IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No: 61405/13

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28/5/2021

In the matter between:

SEKHWELA BRAYNT SEFISO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

SK HASSIM AJ

[1] This is an action for compensation for bodily injuries sustained by the plaintiff in a motor vehicle collision on 15 July 2012 when a motor vehicle driven by the insured driver collided with the plaintiff, a pedestrian.

[2] After several unsuccessful attempts by the plaintiff's legal representative to contact the claims' handler, which at the very latest started on 23 June 2020, counsel informed me that there had been regular telephonic contact with her the day before the hearing commenced. Notwithstanding this, there was no appearance for the Road Accident Fund ("***the Fund***").

The plaintiff's experts' reports

[3] Educational psychologists:

3.1. A report dated 17 August 2017 prepared by Ms Sepenyane ("***the 2017 Educational Psychologist report***").

3.2. A report dated 27 August 2019 (erroneously dated 2018) prepared by Ms F Masipa ("***the 2019 Educational Psychologist report")***.

[4] Industrial psychologists:

4.1. An undated report prepared on the letterhead of "*Rixile Consulting Industrial & Counselling Psychologist*" and signed by Ms Nadira Mohamed. This report followed an assessment conducted on 11 November 2015. The filing notice to which the report is attached was signed on 18 August 2017 ("***the 2017 IP report***").

4.2. A report dated 27 August 2019 prepared by Mr Vuyani Muleya which followed an assessment conducted on 22 August 2019 ("***the 2019 IP report***").

[5] Actuaries:

5.1. A report dated 18 August 2017 signed by Charl du Plessis and Jacqualine Swan from Munro Forensic Actuaries ("***the August 2017 Actuarial report***").

5.2. A report dated 22 September 2017 signed by Charl du Plessis and Jacqualine Swan from Munro Forensic Actuaries" ("***the September 2017 Actuarial report***"). This report is described on the filing sheet to which it is attached as "Joint-Calculations.[1] It is based on the joint minute of the Industrial Psychologists, Ms Mohamed and Ms Cilliers dated 31 August 2017.

5.3. A report dated 4 September 2019 signed by Charl du Plessis and Eddie Theron from Munro Forensic Actuaries ("***the September 2019 Actuarial report***").

[6] Neurosurgeon, Dr Tshepo P Moja, whose report is dated 25 October 2016.

[7] General practitioner, Dr Chewane[2] who signed the RAF 1 form on 15 April 2013.

[8] Plastic and Reconstructive Surgeon, Dr Selahle whose report is dated 26 February 2015.

[9] Occupational therapist, SD Mogola whose report is dated 22 August 2019 ("***the 2019 OT report***").

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1 It is described on the Caselines index as "Calculations based on Joint Minutes".

2 Dr Chewane signed the Form RAF1.

Prior to being assessed by Ms SD Mogola, the plaintiff was assessed by Ms M Zwane on 16 July 2016. Her report is not uploaded to CaseLines. It was Ms Zwane and Ms Moagi, the defendant's occupational therapist, who after a meeting on 11 March 2017, prepared a joint minute.

The defendant's experts' reports

[10] The defendant delivered reports from the following experts:

10.1. Actuary, Mr Lameck Pattison from NBC Holdings dated 18 August 2017.

10.2. Orthopedic surgeon, Dr Bogatsu who assessed the plaintiff on 1 February 2017.[3]

[11] Whilst the defendant served notices in terms of rule 36(9)(a) in respect of the following experts, the summary contemplated in rule 36(9)(b) has not been uploaded to Caselines:

11.1. Industrial psychologist, Caro Cilliers.

11.2. Educational Psychologist, L Hlalele.

11.3. Occupational Therapist, S Moagi.

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[3] The report is undated. It was served on the plaintiff's attorneys on 17 February 2017.

Joint minutes filed by the experts:

[12] The following experts held meetings and the joint minute prepared them have been uploaded on CaseLines:

12.1. The clinical psychologists, Ms Narropi Sewpershad and Ms Elfriede Tromp. The minute records that the meeting was held on 30 August 2017 (***"the 2017 Clinical Psychologist's joint minute")***. [4]

12.2. The industrial psychologists Ms Nadira Mohamed and Ms Caro Cilliers. The joint minute records that the meeting was held on 31 August 2017 (***"the 2017 IP joint minute")***.

12.3. The occupational therapists, Ms Zwane and Ms Moagi[5]. The minute records that the meeting was held on 11 March 2017 (***"the 2017 OT joint minute")***.

The difficulties which plaintiff's conflicting reports and the joint minute of industrial psychologists have presented.

[13] There has been an unfortunate delay in the delivery of this judgment for the reasons which follow.

[14] While preparing the judgment I gathered from the record that after the plaintiff's industrial psychologist, Ms Mohamed (whose report was prepared sometime in 2017 (the 2017 IP report)) and her counterpart Ms Cilliers, had prepared a joint minute on 31 August

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4 Neither reports have been uploaded to CaseLines.

5 Neither of these reports have been uploaded to CaseLines.

2017, the plaintiff instructed Mr Muleya, an industrial psychologist to prepare a report. He consulted with Mr Muleya on 22 August 2019. Mr Muleya's report is dated 27 August 2019 (the 2019 IP report).

[15] As will emerge later, it turns out that the opinion expressed in the plaintiff's 2017 IP report was based on the report of the educational psychologist, Ms Sepanyane, dated 17 August 2017 (the 2017 Educational Psychologist's report). Whereas the 2019 IP report was based on the report of the educational psychologist, Ms Masipa, dated 27 August 2019 (the 2019 Educational Psychologist report).

[16] The 2019 Educational Psychologist report is described on the CaseLines's index as an "*updated*" report. The filing sheet to which the report is attached, is captioned *"NOTICE IN TERMS OF RULE 36(9)(b) (EDUCATIONAL THERAPISTS [SIC] REPORT) (UPDATED REPORT)*". The 2017 IP report is described on the CaseLines's index as "*outdated" report*.

[17] The filing sheet to which the 2019 IP report is attached is captioned *"NOTICE IN TERMS OF RULE 36(9)(b) (INDUSTRIAL PSYCHOLOGIST REPORT) (UPDATED REPORT)*".

[18] It is a misnomer to identify the reports as "*updated*" reports. The 2017 IP report, incidentally, is described on the CaseLines's index as an "outdated" report. This too is a misnomer.

[19] By describing, and presenting, the 2019 Educational Psychologist report and the 2019 IP report as "*Updated reports*" the unfortunate impression was created that the information in the 2017 IP report and 2017 Educational Psychologist report were revised because circumstances had changed due to the passage of time (or a change in circumstances for other reasons).

[20] The plaintiff's case for compensation for loss of earnings is based on the 2019 IP report.

[21] It had not been brought to my attention that after the respective parties' industrial psychologists had arrived at a consensus on disputed issues at a meeting of experts, a later report (i.e., the 2019 IP report) on different assumptions had been prepared.

[22] I discovered, after argument and while preparing the judgment, that the 2019 Educational Psychologist's report as well as the 2019 Industrial Psychologist's report were obtained not because circumstances had changed since the earlier reports by the experts in these disciplines. A reasonable inference is that the reports were commissioned because the opinion of the earlier experts was not good enough and therefore not acceptable.

[23] There was no indication in any of the reports, nor during argument for that matter, that the markedly different conclusions arrived at by Ms Masipa (the educational psychologist in 2019) and Mr Muleya (the industrial psychologist in 2019) were founded on the same facts as the opinions of their predecessors, (the educational psychologist, Ms Sepanyane, and the industrial psychologist, Ms Mohamed), in 2017.

[24] Had I been alerted to the fact that the later reports did not have any new facts (as opposed to a new opinion), I would have requested submissions on the weight, if any, I should attach to the later reports and whether in such circumstances a witness does not have to explain how a different, and more favourable, conclusion came to be drawn on the same facts. I grappled, without any assistance of submissions, on what I should make of the plaintiff repudiating an opinion given by his own expert three years prior.

[25] I had also not been addressed on the status of the agreement recorded by the industrial psychologists in the minute dated 31 August 2017. Before I made any finding in this regard, I afforded to the plaintiff an opportunity to address the status of the agreement arrived by the industrial psychologists. Three e-mails were sent to the plaintiff's counsel and attorney requesting submissions. In the second of these, their attention was invited to Bee v Road Accident Fund 2018 (4) SA 366 (SCA). On 26 November 2020, an assurance was given that a response to the request would be forthcoming by the end of that weekend. This did not occur. Instead, two queries were directed by MS Poto Attorneys to the office of the honorable Judge President. The mandate of the attorneys who had represented the plaintiff at the hearing had seemingly been terminated. A notice of withdrawal as attorneys of record, nor a notice of appointment as attorneys of record, have been loaded to CaseLines. MS Poto Attorneys have not responded to the queries I had raised with their predecessors and counsel. To date no submissions have been forthcoming. In the circumstances, this judgment has been prepared without the benefit of submissions from the plaintiff.

[26] To be fair, it is not only both sets of the plaintiff's attorneys who are culpable. This situation would not have arisen had the Fund participated in the proceedings, even to the limited extent of ensuring that a proper case was before the court. If the claim's handler at the Fund had at the very least read the expert reports, she would have realised that the plaintiff's case had changed, and the court could have been alerted to this. The Fund's indifference places on a court the burden to ensure that the compensation which is paid by the Fund is fair not only to the plaintiff, but also to the Fund. The burden placed on a court to ensure that public funds are protected is an unenviable one. The Road Accident Fund Act constitutes social security legislation. If one claimant is paid more than he/she is entitled to receive, the Road Accident Fund is depleted to the prejudice of other claimants. In this context, and alive to the financial health of the Fund, the court has a duty to ensure that the compensation paid to a claimant is fair and equitable. It is obvious that if a single claimant is overcompensated, the RAF is prejudiced. What must not be forgotten is that this is to the detriment of pending claims and future claims against the Fund and consequently to present and future claimants.

The issues

[27] Returning to the issues the court is called upon to decide.

[28] The defendant has:

28.1. accepted full liability for the plaintiff's proven or agreed damages.

28.2. The dispute as to the defendant's liability for general damages has been settled, so too the plaintiff's claim for medical expenses.

[29] The remaining issue is the plaintiff's claim for compensation for loss of earnings.

Presentation of plaintiff's case

[30] No *viva voce* evidence was led at the trial. The plaintiff's case was presented on the joint minutes compiled by the respective parties' expert witnesses after meeting with their counterparts and the reports which had been prepared by the plaintiff's witnesses.

[31] The plaintiff's case was argued before me on:

31.1. The joint minute delivered by:

31.1.1. The clinical psychologists; and

31.1.2. The occupational therapists.

31.2. The 2019 Educational Psychologist's report, in respect of an assessment of the plaintiff on 21 August 2019[6]. (The defendant had not delivered a report from an educational psychologist); and

31.3. The 2019 Industrial Psychologist's report.

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[6] CaseLines 033-268. The year of the assessment is reflected as "2019". The report was seemingly signed on 27 August 2018, a year before the assessment. The filing sheet to which it was attached is dated 22 August 2019. The report was served on 10 September 2019.

[32] Regrettably, it was not brought to my attention that the plaintiff's industrial psychologist, Ms Nadira Mohamed and her counterpart Ms Caro Cilliers had prepared a joint minute after a meeting on 31 August 2017.

[33] I was under the impression throughout the proceedings before me that the industrial psychologists had not had a meeting. And that I was therefore called to decide the matter on the reports of the plaintiff's industrial psychologists and that I should accept the views of the plaintiff's industrial psychologist, Mr Vuyani Muleya, above those of the defendant's industrial psychologist. The plaintiff's industrial psychologist had confirmed the contents of her report in an affidavit.

[34] It was only while preparing this judgment that I discovered that two years before Mr Vuyani Muleya assessed the plaintiff and prepared a report, the plaintiff had been assessed by Ms Nadira Mohamed[7] after which she prepared a report.[8] The report is not dated. It was attached to a filing notice signed on 18 August 2017. It can therefore be safely assumed that the report had been prepared at the very latest on 18 August 2017. I also then discovered that Ms Nadira Mohamed and her counterpart Ms Caro Cilliers had prepared a joint minute after the meeting on 31 August 2017. These facts were not brought to my attention during the hearing. Considering that a litigant is bound by the concessions made by an expert witness instructed by the litigant, I requested the plaintiff's counsel to prepare written submissions on whether I can disregard the consensus arrived at by the

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7 On 11 November 2015.

8 The report was prepared on the letter head of Rixile Consulting (Pty) Ltd. It bears Ms Nadira Mohamed's electronic signature but is not dated. The report is attached to a filing notice signed on 18 August 2017.

industrial psychologists and on what basis, and why I should have regard to the report of Mr Muleya. I will in due course discuss the issue of the consequences of an agreement arrived at by expert witnesses.

The evidence

[35] Some of the expert witnesses qualified themselves as such and confirmed reports in an affidavit loaded to CaseLines after the hearing. It is not always clear whether the reports confirmed were indeed those reports on which the case was presented before me. In other cases, I have attempted to compare the reports to establish whether they are the same. This has been a most tedious exercise and highly unsatisfactory.

[36] The following experts deposed to affidavits:

36.1. The educational psychologist Ms Masipa. The report compiled after an assessment conducted on 21 August 2019 is attached to the report. The report is not dated. The date when the affidavit was signed is also not reflected. The affidavit was uploaded to CaseLines on 25 June 2020 after the matter was heard. I have undertaken a time-consuming exercise to determine whether the report, which was referred to in argument, namely that at CaseLines 003-625-003-285 is the same as that attached to the affidavit and which appears at CaseLines 001A-3 to 001A-23. (The report does appear to be the same)

36.2. The industrial psychologist, Mr Vuyani Muleya, in his affidavit refers to a report he compiled after he assessed the plaintiff on 22 August 2019. The report is not

attached to the affidavit. In his affidavit Mr Muleya after referring to his assessment of the plaintiff on 22 August 2019 states:

> "*…subsequently I prepared a medico legal report as per instruction of Baloyi Attorneys reference number 01173A/BALOYI/MVA. I hereby confirm the content of the said medico legal report is my professional opinion that I submit to the Honourable Court the content of the medico legal report and can be incorporated herein, as part of this affidavit [sic]. To this end I confirm that a personally to a history a history from the patient and examined him [sic]*"

The affidavit was uploaded to CaseLines on 25 June 2020 after the matter was heard. I do not know which report he has confirmed under oath. It is unacceptable that affidavits are drawn without any thought going into what their purpose is. The expert affidavit confirming the report containing the opinion turns inadmissible evidence into admissible evidence. I have assumed that there is only one report and that it has been confirmed under oath. I should however not have to assume that the report which Mr Muleya refers to in his affidavit is the report dated 28 August 2019 (CaseLines 033-241 to 262). The papers should have been prepared properly. I am often left with the distinct impression that in recent times plaintiffs' legal representatives believe that orders in matters against the Fund are merely for the asking.

36.3. The Occupational Therapist, Ms SD Mogola, in her affidavit refers to a report compiled after assessing the plaintiff on 22 August 2019. The report is not attached

to the affidavit[9]. In her affidavit Ms Mogola, after referring to her assessment of the plaintiff on 22 August 2019, states:

> "*I subsequently prepared a medico legal reference number 22/08/2019 SEKHWELA. I confirm the content of the said medico legal [SIC] is my professional opinion that I submit to the Honourable Court. The content of the medico legal report can be incorporated herein, as part of this affidavit. To this end, I can confirm that I personally took a history from the patient and examined him [sic].*"

I do not know which report she has confirmed under oath. Is it the report dated 29 August 2019 (CaseLines 033-201 to 003-228)? I have again assumed that there is only one report and that it is that report which has been confirmed under oath.

[37] I will decide this matter on the common cause facts in the joint minutes of the experts and the admissible evidence before me. The reports which have not been confirmed under oath have not been considered.

The injuries and present complaints

[38] The plaintiff was two months shy of 18 years when the collision occurred. He sustained a head, wrist, and bladder injury. His pelvis and wrist were fractured and there were multiple lacerations to the scalp, right forearm, right lower leg, soft tissue injuries to the neck, thoracic spine, and right knee, as well as soft tissue facial swelling.

[39] The plaintiff complained to the occupational therapist, Ms Mogola, that he experiences haematuria, residual headaches, memory loss, pain in the right leg during inclement weather and with prolonged sitting and standing, he is unable to carry heavy

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9 CaseLines 001A-27 to 001A-30

loads due to pain in the right arm, he is unable to run or walk long distances due to back pain and his teeth are sensitive to hot beverages. He easily forgets, is unable to concentrate, suffers from nightmares and moving vehicles cause him anxiety.

[40] He reported to the educational psychologist that he experiences pain in the wrist when lifting heavy objects and complained of pain in the abdomen area when urinating.

[41] On the date of Ms Mogale's assessment (i.e., 22 August 2019) the plaintiff was not employed and was relying on financial support from his father.

The occupational therapists

The 2017 OT Joint Minute

[42] The joint minute prepared by the occupational therapists, Ms Zwane (for the plaintiff) and Ms Moagi (for the defendant) on 11 March 2017 recorded that the plaintiff was in grade 11 at Mookgo High School and progressed to Grade 12 but failed the grade. Ms Zwane recorded that the plaintiff had to change his career choice from engineering to law after the accident. The two occupational therapists agreed on the following:

42.1. the plaintiff was unemployed and had never been employed neither formally nor informally.

42.2. from a physical perspective he remained suited to perform sedentary and light occupations with the capacity to handle lower range medium loads.

42.3. his residual physical capacity was likely to decline in the period leading up to the recommended total right knee replacement surgery.

42.4. the plaintiff has suffered "some vocational limitations".

42.5. the plaintiff is likely to be suited for some semi-skilled occupations and skilled occupations based on educational qualifications and residual cognitive deficits.

42.6. considering that most, if not all unskilled occupations and manual occupation require standing walking and handling of medium to heavy loads, he will remain unlikely to perform such occupation considering his (then) current physical ability and the presence of a degenerative condition. If the plaintiff secures such an occupation, it is unlikely that he would perform it until he reaches normal retirement age.

[43] These occupational therapists recorded that the plaintiff presented with cognitive deficits which are likely to impact on his vocational ability should he secure employment in future. These deficits, in their opinion, have compromised the plaintiff's vocational prospects. According to them, he remains likely to experience difficulties in performing highly skilled and skilled occupations because they are cognitively demanding.

The 2019 OT report

[44] Ms Mogale reports the following:

44.1. The plaintiff described the pain he experiences as:

44.1.1. constant throbbing pain in the right knee which is aggravated by doing elevated and lowered work in a standing or sitting position.

44.1.2. Constant throbbing pain in the lower back aggravated by lifting and carrying objects, kneeling, and sitting.

44.1.3. Frequent dull pain in the right arm when lifting and carrying objects with the right hand and when doing elevated work.

44.2. The plaintiff presented with reduced physical endurance but was able to complete all tasks during the evaluation. He could maintain a good sitting and standing position. He complained that he experiences pain after maintaining a sitting or standing position for more than an hour.

44.3. He walked with a normal limping gait, presented with good standing and sitting static balance, and good dynamic balance.

44.4. Insofar as the objective assessment of pain[10] undertaken by her is concerned, she found that the plaintiff's pain related disability concerning activities of daily life (ADL), work, social, leisure and emotional scored between 50%-60% which is an indication of "severe disability" in those areas. Pain is alleviated by rest. The plaintiff has a good functional capacity to perform day to day physical activities.

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[10] The Dallas Pain Questionnaire.

44.5. His pain disability for lower back pain was assessed as being a moderate disability affecting his participation in the activities of daily living.

44.6. The plaintiff displayed a limited attention span. He completed all tasks with rest breaks in between the given instructions. However, in some instances the instructions had to be repeated. The plaintiff also presented with impaired memory. It was concluded that the plaintiff has limited cognitive function which has a negative impact on his day-to-day activities.

44.7. The Quick Neurological Screening Test which assesses the development of motor coordination and sensory integration (both of which relate to learning as well as general daily functioning) was administered. It features 15 tasks used in traditional neurologic exams. Each task in the test gives inputs on evaluation to learning, occupational functions and activities of daily living. The plaintiff scored 20% on the test. This indicates that the plaintiff will not have difficulty with planning and executing motor movements as well as doing his daily living activities, however there are behavioural irregularities.

44.8. The plaintiff's scored 23 on the Montréal Cognitive Assessment[11]which is indicative of abnormal function in cognitive domains which would interfere with his activities of daily living.

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[11] A test designed as a rapid screening instrument for mild cognitive dysfunction. It assesses different cognitive domains: attention and concentration, executive functions, memory, language, visio construction skills, conceptual thinking, calculations and orientation. The total possible score is 30 points, a score of 26 or above is considered normal and below it is abnormal.

[45] Ms Mogale carried out a Functional Capacity Evaluation (FCE). This tool is employed to objectively evaluate the physical capabilities of a person to determine whether those capabilities are well matched to the physical demands of a specific job. Clinicians, such as occupational therapists, employ it to evaluate the degree of an individual's disability. Functional Capacity Evaluation (FCE) is described in the context of occupational rehabilitation as a "systemic assessment of individual's ability to perform a series of tasks safely." FCEs are used, amongst others, to identify how much work the patient can perform and to assist in disability determination process.[12] There are a number of FCEs, however only the Ergoscience "Physical Work Performance Evaluation" (PWPE) has been submitted for a reliability study for all its sections.[13] The PWPE is one of the most used FCEs for back pain patients in the United States. Moreover, it covers a variety of physical demands and gives an overall view of a worker's work capacity. The purpose of the PWPE is to determine a worker's maximum safe physical working abilities. The PWPE consists of a series of 36 standardised tasks to evaluate six different sections: (i) dynamic strength; (ii) position tolerance; (iii) mobility; (iv) balance; (v) endurance; (vi) coordination and fine motor skills. These 36 tasks cover the 20 physical demands described by the Dictionary of Occupational Titles (DOT)[14]. For each task, a Physical Performance Score,

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12 "*The Interrater Reliability of a Functional Capacity Evaluation: The Physical Work Performance Evaluation*" Marie Jośe Durand *et al;* Journal of Occupational Rehabilitation, Vol 14, No. 2, June 2004 p.119.

13 Marie Jośe Durand *et al* p. 120

14 1. Strength demand: **Lifting:** raising or lowering an object from one level to another. **Carrying:** transporting the object, usually holding it in their hand or arms. **Pushing**: exerting force upon an object so that it moves away from the force. **Pulling**: exerting force upon an object so that moves towards the force.
2. Standing: remaining on one's feet up right position without moving about.
3. Walking: moving about on foot.

a measure of the safe level of work (SLW) that can be safely accomplished by the subject is obtained.

[46] The occupational therapist reports as follows on the FCE:

46.1. The plaintiff was able to safely complete most of the tasks presented to him. He put in full physical effort.

46.2. Limping was observed. He used inappropriate body mechanics and was not weight-bearing on the right leg. Pain and fatigue had a bearing on his performance.

46.3. His major areas of dysfunction were limited dynamic strength (lifting and carrying) and poor position tolerance (doing elevated work, bending, forward-reaching and trunk rotation). This was due to pain in the right arm, lumbar spine and both shoulders. He also showed functional limitations when doing elevated work, bending, forward-reaching and trunk rotation.

46.4. The plaintiff showed the ability to constantly (67%-100% of an 8-hour workday) sit, stand, climb stairs, crawl. squat, walk, carry out fine motor movements, and grip.

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4. Sitting: remaining in a seated position.
5 Climbing: ascending or descending ladders, stairs, scaffolding, ramps, poles et cetera.
6. Balancing: maintaining body equilibrium to prevent falling.
7. Kneeling: bending the legs at the knee to come to rest on the knees.
8. Crawling: moving about on hands and knees or hands and feet.
9. Reaching: extending arms and hands in any direction.

46.5. He was able to lift a maximum load of 23 kg from floor level to waist height using inappropriate body mechanics. He was able to do this type of lifting occasionally, (0%-33% of the day). He was also able to lift a maximum load of 20 kg from waist to eyelevel. He was able to do so occasionally (0%-33% of the day) as well.

46.6. The plaintiff showed the ability to carry a unilateral right arm 14kg maximum load and a unilateral left arm 23kg maximum load, occasionally (0%-33% of the day). He also demonstrated the ability to carry a bilateral 20kg maximum load.

46.7. He was able to do pushing and pulling activities with the maximum weight of 25 kg.

46.8. He was unable to do squatting tasks.

46.9. He was able to do tasks in a sitting, forward-reaching kneeling, bending trunk rotation positions and standing. He was able to do these frequently (i.e., 30 – 66% in an 8-hour workday).

46.10. He demonstrated the ability to perform dynamic balance to sufficiently maintain these tasks for productive work activities for up to two-thirds to a full day (i.e., constantly) as required.

46.11. The Ergo-Science Overall level of work placed the plaintiff's strength in the medium range of work. This means that he could do work which required him to exert between 9.09kg to 22.2 kg force occasionally (0%-33% of the day) and/or

4.45kg to 11.36kg of force frequently (34%-66% of the day), and/or greater than negligible up to 4.4kg of force constantly, to move objects (67%-100%).

[47] Ms Mogale concluded that the plaintiff does not meet the demands of his future work considering that four years had passed, and the plaintiff was still presenting with pain and discomfort. What strikes me about the conclusion is what this "future work" is, is not disclosed.

The educational psychologist

[48] Two educational psychologists were instructed to prepare a report on behalf of the plaintiff. The one report was in 2017 by Ms Sepenyane. Two years later, on 21 August 2019, Ms Masipa assessed the plaintiff. The defendant did not appoint an educational psychologist. There are therefore no joint minutes.

[49] Ms Masipa reports that the plaintiff failed grade 1. In 2008, successfully completed grade 8 and grade 9. According to the grade 9 final year report, the plaintiff's performance was within the average range to the below average range. He transferred to another school where he was enrolled in grade 10. He failed grade 10 however successfully repeated it. The school at which he completed grade 10 found the plaintiff to be hard-working and a respectful and obedient learner. He was enrolled at a different school in grade 11. He attended the first two terms of that academic year. The accident intervened and the plaintiff was unable to attend school for four weeks. He was often absent due to pain. He had trouble writing because of the injury to his dominant hand. He had difficulty walking to school

which was a distance from his home. He passed grade 11 in the year of the accident. The school report for the fourth term recorded that the plaintiff's achievement was "*between substantial and moderate*".

[50] In the following year he failed grade 12. He sat for the Grade 12 examinations in 2014 but failed the grade. He later again attempted to complete grade 12 but could not sit for the final examination because he found it difficult to concentrate and study. The plaintiff's highest educational level is therefore grade 11. The plaintiff has never been employed. His post-accident unemployment is due to the injuries sustained in the collision. He has also not participated in a job search for the same reason.

[51] Ms Masipa is of the view that the outcomes of the psychometric assessment conducted by her indicate that the plaintiff's global cognitive intellectual level of functioning was within the average range. This indicated to her that the plaintiff should have adequate skills to learn. He did however present with cognitive deficits in the areas concerning attention, concentration, memory, mental manipulation and processing. According to her, the pain could have exacerbated his attention difficulties because he must change his sitting position often and take short breaks. It is expected that these negatively impacted on his scholastic function. In her assessment the plaintiff's scholastic performance according to the tests administered, was below his age and level. Additionally, he presented with signs of emotional challenges.

[52] Ms Masipa concluded that:

52.1. In view of two years having passed since the accident, she considers the plaintiff's injuries permanent.

52.2. She is of the view that the plaintiff is in a disadvantaged position academically and vocationally and further that it is unlikely that he will attain any educational qualifications beyond grade 11.

52.3. But for the accident, the plaintiff would have reached grade 12 and passed it with at least a diploma admission. He would have been eligible to study towards a NQF Exit level 6 qualification.

52.4. The accident sequelae have had a negative impact on the plaintiff's cognitive and academic performance. It is unlikely that the plaintiff will be able to attain any qualification beyond grade 11.

[53] Ms Sepenyane's report pre-dated Ms Masipa's by approximately two years. Assessing the plaintiff's pre-accident employment prospects. Ms Sepenyane postulated two scenarios:

53.1. considering that the plaintiff presented with learning problems before the accident he was possibly average learner without a supportive and stimulating environment. He reported to her that he failed because his family did not treat him well. This could have been ongoing unresolved issue affecting his pre-accident scholastic performance.

53.2. It is possible that the plaintiff had the cognitive ability to perform adequately but was faced with the environment not conducive enough to tap into his potential. He could possibly have gotten a low Matric (NQF4) and ended up in a semiskilled job. The possibility also exists that he may have gotten a bursary and proceeded with post matric study possibly and FET college (NQF5) like his deceased mother.

[54] Clearly, Ms Masipa's assessment of the plaintiff's pre-accident employment prospects are more favourable than those of Ms Sepenyane.

The clinical psychologists

[55] I have before me only the joint minute dated 30 August 2017 prepared by Ms Sewpershad and Ms Tromp. Neither the plaintiff's clinical psychologist's report nor that of the defendant's clinical psychologist were uploaded to CaseLines. This is unsatisfactory considering that the clinical psychologists record in the minute that they "defer to the other recommendations as set out in [their] respective reports".

[56] The clinical psychologists agree that:

56.1. The plaintiff exhibits neuropsychological problems which suggest that he is functioning at a lower level in comparison to his pre-morbid potential.

56.2. The plaintiff's difficulties are deemed consistent with the profile of an individual who has suffered a mild traumatic brain injury, the difficulties being exacerbated by the effects of post-accident psychological outcome and reported pain.

56.3. Some of the cognitive difficulties may have been present prior to the accident given the history of reported failed grades.

56.4. No further recovery is expected regarding the plaintiff's neuropsychological status.

56.5. Significant changes seem to have occurred to the plaintiff psychological functioning due to the trauma of the death of the plaintiff's friend in the same accident, as well as the chronic pain he experiences.

56.6. both psychologically and psychiatrically the plaintiff is considered significantly more vulnerable than prior to the accident with increased risks of exposure to social discrimination from the residual scarring caused by his injuries.

56.7. the plaintiff's neuropsychological impairment, depressive mood disorder and pain present a significant threat to his occupational function.

The industrial psychologists

[57] The industrial psychologists, Ms Mohamed for the plaintiff and Ms Cilliers for the defendant, prepared joint minutes following on a meeting held between them on 31 August 2017 in which they record:

57.1. the plaintiff was a part-time informal vendor selling braaied/grilled meat after school and on weekends.

57.2. Plaintiff would have attained a grade 12 qualification would have entered the labour market as a semi-skilled worker, in line with the LQ earnings for semi-skilled workers. Given the plaintiff's young age it is likely that he would have progressed to the UQ earnings by the age of 45 years with inflationary increases there after until the normal retirement age of 65 or until physically unfit based on his circumstances.

57.3. If the plaintiff was successful in attaining a NFQ Level 5 qualification he is more likely to have entered the labour market at a Paterson Grading level A1 LQ earnings (basic salary) taking into account his learning difficulties prior to the accident, his low average verbal IQ score as well as his geographical location. Given his young age and with continued experience and training, his earnings are likely to have progressed to the Paterson grading level B2 UQ earnings (basic salary), Corporate Survey Earnings (R Kock, 2017), Table 2.[15]

57.4. It is unlikely that the plaintiff will secure sedentary work because grade 12 is a usual requirement for such positions, his limited English proficiency and his lack of experience.

57.5. With a grade 11, it is unlikely that employers will be willing to give him preference in a labour market where he will be competing with an abundance of matriculants.

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[15] CaseLines: p. 003-128: Joint Minute by Industrial Psychologist dated 31 August 2017. See also: CaseLines: 033-17, Report of Industrial Psychologist, Ms Mohamed, paragraph 7.1.6

57.6. Most if not all sedentary occupations are regarded as skilled occupations and the occupational therapists agree that the plaintiff is likely to experience difficulties in highly skilled and skilled occupations because of his cognitive deficits.

57.7. The chances of the plaintiff securing light and semi-skilled work is severely limited due to his physical cognitive and psychological limitations.

57.8. Due to the manual nature of unskilled occupations the plaintiff remains unlikely to perform unskilled occupations considering his physical abilities and the presence of a degenerative condition. He may rely on reasonable accommodations in the workplace and the use of occupational assistive devices.

57.9. The plaintiff's employment prospects are limited to his labour potential as opposed to an educated worker who has specialised skills and expertise.

57.10. Because employers are likely to employ a better educated individual with grade 12 or a physically able individual for physically strenuous duties, it is unlikely that future employers will be willing to accommodate the plaintiff's medical difficulties by providing work with a limited scope.

57.11. The plaintiff's physical limitations render him an unequal competitor in the open labour market.

57.12. Plaintiff has suffered a past loss of income and will suffer future loss of income.

57.13. Ms Mohamed holds the view that it is unlikely that the plaintiff will be able to improve his education or secure employment in the sedentary/light occupations, or unskilled or semiskilled sector.

[58] Ms Cilliers is of the opinion that the plaintiff has been compromised in the open labour market and he will experience periods of unemployment. She recommends that a higher contingency in the circumstances is considered. Furthermore, it is anticipated that the plaintiff's income will be less because he will be seen as a vulnerable employee who needs accommodation and has to take frequent breaks.

The industrial psychologist: Mr Vuyani Muleya

[59] On 22 August 2019, the plaintiff was assessed by Mr Vuani Muleya, an industrial psychologist following on which he prepared a report on 27 August 2019. In his report Mr Muleya records that he was placed in possession of the reports of the clinical psychologist Ms Sewpershad, educational psychologist Ms Masipa and the occupational therapist Ms Mogola. He was seemingly not provided with the report compiled by the industrial psychologist Ms Mohamed, nor the joint minutes prepared by the latter and her counterpart Ms Cilliers. There is no reference in his report to the 2017 Educational Psychologist report.

[60] Mr Muleya is of the opinion that had the accident not occurred the plaintiff would have completed grade 12 and went on to study towards a diploma i.e., a NQF Level 6 qualification of his choice. He would have completed this by the age of 24 – 25. He would have spent 6-12 months searching for employment in line with his qualifications. He would

have secured employment at the age of 25 – 26. He would have started earning at Paterson Level B4 and his earnings would have grown gradually with experience towards Paterson Level C3/C4 by the age of 45. He would have reached his career ceiling at this level and would only enjoy yearly inflation related salary increments until the age of 65 depending on his health economic factors and retirement policy of his employer. Mr Muleya's opinion is based on the opinion of the educational psychologist Ms Masipa. Mr Muleya appears not to have been privy to Ms Sepenyane's report. He was however privy to the report from the clinical psychologist, Ms Sewpershad. He therefore was confronted with the conclusion that the plaintiff's level of cognitive functioning may have been in the low average range prior accident. Ms Sewpershad's view is based on the plaintiff having failed grade 1 and grade 10 once. Mr Muleya challenges the correctness of Ms Sewpershad's view because the clinical psychologist had noted that the plaintiff had scored on two tests in the superior range and on one test above average which suggested to him that the plaintiff's "*educational history may not be a true reflection of his cognitive potential*". Because of this he concludes that he is of the opinion that had the accident not occurred, the plaintiff could have passed matric and went on to study a further tertiary level. He sees support for this in the following statement in Ms Masipa's report:

"Noting the other contextual factors (mothers death, father visiting on occasion, moving houses and school) it could be stated that these have a potential to pose as learning barriers for the learner and that could have influenced his learning general scholastic performance considering the grade at which he was at the time of the accident, grade 11, his performance and the support rendered by the Department of education to high school learners to reach and pass grade 12, his post-accident psycho-educational psychometric assessment outcomes, [the plaintiff] would have reached grade 12 as he did post-accident. He would have passed it with at least Diploma admission. He would then be eligible to study towards a NQF Exit level 6 qualification."

[61] Turning to the plaintiff's post-accident employment prospects, Mr Muleya is of the view that the plaintiff would only qualify for general worker jobs because of his level of education. However, these jobs require prolonged sitting, walking, stair climbing, squatting and lifting heavy objects which would render him physically unsuitable. Plaintiff is accordingly at risk of prolonged unemployment. Additionally, the neurocognitive difficulties which confront the plaintiff are prejudicial to his participation in the open-labour market. The plaintiff is psychologically vulnerable after the accident because of depression, anxiety and negative self-image which are all compounded by the chronic pain. The scarring caused by the injuries expose the plaintiff to social discrimination. All of these will impact negatively on his ability to maintain healthy relationships in the workplace. This makes the plaintiff vulnerable to unemployment according to Mr Muleya.

[62] Insofar as the plaintiff's post-accident employment prospects are concerned, Mr Muleya is of the view that it is not expected that the plaintiff will attain academic qualifications beyond grade 11. Based on this he does not qualify for office-based, and clerical jobs, fall within the sedentary and light category of work. However, because of his physical, cognitive and psychosocial limitations he is not suitable for general worker jobs either.

[63] According to Mr Muleya the plaintiff is a compromised jobseeker and competitor in the open labour market. He is at risk of prolonged periods of unemployment throughout his adult career. The plaintiff will therefore struggle to secure employment in the open labour market unless accommodated by a sympathetic employer. In his view, employers

in the open labour market are not sympathetic to the disabled people living with limitations. In the unlikely event that he manages to obtain employment in future, the plaintiff's earnings are not expected to go beyond the mild quartile of unskilled workers as per salary guidelines for noncorporate workers in the open labour market.

Analysis

Pre-accident employment prospects

[64] There is a marked difference between Mr Muleya's assessment of the plaintiff's pre-accident employment prospects and those agreed upon by the industrial psychologists, Ms Mohamed and Ms Cilliers at the meeting of these two experts. Mr Muleya's assessment of the plaintiff's pre-accident employment prospects are based on the report of Ms Masipa who assessed the plaintiff on 21 August 2019. While the joint minute of the industrial psychologists is based on the assessment conducted by Ms Sepenyane. The plaintiff's own experts differ on the plaintiff's academic path. No explanation is given for this. What troubles me is that counsel did not consider it appropriate to bring this to my attention when the matter was argued.

[65] I am not required in this case to determine whether the opinion of the defendant's expert witness is more probable than that of the plaintiff. I must decide, and I must add most unusually, which of the plaintiff's educational psychologists' postulation on the plaintiff's pre-accident academic progress is more probable.

[66] The plaintiff's industrial psychologists' assessment of the plaintiff's pre-accident prospects of employment is premised on the findings of either the educational psychologist, Ms Sepenyane or Ms Masipa.

[67] Do the probabilities favour the view expressed by the plaintiff's educational psychologist, Ms Sepenyane in 2017? Or do the probabilities favour the view expressed by the plaintiff's educational psychologist, Ms Masipa in 2019.

[68] On the best-case scenario for the plaintiff, Ms Sepenyane is of the view that the plaintiff may have pursued post matric study possibly and FET college (NQF5) like his mother had.

[69] Ms Masipa is of the view that (i) the plaintiff would have completed grade 12 and proceeded to study towards a diploma i.e., NQF Level 6 qualification; and (ii) would have started earning at Paterson Level B4 and his earnings would have grown gradually with experience towards Paterson Level C3/C4 by the age of 45 he would have reached his career ceiling at this level and would thereafter have enjoyed only yearly inflation related salary increments until the age of 65.

[70] I have two difficulties with Ms Masipa's conclusion concerning the plaintiff's academic progress. Having acknowledged that the circumstances in which he found himself pre-accident (his mother's death, the infrequent contact with his father, relocating to another area and therefore changing schools) are circumstances which could potentially pose as learning barriers and could have influenced the plaintiff's learning general

scholastic performance, she leaves this out of account even though it is evident that he failed grade 10 at a point when he had changed schools. It seems that relocating from one environment to another could have posed a learning barrier. Ms Masipa does not explain why relocating to another area and a change in learning institutions when he enrolled for a Diploma would not have caused the type of disruption that could have led to the plaintiff not completing it.

[71] Unless the factual foundation for an expert witness's opinion is correct, and the opinion is underpinned by proper reasoning, opinion evidence has no probative value.

[72] I find no support in Ms Masipa's report for her conclusion that the plaintiff would have passed grade 12 "with at least a Diploma admission".

[73] I find nothing the report to suggest that having identified that the plaintiff's performance in grade 9 was within the average to below average range, she took this into account in arriving at her conclusion on his academic progression. Lest my criticism of her opinion in this regard is unreasonable, I am still confronted with the problem that Ms Masipa does not say that the plaintiff would have attained a NQF Exit level 6 qualification. What she says is that with a grade 12 with at least a Diploma admission the plaintiff "*would then be eligible to study towards a NQF Exit level 6 qualification."* This is different from saying that he would have obtained such a qualification.

[74] I am not satisfied that the plaintiff has discharged the onus of proving that but for the accident the plaintiff would have successfully attained a NQF Exit level 6 qualification.

Mr Muleya's view on the plaintiff's pre-accident career prospects rests entirely on Ms Masipa's view on the plaintiff's academic progress pre-accident. It therefore follows that Mr Muleya's views on the matter cannot be sustained.

[75] Depending on the status of the agreed facts as recorded in the joint minute all may not be lost for the plaintiff. The plaintiff's industrial psychologist Ms Mohamed and the defendant's industrial psychologist had reached consensus at a joint meeting on the plaintiff's pre-accident academic progress.

[76] Based on the educational psychologist, Ms Sepenyane's assessment that plaintiff could possibly have gotten a low Matric (NQF4) and ended up in a semi-skilled job, Ms Mohamed and Ms Cilliers agreed that the plaintiff would have completed grade 12 and would likely have entered the labour market as a semiskilled worker earning in line with the LQ earnings for semi- skilled workers and that it is likely that he would have progressed to the UQ earnings by age 45 with inflationary increases thereafter until the normal retirement age of 65.[16]

[77] They also agreed that if the plaintiff was successful in attaining a NFQ Level 5 qualification, he is more likely to have entered the labour market at a Paterson Grading level A1 LQ earnings (basic salary) taking into account his learning difficulties prior to the accident, his low average verbal IQ score as well as his geographical location. Given his young age and with continued experience and training, his earnings are likely to have

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[16] CaseLines: IP Joint Minutes, p. 033-127, para 1.5.

progressed to the Paterson grading level B2 UQ earnings (basic salary), Corporate Survey Earnings (R Kock, 2017), Table 2.[17]

[78] In Craig Francois Thomas v BD Sarens (Pty) Ltd[18] (approved by the Supreme Court of Appeal in Bee v Road Accident Fund 2018 (4) SA 366 (SCA)) Sutherland J (ashe then was) had this to say about expert witnesses and agreements they arrive at with their counterparts:

> *"[8]…what should appear, typically, from an expert's report is a set of facts and/or a series of opinions. Sometimes the 'facts' upon which opinions are based are contested and sometimes experts called by opposing litigants agree on those facts. Similar agreements or disagreements over a given opinion can occur.*
>
> *[9] The general principle is that a decision on what constitutes the facts on any issue is the preserve of a court. …There is only one category of exception: i.e., when the parties agree on the facts. Even if a court might be sceptical about a set of agreed facts, there is no licence to go behind the parties' agreement, at least in a civil matter, just as the admitted facts on the pleadings are not to be interrogated by a court.*
>
> *[10] Where litigants in a damages dispute give due notice to call an expert who is to adduce facts and to give an opinion, such notice binds the litigant who gives that notice. It is not open to that litigant to impeach its own expert witness unless and until it clearly repudiates all, or some, of the expert's contribution.*
>
> *[11] Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. It is self-evident that do so at so late a stage is undesirable because it may provoke delay, but that is a practical aspect not touching on any principle. It is conceivable that very exceptional circumstances might exist that allow a litigant to repudiate an opinion later than this moment, such as fraudulent collusion, or some other act of gross misconduct by the expert, but such considerations do not bear extrapolation for present purposes.*

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17 CaseLines: p. 003-128: Joint Minute by Industrial Psychologist dated 31 August 2017. See also: CaseLines: 033-17, Report of Industrial Psychologist, Ms Mohamed, paragraph 7.1.6

18 [2012] ZAGPJHC 161.

> *[12] Where experts are asked or are required to supply facts, either from their own investigations, or from their own researches, and an agreement is reached with the other party's experts about such facts, such an agreement on the facts enjoys the same de facto status as facts that are expressly common cause on the pleadings or facts agreed in a pre-trial conference or in an exchange of admissions."*

[79] Ms Mohamed and Ms Cilliers accepted the findings and the opinion expressed by Ms Sepenyane. Based on that they agreed on facts going to the plaintiff's academic progression had the accident not occurred. The agreed facts have the same weight as common cause facts on the pleadings. Neither the plaintiff nor the defendant can simply repudiate that opinion because it does not suit them.

[80] In any event I am satisfied that the probabilities favour a scenario where the plaintiff would have achieved a NFQ Level 5 qualification.

[81] The plaintiff's late mother had passed Matric and was undertaking FET. The plaintiff's average mark for the following academic years was as follows:

81.1. Grade 8 (2008): 50.77%.

81.2. Grade 9 (2009): 49.44%.

81.3. Grade 11 (2012): 45%.

[82] In grade 8 the plaintiff achieved above 50%, in grade 9 he achieved just under 50% and in grade 11 (which was the year in which he was involved in the accident) he achieved 45%. I am satisfied that the probabilities favour the best-case scenario postulated by Ms Sepenyane, namely that the plaintiff would have pursued post matric study, attended a FET college like his mother had and would have obtained an NQF5 qualification.

[83] I am alive to the fact that the plaintiff's industrial psychologist's opinion is based on the report of Ms Sepenyane which is not confirmed under oath. In my view it is permissible to have regard to Ms Sepenyane's report because it was the basis for the consensus on certain aspects between the plaintiff's industrial psychologist Ms Mohamed and the defendant's industrial psychologist, Ms Cilliers. I can find no basis to reject this agreed opinion.

Post-accident employment prospects

[84] The industrial psychologists Ms Mohamed and Ms Cilliers agree that:

84.1. It is unlikely that the plaintiff will cope with future studies.

84.2. It is unlikely that the plaintiff will be able to secure sedentary work in the absence of a grade 12 qualification and his limited English proficiency and lack of experience.

84.3. The prospects of the plaintiff securing light and semi-skilled work is severely limited because of his physical, cognitive and psychological limitations. These limitations also exist when it comes to the prospect of the plaintiff obtaining employment in the unskilled sector especially because of the manual nature of the work involved.

[85] Mr Muleya does not expect the plaintiff to further his studies beyond grade 11. He holds the view that the plaintiff does not qualify for office-based and clerical jobs that fall

within the sedentary and light category. He is not suited for general worker jobs within the medium to heavy category of work because of his physical, cognitive and psychological limitations which are compounded by chronic pain. Mr Muleya concludes that the plaintiff is at risk of prolonged periods of unemployment and that if the plaintiff does secure employment, it is unlikely to go beyond the mid-quartile of unskilled workers as per salary guidelines for non-corporate workers in the open labour market. (CaseLines: 033-259 (p.18 of Mr Muleya's report).

[86] Evidently in Mr Muleya's expert opinion the plaintiff is for all intents and purposes unemployable.

[87] I find it most remarkable that the plaintiff has made no effort to secure employment. I am cognizant of the fact that the plaintiff communicated this to Ms Masipa on 21 August 2019. However, if there had been a change in his circumstances, I would have expected the plaintiff to have testified to that. He elected not to do so.

[88] I accept that the plaintiff does have limitations. However, the 2019 OT report does not present a picture of an individual whose limitations are so severe that he is unable to work at all. Based on her findings referred to in this paragraph and paragraphs 42, 44 and 46 above, I am not persuaded that the plaintiff is unemployable.

88.1. The plaintiff was alert and fully responsive throughout the assessment;

88.2. was able to give accurate account of the accident and was able to participate in all activities with adequate effort;

88.3. managed throughout the assessment to understand questions posed to him and was able to answer them appropriately;

88.4. experiences pain in inclement weather;

88.5. is unable to do heavy (as opposed to moderate or light) maintenance work;

88.6. suffers from occasional (as opposed to frequent) headaches;

88.7. could maintain a good sitting and standing position, presented with good sitting and standing balance and was found to have a good dynamic balance;

88.8. could, insofar as sitting and standing endurance is concerned:

88.8.1. complete all the tasks given to him during the evaluation even though he presented with reduced physical endurance;

88.8.2. he tires after an hour;

88.8.3. reported mild pain in the right knee after sitting for an hour;

88.8.4. was found to have good functional capacity to perform day-to-day physical activities;

88.8.5. his disability for lower back pain was assessed to be 40% which symbolises moderate disability affecting his participation in activities of daily life.

88.9. The plaintiff experiences constant throbbing pain in the right knee when performing elevated work and constant throbbing pain in the lower back when lifting, carrying, kneeling, sitting and bending. He experiences frequent dull pain in the right arm when lifting and carrying objects with the right hand and when doing elevated work. The pain is alleviated by rest.

88.10. does not take medication for the management of pain.

88.11. The plaintiff will not have difficulty with planning and executing motor movements as well as doing daily living activities.

[89] In my view and in the absence of evidence to the contrary, the plaintiff has been unemployed not because he has sought employment and been rejected, but because he has not made any attempts to secure employment. I am not persuaded that the plaintiff is unemployable.

[90] Considering that the plaintiff is just under 27 years old,[19] and the prospect that he would have achieved a NFQ Level 5 qualification may be too optimistic, a higher contingency deduction for future premorbid loss of earnings is warranted. This will also cater for the possibility that the plaintiff's academic performance could have been affected by various stressors. For instance, the emotional distress suffered by the plaintiff having lost his mother at an early age, or that caused by the infrequent contact with his father, and the instability brought about by relocating to another place. The severity of the distress or

[19] The plaintiff was born on 2 September 1994.

the nature of the stressors could affect whether the plaintiff attained the NFQ level 5 qualification at all or whether he attained it much it much later than reasonably expected. A 20% deduction for contingencies in my view is therefore appropriate.

[91] Insofar as post-morbid loss of earnings is concerned, I cannot ignore the possibility that the plaintiff may secure semi-sedentary, light, or semi-skilled work type of work in which he can take regular self-select movement breaks and alternate between sitting, standing and walking as needed, and where frequent load handling is not required. In view of this and some residual earning capacity, a deduction of 20% for contingencies is fair and just in the circumstances.

[92] The plaintiff's actuary has prepared three reports. However, the assumptions on which the plaintiff's loss of earnings has been calculated are not consistent with my findings. The actuary is therefore required to calculate the plaintiff's loss of earnings on the following basis (allowing for the RAF cap, if applicable):

92.1. Pre-morbid:

The plaintiff would have obtained a NFQ Level 5 qualification. He would have entered the labour market at a Paterson Grading level A1 LQ earnings (basic salary). His earnings would have progressed to the Paterson grading level B2 UQ earnings (basic salary),

Corporate Survey Earnings (R Kock, 2017), Table 2.[20] A 20% deduction should be applied for contingencies.

92.2. Post-morbid:

The plaintiff is employed in the unskilled sector and his salary will not go beyond the mid-quartile of unskilled workers as per salary guidelines for non-corporate workers in the open labour market.[21] A 20% deduction should be applied for contingencies.

[93] Upon receipt of the revised and updated actuarial calculations, the plaintiff's counsel is requested to prepare a draft order reflecting the compensation for past and future loss of earnings. In preparing the draft order it must be borne in mind that the compensation claimed in the amended particulars of claim is R3 500 000.00[22]. The plaintiff is not entitled to compensation exceeding this amount. Provision must also be made for the payment of interest and costs, which are to include the costs of 23 June to 25 June 2020.

[94] Once the draft order is prepared and received by me, I can be approached to make it an order of court.

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20 CaseLines: p. 003-128: Joint Minute by Industrial Psychologist dated 31 August 2017. See also: CaseLines: 033-17, Report of Industrial Psychologist, Ms Mohamed, paragraph 7.1.6.

21 CaseLines: 033-259 (p.18 of Mr Muleya's report).

22 CaseLines: 004-5 and 004-004-6.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

28 May 2021

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 May 2021.

Date of hearing: 25 June 2020

Appearances:

Plaintiff: Adv. Desmond Mphahlele

Defendant: No appearance.