IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO / YES	
(2)	OF INTEREST TO OTHER JUDGES: NO/YES	
(3)	REVISED. Appearances Corrected	
(4)	SIGNATURE	DATE
	Electronically delivered N V Khumalo J	03/08/2020

CASE NO: 74231/2014

SWART J L **PLAINTIFF**

And

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

N V KHUMALO J

[1] This is an action against the Road Accident Fund ("the Fund") ("the Defendant") as a statutory insurer, responsible in terms of s 17 of the Road Accident Fund Act 56 of 1996 ("the Act"), as amended, instituted by the Plaintiff, a 55-year-old electronic engineer, for compensation for damages allegedly resultant from personal injuries he sustained when an insured motor vehicle reversed into him in a parking lot on 25 October 2011.

[2] The injuries sustained as stated in the particulars of claim are a soft tissue injury to his back and right hip, injury to the right side of the head and neck, and upper and lower molar

teeth on right side damaged, mild diffuse concussive brain injury, mood disorder and nerve pain/damage.

[4] The Plaintiff avers that accordingly he was as a result hospitalized and underwent emergency treatment at Wilmed Park Hospital followed by normal treatment during further hospitalization. He experienced pain, discomfort, suffering, emotional trauma and shock which he will continue to experience in future.

[5] As a consequence of the aforesaid collision and the injuries sustained, the Plaintiff alleges to have suffered damages in the amount of R3 315 414.25 constituted as follows:

[5.1]	Past hospital, medical and related expenses	R 158 483.25
[5.2]	Future hospital, medical and related expenses	R 400 000.00
[5.3]	Past and future loss of earnings	R1 956 931.00
[5.4]	General Damages	R 800 000.00

[6] The parties have settled the merits on the basis of 100% liability being accepted by the Defendant for payment of the Plaintiff's proven or agreed damages.

[7] The Plaintiff has accepted the Defendant's tender of an undertaking in terms of s 17 (4) (a) of the Act for future medical and hospital expenses. The issue of general damages has been referred for determination to the designated tribunal of the Health Professions Council of South Africa (HPSCA).

[8[The only aspects of damages to be adjudicated upon in this court is in respect of loss of earnings, past and present and past hospital and medical expenses.

[9] The parties agreed that aside from oral testimony, the evidential material before the court comprises of the reports that the parties agreed at a pretrial meeting on 11 April 2019 that if not formally admitted or disputed by the Defendant by the time of trial, would be deemed admitted into evidence or else under affidavit without the experts leading oral evidence. The reports filed inter alia, were those of Dr A P J Botha, Specialist Physician; Dr D Shevel, Psychiatrist; Dr S Barnes, Dental Surgeon; Dr H W Kluge, a maxilla- facial – and Oral Surgeon and by GW Whittaker, the actuarial. This includes all the joint minutes.

[10] Mr P W de Waal SC appeared for the Plaintiff and Mr Matambela for the Defendant. Mr de Waal in his opening statement presented the *sequelae* of the injuries that were to be proven by the Plaintiff to be as follows:

The back and right hip

[10.1] He submitted that the main feature is the debilitating pain which the Plaintiff has suffered since the date of the accident and which he will suffer from for the remainder of his life, a severe permanent neuropathic pain in his right hip due to the injury to the lateral, cutaneous and sural nerves upon which Prof Fritz would testify.

Neck and back pain

[10.2] Also the issue of back and neck pain he suffered from time to time as part and parcel of a pre- existing condition to which the accident contributed.

Neuropsychological deficits

[10.3] The moderately severe depression and the consequent neuropsychological deficits caused thereby secondary to the severe neuropsychological deficits to the severe neuropathic pain that is the prominent cause of the Plaintiff's functional un-employability. He referred thereto as a vicious circle that which Dr Mazabow was to testify about. Also testifying further to a long term psychotherapeutic treatment being likely to be required although Plaintiff with a poor prognosis and lifelong vulnerability to depression.

Neurocognitive deficits

[10.4] Dr Mazabow also highlighting in his testimony the importance of inviting attention to the neurocognitive deficits as a result of the pain induced depression which the Plaintiff suffers from, these are his memory problems, irritability and the short temper. Aspects Counsel argues were evident during the testimony of the Plaintiff.

[11] On the issue of earning capacity, Mr de Waal pointed out that the evidence is going to indicate that there is no documentary evidence of the earning capacity of the Plaintiff. Most of the money was paid in cash. He was involved in Telecommunications and Electronics. The basic amount he earned was R10 000. Due to those difficulties he had no tax returns**, salary slips**. The parties have based their arguments on the calculations by the actuary Whittaker as there is no counterpart. Following on what was agreed at the pre-trial meeting on 11 April 2017 that the reports were admitted on the basis as indicated in para 2.5. on par 14.7 that the Defendant agreed on the veracity and contents of the documents.

[12] Furthermore, he pointed out that evidence would show that the Plaintiff had pre-existing problems. He had a nerve injury on the right hip and was diabetic. A weight gain which is the cause of the effect of the nerve on his right foot. The theory is that the nerve does not correlate, causing injury to the nerve is unlikely. Because of the pain the Plaintiff suffers from depression, is demoralized and not as agile as he used to be. It is unlikely that he will gain employment as long as he has the deficits. His employability as an electrical Engineer highly unlikely due to scarcity of skills. Not necessary on the feedback from the Plaintiff. The earning capacity will be dealt with by the Industrial Psychologist.

[13] The Defendant was proceeding with the matter on the basis that the one who alleges has got to prove. Also on the basis that the duty to rebut only arises if a prima facie case has been established or proven. Therefore whether or not the Defendant bears the evidentiary onus to establish whether the evidence of the Plaintiff is to be accepted depends on its probative value. Plaintiff had to prove his injuries and the sequelae thereto resultant in his loss.

Evidence by Dr Fritz

[14] Dr Fritz, a physician for 15 years and a practicing Neurologist indicated that she has also worked in clinical and also teaching. Her testimony was that Plaintiff's injuries were

regarded exclusively as a soft tissue injury in the right hip, back and neck. The persistence of the pain made them think that it must be a nerve pain exacerbated by previous conditions of degenerative lumbar spine disease. It appeared that the direct impact pressed on this nerve, there was no pain there prior to the accident. Nerve from the diabetics, the cause of the pain brought up the pain of this nerve. The notion is that it is the diabetic pain. According to the Orthopedic Surgeon diabetes affects and involves the bones and nerves and when you have diabetics there is a small damage feeding the sensory nerve. Diabetes pain affect the actual nerve that goes to sensory nerve and when sense is damaged you get pain or numbness depending on the severity. She concluded that there was certainly poorly controlled diabetes preceding the accident. Secondary damage from the nerve brought from the pain as closest compression from the nerve.

[15] She pointed out that Plaintiff fell again from the right side. At that time, he had a big amount of pressure when the damage occurred, impairing blood to the nerve. The diabetic nerve has got blood supply given by very small blood vessels that tend to have got damaged from this blood levels. When it got damaged on top of that nerve, it further damages the function of that pain. Then there will be pain problems, which it is not new problems but a typical position in the immune effect. She referred to Kritzinger's testing whether the problem coming from the nerve roots, or the back or marginal/peripheral pain. Through EMG L2 or S1, the compression nerve indication of electrical current can be sent to the nerve EMG power by putting a needle into the nerve being supplied to see if there is damage. The site of pain that the team of consultants found it was no longer to the bruising of the tissue. The EMG reflected the fact that the combination of the lateral cutaneous nerve and the compression neuropathy and the peripheral neuropathy are all combined in the Plaintiff's sensory nerves and reflected the fact that there was no degenerative nerve root present as the cause of the problem. His sensory lateral nerves might be damaged by diabetes. The sensation test show that he had diminished sensation in the disc of those nerves. It could be seen from only not slowing the sensory nerve conduction on the outside when he indicated a lot of pain.

[16] However no potential could be obtained as the nerve could not be assessed properly. The diabetes nerve which has already had compression was noted. The actual motor nerve roots by the back were not affected but the EMG L2 evidenced that actual nerve root damaged. So worth trying medicinal works on the nerve pain. The condition of nerve with affected pain will be diminished with the use of Merina. Plaintiff took the medication proving that there was a nerve damage not vertebrae or his back. Plaintiff must have had underlying damage by the diabetes meaning prior to the accident his nerve roots already predisposed to injury. After the accident he experienced pain which never went away and been very severe. There being a loss of sensation in the distribution. **When she saw the Plaintiff he had in fact gained weight, weighing 135kg which was attributed to the compression on lateral cutaneous nerve of the thigh**, **nerve pain due to weight gain**. Cause of the weight gain when he was no longer working he was not exercising and depressed and started eating a lot more than before the accident, food comforting him, aggravated by not exercising. He initially thought it could have been the cause of the pain. He has lost weight now but his pain is still there.

[17] On Plaintiff's present status or what he exhibits Frits says it indicates that pain is a difficult symptom to evaluate objectively and people with pain are often ignored or not

believed as this cannot be quantified. A diabetic peripheral neuropathy is a sensory peripheral neuropathy and Plaintiff's major manifestation is pain. **Dr Kritzinger's report confirms that Plaintiff had early signs of peripheral neuropathy in the nerve, as per conducted studies and the cause of thereof is almost the Plaintiff's poorly controlled diabetes** but the combination of the lateral cutaneous nerve with a compression neuropathy and a peripheral neuropathy would result in a relative generalized nerve injury with each playing a role. The test was conducted to exclude the fact that pain was arising from the back and from the previous back injury. On 26/10/2011 there was a potential that pain could be found in blocks (2-C7, S1) suggesting another confirmation that pain was severe and that it did not go away but did too much to relieve pain. De Kok's notes show that prior to the accident Plaintiff had a vertebral degenerative problem predominantly of his neck and that he had diabetes. He indicated to bruising that was persistent and the pain not going away. He had chronic pain, which is the persistent pain aggressively becoming worse. The extensive investigation of the site of his pain shows that he has got lumbar disc degeneration but the normal EMG over the nerve roots reveals that this is not the site of the pain. **The hip joint appeared normal**, which also does not appear to be the site of the pain. But it confirmed the site of the pain to be the **damage to the sensory sural nerve and the lateral cutaneous nerve on the thigh on the right, which is particularly vulnerable because he has diabetic peripheral neuropathy which involves the nerve and predisposes it to pain and any reaction to compression**.

[18] She noted that Dr Mazebow, the Clinical Neuropsychologist indicated that Plaintiff did not sustain a traumatic brain injury in the accident, with a denial of a head injury. He has considered that **the major factor is that he has chronic depression that is moderately severe exacerbated by the chronic pain** but due to all the other things then suggest that he should be under ante depressant. The chronic depressive disorder would be expected to impact on his levels of concentration, attention, frustration tolerance, energy and motivation. The severe pain causing severe depression and no medication at that stage. Noted that Mazabow concluded that from a neuropsychological perspective **Plaintiff retains his overall intellectual cognitive capacity.** He has pain and physical limitations with chronic depression. She agreed with Mazebow that **Plaintiff has sensory pain as a result of the impact at the time of the accident onto previously damaged nerves and superimposed chronic depression which is not likely to be improved.** She noted the Psychiatrist, Dr Shevel's reporting that if **one has been dealing with a diabetic, already having damage chronic pain caused by diabetic nerve damage, is one of the worst that came out after the accident**. He diagnosed severe depression precipitated by the soft tissue injury sustained in the accident and comments on the underlying general medical condition and his **preexisting orthopedic pathology on this nerve causing extreme pain**. There is comment on pain that one would get from bones and not emphasis on very serious nature of compression of diabetic nerve.

Fritz comment on Truter report

[19] On the comment by Truter, the Clinical Psychologist that Plaintiff was after the accident seen by Dr Birell an Orthopedic Surgeon who said that the patient went back to work a week after the accident, he was in hospital for 3 to 4 days the sick leave was deserved. Dr Birell reported that the fact that Plaintiff says he closed his business after the accident cannot be blamed on the accident. **He also considered that his overweight status and diabetes would cause early retirement long before the sequelae of the accident**. He indicated the undermentioned severity of the pain, degenerative back disease super imposed by the

diabetes. Also noted that Plaintiff is frustrated and believes his pain is responsible for his physical limitations and therefore needed psychological intervention. She took note of the report by Dr Bruyn an Orthopaedic Surgeon of a joint formed and held on an actual nerve that is neurological Orthopaedic bones 2 joints. Sensory nerve where there is diminishing sensation or not sub severe pain some people tend to say they are magnifying the problem. The underlying diabetes which had created some peripheral nerve damage but no pain, it would be accountable for 30 % and the accident would account for 70% of his symptomatology as the pressure on the nerve is the source of the major pain. His headache and neck pain where 30 % of the underlying vertebral degenerative disease that predated the accident and 70 % due to accident. They knew he had a damaged nerve for which he had no pain. As a result of the accident he had compression on the nerve which had totally incapacitated the 30% role. **Diabetes after the accident will contribute 70% of his symptomatology, causing him to be depressed**. **The major source of his pain was the nerve over the right side of the femur radiating into the groin and the right hip and right femur and right thigh**. H**e is extremely restricted by the nerve pain on the right hand of the femur region** where he has been shown by Kritzinger to have damaged of the sural nerve and lateral cutaneous nerve of the thigh. **That said to be the site of his pain. He had a local back pain attributed to the degenerative problems that predated the accident.**

[20] He had a very poorly controlled diabetes from his blood results and the treatment he was taking. He had a pain over his lumbar region between L2 and L5 and a disc space narrowing over L2 and L5. This predated the accident but was aggravated by the accident as was his neck pain, causing compression on the pain on the right. If he had fallen best it would be light. He had never developed any pain from diabetes before the accident, After the accident he had (1) tremendous pain (2) was no longer able to work and the depression. It was not the brain. He did not think the bones had anything to do with a permanent disability. **In 2011 he had an accident, it was terrible. She saw the Plaintiff in 2016 but Plaintiff said the pain has improved and he said he has also improved but it was for a short a while**. **Now he says its worse, but Orthopedics says he has had very little damage from the accident.** From a neurology point of view, she would give a different perspective. She confirmed the contents of the joint minutes. Looked at a different perspective given **Dr Birrell**, who in terms of the Narrative Test, had **concluded that Plaintiff does not qualify for a serious injury from an orthopedic perspective, estimating a loss of capacity of not more that 5% to 6% as a result of the accident and will not have to retire early as a result of the accident**. Birrell agrees that he would require conservative treatment. He notes that Plaintiff not a good candidate for surgery due to his overweight status and his diabetes and has 1% to 2% chance of requiring neck or lumbar surgery. Does not agree with apportionment. Dr Manga forming a slight point of view. **The manifestation of the diabetic effect on his peripheral nerves as well as the EMG changes described by Kritzinger would suggest that most sensory peripheral nerves have been fairly severely damaged by diabetes and therefore would be vulnerable to any impact or force on them. The pain was because of a diabetic nerve,** therefore it will cause the frustration that is why the emphasis, due to the fact that diabetes was becoming severe and the pain as well becoming more. Not aware he has his joint headache and hectic disease nothing like the type of pain electro severe at the thigh. **Overweight is the cause of the pain.** The pain was very bad instantly at the time that he fell.

[21] Under cross examination Prof Fritz was asked regarding her conclusion, her view on Mazebow who has commented that on the depressant that have positive, he did not need to

qualify that. It was put to her that he actually saw Plaintiff, the pain had only become very much worse and Plaintiff seem to have lost every defence. Also that Plaintiff always had constant pain as indicated in her report when she refers to - "The accident had caused him to gain weight which exacerbated the pain, the gain weight he is experiencing from date of accident exacerbated his pain". He weighed 90kg at the time, and the cause of the pain. Now he had lost weight, what now? **Fritz replied that maybe the toll of gaining weight contributed to the sensory peripheral nerves he presented, causing sensation, numbness or pain to his right foot and thigh.** It was put to her that the reports say Plaintiff sustained quite a number of injuries, he fell at work, broke his leg, and asked the likelihood that all those injuries that he sustained before did not activate the pain? She said the damaged nerve in his thigh was caused by the profound fall – not the right that traumatized the nerve. It all improved with time that is why there was no single nerve at the time that created the type of pain. When Plaintiff went to see him he was weighing 135 kg in 2012 July. He told him that he gained weight too soon when asked to clarify his statement how he can have the same weight from 2011 to 2017 Plaintiff said he can't answer to that. The car injured him on the right side and the pain is on the right side.

Plaintiff's evidence

[22] He confirmed that he is an electronic engineer and worked for Telkom having started in 1994 -1995. He then started his own computer telephone system and appointed a technician who can help him because workload became too much. He started Compuphone Care CC on his own. He started working from his house, a 6 bedroom house with a flat-let that he converted into an office. Louise Reynecke worked for him for 6 years. He was engaged by schools in Klerksdorp, Swartz Reinecker and also in Mafikeng. He worked around the clock 7 days a week. He tried working for 6 days and on Sunday made it church day. In October 2011, he employed approximately 15 people working for him at the schools, that included two technicians at each school to oversee problems in Potchestroom and Klerksdorp. He did marketing- he had an advert on the radio, marketing was also by word of mouth. His work also spoke for itself. The accident caused so much motion because he lost his ability to go see his clients when he can help them in other areas and communication with his clients. It was difficult to lose that. He had to drive two times just to go and get the spares at Klerksdorp to get the parts to fix. He came to Pretoria four times a week. He earned R10 000 a month from all the contracts with all the schools, but sometimes it was more. He could afford camping and eating out. The R10 000 he mentioned was the minimum. That is what he took home, after paying electricity, rent, salaries and wi-fi. Also in 2011 the CC was making R30 000 or more depending on how many computers he had sold. He normally paid his employees in cash. Some of the computers they were on sale they would earn commission on sale. There was a time when he could not pay his employees and he asked them to give him time but he couldn't. .

[23] Furthermore he said in 2011 there was a virus in computers and he lost everything on the computer, which is bank accounts, however most of his earnings did not go into the banking accounts. He does not have copies of bank accounts or information on that. His books were done by him and his secretary, which were not really complicated but they were up to date. The CC was registered and his personal expenditure documented. He paid his cars out of his driving insurance, eating out and there was a house bond. He was the breadwinner. His wife did not get a huge salary. They would go caravan camping, on fishing trips and going to

Magaliesburg Club and Ventersdorp. He played golf and action cricket. He programmed and installed telephone system and extensions. He wrote a pro forma for the bank and took it to Absa. He installed the banks telephone system. There were 3 groups of employees, him and his helper would go out and install cables, plugs and program the system. The helper would just be forwarding him the cables to install. The helper will first roll out the cable and he will do the joints putting the plugs. Telkom was lenient to him cutting him in. It was an active job and he was busy all the time. When he was sleeping he would be thinking about where to start and what is the best way to do the job.

[24] On his weight he said he was weighing 89 kg after the accident and was in so much pain. Even though he was sporty, healthy and a go getter, he gave that all up. He had to sell the caravan. He could not eat red meat and sugar. So he got frustrated and took it out on something to eat and became a compulsive eater. He says there was a time when he gained weight up to 135 kg and does not want to be back there anymore. It was put to him that Prof Fritz actually said he lost weight since the last time he saw him. He said he lost weight as he cut out sugar and starch. However, the fact that he lost weight did not improve his situation as on his right hip the pain is consistent. He said he cannot describe to anybody how the pain feels. It is on his right hip lower back, lower foot on top. He walked on his feet inner sole.

[25] Regarding his post-accident situation he says he went back to some of his clients and tried to start working again, but just driving to them he could not take it. He had to shut down. His son started his own business in the beginning of 2012 he could not continue to do it. He gave his clientele to his son to follow. They had to live on the salary of his wife. So he lost his house, his cars and could not provide for his son and wife. Ben his youngest son could not go to University. They asked for loans to keep the other son at University. He was also trained as a Draftsman and a Surveyor for Telkom underground cables, that is on the big towers but then he could not climb the stairs and ladders.

[26] On the accident Plaintiff testified that on 22 October 2011, a motor vehicle reversed on him, the driver was his Doctor's husband, Mr Du Plessis (Du Plessis), who drove into him and injured him on his right hip and on his ribs. Du Plessis applied brakes when he realized that Plaintiff was hit, who was then thrown away. Plaintiff got himself in hospital and he says he could not remember what happened. The last time Plaintiff knew they were to go to the pharmacy. When Plaintiff's son came outside, blood was coming out of Plaintiff's nose. Plaintiff says he was injured on his face, lower ribs, a tooth came out and his glasses were broken**.** He was admitted to hospital where he stayed for 4 days. X-rays were taken. After discharge, he says he tried to do business with his client but the pain was so severe that he could not tolerate it, his hip lower back, ribs and his teeth were broken with crown out. He used injections to control his diabetes and no pills. He had a back operation in 1987 at Pretoria and it had no effect on his back. He had back ache from time to time but it was not an issue. He would continue to work and put 6 telephone systems per day, that is how he worked. About his son's business he asked his son to start earning money for himself. His son also did maintenance work. He gave his son advise over the telephone on installation of systems and gates. He could not climb ladders and did not get paid for the advise he gave his son. The business however went down. The maintenance business in general closed down since the economy is not viable in Klerksdorp. They started baking pies which was difficult. They would make only about 18 pies. He could not roll out the pies because of the pain so his son had to do the cooking and the rolling. Also there was too much competition.

[27] Plaintiff in addition says after the accident he got frustrated and short tempered. The frustration was as a result of the pain, something that is not enjoyable. **He underwent an operation for the nerve release of the right thigh so that the pain can go away it was not a success. The pain is more severe than it was**. He takes pain killers 150 mg to bring down the pain. He used what the doctor gave him for pain but it did not work. The pain is difficult to explain to anybody. When the pain is in, it stays the whole full day, especially the back part. He tried applying for a job in Klerksdorp Technical High School as a handy man apparently they knew about his accident and were supposed to support him but they didn't. He was frustrated sitting at home doing nothing. Sometimes he forgets what he was trying to do in the right way even his technician work. He at one stage just said that it was enough, he cannot take it and decided that he will fight this. He was very strict onwards. In 2015 he broke his foot whilst walking. His right foot seemed to disappear before and then he fell off the ground. Another fall happened whilst he was busy injecting himself standing in front of the TV when he fell and his foot was gone. When he is put in the same situation it was frustrating for him because he knew he could do the job, he just gave up. He confirmed the list submitted to be of some of his clients that he could remember when he first drove up.

[28] Plaintiff was under cross examination by Mr Matambela questioned about Omnicorp, a company in Potchestroom. He pointed out that he has never spoken about that company as his own and does not have an idea where it came from. He has never mentioned the company. He stated that, one of his employees, namely, Koekermoer was involved in a matter where computers were stolen and sold to him and they came to him.

[29] Regarding the accident, he said it happened at the Doctor's Parking, which is a double parking in between the pillars at the back. The motor vehicle driven by Mr Du Plessis, was parked under the parking. He could not remember what happened, he was told that Du Plessis was in the bakkie, he reversed, stopped and pushed him into the pillar. His son told him he could see his body on the ground. He had felt something hit him on the jaw and it broke and his tooth came out. It was pointed out to him that on Dr Barnes report it is stated that he said the inside of his mouth was bleeding, however it was not documented on the hospital admission notes. Plaintiff said he was partly drugged when the police wrote the statement. He could not recollect anything because he was in pain. He could only remember when he got hit, that contradicts his police statement. It was also pointed out that he said Du Plessis drove away so he could not talk to him (it was a hit and run). Whilst in his police statement he said Du Plessis spoke to him and called his wife, Dr Thelma de Kock, his doctor. His reply was that maybe his son was there and he is the one who spoke to the police or maybe he was told by somebody that Du Plessis came back. According to him Du Plessis drove away from the scene. He was asked why was he experiencing pain on his right side hip because according to him in his police statement the car hit him on his foot and he fell backwards. He said if Du Plessis had not applied the brakes the vehicle would have finished him.

[30] In relation to his business, it was put to him that he testified to having 15 employees but the list given of the employees is not sufficient there can be more. He could not answer but said he closed the business at the beginning of 2012. He tried to sort out his accounts before closing down but ran out of money at end 2011. At the beginning of 2012 he closed the account. It was put to him that he said to Ms Noble at the time of the accident he employed his two sons whilst they were still at school whom he took to his clients. He said he could not do that until his son completed his Matric in December 2012. He stopped until

Koekemoer took his clients over, they went to Omnicorp. It was put to him that he also said he continued to service 10 clients until his son finished matric in 2012 December. He denied to have serviced any clients from December 2011, alleging that maybe it is just a typographical error, a human error, he did not service any of his clients. He could not drive around. He called his clients and told them that he was in an accident. Koekemoer took the clients over. He said when he stopped doing business, he lost his car and his house. Him and his son lived in a garage in Potchestroom. He did not have a luxury home anymore. He lost everything. He deregistered the business from which he was making R100 000 and drew R10 000 monthly – R35 000, sometimes less, sometimes more, mostly in cash. He kept the cash in the safe. It was a successful business doing business with loads of computer companies and they were actually not coping. He serviced the private sector, schools, academy and lawyers. Most of them paid by cash. Cars he owned included a Combi, bakkie and a BMW. He bought them from a Company. At the start of his career he had one car. He bought for R30 000 the 3rd car, an old Combi, when he was working for Telkom. He deposited the money into the seller's bank account and he paid the bank. He was complying with SARS regulations, but was not paying tax as he was under the limit. Sometimes he made a R100 000 which was a turnover of the business and had to still pay salaries. When he was asked how much did he really pay his employees he said he gave his employees salary slips, everything was in the computer that got lost in 2011 when everybody got the worm in 2011. If he paid through the bank, he was told that he could have asked for bank statements. He said the whole of SA was struck by the same worm even the banks all over SA. When he told his lawyers that he lost all the paperwork they didn't discuss with him further or say anything about asking for the statement. He was asked if he was aware that he has not presented any proof to the court that he generated any income. He argued that everybody got that worm and does not understand what Mr Matambela wants or what answer he was looking for. He said most of the people in Klerksdorp, Swartz Renecke closed businesses and companies down because of the economy. He could not get proof from his business clients either.

[31] It was pointed out to him that his company was deregistered on the basis that he was not paying vat, even when it was making money. His version was that Esme Noble did not say anything about bank statements as she asked him to now do other things like getting a Dr's report, Police report, information about employees, clients. He went back to some of the clients to get invoices. **Him and his secretary did the bookkeeping of his company which he registered in 1999.** Actually he did the books himself. His secretary will then only check the invoices to see if he has written everything in. She ran the office. He had 15 employees or more. He did not go with all of them on site. More of them were more experienced, they went to the site and worked there on their own. He had one Doctor's report for Noble, there was this pain on his hip that was so frustrating. He, most concentrated to getting by also for himself and try and resolve the pains on his hip. They did not discuss it any further because he was trying to resolve the pain on his hip and teeth. He acknowledged Professor Fritz whom she remembered consulting with, that she was in court.

[32] On the pie business, Plaintiff said they made them, baked and sold them. They were not doing any paperwork. It was not a viable business but a way to try and survive and see if they can get something going. He could not cope with the rolling of the dough, his son was doing it. He mockingly said he only stood there when they were making them and put salt in the meat to be part of the business. He could not manage it himself because of the pain. He could not remember how much they spent or made from the baking. He told Matambela to

do his own calculation. He alleged to have gained weight after the accident because he could not do the work anymore. He used to work 6 or 7 days a week to use his brain, go camping. He did not work on Saturdays but planned on those days how to improve the business. His secretary was also selling DVDs and stuff.

[33] He indicated that his business was advertised by word of mouth and on the radio station in Klerksdorp. He gained clients from both. He did not have any contracts with his clients**. He said he was advised not to submit his books because he has not reached the limit but could not remember who was advising him. He was paying SARS but through the bank**. He cannot remember at the time as he had two different bookkeepers and a lady that works at SARS. He deregistered the company and cannot remember what documents they required for the payment. The time frame was also not clear. He could not remember if he was issued with a tax clearance, also if it was necessary. He said apart from his salary slip, he does not have any documentation and there is no chance that Counsel can come to the conclusion that he was lying. He only discussed the bank statements just once with his attorney and could not remember if they discussed the request of bank statements from the bank and **he never thought they were necessary.** They did not discuss the matter any further, mentioning that there are loads of stuff that he forgot. He confirmed that he could have asked the bank for the documents.

[34] On re-examination he said he kept all the invoices in the computer, client information, id no' s, bank details and salary slips. 80% of the money went into the till and 20% into the bank (Eft payments to the bank) if he had statement it would reflect only 20 % of the income.

Evidence of Dr Mazabow

[35] Dr Mazabow is a Clinical Neuropsychologist, 25 years in practice. His report was prepared after consultation and assessment of the Plaintiff. He reported on the depression disorder being moderate to chronic. And noted that Shevel, the Psychiatrist, had found moderate depression whilst Mphuthi found that it has been long standing and from the same accident. His limitations were imposed by the chronic pain affecting his self- esteem control, which made him give up his business even though he was the bread winner, resulting in financial loss. **His cognitive functioning was well preserved on the high end of intelligence**. The difficulties Plaintiff experienced were concentration, stimulus resistance and planning memory visual. He did not sustain a brain injury. **In his case the reason for his difficulties was pain and depression.** Chronic pain can affect concentration, dissipates memory, deprives brain of stamina to stick with info and speed, flexible thinking and everyday consistency. From the interview of Plaintiff's son, he found out that Plaintiff is short tempered, irritable, fatique, abrasive. Have had a dose of that over the last 2hrs. The prognosis- chances of finding, improvement supportive psychotherapy –**as long as pain persists he's going to remain vulnerable and would continue to see the sort of problems. Treatment program required**. **He can work at a clerical level as cognitive functions are there as an average application of that skills required.** On concentration – his brain and depression affect his motivation and energy level. Abrasiveness- which is due to pain, when he is in pain, he is short –tempered and prone to committing errors. His ability to use his brain has been unreliant. Neuropathic pain is unlikely to resolve. He notes that the real support of his opinion is guarded or poor. If Prof Fitz has said it will be permanent depression, then psychotherapy would be supportive but will not remove depression or resolve the pain.

[36] Under cross examination by Mr Matambela. He pointed out that Prof Fritz did not comment much about the Plaintiff's neck pain. The neuro peripheral-ness. **He said the pain is lower** and the presence of the back chronic pain. **Depression was as a result of a pain.** It should come from the pain. Equivalent apportion in terms of his psychological problems, before accident not premorbid best performance method. Best performance now we look at post morbid.

Esme Noble

[37] Ms Esme Noble is a registered Industrial Psychologist, 35 years in the health profession who consulted with Plaintiff on July 2016. She testified to having conducted a research whilst she was compiling the report. She was to compile a report on the impact of the accident on the Plaintiff's earning capacity. There was a vat number as per Botha and herself. She wanted to check what Compuphone Care and or Omni Corp was all about. Dr Botha's dealing with diabetes his opinion is important. **He opines that based only on the medical status namely diabetes, hypertension and obesity, Plaintiff would have been able to work in his previous capacity in his field until retirement age of 65**. Noble noted that **since 1994 Plaintiff was self-employed.** He reported to her that his earnings were R10 000 when to Kheswa he said that they were between R10 000 and R60 000. Take home is the amount of the profit which was R10 000. She looked at the amount of R10 000 in theory it was the closest to what he all did. Average amount was R110 000 per annum. Plaintiff indicated that R120 000 per year. She found that not to be unrealistic. If there was a difficulty in proving his claim he would have pitched him in any case on R120 000 per year until normal retirement at 65 as per Botha and herself. Noting that according to Kheswa Plaintiff was only self-employed from 2002. He worked for Pressy Tel from 1999 -2000 and logitel from 2000- 2001). Kheswa considered profits at R60 000 she reasoned they split it into R35 – R120 000 realistic if that is found valid. Kheswa recommended the court to split the claim of R75 000 X 2 / She saw all the reports quoting Fritz extensively from Shaval reports. She also looked at age qualifications, labor market requirements in that area. She looked at the wide range of aspects and Fritz's report. **She found Plaintiff to be functionally unemployable in the labour market**. She listened to Fritz's evidence it was more convincing. Listening to Mazebow, Prof Fritz emphasizes all the psychological impact, explaining the pin like a burning coal. **Chronic pain- is an employability problem. Plaintiff's state of mind (cognitive function)**. In 1993 it was the last time Plaintiff worked for a boss. Due to his pain motivation, his negativity nobody would employ him, he was on his own for 17 years. Baked pies, which is a ridiculous way of making money. There is now no chance that he would be able to find work or start a new business. What kind of job will he be pitching for? He was functionally unemployable. He had no position or any other work experience.

[38] Under cross examination she confirmed that she was there all the time when Plaintiff testified. There is no registration of OmniComp CPIC registration. She said that there was a vat invoice that was part of the bundle. Although there was confusion it was reported to her that CPIC cleared that for him, that Plaintiff was involved in business anyway. It is a long time ago. His minimal wage the Plaintiff put it at R10 000 working on an average. On further investigation she asked for the bank statement and found out that Plaintiff was not tax **compliant**. That he lost documents that were in his computer. She confirmed Ms Kheswa's finding of R60 000. From R10 000 to R100 000 taking that he said he paid private employees for that is not his earnings. On a R10 000 base – Plaintiff confessed more than once that he

did not pay tax. The turn- over of the business- expenses of helper, actually go on site**.** In the joint minutes Kheswa agrees that Plaintiff will work up to the age of 75 retirement age. It is important that to this matter he was stuck with Mr Mashine considering an amount of over R60 000 and others R12 000. She informed him that all he can say was +R6000 -R160 000 they confirmed this. She tried to establish what the R60 000 was for and went on and asked the staff, namely Ms Reynecke, she was again told that there was no collateral. She then ignored everything even though she did not ask for bank statements in any report. She confirmed that she just agreed to what they told her on a context that she finds a middle ground that has a variable income and informed them that they are stuck with R100 000 or use the R100 000 that as turn- over. She looked at the period and split the difference. She was asked why would she want it to be found that she provided a scenario based on qualification and based on age. Her reply was that it is always the case she seeks for action and apportionment whilst bank statements can be used that is to assist the court on postulation. Also qualifications and experience. She spoke to Ms Reynecke. She split the info just for the sake of the joint scenario.

[39] Noble further reported not to agree with Ms Kheswa, even though Plaintiff provided neither her nor the court with any of the documents or books referred to. Noble was asked that if Plaintiff reported that he did not register for vat, have tax forms or made use of an accountant, also that he did not have financial statements or invoices, his reason being that his computer picked up a worm, from what did she make out what was Plaintiff's earnings. She said for the fact that there were salaries paid up, she in desperation used that to have an an insight to his finances, doing his book keeping. It was pointed to her that Plaintiff did not say what was in the computer was his finances. He actually said he paid the salaries in cash. She said she could not say that was a responsible way of payment of salaries but they have full influence and as he anyway paid out salaries and she has used that out of desperation because they did not have much. On it being put to her that she did not have proof to assess and criticize Ms Kheswa on her quantification she said she took Plaintiff's view on speculation that was reported to her per month.

Evidence of Barend Swart

[40] Barend Swart is the Plaintiff's son. According to him he was aware of the issues his father had with regard to his position prior to the accident in October 2011. He was in Grade 11 and 17 years old when the accident occurred. He is now teaching English in China University and has a degree in Education. In 2015 he finished his studies for which Plaintiff did not pay any money. He then had an Eduloan which is for students and paid it off every month from his salary. His parents could not afford at the time, so he started working after he finished school in 2012. Him and his mom actually helped the Plaintiff. He has an elder brother. Before the accident and whilst he was still in school, the plaintiff used to make jokes, was energetic, played golf, cricket, enjoyed paint balling and caravan camping club every weekend. They will go to the resort and he will walk with them on wild trails. After the accident the plaintiff couldn't do anything with them, he was always full of pain. Sometimes he wanted just to give up. From the date of the accident it was downhill with all the pain the Plaintiff had. He had to help him in the **mornings.** He was aware that Plaintiff's pain was bad because he would sometimes sit there crying of pain. He has never seen Plaintiff without pain. He used to walk far with them but now he complains every time of pain. Before the accident he did not complain of any pain. If he complained it was maybe of a headache. After the

accident he complained a lot about the back neck and hip due to the whiplash he got. In 2015 he coughed and his rib broke. He confirmed that he stayed with his parents and was with the Plaintiff all this time. Plaintiff did not have any problems with his weight as he was always busy all the time and would walk. After the accident Plaintiff could not walk. It was too painful to stand up and at night sometimes he struggled to sleep. It was put to him that reports filed by experts say that Plaintiff is irritable and has a temper. He indicated that it was not the case before the accident. Plaintiff's demeanor was instead friendly and happy before the accident. After accident he got irritable sometimes he took it out on them. Everyone around Plaintiff irritates him. He would get angry and sometimes would apologise. He disagreed that Plaintiff was still the same.

[41] Regarding Plaintiff's employment he said what he knew about it is that he was self-employed. He worked with computers, fixed telephones systems and looked after them. Plaintiff also helped his business with installing computers and fixing telephone systems. Plaintiff had a shop in Klerksdorp that he sold his computers from, being self- employed. There were about a few people that were working for the Plaintiff. A secretary + 1 guy who helped the Plaintiff put up the computers. He did not know all of them. Plaintiff worked Monday to Fridays. Sometimes on Saturdays but mostly he will be with them as a family during the weekend. Sometimes late or throughout the night. On Plaintiff's earnings he said the Plaintiff would go out to restaurant, camping, braaing and all that. His mother was always employed, from 2007. She worked at a school in Potchestroom, before then she was a house mother. After the accident Plaintiff wanted to continue with the business. Plaintiff however could not drive to the businesses anymore, they were too far. He could not bend or sit, he just could not do the job anymore. **When Plaintiff stopped working he was still at school**. There was a big change, they never went on camping anymore, everything stopped. Plaintiff did not get any money anymore. **Plaintiff started selling pies to make money**. They survived because her mother had a little bit of money. They moved and tried to sell most of the things, the house, and cars got less and less until there was nothing. They had the FordFocus, Camry which they had for a long time and it was sold for nearly nothing. He said his grandmother had a deli. He asked the Plaintiff why they didn't start the pie business to give them more money a little bit. His mother then helped him and the Plaintiff sometimes when she can. Physically the Plaintiff was not capable of doing anything. It became more expensive because they needed the ingredients and it became expensive as not much profit was being made. He then tried to start the maintenance business. He waited until he could buy enough tools. It just stopped as also there are a lot of people who do the same job. The Plaintiff did not play a role in his business but just gave advise. Plaintiff could not do it physically. With the income he made he paid for electricity and books for his brother. He contributed to put his family through, and for fixing the car as it had an engine problem. Before the accident the Plaintiff was employed at Eskom and had also worked for a company then started a business.

[42] Under cross examination he confirmed that him and the Plaintiff are very close and would tell each other any of their problems, even before the accident. The Plaintiff would have told him if he experienced any pains prior the accident which he didn't. He did not remember his father consulting any doctors prior the accident. He was then referred to Dr Thelma De Kock's report in the Plaintiff's trial bundle where it is indicated that Plaintiff consulted De Kock in 2009 on 3, 24 and 27 August complaining of an ear ache and after an ear operation. On the 17 December 2009 he consulted on an injured arm and in August 2010 he consulted on a severe headache and March 2011 still of a severe headache. He said he was

not aware of those visits. On Plaintiff's motor vehicles he was asked how old was he when Plaintiff owned the two, the Ford Focus and the Camry cars, he testified about. He said he could not remember because he was a kid. He was starting Grade 8 or 9 or was in Grade 11. The second car was sold when he was in Grade 12. He said he would know if Plaintiff had a BMW. He could however not remember that or everything because it is difficult to look back. He could not remember the Plaintiff selling any car after experiencing financial problems. He was asked if when Plaintiff sold his car, he was old enough to know what a bakkie is, since he could start driving a car from when he was in grade 10 and one of Plaintiff's cars was a bakkie. He replied that when Plaintiff sold a car he knew what a Combie is, it is like a taxi which they had a long time ago when they were small. However, he does not remember the Combie being sold or about the Bakkie.

[43] He furthermore testified again that he was in Grade 11 when the Plaintiff started the baking business. **He was in Matric in 2012 at the beginning of the year, when he also started baking.** Him and Plaintiff spoke about it, he stopped it, baked on and off and went on for a few years. They final stop was in about 2017. He was told of Plaintiff's statement that Plaintiff actually stopped in 2012. He said Plaintiff did stop baking, it was on and off, the family's baking was only for eating, so they baked for themselves. He said Plaintiff meant they stopped selling to companies but baked for themselves and family. They sold on and off. Plaintiff helped with the business in 2012 and stopped. So the business did not keep on going. Before 2012 Plaintiff tried to help, he tried to show him how it works after the accident. It was a long time ago, so he could not remember very well. He was asked if Plaintiff helped seasoned the pie or making invoices, he said he could not remember that as well. **He said he actually started baking in 2011 when he was in Grade 11, he did it when he was off**. His father started experiencing problems a month after the accident, in 2012, things were starting to change.

[44] With regard to Plaintiff's employees he said it was not quite clear to him since he was still at school, he only knew about two, he was not there in the business. He saw the employees when he visited his father's business. The business was in Klerksdorp in a shop. The employees were working at the shop. He was at school and did not worry about the employees. Asked about their number or names and how big the shop was, he said he does not remember because the last time he was there it was when he was a kid. He was told that Plaintiff said he had a six- bedroom house and had turned one of the bedrooms into an office. He said his father ran his office from both and he later on moved it from the house. He was asked if the house had a different address from the shop. He said yes. The house was down the road and the business or shop in Flemida.

[45] That was the Plaintiff's case. The Defendant also closed its case.

LEGAL FRAMEWORK

[46] The primary object in respect of a claim for *Lex Aquilia* is to restore the Plaintiff's patrimony and, as far as possible, to place the Plaintiff in a position he or she would have been in had the delict not been committed: see *Standard General Insurance Co Ltd v Dugmore* 1996 (1) SA 33 (A) 41, 1996 4 All SA 415 (A) 418. Therefore, in considering whether the Plaintiff is entitled to be compensated for a past loss of income, actual pecuniary loss of earnings is what is referred to, implying a diminution of the Plaintiff's estate. The compensation is in relation to an inability/disability to have made an income or earned the salary, one must ascertain whether any loss has in fact been suffered. The amount awarded therefore must do

justice to the parties, and must reflect the interest of both the Plaintiff and the Defendant; see *Rudman v Road Accident Fund* [2002] 4 All SA 422 (SCA), 2003 (2) SA 234 (SCA). In reference to Voet (9.2.16) this interesting statement in regard to loss of income was made that:

> "Where damages have to be compensated, only **direct loss** is taken into consideration, and not damages flowing from a new supervening cause, even though the direct loss permitted such new loss to operate."

[47] In establishing such loss, oral testimony and documentary evidence tendered to indicate how the Plaintiff was inconvenienced will be considered, looking at the nature and extent of injuries sustained and the Plaintiff's actual earning capacity to determine also whether his ability and potential to earn in future has been affected.

Analysis

[48] It posed a big challenge to determine the exact nature and the extent of the injuries sustained by the Plaintiff in the accident on 25 October 2011 as he was not upfront, notwithstanding his Counsel having outlined the relevant injuries at the beginning of the trial. It is also important to take cognizance of the fact that the Plaintiff is an educated person with a post matric qualification. His lack of forthrightness and sincerity in answering the questions or giving explanations of the shortcomings in his evidence is inexcusable and made it difficult to determine the pending issue. His tendency to exaggerate seems to be habitual. He not only struggled to explain the injuries sustained but also even to explain how the accident occurred.

[49] Injuries sustained by the plaintiff and the immediate consequence thereof are supposedly documented in the hospital records and the subsequent medico-legal reports prepared and obtained from various medical professionals in their respective fields of expertise after consultation and factual verification thereof with the Plaintiff. The actuaries will thereafter rely or refer to the relevant reports for the purpose of the quantification of the plaintiff's loss of earnings/earning capacity, more specifically that of the Industrial Psychologist. The onus is therefore upon the Plaintiff to prove that the facts upon which the assumptions on the resultant sequelae are made by the medical experts are authentic, not exaggerated or misrepresented. Any shortcomings in such evidence will taint the whole postulations and opinions by the experts and affect also the calculation or the quantification of the loss that has been made reliant on such evidence. The outcome will therefore not be fair to the parties. That should be utmost in the experts' mind when compiling their reports and the condition upon which the evidence and the reports of the medico legal experts would be scrutinized.

[50] Spilg J in *Ndlovu v Road Accident Fund 2014(1) SA 415 (GSJ)* at 438 para 113 outlined some difficulties often encountered in relation to primary facts as provided by the Plaintiff in compilation of the expert reports, stating that:

> '114. If the patient is the source of the information regarding the injury and the facts he or she supplies differ from those recorded by the hospital or doctors at the time of the accident or other primary source documents, then this should be clearly stated. In the present case the experts should have requested the doctor who compiled the RAF medical report to submit the hospital or other medical records upon which he relied.

> In the circumstances of this case the hospital records were self-evidently the source documents demonstrating the injuries sustained in the accident and their immediate sequelae. These records would have readily provided the empirical data upon which the experts could then have based their opinion.
>
> 115. There remains a need for the expert's report to distinguish between the primary extrinsic data used and the patient's comments. This is necessary in order to maintain the requisite distinction between opinion evidence, which is receivable (and which may also include reasons as to why the patient's say-so is supportable based on the practitioner's field of expertise), and an untested version which amounts to an assumption. In the latter type of case it should be clearly identified as such, and not masquerade as factual evidence, particularly where the very purpose of obtaining expert testimony may have been to test the veracity of the plaintiff's allegations.
>
> 116. The need for medical experts to identify originating source data and at least identify or raise concerns regarding their effect on quantum if there are discrepancies is also apparent when considering how a failure to do so may result in prejudice, particularly for the plaintiff…..

[51] The Plaintiff's evidence in chief was that on 22 October 2011, a motor vehicle driven by Mr Du Plessis, the husband to his Doctor reversed on him and injured him on his right hip and ribs. When Du Plessis realized he has hit him, he applied brakes and Plaintiff was thrown away. He was injured on his face and lower ribs, a tooth came out and his glasses were broken. He also said when his son came out to him, blood was coming out of his nose. He got himself in hospital. He could not remember what happened. After he was discharged 3 to 4 days thereafter he tried to do business with his client but the pain was so severe that he could not tolerate it, his hip, lower back, ribs and his teeth were broken with a crown out.

[52] It was also the Plaintiff's evidence that when Du Plessis drove into him, he felt something hit him on the jaw and it broke and his tooth came out. However, in the statement he made to the police a day after the accident, as it was pointed out, he alleged to have been hit by the motor vehicle on his **right foot** and he fell down. He said he ended up lying at Wilmerdpark Hospital with injuries on his **feet,** back and neck. There was no mention of a hip or face injury. This is a statement Plaintiff made when he had already been in hospital for a day. Plaintiff should by then aware of his injuries and what he was being treated for at the hospital. At the time Plaintiff was even aware that Du Plessis had already made a statement that no injuries were sustained. Now Dr Birrell and Ngobeni, the experts who saw the Plaintiff in 2015, 2018 and 2019 agreed in their joint minute that the injuries, said to have been sustained by the Plaintiff, if any, were soft tissue to the lumbar spine, right hip, neck and the right side of the head, also maxilla facial injuries, and to the treatment he received at Wilmerdpark hospital. No foot or ribs injury is mentioned. However, in the same report Ngobeni, singularly refers to Plaintiff's foot injury which he alleges might jeopardise Plaintiff's opportunity to seek work or start a new business if it involves standing and walking a lot. She defers to the Occupational Therapist and Industrial Psychologist. Dr Ngobeni continues to talk of a foot deterioration which might be Charcot foot from diabetes. Therefore the significance of the foot injury to Plaintiff's future employment being obvious. Birrell referred to a work capacity of not more than 5% lost and reckon Plaintiff does not have to retire early. Birrell only talks of his overweight and diabetes and that he has 1 to 2% chance of requiring neck or

lumbar surgery, not at all mentioning a foot injury. Ngobeni further qualifies his opinion by estimating Plaintiff's Whole Person Impairment at 6%. The experts did not refer to the hospital records.

[53] It was very important that the exact nature of the injuries that were sustained by the Plaintiff are referred to accurately to enable proper and accurate determination of the direct sequelae associated with the injuries. Clarification being crucial since what was presented at the beginning of the trial by Mr de Waal to be the main feature to Plaintiff's woes is the debilitating pain which the Plaintiff alleges to have suffered since the date of the accident and which was said he was to suffer from, for the remainder of his life, resultant from the severe permanent neuropathic pain in his right hip due to the injury to the lateral, cutaneous and sural nerves upon which Prof Fritz testified.

[54] The presence of hip rather than foot injury being highly relevant to support a case relying on the type of neuropathic sequelae claimed to have arisen in this case. Also more so as the Plaintiff was prone to injuries prior to the accident and after the accident, one of which was a hip injury. It was important to be able to determine accurately the liability of the Defendant by clearly recognizing the injuries that were directly caused by the accident and the direct source of the Plaintiff's pain. Alternatively, conditions or injuries that pre-existed and were exacerbated by the accident or sustained post the accident. Some of the experts avoided commenting or making reference to the injuries reported by the Plaintiff to have been sustained post the accident. Notable however is that a few of the experts that testified except for Birrell referred to Plaintiff's complains as per the admission records at Wilgemordpark hospital. For the past and present medical costs no reference is made to costs for admission of the Plaintiff to the hospital on 25 October to 28 October 2011.

[55] At this instance it is important to echo the words of the learned Spilg J when he went on to say-

> 116. The need for medical experts to identify originating source data and at least identify or raise concerns regarding their effect on quantum if there are discrepancies is also apparent when considering how a failure to do so may result in prejudice, particularly for the plaintiff. In this case the RAF medical report does not qualify as a source document evidencing the injuries or their immediate sequelae, since it was prepared two years after the accident by someone other than the trauma-unit doctors.

[56] Contrariwise Birrell the Orthopedic Surgeon names as one of his source document the Wilmerdpark Hospital records. According to Birell, the hospital records note injuries as follows (1) soft tissue injury of the back and right hip and complain by the patient of pain on the right side of the head and neck. Visser's clinical report as the treating doctor at the hospital refer to a neck pain with muscle spasm, lower back pain with muscle spasm and hypersensitive area over the right upper leg. Birrell also indicated that the RAF 1 Form was not completed. The treatment received was stated by the Plaintiff to include a neck collar for approximately three months which according to Birrell was not on the hospital records. According to Birrell the hospital record indicates that a prescription for chronic medication given was, tramal, perfalgan and Rayzone to be administered intravenously. He then remarks that the patient is

markedly overweight and that possibly the hospital records if available, will give an indication of his correct weight at the time of accident. \So he had not seen the hospital records, notwithstanding that he was supposedly to have recited from the hospital records already. It therefore seems the hospital records on the admission of the Plaintiff were actually also not available to Birrell. He had indicated at the end of his notes that "apparently there are hospital notes available concerning his post -accident admission to the Wilmed Park Hospital and he will attempt to obtain those as well.

[57] The observation by **Dr Birrell are that the Plaintiff had no scars due to the accident**. He would have experienced moderately acute pain for 3 to 4 days followed by moderate pain for 5 to 7 days. **He recommends an apportionment between the symptoms caused by the accident and his pre-accident condition which is in his opinion 90 % of his symptoms being due to pre-existing pathology and 10% are due to the accident. The fact that he closed his business cannot be attributable to the accident.** Admitted to hospital only for 3 days. He also did not have to retire earlier due to the accident. His overweight status and diabetes would have caused early retirement long before the sequelae of the accident could do so. This is in line with the argument submitted on behalf of the Defendant that 90 % attributable to his pre-existing condition.

[58] Mazabow has indicated that the ambulance record was not present, however a note from Wilmerdpark Hospital dated 25 October 2011 at 21h00 stated that Plaintiff was brought in by ambulance with an injury to his right hip and soft tissue injury to his back, no mention is made of head or neck or facial injury. He notes Plaintiff's complains to him to have been pain in the hip, neck when driving or sitting for long, bending or picking up things. The pains stays for the whole day the whole time. Also complains of headaches. [From a neuropsychological perspective he noted that Plaintiff retains his overall intellectual –cognitive capacity within the high average range which would serve as a resource in the context of sedentary clerical /administrative work. It is contrasted with the presence of ongoing pain and chronic depression relating to the pain limitation and depression which will probably prevent him from applying efficiently his retained cognitive ability in the work context. He noted it would serve as obstacles in the context of sedentary clerical /administrative work and to impact on his interpersonal relationships and on his quality of life. He reckons Plaintiff meets the criteria of the Narrative test of significant and long term disturbance.

[59] Plaintiff's allegation of what injuries he sustained and the chronic pain he alleges to consistently experience should be evaluated against what was pre-existing at the time of the accident in order to determine the apportionment of his physical dysfunction related to the injuries he sustained in the accident. Plaintiff pointed out to Dr Shevel that he experiences persistent numbness from the right hip extending to the right knee. His physical activities and mobility restricted. To which Mazabow had opined that the chronic pain and depression have accounted for the Plaintiff's psychological dysfunction and perceived cognitive deficits. **Shevel has whereupon pointed out that insulin dependent diabetes combined with hypertension can also adversely affect cognitive functioning and overall level of psychological wellbeing. He has concluded that the Plaintiff's depression is largely secondary to his general medical condition which is precipitated also by a hip injury post the 2011 accident.**

[60] Shevel further agreed that his occupational functioning adversely affected largely due to his physical condition but also by him being overweight. However, that would be manageable by appropriate Psychiatric treatment and psychotherapy to improve his quality of life. Whilst **Truter reported that since he has not had the benefit of the interventions or treatment, which means he is not yet functioning to his optimal, considering his psychopathology, it cannot be categorically stated that he has suffered permanent long term impairment without running the risk of rightly being accused of expressing a premature unfounded opinion. He also did not rule out the possibility of Plaintiff over interpreting his condition.** That view is not far-fetched if taking into consideration that in 2016 Plaintiff indicated that the pain has subsided. 2 years later he alleged it to be worse. We also know that he had other misfortunes of falling twice after the accident.

[61] Truter who was consulted for the psychological report on the impact of the incident on Plaintiff's life, noted that surgery to Plaintiff's hip envisaged in the near future and questionable if attributable to the accident under review. Plaintiff's complain to Truter, inter alia, was that he believes his diabetes has been out of control since the accident. Also of a burning sensation on his upper leg and pain and discomfort in his hip and lower back. He said his pain has negative consequences and display symptoms of depression, emotional irritability which has led to him once assaulting a friend who once humiliated him. This he said said notwithstanding that Plaintiff's son denied that Plaintiff's irritability escalated to that point. Truter further notes that Plaintiff sustained Orthopaedic injuries and was admitted for 3 to 4 days at the Wilgemord Hospital but indicates that hospital records still have to be obtained. He also seem not to have had sight of the hospital record. Plaintiff also complained to Truter about the ongoing pain and discomfort being unbearable and giving rise to frustration and depressive symptoms, making reference also **to a fraudulent deal between him and his brother which led to the loss of his house** and his son's poor academic results, stating that as his other source of depression. What is significant is that Truter concluded that Plaintiff does not suffer from a significant long term mental disturbance in terms of the Narrative Test.

[62] Fritz on the other hand indicated Plaintiff's major pain to be over his right hip, over the head of the femur radiating down the side of the right leg onto to the knee. Also pain on his lower back and neck. He reckons Plaintiff appears to have fallen down as his son found him lying down. **At Wilgemord Hospital nothing was done to the site of the pain and he was told that this was an exacerbation of an old injury.** He was apparently sent for x-rays and the pain found not to be associated with the bone as he did not have a fracture of the femur or any fracture of his back. He was just told that these were soft tissue injuries and given pain medication. He says when he was discharged he had a great deal of pain. It is noted that his diabetes had gone out of control.

[63] Fritz had suggested that according to Plaintiff's history he appeared to have compressed a nerve and has a fairly significant peripheral neuropathy involving his feet, his leg and pelvic nerves. As he had no bone injury or fractures, the intolerable pain was thought to be from an injury to the nerve. However, what was found was the old chronic right sided L5 nerve root degeneration which was not of importance and the rest of the roots on the right side normal. There was no degenerative nerve root present as the cause of the problem. **The conclusion was that due to his sensory nerves being injured by diabetes he has severe diabetes and peripheral neurotherapy which indicates that prior to the accident the nerve**

root already predisposed to injury. It should therefore be accepted that he had a pre-existing severe diabetic peripheral neuropathy that had caused damage to the nerves. It seems after the accident it became debilitating or unbearable. It is due to his long-term high blood sugar levels, that his nerves damaged. It has not been suggested that its permanence or its severity should be attributable to the accident. **The compression might have jolted the underlying problem but said that the severity of the pain super imposed by diabetes**.

[64] Seemingly less is attributable to the accident, actually it seems the accident had very little to do with any of his sensory nerves being injured or peripheral neurotherapy. It would be then fair that a very minimal percentage of whatever might have been the cause of the pain and the concomitant loss he may have suffered, could be attributable to the accident. Birrell was actually of the opinion that the accident had nothing to do with the Plaintiff not proceeding with his work. It is also significant that the EMG has confirmed that the location of Plaintiff's pain is a severe damage to the sural and lateral cutaneous nerve of the thigh on the right side, which has created a great deal of distress. Fritz has concluded that the extensive investigation of the site of the pain has shown that Plaintiff has the lumbar disc degeneration, however the normal EMG over the nerve indicate that this is not the site of the pain. The hip joint also appears normal. The EMG confirmed the site of the pain to be damage to the sensory sural nerve and lateral cutaneous nerve of the thigh on the right which is said to be vulnerable. Due to his diabetes it is predisposed to pain and any reaction to compression (compression on the nerve related to his weight).

[65] Consequently it is noteworthy that Dr Birell reported that Plaintiff's overweight status and diabetes would cause early retirement long before the sequelae of the accident. He indicated that the undermentioned severity of the pain, degenerative back disease super imposed by the diabetes and his weight. It would therefore be reasonable to consider the proposition of apportionment between symptoms caused by the accident and his pre-accident condition. A proposal was made that his weight and diabetes after the accident contributed 70% of the Plaintiff's symptomology causing him the pain and to be depressed.

[66] Noble as such is of the opinion that Plaintiff remains employable in the open labour market. It seems accident had little effect on his earning capacity (whatever that is) than the pre-existing ailments he had been battling with. She, directly links Plaintiff's occupational prognosis and job sustainability to the orthopedic prognosis and progression as well as the success of the future recommended intervention. Thus, with recommended treatment and interventions by appointed experts he will be able to work in the open fields.

[67] An additional challenge is the establishment of the nature and extent of Plaintiff's earnings posed by the lack of collateral information. Plaintiff's account about his occupation or how he made a living being inconsistent and not documented anywhere. The Plaintiff's witnesses failed to corroborate his allegations on the status of his business. It is one thing that there was no single document relating to any of the business' activities, how much work it did, the number of people it employed, the expenses it paid in terms of wages, if tax or vat paid and the profits it made but worse if the testimony intended to support it is questionable and inconsistent. The discrepancy was even on where the business was located and how and when was it folded. In addition what the Plaintiff told the experts about these facts differed from expert to expert.

[68] It is trite law that an award of damages for the loss of a claimant's earnings or earning capacity is intended to place him in the financial position he would have been in, had it not been for the delict, to allow him to enjoy financial benefits equal to the quantum of his potential earnings to be lost by him. The Plaintiff bears the onus to prove his loss arising from the accident. The starting point is his or her earnings at the time of the accident, allowance being made for possible future fluctuations.

[69] In general, damages in loss of earnings shall be substantiated by the Plaintiff's salary slips, bank statements and tax returns and or financial statements of the company that will clearly show what the Plaintiff either personally earned or his company made before the accident took place. However, in the absence of collateral earnings at least the evidence in that regard has to be credible and consistent. In this matter there is neither substantial evidence nor credible testimony on Plaintiff's earnings. Certain aspects relating to his management of the business and legalities cannot simply be just be explained away, like not keeping financial statements and not paying tax. His allegation not to have salary slips available when he allegedly employed 15 people for whom he was supposedly responsible for salaries for so many years, and bank statements when he had a long list of customers amongst them banks and schools who would not have agreed to pay cash for services rendered and without proper invoices issued, is questionable.

[70] The evidence of Esme Noble was that since 1994 (1999) Plaintiff was self-employed**. Plaintiff** reported to her that his earnings were R10 000 monthly and R120 000 per year when he has told Kheswa that they were between R10 000 and R60 000 monthly. Noble however looked at the amount of R10 000 in theory to be the closest to what he did. She said If there was a difficulty in proving his claim he would have pitched him in any case on R120 000 per year until normal retirement at 65 as per Botha and herself. The problem is that she had no concrete information that indicates that the information given by the plaintiff was credible, especially when it became apparent that there was a discrepancy to what he had told the other expert about his employment history and the business he conducted. Noble's attempt to find collateral information by phoning Ms Reynecke did not yield anything. Noble could also not verify the information in relation to the date when the company started and stopped operating. There was an indication that Plaintiff actually had continued to service 10 of his clients during the period 2012 when he is supposed to have stopped a month into 2012. According to Khwesa Plaintiff was only self-employed from 2002. He worked for PressyTel from 1999 -2000 and Logitel from 2000- 2001. Whilst Noble's information was that Plaintiff has been self –employed since 1994. Kheswa's information seems more accurate as Plaintiff has alleged to have registered the company in 1999.

[71] It was also very apparent from the testimony of Plaintiff's son that there was no steadfast information about Plaintiff's business, and no manner of verifying same. It seems where it operated from could also not be ascertained even from his own son. The son was not aware that Plaintiff operated his business from home. According to him his father operated his business from an office in town. He battled to explain how he could not have been aware that the business was allegedly operated from one of the rooms at home. The confidence the son had when he alleged to know everything about the Plaintiff waned as soon as he was shown to lack knowledge regarding his father's business and health. He could not even with conviction give details of what happened to his father's motor vehicles. The son did

not mention the 6-bedroom house. The son's evidence is therefore not acceptable. Kheswa also battled with the truthfulness of the Plaintiff's stories.

[72] As was pointed out by Berman J in *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA652 (C) at 655l-656E;

> "The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss. That this is so appears from the well-known passage from the judgment of Stratford J in *Hersman v Shapiro & Co* **1926 TPD 367** at 379, quoted with approval by Diemont JA in *Esso Standard SA (Pty) Ltd v Katz* **1981 (1) SA 964** (A) at 970E, *viz*:
> 'Monetary damage having being 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 pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it'."

[73] There must however be sufficient evidence before the Court for it to be in a position to make a proper assessment of damages, for:

> "... it is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of loss could have been made",

per Rose Innes AJ in *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* **1976 (2) SA 111** (C) at 118E. See also *Mkwanazi v Van der Merwe and Another* **1970 (1) SA 609** (A) at 630.

> "Thus where evidence is available to a plaintiff to place before the Court to assist it in quantifying damages, and this is not produced, so that it is impossible for the Court to do so, or there is no, or quite insufficient evidence which can be produced by an unfortunate plaintiff, he must fail..."

[74] As regards what balance of probability entails, the following was stated in ***Ocean Accident and Guarantee Corp. Ltd v Koch* 1963 (4) SA 147 *at 159 B-C***

> "… That seems to me to present no difficulty, since the degree of proof required is a court of law is not "absolute science: but merely (this being a civil case) a balance of probability; see ***West Rand Estates Ltd v New Zealand Insurance Co. Ltd.*** **1925 AD 245** ***at page 263.*** As to balancing of probabilities, I agree with the remarks of *Selke J* in ***Govern v Skidmore* 1952 (1) SA 732** ***(N) at page 734*** namely:

> "… … in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys, in his work on *Evidence 3rd ed, paragraph 32*, by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion may not be a reasonable one."

[75] The parties have agreed that the actuarial calculations by G A Whittaker will be used as per their agreement noted in the pretrial conference minutes to consider what is appropriate to grant as fair and reasonable loss of earnings past and present. According to the Defendant the Plaintiff's failure to satisfactorily discharge the onus to prove his claim, must result in his claim being dismissed. But, if the court notwithstanding, the shortcomings was inclined to give an order, very high contingencies should be applicable on a supposition of a proportion of 90/10%. 90% of loss being attributable to pre-existing conditions and 10% to the accident.

[76] For the reason that there was no credible facts established regarding Plaintiff's actual earnings, I have practical problems in applying any postulations based on the information or the report of Esme Noble. In addition the actuary has in his calculations noted that the Plaintiff started operating his business from 1994. I have shown the discrepancy of that information as he only registered his company in 1999 and had according to Kheswa started his own business post 1999 in 2002. His earnings are postulated at R10 000 monthly for the 10 years he started his business or is it from 1994. The whole factual basis does not make sense. If there was a trend of his earnings remaining the same for all the past 10 or 17 years, there would not be any justification to impose inflationary increases in the postulated future earnings. Furthermore, using the calculations of the actuary, the calculation on his past loss of earnings would outright exclude the postulation for the year 2012.

[78] A further concern is about what was noted by Esme that Plaintiff employed his two sons in the business and they appear in the list of employees. Followed by Plaintiff's allegations that his clients were stolen by an ex-employee, when he has also alleged to have passed the clients on to his son who supposedly opened his business when he finished matric and to whom he gave advise on how to do the work. The business is given life after the accident but now under the ownership of the son with Plaintiff only giving advise and without being paid any remuneration. They also post-accident engage in an unclear business venture of baking pies, without any indication of how much was made out of it and who was in charge. Noble had to guess everything.

[79] It clearly is evident that the rate of the discount cannot be assessed on any logical basis because the assessment, in the main, is arbitrary and depends on the trial Judge's impression of the case. (See: **Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A) at 614F and Van der Plaats *v* South African Mutual Fire and General Insurance Company Ltd 1980 (3) SA 105 (A) at 114-115)**.

50. Windeyer J, in **Bresatz *v* Przibilla [1962] HCA 54; (1962) 36 ALJR 212 (HCA) at 213** stressed that each case depends upon its own facts. According to the Judge *"all 'contingencies'* are *not adverse":* All *"vicissitudes"* are not harmful. Indeed the circumstances of cases differ and this is a very important consideration

[80] Taking into consideration all the concerns raised, very high contingencies as suggested by the Defendant are justifiably applicable. The future loss of earnings would be visited with the application of a contingency of 70%. Equally past earnings upon which there is an indication of no tax being paid or no collateral information on earnings a contingency of 60% would apply. As a result, applying a contingency of 70% on the amount of R1 011 612.00 as per the actuarial calculations, the past loss of earnings payable would be R303 483.60. Applying a contingency of 60% on the amount of R1 169 971.00 as per actuarial calculations, the future loss of earnings payable would be R467 988.40. The amount therefore payable to the Plaintiff for loss of earnings is R771 472.00.

[81] In the result the following order is made:

1. The Defendant shall pay the total sum of R889 222.32 (Eight Hundred and Eighty Nine Thousand Two hundred and Twenty Two Rand Thirty Two Cents) to the Plaintiff, which amount is calculated as follows:

1.1 Past medical, hospital and related expenses R117 750.32 (One Hundred and Seventeen Thousand Seven Hundrend and Fifty Rand Thirty Two Cents)

1.2. The Defendant is to pay a sum of R303 483.60 (Three Hundred and Three Thousand Four Hundred and Eighty Three Rand Sixty Cents) for loss of past and future earnings; and

1.3 The Defendant is to pay the sum of R467 988.40 (Four Hundrend and Sixty Seven Thousand Nine Hundrend and Eighty Eight Rand Fourty Cents) for future loss of earnings

1.4. Future medical, hospital and related expenses Section 17 (4) (a) Undertaking.

2. The payment of the abovementioned amounts are to be made in terms of the Draft Order annexed hereto marked X, paragraph 1 to 5 thereof being incorporated into this agreement.

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N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Plaintiff: **W P DE WAAL SC**

Instructed by	**ADAMS & ADAMS ATTORNEYS** **Tel: 012 771 2433** **Ref: DBS/SVBD/ef/P651**
On behalf of Defendant:	**MATAMBELA**
Instructed by:	**TSEBANE MOLABA INC** **Ref: Mr Baloyi/ SJ/12127** **RAF REF: 560/12257994/1101/0** **Tel: (012) 342 4921/7076**