following should be considered:

8.3.1 he testified that the Plaintiff has a serious injury; that it will get worse even with good treatment; that it will affect his working capacity and concluded by saying that patients with chronic pain age 10 years before time.

He testified that*: "This patient has a serious injury to more than one level in his neck. It will get worse. It will affect his amenities of life. It will affect his working capacity and in my opinion his age of*

retirement. It will have an effect on him for the rest of his life because the pathology will get worse, and in my opinion, it is a serious injury."

[9] Expounding on the radiologist report, he stated that:

"There is early disc spacing narrowing" and testified that one of the first signs of wearing away of a joint is early disc space narrowing. The First radiological sign in disc space narrowing will be seen in arthritis, whether a knee or ankle or the neck or back is narrowing. *"There is no prevertebral soft tissue swelling"* simply means that there was no swelling or proof of acute injury. He explained it as follows. The bone is covered with a cartilage. You have a bone on the side covered with a cartilage. These bones articulate with each other. As the cartilage wears away, it can be age or trauma related, a space that you will see, or the knee joint get smaller and smaller. The joint consists out of a cartilage. In the neck it is called a disc, so as the disc is wearing away the disc space will get smaller and smaller on X-rays, so that is one of the first signs of wear and tear in the neck.

[10] The report by Burger Radiologists Inc dated 25 September 2015 stated that:

"There are early spondylitic changes with early neuro-central joint degeneration with early sclerosis of the facet joints most pronounced at levels C3-4, C4-5 AND C5-6."

According to him, they are talking about the wear and tear in the joint or facet joints. There was a wear and tear of the front joint and of the two back joints. The expression *"there was an early sclerosis of the facet joints"* is the same thing as the wear and tear of the facet joints. He confirmed that the C1/C2 level of the facet joints was normal. He also testified that *"internal fixation of a shoulder with early neuro-central joint degeneration"* was not accident related.

[11] *"There is early bony impingement of the exit foramina at the levels C3-C4, C4-5, and C5-6.",* the report continued. Regarding this aforegoing statement in the report, he testified that you have a spinal cord, but at each level a little nerve comes out. These nerves run in a tunnel. That tunnel in which these little nerves run is called *"foramina".* Because of the wear and tear, the size of the foramina gets smaller. According to his knowledge, there are many medical reasons for this clinical situation. One of the reasons for such situation is the effects of degeneration of the spine. Later in life, he continued with his evidence, it starts impinging on the nerve

root. That will cause pain on his arm. He testified that there was no radicular pain and that there was no nerve impingement.

[12] He conceded that for every patient he thinks has a serious injury, it is his responsibility to study the X-ray. With the X-ray he will basically see the bone. He said that it was 100% his responsibility to look at the X-ray. He confirmed that he will look at the X-ray, study it and make his own diagnosis. He will also look at the X-ray report to make sure that it agreed with him or to check if he has missed something. But it was 100% the responsibility of the surgeon to look at the X-rays and make a diagnosis. He told the Court that he double checked whatever was written on the X-ray report by Burger Radiologists on the X-rays themselves.

[13] He testified that, considering the X-rays and X-ray report and his clinical observations, a person with these injuries would present with a pain in the neck. A patient with a serious neck injury will have these symptoms.

[14] He recommended conservative treatment with:

14.1 non-steroid anti-inflammatory drugs and analgesics;

14.2 physiotherapy;

14.3 biokinetics;

14.4 infiltration and facet joint blocks in theatre. He opined that provision should be made for two more of the suggested treatment at R12,000.00 per treatment;

14.5 rhizotomies, the cost of which is R30,000.00;

14.6 anterior fusion of the involved levels. This, according to his report, will cost R120,000.00;

14.7 pain and suffering, pain in the neck: two to four weeks, in hospital: three to five days; unable to drive: six weeks.

[15] Dr Oelofse's second report was, as indicated above, on 7 March 2018. He testified that he was compelled by the law to prepare the report. He had to consult with the Plaintiff and assess his injuries as a follow up. The purpose of examining the Plaintiff on the said date was to establish if the injury he had sustained had progressed. The second reason was that he also was of the view that the medico-

legal report lost its validity after a period of two to three years. He emphasized though the importance of a follow-up assessment.

[16] In his compilation of the second report he had the following documents before him:

16.1 RAF1 – Claim form;

16.2 RAF4 completed by Dr TG Tshitake;

16.3 Medico-legal report by him dated 25 September 2015;

16.4 the Plaintiff's questionnaire; and

16.5 Radiology Report by Burger Radiologists dated 7 March 2018 prepared by Dr Toni De Beer with an addendum completed by Dr P Fourie.

The radiologist report of 7 March 2018 reported as follows about the Plaintiff:

"Addendum Final Report

Cervical Spine

In addition to the described abnormalities there is also C5-6 as well as C6-7 spondylosis changes present with some disc space narrowing and early developing neuro-central spurs. No gross foraminal impingement signs are seen.

Approved

Dr Phillip Fourie"

"Final Report

X-ray Cervical Spine

There is no prevertebral soft tissue swelling.

There is moderate loss of normal cervical lordosis, with a curvature convex to the left.

There is a degree of disc space narrowing with sclerosis of the endplates at the disc level C3-4.

There is early neuro-central joint degeneration at the level C6-7.

There is moderate facet joint sclerosis at all levels.

There is no significant bony narrowing of the exit foramina.

There is no evidence of bony cervical ribs.

There is no cortical remodulation due to old fractures.

The C1-2 level appears normal.

Approved

Dr Tobie De Beer"

[17] As with the first report it was expected of the witness to diagnose or assess the injuries of the Plaintiff from the X-ray report or radiological report.

[18] The Plaintiff told him that he continued to experience pain in his neck; that the pain in his neck has not subsided since the previous examination for medico-legal purposes. The pain has progressively increased over the last few years; despite the pain medication and treatment he received, the pain never really improved. Over and above, he continued to experience headaches and neck and shoulder muscle spasms on a regular basis. Over-the-counter pain medication at times offered limited pain relief.

[19] On this occasion the Plaintiff told him furthermore that he experienced pain in his neck especially after a long day at work; that he experienced pain when he lifted heavy objects or when he worked about shoulder height; and that the pain increased during times of inclement weather. The pain radiates down his shoulder blades

when he must travel long distances. Sitting in the same position or working on low surfaces makes the pain worse. He experienced a burning sensation. He experienced muscular spasms throughout his entire neck. Turning his neck from side to side exacerbated his pain. He continued to experience radicular pain in his left arm and a numb feeling in the last three fingers of the left hand. He took over-the-counter pain medication that offered relief for a short while. Dr Oelofse found that the Plaintiff's complaints on this second consultation were the same as the complaints the Plaintiff told him about during the first consultation. The difference being that on the second occasion the symptoms had intensified.

[20] Analysing the Burger Radiologist Report dated 7 March 2018 Dr Oelofse testified that:

20.1 there was moderate loss of cervical lordosis, with a curvature convex to the left;

20.2 there was a degree of disc space narrowing with sclerosis of the endplates at the disc level C3-C4;

20.3 there was also C5-C6 as well as C6-C7 spondylosis change present with some disc space narrowing and early developing neuro-central spurs;

20.4 there was a moderate facet joint sclerosis at all levels.

[21] In his capacity as a neurosurgeon he made the following diagnosis:

21.1 multiple level injury of the neck resulting in:

21.1.1 chronic pain and spasm;

21.1.2 left radicular symptoms;

21.1.3 C3-4, C5-6 and C6-7 spondylosis.

[22] He prescribed the following treatment:

22.1 conservative treatment with nonsteroidal anti-inflammatory medication and analgesics;

22.2 physiotherapy;

22.3 biokinetics, he proposes that if biokinetics failed or did not offer relief the Plaintiff would require:

22.3.1 facet joint blocks in theatre;

22.3.2 intensive conservative treatment and rhizotomy in theatre if facet joint block in theatre fails.

[23] On the narrative test he reported that for the following reasons the Plaintiff qualified for the narrative test. The Plaintiff:

23.1 had no previous neck problems;

23.2 was only 38 years of age at the time of the accident;

23.3 the initial X-rays obtained were reported as normal;

23.4 has serious constant pain affecting his amenities, quality of life and productivity since the accident;

23.5 X-rays obtained on 7 March 2018 reported post-traumatic spondylosis on three levels.

Then he recorded that the Plaintiff had more than 80% possibility of degeneration to progress to the final stage of spondylosis.

[24] In his evidence, Dr Oelofse testified further that for the first time the Plaintiff developed radicular symptoms. This means that a nerve root from the neck that

goes down to the arm were affected. On examination the Plaintiff had reduced feeling on the area of the nerve. The X-rays showed that there was deterioration. In his opinion this degeneration has progressed to an extent that in another three years the rate of wear and tear will continue and will affect all aspects of the Plaintiff's life. For this reason, the Plaintiff would have to retire earlier because his working capacity will reduce.

[25] He admitted that he had seen and perused the X-ray report by Drs Oosthysen and Engelbrecht Radiologists Inc. (Drs Oosthysen) that had been sent to him by Dr Tshitake and had found that it was a normal X-ray. He found nothing wrong with the report. He and Dr Tshitake agreed clinically on basically everything with their initial examination.

[26] In his testimony he told the Court that according to his assessment of 7 March 2018, the Plaintiff had become worse to the extent that he had developed radicular symptoms. The development of radicular symptoms was an indication that the nerve root from the neck that goes downward to the arm had been affected. The examination showed that the Plaintiff had reduced sensation on the area of the

nerve so that it had also deteriorated. The degeneration that the Plaintiff experience will affect all the aspects of the Plaintiff's life. The Plaintiff will consequently retire earlier because his working capacity will reduce. He will retire 5-10 years earlier.

HIS ANALYSIS OF DR TSHITAKE'S REPORT

[27] This report was made following an assessment made by Dr Tshitake on 5 August 2016, in other words, four years after the accident in which the Plaintiff was involved and one year after Dr Oelofse's first report. Dr Oelofse testified that he had asked for X-ray reports of Drs Oosthysen from Tshitake and that Tshitake provided him with a copy of the X-ray report.

[28] He testified furthermore that he normally would refuse to do any joint minutes without X-rays. He admitted that he saw the X-ray report which had been prepared by Drs Oosthysen and reported by Dr Z I Ibrahim. He noticed that it showed a normal X-ray and that he reported that nothing was wrong.

[29] He testified that he and Dr Tshitake agreed clinically basically on everything on their initial examination, but they differed when they looked at the X-rays. Dr Tshitake saw a whiplash in the X-ray whereas he saw a pathology on the Plaintiff's neck and made it a serious injury. He said he and Dr Tshitake were nevertheless *ad idem* that:

29.1 the Plaintiff had sustained an injury;

29.2 that he still complained of neck injury;

29.3 that he still had spasms;

29.4 that he still had restricted range of movement; and,

29.5 that the Plaintiff did not have reticular symptoms or abnormal neurological fallout. What he regarded as pathology of the neck and as being a serious injury Dr Tshitake regarded it as a mere whiplash.

[30] When he was pushed to explain how it came about that the X-ray reports differ so materially he said that firstly he had this problem with radiologists that push masses of patients and who "*do not spend time looking for these finer little on X-rays that show clearly wear and tear.*"

[31] Secondly, he could not give an opinion on X-rays that his colleague, that is Dr Tshitake himself looked at them. He did not know how experienced Dr Tshitake was as a spinal surgeon. Most orthopaedic surgeons do not do spinal work.

[32] He testified furthermore that he did not only look at the X-ray report but over and above he looked at the X-rays themselves.

[33] He testified that if you see a patient three years after the accident and that patient still complains about pains, he is still young and fit and his pain has gotten worse. Now he complains, for the first time, about pain going down his neck. In his opinion the opinion of Dr Tshitake would have been different.

EVIDENCE OF HANRI MEYER.

[34] She was the plaintiff's second witness. An occupational therapist by training, her qualifications and expertise in that field were not in dispute. She consulted with the plaintiff for the purpose of evaluation on 16 February 2016 where after she compiled a medical-legal report on her assessment of the plaintiff and updated it on 31st May 2016.

[35] Miss Meyer qualified at the University of Free State in the year 2003. She did psychic training at the University of Potchefstroom and thereafter did spinal rehabilitation. At the time she testified in this matter her occupation consisted mainly of preparation of medical-legal reports.

[36] Having evaluated the plaintiff, she prepared her medical-legal report. She testified that she did several tests to get the assessment results. Having noted the diagnosis of Dr L F Oelofse she expressed her opinion of the plaintiff with relation to:

36.1 administration tasks and sitting;

36.2 recommend that use of assistive devices;

36.3 loss of amenities of life.

[37] With regards to administration task and sitting she observed that after 45 minutes and while busy with computer work the plaintiff started rubbing his neck and would then report discomfort. At the end of one hour the plaintiff reported neck pain. She recommends the use of assistive devices. About loss of amenities of life, she testified when you cannot sleep because you have pain, it disturbs you your lifestyle. It also affects your productivity. She also stated that the plaintiff's driving was affected by the injury or his driving abilities were affected by the injury.

[38] She observed that after the accident the plaintiff was absent from work for only one day. The plaintiff continued with his work tasks, without reporting any difficulties until 2013 when he received a better offer at another company. The plaintiff reported to her that his

work demands in terms of taking the measurements within a mine shaft or on mine surface remain the same. Furthermore, he reported that for the first three years his work required up to 40% to 50% driving and excessive computer work. He however adapted his work tasks in this regards due to the increasing neck pain when driving frequently and when performing prolonged computer work.

[39] The plaintiff what does relate to the sedentary to light work with occasional medium positional demands.

[40] On 17 April 2018 Miss Meyer made a follow up to re-evaluate the plaintiff. For that purpose, she was furnished with the following documents:

40.1 RAF 1 completed by Doctor G Bronkhorst;

40.2 RAF 4 completed by Doctor J Schutte;

40.3 orthopedic medicolegal report dated 25 September 2015 by Doctor LF Oelofse;

40.4 orthopaedical medical legal report dated 5 August 2016 by Doctor TG Tshitake;

40.6 joint minutes of orthopaedical surgeons dated 23rd August 2017 by Doctor L F Oelofse and Doctor TG Tshitake.

[41] The plaintiff noted that he used Myprodol and Mypaid for the pain he experienced in his neck. He takes these painkillers symptomatically and not daily. In the second report, Miss Meyer observed that the plaintiff continued in the same position with similar work tasks with the following change: a data collector was appointed for his services in 2017. This lessened the physical survey work the plaintiff had to perform. His work tasks now mostly related to driving 220 kilometers and: rare surveying and sedentary computer

work. The plaintiff noted that he still experienced increasing pain in his neck when driving frequently and when performing prolonged computer work. After 30 minutes he requires a break. Future earning capacity did not change much. The loss of amenities remains unchanged. She reported that the plaintiff was not fully suited for his current work task as a mine surveyor. The restrictive factors are his driving tolerances as well as his reduced tolerance for administrative work due to neck symptoms.

EVIDENCE OF EMILE SCHOEMAN

[42] In his testimony, the Plaintiff told the Court that, *inter alia*, he was single, he had no child and was unmarried. He had a basic surveying certificate which he obtained while he was still employed at Matrix Gold Mine, while he was still working underground. He played cricket and squash only at social level. But he has since stopped playing.

[43] While he was working at St Helena, he acquired basic mining sampling knowledge. He told the Court that he joined Isambane Mining in 2013. He was allocated three open mines to do his work. He was working the same hours at each mine, although the working hours remained the same from 07h00 to 03h00. He had to visit three mines situated not far from each other. His function included driving his assistants who was not allowed to drive.

[44] Because he worked exceptionally long hours, he decided to resign. He also decided to resign because of pain. When he resigned, he took a pay cut from R58,000.00 per month to R35,000.00 per month. His new job was at ESS Surveying. He experienced a burning sensation in his neck after driving. It was a little bit worse at the time of his testimony. Because of such pain he had to go and see a chiropractor.

EVIDENCE OF KAREN KOTZE

[45] She is an industrial psychologist with proper qualifications. This was common cause between the parties. There was therefore no dispute that she was an expert in her field. She told the Court that she interviewed the Plaintiff and having done so prepared a report. Relying on the following opinion of the Orthopaedic Surgeon:

"I believe that the injury had a profound effect on the patient's productivity and working ability and will continue to do so in future", she remarked, in her report, that it was her opinion that the patient would have been able to work until the normal retirement age of 65 years, if not for the accident sustained. It must be recalled that this observation is not based on the orthopaedic surgeon's report. This witness would certainly not make the same observation if he had been provided with a copy

of the orthopaedic report by Dr Tshitake. She would most certainly have had a different view. In this regard it would be recalled that Dr Tshitake testified that there was no medical evidence that the Plaintiff had sustained any neurological injury. In the absence of any such injury she saw no reason why the Plaintiff should not continue to work until he was 65 years of age. Finally, according to Dr Tshitake, the injury that the Plaintiff sustained because of the motor vehicle accident did not have any deleterious impact on any aspect of the Plaintiff's life. Now about the impact on career prospects she reported that, based on expert opinion and on his assessment, it appears that the Plaintiff's career prospects had been impacted in the following respects:

45.1 the orthopaedic surgeon indicated that Mr Schoeman's working ability has been profoundly affected and will continue to do so in the future. As a result, even with successful treatment, he will be requiring accommodation and light duty, ergonomically neck friendly environment; he added that even if the Plaintiff was accommodated provision should be made for 5-10 years earlier retirement. In this regard Dr Oelofse noted that Mr Schoeman is not accommodated at work;

45.2 earlier retirement as indicated by Dr Oelofse could therefore be expected;

45.3 it appears that the occupational therapist agree, as indicated in the joint minutes, that although Mr Schoeman meets the physical demands of his occupation as a mine surveyor he has a decreased tolerance of performing computer work, when considering his neck symptoms. He is also required to implement economic principles and use special devices;

45.4 as per collateral information the Plaintiff complains about back pain at works and works at a slower pace. He is not accommodated at work;

45.5 the expert knows that although he is still employed in his pre-accident capacity as a mine surveyor, he is not fully ceded to do a full range of work just expected;

45.6 therefore, his occupational functioning has been negatively affected by a *sequelae* of the injuries sustained in the accident and resulted in the loss of productivity and efficiency;

45.7 in general, it is acknowledged that employees with injuries as these would be disadvantaged, to a greater or lesser extent, in respect of their competitiveness in the open labour market, especially in comparison with uninjured piers. That renders Mr Schoeman occupationally more vulnerable. She then opined that

the Plaintiff's career prospects had to be truncated by the sequelae of the injuries sustained in the motor vehicle accident.

[46] In conclusion, she opined that the Plaintiff's career prospects and associated likely earnings had been truncated by the *sequelae* of injuries sustained in the accident. For purposes of quantification of the claim his loss of likely earnings could be based on the difference between the pre- and post- accident likely earnings. Past loss of earnings appears to be inapplicable to his case. Future sick leave could constitute a loss of income should treatment be required, in other words, forfeited leave. 5-10 Years early retirement as indicated by Dr Oelofse is expected. It is acknowledged that contingency deductions, if applicable, are the prerogative of the Court.

EVIDENCE OF TSHIFHIWA GODFREY TSHITAKE

[47] Mr Tshitake is a qualified orthopaedic surgeon; a specialist in that field since 2009. He holds the following qualifications: MBChB; MMed (Orth) FC(Orth) SA and CIME. His expertise is not in dispute. On 5 August 2016 he consulted with the Plaintiff and assessed his injuries. He read into the record the details relating to MRI scan which found the Plaintiff to be normal.

[48] He described an MRI scan as a specialised tool which seeks to determine the pathology or structural integrity of tissues and abnormalities that would otherwise not be picked up by a normal X-ray. MRI scan is designed to pick up injuries to nerves, intra-vertebrae discs, which are tissues that are between vertebrae and bodies, in the temporal discs. This would include injuries to nerves, ligaments, intra-vertebrae discs. An MRI scan would be typically ordered or conducted when the X-ray would have shown nothing, but the patient still complained about further symptoms or pain. X-ray and MRI scan are not designed to do the same thing. The purpose of an X-ray would be to show bone structure. If the X-ray shows that the bones are normal, but the pain or problem continues, then you take it up with an MRI scan or a CT scan. The MRI scan diagnoses problems that the X-ray cannot detect or pick up. Due to its costs in South Africa, the MRI Scan is not routinely used. To use it a patient must have significant clinical signs. So, the indications basically would be neurological findings, nerve tension signs, like one conducting a Spurling's Test, if there is a nerve that is compressed. (A Spurling's Test is described as a medical manoeuvre that is used to assess the nerve root of pain (also known as

radicular pain. The examiner turns the patient's head to the affected side while extending and applying downward pressure to the top of the patient's head).

[49] Then he analysed the report by Burger Radiologists Incorporated. MRI Scan report that was taken two months after the accident. About it he testified that:

49.1 *"normal cervical lordosis and alignment"* means that the neck posture and alignment were found to be normal;

49.2 *"bony elements and paravertebral joints were found normal"* means that the bone did not show any problems. Paravertebral joints between the vertebral bodies were also found to be normal. This include facet joints, and co-vertebral joints. These are around the vertebral bodies where they articulate. They are joints. All these facet joints were found to be normal. In the MRI they found no degenerative changes. Degenerative change, he continued with his testimony, is the physiological process that all human beings go through. It can set in on a person in the third decade of his life, in other words, in his or her thirties. It can affect any of the multiple joints in the body and the spine. It is basically a wear-and-tear process that accompanies ageing. It is a natural phenomenon. This natural phenomenon may result from a variety of causes,

among them, activities in which a person is engaged, such as playing sports, rugby, soccer or even from work. If you drive long distances where you would have to have your neck extended or twisted a lot or moving around would also predispose a person to getting earlier than usual degenerative change. People with arterial sclerosis, a disorder in the blood, where you get blood vessels blocking up around the joints cause the degeneration of the joints, including in the spine. Trauma is one of the causes;

49.3 the problem with soft tissue injury is that one is unsure whether it is a psychological process or whether it is caused by injury. If you have a fracture you would expect the process to start happening rapidly but if you have a soft tissue injury, it becomes difficult to determine whether this resulted from a natural process or is injury related. A soft tissue whiplash can also result in degeneration. If you do X-rays a few weeks after an injury has occurred and you find these degenerative changes, it is probable that they were there before the injury;

49.4 *"the generalised disc space narrowing of the intra-vertebral discs at all levels"*. He explained about the said report that these levels are found to have normal

intensity. It means that there were no injuries to the discs that the MRI scan could pick up. It also means that the levels were normal;

49.5 *the disc in C7/T1 was normal.* There was no bulging or prolapsing of the nerve present. There was no spinal canal stenosis or any nerve compression. At C6/C7, there was mild posterior bulging. No prolapse or herniation was present. Herniation is degenerative changes but if you find any bulging it would be part of what constitutes degeneration;

49.6 about C6/C7, he testified that there was no nerve compression, or any other spinal canal stenosis demonstrated. Prevertebral joints are found to be normal in that level. So basically, in C6/C7 there is a mild posterior bulging which is a form of degeneration. But it was mild. In respect of C5/C6 annulus fibrosis was intact, that was a ligament in the spine that was found to be normal;

49.7 regarding C5/C6 level he found that it was normal. He testified that there was no disc prolapse or herniation present; no spinal canal stenosis demonstrated, and the prevertebral joints were normal;

49.8 about C4/C5 level he testified that it showed broad based posterior disc bulging; that he found a degenerative change. He testified furthermore that the level did not demonstrate any nerve compression or spinal canal stenosis. He

explained what the spinal stenosis is as follows: that there is a canal where the spinal cord lies. In that canal several factors can narrow that canal. If that canal gets narrowed, you diagnose what is called canal stenosis. That will manifest itself with the dysfunction of the spinal cord or nerves. You would pick it up either with excruciating pain or tingling sensations going peripherally to the limbs. That finding, if it is made, would mean that there is pressure on the spinal cord which would cause enormous pain and dysfunction because if the nerves are pressed, there will be interference at the end. Either you get numbness, weakness, or dysfunction of the organ the nerve is supposed to end. He testified that in case of this level C4/C5 it was found that there was no stenosis;

49.9 he testified that the disc at C3/C4 is normal at that level, that no bulging or prolapse was present. No nerve compression or spinal cord stenosis was demonstrated;

49.10 *C2/C3 and cranial cervical function*; these levels were normal. Having had a look at the MRI Scan report, he concluded that it was a normal cervical spine; there was no nerve compression, or any spinal canal stenosis demonstrated.

Basically, this was a normal MRI for a person of the Plaintiff's age; with mild degeneration at those stated levels, two months after the accident. Looking at the MRI scan taken at the time of the accident, he would diagnose the Plaintiff as having sustained whiplash or soft tissue injury. He would not expect excessive pain because there were no significant structural derangements.

[50] At the time of the assessment the Plaintiff complained of a painful neck with occasional episodes of stiffness. He also complained of partial loss of the sensation involving his left hand and a painful left shoulder since the accident. On complaints alone one is unable to say that the injury is serious. One would have to make sure that the pains that the Plaintiff complains about can be confirmed with objective clinical assessment and even radiological assessments to be able to make a reasonable conclusion about the seriousness or otherwise of the injury.

[51] On the assessment of the spinal examination in the region he started with the cervical spine. The Plaintiff was found to have the tenderness of the muscles of the neck posteriorly on the right side. This means that one would have to palpate him, in other words, to press him and ask him where the pain is. He also performed a

"Spurling's Test" and it was found to be negative. The purpose of performing the "Spurling's Test" is to establish if there was any entrapment of any nerve or nerves. If this were found to be positive, it would be a significant finding because his injuries to his neck would have been causing pressure on his neck. In this case, he found that it was negative. The Plaintiff did not have any nerve entrapment.

[52] In examining the Plaintiff's thoracic spine, he found that his upper back was normal. The Plaintiff's lumbar spine was normal. No abnormalities were detected. He found that the Plaintiff had normal power and sensation. The relevance of the Plaintiff having normal power and sensation in his upper extremities was that the Plaintiff did not have any spinal cord injury associated with soft tissue injury. His spinal cord was therefore normal.

[53] He continued with his evidence on his report and testified that X-rays on the cervical spine had been ordered and done by Dr Oosthysen and Engelbrecht Radiologists and reported by Dr Ebrahim. He had attached to his report such X-rays. According to him the Plaintiff's X-rays and stress views of the neck were normal.

Pain and Suffering

53.1 the Plaintiff suffered from acute severe pain following the injuries he sustained in the relevant motor vehicle accident. The acute intensity of his pain would have diminished with gradual passage of time while convalescing;

53.2 the Plaintiff continued to experience some pain in the neck that is not associated with any objective significant clinical pain or radiological pain deficit. The absence of significant neurological deficit is a favourable finding. He testified that neurologically he found out that the Plaintiff had normal power and sensation in the cervical spine. The Plaintiff did not have any spinal cord injury associated with soft tissue injury. According to Dr Tshitake the Plaintiff has no permanent serious scaring or disfigurement. More importantly his life expectancy has not been shortened by the injuries he sustained.

[54] In his report, Dr Tshitake, recorded that the Plaintiff's neck injury is unlikely to result in early retirement from his present position as a surveyor; that he has not been temporarily or permanently disabled following his neck soft tissue injuries. According to him, the Plaintiff manages to perform basic self-care activities of daily living independently. He had no objective significant clinical deficits that would prevent his capacity to engage in sporting activities.

[55] According to Dr Tshitake, the Plaintiff had suffered a whiplash type soft tissue injury of the neck. Having gone through the MRI scan report, Dr Tshitake found that his clinical examinations and findings were consistent with the MRI scan report because the MRI scan concluded that there was no nerve compression or any spinal canal stenosis. So, if you have a normal MRI scan and normal clinical findings that means the problem is not serious.

[56] He also commented on the X-rays attached to Dr Oelofse's report dated 25 September 2015. He explained the following by Dr Tobie De Beer as follows:

56.1 *"There is no prevertebral tissue swelling."*

He explained that prevertebral soft tissue selling is the flesh that is basically in front of the vertebral bodies. If there is significant injury both soft tissues swell up. If the injury in the vertebrae is occult, those soft tissues swell up. This becomes a red flag that indicates to a clinician that perhaps there is some ligament or a disc that is injured. This condition may require a further testing. But in the case of the Plaintiff there was no swelling. Consequently, his condition was normal.

56.2 *"There is an early generalised disc space narrowing of the intervertebral discs at all levels."*

He was unable to explain this condition. He stated that it is difficult to conclude because usually when one measures the discs one does so in relation to the others. In other words, one above or below the subsequent ones. If you say there is general, and you also say early generalised disc narrowing of all of them it is difficult to make any finding.

56.3 *"There are early spondylotic changes with early neuro-central joint degeneration with early sclerosis of the facet joints most pronounced at C3-4; C4-5; C5-6."*

According to Dr Tshitake this means that the Plaintiff have degenerative changes. This was also confirmed by the MRI scan. In his report, based on the MRI scan, Dr van der Merwe had reported that there was a broad base disc narrowing at C3- C4; C4-C5. This was an indication of degenerative changes that they would have seen in the X-rays. C1-C2 level was normal. There was no evidence of bony cervical injury.

56.4 "There is previous internal fixation of the shoulder with early neuro-central joint degeneration."

In this regard he testified that during the third decade of life degeneration starts to manifest itself. According to him it is normal to have degeneration in the third decade of one's life. He continued with his evidence and testify that it must be put into context. If, for example, you have an X-ray in that third decade and several months later there is an acceleration of the degenerative changes then we would be suspicious whether these were caused by the injury or not. But if you took the X-rays soon after the injury and it is found that you have degeneration; we do it again and you have degeneration; we do it again after a year or two years later and we still find degeneration, it is basically just the radiological findings in the ageing process that was there before.

[57] According to the MRI scan by Dr van der Merwe, there were similar degeneration findings in respect of C3-C4 and C4-C5. He testified that he would still find that the Plaintiff had suffered a mild soft tissue injury that he sustained. He would also find that incidentally he also has degenerative changes which are age-related. If on a clinical examination, he found significant neural impairments and then combine these impairments with these X-rays he would have concluded otherwise. But clinically with no such evidence of nerves being compressed it would be difficult to assign a

"serious" status to the injury. He persisted with his evidence that for someone in his status, if it is indeed early degeneration it is normal as it is a natural phenomenon. In other words, degeneration reported about in the X-ray report on which Dr Oelofse relied was not induced by the motor accident in which the Plaintiff was involved on 6 September 2012 but took place naturally.

DR TSHITAKE'S ANALYSIS OF DR OELOFSE'S REPORT OF 25 SEPTEMBER 2015

[58] He observed that Dr Oelofse's report of 25 September 2015 indicated that he also performed a Spurling's Test Compression Test and that the result was negative. He and Dr Oelofse made the same finding in this regard. Quite convincingly there was no nerve entrapment. That is what it meant. He agreed with Dr Oelofse's findings that the Plaintiff's ability to flex and extend his neck was normal. This means that the Plaintiff had no problems with his neck. Furthermore, he agreed with Dr Oelofse's finding that there was minimal restriction of lateral bending or rotation of the neck to the right side. The rotation of the neck to the left was normal. He agreed with Dr Oelofse's finding that he also found tenderness in the midline of the neck and under the sub-occipital area under the head.

[59] He was sceptical about Dr Oelofse's finding that he found spams. He explained that spasms are caused by contraction of the muscles. He told the Court that he always finds it difficult to find spasms because this is the field for physiotherapists. They are able, by touch and asking the patient questions, to feel that a muscle is tense or not tense.

[60] His comments on Dr Oelofse's second report dated 7 March 2018

60.1 The X-ray report by Dr Philip Fourie stated that:

"In addition to the described abnormalities there is also C5-6 as well as C6-7 spondylosis changes present with some disc space narrowing and early developing neuro-central spurs.

"No gross foraminal impingement signs are seen."

He explains that this was a confirmation that there were degenerative changes in the spinal cord.

60.2 In the X-ray cervical spine report by Dr Tobie de Beer it is reported that:

"There is no prevertebral soft tissue swelling.

There is a moderate loss of normal cervical lordosis, with a curvature convex to the left."

He explained that that depended on the position at which the radiographer took the X-rays at the time. It is just an issue of the position the patient took when the static image was taken. It could be that when the radiographer took the X-ray the patient was bending to one side. That would result in the static picture that the radiographer would capture. When this picture goes to the radiologist for interpretation, the radiologist will see it either or as both postural pictures. You were positioned in a certain way when the picture was taken, or you are always like that because of pain. So, the radiologists see the curvature as not normal then they say, regardless of the position at which the picture was taken, that the curvature is lost.

60.3 *"A degree of disc space narrowing with sclerosis of the endplates at the disc level C3-4. There is early neuro-central joint degeneration at level C6-7. There is moderate facet joint sclerosis at all levels."*

In the X-ray cervical spine report by Dr Tobie de Beer, he testified that it is basically the same pattern of degeneration. He testified that to determine the extent of the degeneration, one would have to compare the 2018 X-rays and

the 2015 X-rays to see any significant differences. He concluded by stating that all that he could say was that observations confirmed that there were degenerative changes that he previously testified about. He told the Court that he did not have enough evidence before him to enable him to make a finding that the Plaintiff could retire 5-10 years earlier, all because he did not sustain any neurological deficits.He did not think that the plaintiff must retire early unless he had some neurological problems.

60.4 Dr Oelofse had testified that it was up to the orthopaedic surgeon, and not occupational therapist or industrial psychologist, to comment on retirement. Dr Tshitake accepted that it may be Dr Oelofse's view but that the assessment on retirement was a multi-disciplinary one, in other words it takes more than an orthopaedic surgeon to make such an assessment.

[61] At the time he and Dr Oelofse compiled the joint orthopaedic minutes, he was not in possession of the Occupational Therapist's report. So, all that he could do at that time was to defer to such a report even if he did not have it. But even if he had such a report those findings by the Occupational Therapist would not have assisted him, if the Plaintiff's clinical state were to be interpreted the same as what he has found in

his assessment. He would still have no grounds to find that the Plaintiff would retire early. Referring to the occupational therapist's joint minutes who both remarked as follows:

"We agree that Mr Schoeman's work task as a surveyor requires sedentary to light work demand", he testified that it seemed that his job was a sedentary one and if he did not have any neurological deficits but just neck pain, he would not be able to say that the Plaintiff would retire early.

[62] Going back to his report, he told the Court that the Plaintiff had no objective significant clinical deficits that would prevent his capacity to engage in sporting activities. He could not find a single fault if he started exercising. He found that there was no need for any surgical treatment. This need would have arisen if he had suffered neurological deficits or nerve entrapment signs that would have prompted the doctor to do a scan to confirm how serious the injury was and to do a procedure. When he assessed the Plaintiff, he could not conclude that he needed any surgical treatment. He testified that Rhizotomie was neither cheap nor reliable. He did not recommend any future medical treatment.

[63] On a question by the Court how he would rate the injuries sustained by the Plaintiff, he testified that it was not serious. Furthermore, he said that X-rays were reliable in picking up bone injuries.

EVIDENE OF KB KGALAMADI RAMUSI

[64] He testified that he consulted with the Plaintiff on 2 September 2015. At the time of the evaluation the Plaintiff told him that he was earning R55,000.00 per month where he was working. There was no proof of income of that amount because the Plaintiff did not provide him with his salary slip or any proof of his earnings. Apart from consulting with the Plaintiff his report was made based on the following documents, *inter alia:*

1. RAF4 form completed by Dr Tshitake;

2. Orthopaedic surgeon's report from Dr TG Tshitake;

3. Occupational Therapist Report from Ms N Ntzungu.

He was never given the Plaintiff's expert reports. The purpose of his consultation with the Plaintiff was to evaluate his pre-accident position and to compare it with the post-accident position. He made it clear in the report that it was based on the result of the interview conducted with the Plaintiff on the medical and therapeutic

reports, labour market as well as the Plaintiff's circumstances. He also pointed out that the conclusions arrived at and the recommendations made could change if any other significant information were presented, e.g. the Plaintiff's expert reports.

[65] With regard to loss of earnings he reported that the Plaintiff had the accident on 6 September 2012 while he was working at Shanduka Cole. Because of the accident he stayed out of work for about half a day and he was back working the next day. He could only have obtained this information from the Plaintiff himself and from the other reports. The Plaintiff was paid in full for the period. He concluded by saying that the Plaintiff would not have suffered any loss of earnings for unpaid sick leave. The Plaintiff was now on sick leave.

[66] He reported furthermore that the Plaintiff returned to work on the same work tasks with no difference in earnings. At the time of the accident, the Plaintiff was earning R30,000.00 basic. Even without having submitted proof of R55,000.00 per month he claimed he was earning, the Plaintiff was therefore still not likely to have suffered past loss of earnings from an employer accommodating measure. Furthermore, he reported that the Plaintiff told him that he was still at the same job at the time of the

evaluation. According to his observations medical opinion before him suggested that the Plaintiff sustained a neck injury which has since cleared and that it has not resulted in any significant incapacity. Here he was reciting the findings of Dr Tshitake. He reported further that the Plaintiff was still expected to continue in his pre-accident work and that no early retirement for the Plaintiff was envisaged. Accordingly, the Plaintiff was not expected to suffer loss of earnings in future arising from the retained capacity to work.

[67] In conclusion, he reported that:

67.1 but for the accident and considering the Plaintiff's pre-accident employment and education history, it is postulated that the Plaintiff would continue to work until he reached his normal retirement age;

67.2 the Plaintiff's post-accident capacity to work and earn an income seem not to be impaired;

67.3 the Plaintiff was expected to continue working in his pre-accident work until he retired;

67.4 the Plaintiff should be compensated for the post- and future accident related treatment, pain, and discomfort.

[68] During cross-examination he conceded that when he assessed the Plaintiff, he did not have all the reports. He conceded furthermore that if he had received all reports and the report of Dr Oelofse he would have aligned himself with his view on the Plaintiff's retirement age.

ANALYSIS

[69] Both Dr Oelofse and Dr Tshitake are experts. They are orthopaedic surgeons. Both have given expert testimony. There is a conflict of expert testimony in this matter. It is the testimony of Dr Oelofse that the Plaintiff has suffered serious injuries because of the motor accident in question. On the other hand, Dr Tshitake's expert testimony is that the Plaintiff has not sustained any serious injuries.

[70] It will be recalled that during the cross-examination of Dr Tshitake, Adv Diedericks (SC) pointed out to him that Dr Tshitake was the Court's witness and not the

Defendant's witness. This principle did not apply to Dr Tshitake alone. It is applicable equally to Dr Oelofse too. Although he gave evidence for the Plaintiff, Dr Oelofse was, in equal measures, not the Plaintiff's witness but the Court's witness. The rationale behind this principle is that they are both experts and their expert testimony is designed to assist the Court in circumstances in which the Court is not equipped with the ability to assess a person's injuries. The function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that because of his special skill, training or experience, the reasons for the opinion which he expresses are accepted. See in this regard **Menday v Protea Assurance Co Ltd 1976 (1) SA 565 ECD- 569 B-C**; **Schneider N O and others v AA and Another 2010 (5) SA 203 (WCC) at 211J-212B**

[71] The starting point on the subject is set out as follows in the South African Law of Evidence, 2nd Edition by DT Zefferit and AP Paizes page 321:

"The opinion of expert witnesses is admissible whenever, by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officer."

There is no doubt that both are specialists in their field; that they are experts in their field was never challenged. Neither of them challenges the other that they are both experts and furthermore that they possess the necessary qualifications in their field of speciality. They have the necessary qualifications in their speciality fields. It is not in dispute that when one looks at the qualifications of Dr Oelofse and his track record, he seems, at first sight, to shade Dr Tshitake. What is of crucial importance is whether both are equipped with the necessary qualifications and ability to be expert orthopaedic surgeons. In my view, they are.

[72] It is the duty of the presiding officer to decide whether the witness has sufficient qualifications to be able to assist the Court. The Court must be satisfied that the witness possesses enough skill, training, or experience to assist it.

"However eminent an expert may be in a general field, he does not constitute an expert in a sphere unless by special study, or experience, he is qualified to express an opinion on that topic. The dangers holding otherwise, of being overawed by a recital of degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure "theory" untested by knowledge or

practice. The expert must either himself have knowledge or experience of others who themselves are shown to be acceptable experts in that field."

I am satisfied that both are by virtue of their special study and experience qualified to express an opinion on the injuries sustained by the Plaintiff. These experts' testimony about the seriousness or otherwise of the Plaintiff's injuries was based, in principle, on two grounds. Firstly, their consultation with the Plaintiff and secondly, and more importantly, their analysis of the X-ray or MRI scan reports. Their assessment depended entirely on the analysis of the radiologist's reports that they perused or interpreted. Each one of them gave what each deemed to be valid and relevant reasons for his findings. If an expert's opinion is to carry any weight it is of paramount importance for him to state his reasons:

"… an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some competent witnesses. Except possibly where it is not controverted an expert's bold statement of his opinion is not of any re-assistance. Proper evaluation of opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reason proceed, are disclosed by the expert." See **Coopers (SA) (Pty) Ltd v Deutshe Gesellschaft Für**

Schadlingsbesbekǎmpfung MBH 1976 (3) SA 352 (A), 371F-H; **Road Accident Fund v S M (1270/2018) [2019] ZASCA103 (22 August 2019).**

[73] In my view, unlike Doctor Oelofse, Doctor Tshitake gave truly clear reasons for the conclusions he had arrived at. Doctor Oelofse relied in the main on his qualifications and the fact that he was better trained than Doctor Tshitake. It was not about being better trained or about being a special surgeon. It was simply about your ability as an expert to give very clear reasons for your findings; to make a layman or the court understand your evidence. All that the two doctors had to do was firstly to consult with the plaintiff, obtain the history of the injuries that he had sustained from him and more importantly to interpret the X-ray or MRI scan reports that they received from the radiologists. There was a perceived air of superiority in the evidence of Dr Oelofse. In my view, he created an impression that his evidence was better than Dr Tshitake's. His remarks with regards to X-ray taken by the Defendants' radiologists will be remembered that he "had a big problem with the neurologists that push masses of patience and who do not spend time looking for these finer little things on X-rays that show clearly wear-and-tear." By these disparaging remarks he was complaining about the perceived poor quality of the X-ray report from Drs

Oosthysen. He did not, however, directly say that Drs Oosthuizen did not spend time looking for finer little things. This was a direct expression of dissatisfaction by Dr Oelofse with radiologist report prepared by Drs Oosthysen. In my view the expression of such dissatisfaction was misplaced because Drs Oosthysen only expressed an opinion from the results of an X-ray. He might as well have levelled all the criticism at the X-ray machine that took the images and not at the radiologists who genuinely tried to interpret what the saw in the images.

[74] He again showed that he held himself to be superior to Dr Tshitake when he said that:

"I did not know how experienced he was and a special surgeon. Many orthopaedic surgeons do not do special work."

Here he was undermining the work of an orthopaedic surgeon who did not do special work as if it was not enough to be an orthopaedic surgeon and as if one had to be a spinal surgeon to be able to interpret the radiologist reports. At no stage did he say that Dr Tshitake misread or misunderstood or misinterpreted the radiologists' reports. In fact, neither expert questioned the others' ability to interpret the radiologist reports. Ms Moses argued that Dr Oelofse was not a credible witness.

She pointed out that his evidence-in-chief was inconsistent with his evidence under cross-examination and that his reports cannot be relied upon. I agree with her.

[75] Even where a Court has the advantage of expert testimony it does not, however, have how to verify the witness' conclusions. In other words, the Court does not have any means by which to test the veracity of the testimony of an expert witness. For that reason, expert testimony presents a very strange difficulty in the assessment of the probative value of the expert testimony. How does a Court test the probative value of an expert's testimony? In **R v Jacobs 1940 TPD** the Court answered that question in the following manner:

"In cases of this sort it is of great importance that the value of the opinion should be capable of being tested; and unless the expert states the grounds upon which he bases his opinion it is not possible to test his correctness, so as to form a proper judgment upon it." See also **Coopers SA (Pty) Ltd** supra. *"A Court will only be able to determine the probative value of expert testimony if it understands such evidence; it will only understand such evidence if the expert gives clear reasons for his conclusions in "proper evaluation" of the opinion can only be undertaken if the*

process of reasoning which led to the conclusion, including the premises from which reasoning proceeds, are disclosed by the experts."

In this manner a Court is placed at the pedestal where it can make its own finding of facts; therefore, it can decisively determine the probative value of an expert's testimony.

[76] As pointed out earlier, there is a conflict of expert testimony as to whether the Plaintiff sustained serious or non-serious injury. It will be recalled that Dr Oelofse described the Plaintiff's injury as serious while Dr Tshitake's evidence was that the Plaintiff's injury was not serious. This trial was conducted on that basis. At the heart of the dispute was whether the plaintiff had suffered any serious injuries, as propounded by Doctor Oelofse, or mild injury as testified by Dr Tshitake. According to TD Zeffert and AP Paizes at page 328:

"··· If there is a conflict of expert testimony, in matters where the rationale for the opinion is utterly beyond the grasp of the usual trial of fact, it may be thrown back upon doubtful facts such as the rival witnesses' reputation and experience."

This issue of conflict of expert testimony was the subject of **S v Malindi 1983 4 (SA) 1999 TPD at page 104 C-D**, the Court, as per Le Roux J, as he then was, had the following to say:

"It is, therefore, clear that the Courts have taken the view that fingerprint identification is a matter for experts. Even though it cannot be clearly demonstrated to a Court the question is not so much whether the Court can see similarities or dissimilarities indicated by the expert but while it can trust the expert and rely on his statement and his opinion." My own underlining. The Court then said at page 104 H:

"Where two experts clash in their opinion it is for the Court to decide which of these experts are preferable as stated by Hofmann and Zeffert in their book on South African Law and Evidence at page 86. In Louwrens v Old Wage 2006 2 SA 161 SCA paragraph 27 the Court set out the proper approach when faced with conflicting evidence what was to "determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities."

Finally, on this point the learned authors state at page 329 that:

"A court does not ask whether a particular scientific thesis have been proved or disproved. In such proceedings it asks whether the balance of probabilities lies on a conspectus of the totality of the evidence."

[77] A Court does not, without giving reasons, look at the conflicting testimony of two expert witnesses and simply express that it is satisfied with the views expressed by one expert and fail to furnish reasons why it does not prefer the views of the other expert. In both cases it must furnish reasons. See in this respect **Michael and Another v Linksfield Park Clinic (Pty) Ltd 2001(3) SA 1188 (SCA) paragraph 39**:

"It would be wrong to decide a case by simple reference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed."

According to **Lourens v Oldwage 2006(2) SA 161 SCA** "*What was required of the trial Judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning which term and to what extent opinions advanced by the experts will founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities."*

[78] In my view, in determining whether an injury is serious based on the testimony before it, a Court must look at:

78.1 the history of the motor accident in which a litigant was involved;

78.2 what happened to the litigant after the accident, i.e. whether the litigant walked away or drove away from the scene of the accident or was driven away in an ambulance;

78.3 whether he received immediate medical treatment either at the scene or at the hospital or at the medical doctor's consulting room;

78.4 the nature of the medical treatment that she received, and if he was taken to the hospital, the length of his detention at the medical treatment centre;

78.5 if he did not receive immediate medical attention, the explanation given for the delay;

78.6 the clinical records of such a litigant;

78.7 the diagnosis of such a litigant by the medical specialists; and

78.8 the nature of the treatment recommended by each medical specialist, among others:

78.8.1 the history of the motor accident in which the Plaintiff was involved

The Plaintiff told Dr Oelofse that at the time of the accident he was the driver of his own motor vehicle. He was stationery at a stop sign

when another motor vehicle hit his motor vehicle from behind. He told the same history to Dr Tshitake;

78.8.2 what happened to the Plaintiff after the motor vehicle accident, in other words, whether he walked away or drove away from the scene

According to Dr Oelofse the Plaintiff was not taken to hospital after the motor accident. There is no evidence on this aspect. The Court will therefore assume that he drove himself away from the scene of the motor collision. These two factors alone, firstly, that he drove himself away from the scene and secondly, that he was not driven away in an ambulance are, in my view, indicators that he had not sustained a serious injury. The Plaintiff did not feel that he had been seriously hurt at the time. It is not unusual to see an ambulance transferring injured people from the scene of an accident;

78.8.3 whether he received immediate medication treatment

He told Dr Oelofse that he did not have neck pain immediately after the accident but decided to consult with his general practitioner just to be safe. This factor supports the fact that he drove himself from the scene of the collision. He told Dr Tshitake that he went to

consult with his general practitioner straight from the scene of the collision. He did not tell Dr Tshitake the reason for consulting with the practitioner straight from the scene of the collision. One can only assume that it was for the same reasons he gave to Dr Oelofse. Whatever reason he gave for seeing a doctor the conclusion is inevitable that it was not because he had felt, at the time, that he had sustained any serious injury. All the aforegoing, in my view, supports Dr Tshitake's assessment that the Plaintiff's injury was not of a serious nature. In fact, he told Dr Oelofse that he went to see his GP "just in case……" ;

78.8.4 neither Dr Oelofse nor Dr Tshitake had the Plaintiff's initial clinical records when each consulted with him. Therefore, the initial diagnosis of the Plaintiff by his GP is unknown, not only to the Court but also to the two doctors. I assume that he drove himself to and from the first doctor. I assume furthermore that the initial doctor acted professionally in assessing the Plaintiff's injury in assessing the Plaintiff and that at that stage he found nothing wrong with the Plaintiff. If the doctor had diagnosed him with any serious injury, I

see no valid reason why the doctor did not record his findings in writing or why he was not called to testify;

78.8.5 the Plaintiff told Dr Oelofse that about two months after the motor vehicle accident in question, he went to consult with his general practitioner. To Dr Tshitake he said that he consulted Dr Bronkhorst. The reason for consulting with his general practitioner was that he complained of severe neck pain and muscle spasm. Dr Bronkhorst referred the Plaintiff for X-rays and subsequently to an MRI scan. To Dr Oelofse he reported that he was only referred to X-rays. In the meantime, according to Dr Oelofse, the Plaintiff was treated conservatively with medication and physiotherapy. According to Dr Tshitake the Plaintiff received anaesthetic and anti-inflammatory medication. The Plaintiff did not explain why it took him two months before he consulted with Dr Bronkhorst. I have concluded that the Plaintiff took so long to consult with Dr Bronkhorst largely because he had no pains;

78.8.6 he told Dr Oelofse that he had not experienced pain immediately after the accident but that a few days later he had severe pain in his

neck. Although he said that he had severe pain in his neck a few days after the accident he does not explain why it took him two months before he consulted with his general practitioner;

78.8.7 the Plaintiff, according to Dr Oelofse, continued to have pain and discomfort in his neck with neck and shoulder spasm. The power in his left arm became weaker and he had pain in his left shoulder. He made the same complaints to Dr Tshitake. According to Dr Tshitake a patient may complain of a pain going down to the arm or numbness of that arm or feeling that the arm is weak or there is pressure on the nerve. The only way to pick that out objectively is to use an MRI scan to see how severe the pressure is on that nerve;

78.8.8 based purely on the X-ray report from Burger Radiologists Dr Oelofse diagnosed the Plaintiff with having:

(a) C2-C6 facet joint injury with:

(i) chronic pain and spasms;

(ii) C3-4, C4-5 and C5-6 osteo-arthritic changes; and

(b) soft tissue injury of the cervico-thoracic junction with chronic pain and spasm. Dr Tshitake described all these diagnoses by Dr Oelofse simply as whiplash. His diagnosis was also that the Plaintiff had sustained a whiplash type soft tissue injury of the neck.

[79] The Plaintiff had suffered no fractures or at least the X-rays and scans did not reveal any such fractures. He was never hospitalised. It is common cause between the two doctors that he experienced pain. He could walk and drive himself. On examination of his spine it was found by Dr Tshitake that he had not suffered any permanent serious scaring or disfigurement, and furthermore that his life expectancy has not been shortened by the injuries he sustained. According to Dr Tshitake the Plaintiff's neck injury is unlikely to result in early retirement from his present position as a surveyor, and finally, he has not been temporarily or permanently disabled.

[80] Having had a look at the X-ray report or radiologist reports Dr Oelofse testified that it reported a normal spine. He agreed furthermore that there was no spondylosis or

osteo-arthritis in the Plaintiff's cervical spine. Therefore, the Plaintiff did not have any injury on the cervical spine. Basically, he was unable to testify that what he interpreted on the radiologist report was accident related. For instance, when it came to *"previous early fixation of a shoulder with early neuro-central joint degeneration"* he testified that it was not accident related. When it came to the remark that *"there is early bony impingement of the exit foramina"* he testified that it resulted from one of the effects of degeneration of the spine. Unlike Dr Tshitake, he attributed this condition to a natural phenomenon. Dr Oelofse went further and testified that this degeneration of the Plaintiff's spine is something that will later in life start impinging on his nerve root and that will give him arm pain, pain that goes down with his arms and into the fingers.

[81] It is not clear whether Dr Oelofse saw the Plaintiff's X-rays. In one instance, he testified that:

"I did not see the X-rays myself, but X-ray reports reported a normal spine" and in another instance, when Adv Diedericks SC asked him the following question:

"Now in this instance, did you double check whatever is written on the X-ray report, did you double check it on the X-rays themselves?"

His answer was *"yes".*

[82] The evidence of Dr Tshitake on the purposes of the X-ray and an MRI scan should be recalled. In my view, the difference is of crucial importance. He described an MRI scan as a specialised medical equipment which seeks to determine the pathology or structural integrity of tissues and abnormalities that would otherwise not be picked up by an ordinary X-ray. He further testified that this would include injuries to nerves, ligaments, and intra-vertebral discs. Dr Oelofse conceded Dr Tshitake's evidence about the purposes of the MRI scan. Dr Tshitake made it noticeably clear in his evidence that X-ray was designed to diagnose broken bones. Accordingly, even if an X-ray would show soft tissue injuries, as testified by Dr Oelofse, because an MRI scan is designed to diagnose soft tissue injuries or whiplash, an MRI scan will be precise, clear and more reliable than an X-ray diagnosis of soft tissue injuries. Finally, he testified that an MRI scan would have been ordered if the X-ray showed nothing, but the patient continued complaining of pain. During cross-examination Dr Oelofse conceded that MRI-scan findings, as far as soft tissue injuries are concerned, are more reliable than X-ray findings.

[83] Dr Oelofse testified that when he assessed the Plaintiff, he had his clinical records. He became evasive when he was asked by Ms Moses which hospital the clinical records he had, came from. He did not answer the question properly. At first, he seemed to say the notes from the General Practitioner, which still had not answered the question. When Ms Moses persisted with the question he answered *"yes, I have just explained."* When he had explained nothing. At this stage he was clearly becoming irritated at the question. But still he was not answering the question.

[84] Ms Moses struggled to get a proper and straight forward answer from Dr Oelofse about whether he, Dr Oelofse, had perused the Plaintiff's scan, when he assessed the Plaintiff. Getting a proper answer from him was like draining water from a granite wall. The question was repeated: *"Did you have sight of it at the first assessment?"* Then the Court interjected and asked him: *"Did you read it?"* His answer was *"I truly cannot remember. I can only assume I read it."* Ultimately, he said that: *"I remember I did not have the MRI itself so I could only say that the radiologist report of the MRI scan was reported as normal."*

[85] The two expert witnesses discussed their reports. They were unable, however, to compile any joint minutes due to their divergent views in whether the Plaintiff had sustained any serious injury. He could not even discuss the cause of their differences.

[86] It should be established from the plaintiff whether he was absent from work because of the injuries sustained in the collision and, if so, how long he was absent from work. It is important that the name of the employer be obtained so that he may give details of any loss of earnings or he may testify about them. The duty is therefore on the plaintiff to prove that he lost income because of the injuries that he sustained during the accident. He must show that, because of the injuries, he was unable to go to work and for that reason the employer did not pay his salary. If the claimant has lost income due to the fact his or her bodily made it impossible for him or her to earn an income, such loss can be recovered as part of his or her third party claim; See in this regard **Rudman v Road Accident Fund 2003 (2) SA 234 (SCA).**

[87] In his report t in respect of sick leave, Dr Oelofse states that the patient, referring to the Plaintiff will need sick leave for the above procedure for cervical spine injury. He

reported furthermore that the injury the patient sustained in the accident had an impact on his productivity; that even with the successful treatment the patient will always have a deficit regarding his neck. The injury the patient sustained in the accident makes him an unfair competitor in the open labor market. About retirement, Dr Oelofse observed that: *"it is my opinion that the patient would have been able to work through the normal retirement age of 65 years, if not for the accident and injury sustained".*

[88] On the other hand Dr Tshitake's observations about the plaintiff are contained in paragraphs 54 and 55 supra. In addition, he reported that *"There have not been lost earnings"* which means that the plaintiff had not lost any income because of injuries.

[89] The occupational therapist states among others about the current employment description, that the plaintiff continued in the same position with similar work tasks. She reported furthermore that the plaintiffs planned to continue with his current work.

[90] About current employment the Orthopaedical surgeon states that:

"The *plaintiff continues to be employed y Isambane Mining as a surveyor."*

[91] I have already dealt with the competing testimony of Drs Oelofse and Tshitake above. The duty is on the plaintiff to produce evidence that, because of the injury, he has suffered loss of income. in the face of this competing evidence the court is compelled to find that the plaintiff has not suffered any loss of earnings and will not in future suffer any such loss of earnings. It is trite that the onus rests on the plaintiff to prove his case on the balance of probabilities. See **Pillay v Krishna and Another 1946 SA 946**. In my view, the Plaintiff has failed in his duty to satisfy the Court that he has lost any earnings or stands to lose any earnings as a consequence of the motor vehicle accident in question.

[92] Just before his closing address but after the Defendant had closed its case, Adv Diedericks SC brought an application in terms of Rule 33(4) of the Uniform Rules of Court for a separation of general damages from loss of earnings. The application was unopposed and was accordingly granted. Consequently, the only issue that occupied the parties was and which the court was required to decide was loss of earnings. This issue of loss of earnings was intrinsically linked with the merits of the matter. To establish whether there was any loss of earning the court had first to determine

whether the Plaintiff had sustained any injury and, if so, the extent of such injuries. It would not sufficient for the purposes of determining loss of earning to place actuarial calculations before the Court and ask the court to determine such the loss of earnings without any reference to the merits of the matter.

[93] Finally, it is of paramount importance to point out that according to the Plaintiff's particulars of claim there is no claim for Loss of Income. Though there is a claim for Estimated Loss of Earning Capacity, Adv Diedericks SC seemed to lay heavy emphasis on Loss of Income claim and not on Loss of Earning Capacity claim. That it is so, is clear from what the court was asked to decide at the beginning of the trial and the issues that the Court was asked to separate in terms of Rule 33(4). In both instances no reference was made to loss of earning capacity. Adv Diedericks SC did refer to loss of earning capacity in his last statement in reply. But whatever claim the plaintiff intended prosecuting, against the Defendant, my conclusion is that the plaintiff has failed to discharge the onus of proving on the balance of probabilities that he is entitled to the relief that he seeks.

I therefore make the following order:

1. **The application in terms of rule 33(4) of the Uniform Rules of Court to separate the general damages from loss of earnings is hereby granted.**

2. **The issues regarding general damages are postponed sine die.**

3. **The Plaintiff's claim for loss of earnings capacity or loss of earning, whichever is applicable, is hereby dismissed, with costs.**

_____

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	Adv F Diedericks (SC)
Instructed by:	VZLR INC;
Counsel for the Defendant:	Attorney N Moses

Instructed by:	Marivate attorneys
Dates heard:	19-23 August 2019
Date of Judgment:	17 June 2020