

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 16079/2018

- [1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED.

Date:

WHG VAN DER LINDE

In the matter between:

J, T

Plaintiff

and

The Road Accident Fund

Defendant

J U D G M E N T

Van der Linde, J:

Introduction

- [1] This is a claim against the RAF for damages arising from personal injuries which the plaintiff says he sustained during a collision. The defendant has conceded liability but not quantum. The parties have also not asked me to make a finding as to the amount that would fairly compensate the plaintiff for the general damages allegedly suffered by him, since whether

or not a serious injury has been sustained, has been referred to the Health Professions Council of South Africa's Tribunal for determination.

- [2] Exhibits C and D were handed up by agreement. These two exhibits, described as general documents, formed part of a bundle of exhibits handed up, A1 through L. The usual status agreement applied, namely that the documents are what they purport to be, but the truth of their contents was not admitted. Exhibits A1 and A2 were handed in as formal admissions. What was also admitted is the quantum of the loss in respect of past medical expenses, in the amount of R10 000. As regards future medical expenses, the defendant has tendered an undertaking in the usual statutory format.
- [3] What remained in dispute were past and future loss of earnings, the combined claim under this head of damages being for some R5.7 million. Costs remained in dispute.
- [4] What had happened was that the plaintiff was stationary in his motor vehicle at an intersection when he was hit from behind by the vehicle in respect of which the defendant assumes statutory liability for negligent driving, injuries and consequent damages.

The plaintiff's case

Dr Visser

- [5] The plaintiff's first witness was a Dr Visser, a psychiatrist, who proved his report at Exhibit E. He explained in his viva voce evidence that although the plaintiff would appear to have suffered no concussion in the usual sense of the word during the collision, he may have experienced an altered state of consciousness. I interpose to point out that that the common cause hospital records do not suggest that the plaintiff lost consciousness, but only that he was "dizzy" after the collision.

- [6] It would appear that after the plaintiff was hit from behind, his vehicle was forced forward and he hit his head against the steering wheel. After a short delay at the scene of the accident, he drove himself first to one hospital and then to another. There were no fractures. The injuries were all, to the extent that these were yet to be proved, of the soft tissue type.
- [7] Dr Visser said that in some people such an injury can result in permanent depression, with poor attention and poor memory. He believes that this is evident in the case of the plaintiff because he has recurrent headaches, disequilibrium and sleep problems. He believes that the effect of the chronic pain suffered by the plaintiff was to impact him functionally. The witness said however that it was impossible for him to gauge whether the plaintiff has been functionally impaired compared to his pre-accident condition. He thought that the plaintiff was likely to improve but it was impossible to say whether full recovery will eventuate.
- [8] Before turning to the cross-examination it is necessary to remark that the evidence of the witness was given, virtually without exception, in response to leading questions to which there was no objection by counsel for the defendant. The court indicated to counsel for the plaintiff that the value of answers given to leading questions is compromised, but the leading questions nonetheless continued.
- [9] In cross-examination the witness explained that the plaintiff had said that he felt “*dazed*” when in consultation the witness asked the plaintiff whether he had lost his consciousness in the collision. The witness also said that he thought that with treatment the plaintiff’s chances of passing his non-academic MBA, the first year of which he had passed, but the second year of which he had failed post-accident, were good. Generally, his chances of improving were good.

Dr Sugress

[10] The next witness for the plaintiff was Dr Sugress. She has a PhD in Industrial Psychology and proved her report at Exhibit F. She explained that the plaintiff was in his 2nd year MBA at a higher education institution when the collision occurred. He failed that year. He had passed his 1st year. He did not have matriculation exemption when he passed matric but did obtain a Diploma in Human Resources thereafter. Years later he enrolled for his MBA, which is not an academic MBA, at Henley Business School. The witness said that she had obtained the plaintiff's academic transcript from Henley Business School but she did not hand it in as an exhibit and it was never proved.

[11] The witness said that she did not receive confirmation of the plaintiff's income of R45 000.00 per month with Cell-C. She explained that he enrolled for his MBA in 2012. In March 2012 he joined Lenovo having moved there from Cell-C where he was a Senior Manager. His contract of employment was proved. He was offered a sign-on bonus of R60 000.00 at Lenovo. At Lenovo he was a Service Delivery Manager earning R60 000.00 per month, and this was a 25% increase on his previous salary. He was travelling a lot into Africa. He was working in a corporate sector prior to the injury, and his income was at the Paterson level D1, between the median and upper quartile. His education and training was at the level of NQS level 6, yet he was earning what a graduate could potentially earn in the corporate sector.

[12] The witness said that the probability was that the plaintiff would have completed his MBA. He had, pre-morbid, a high-average cognitive ability. He completed his 1st year MBA studies successfully and was therefore ambitious and his career was on the rise.

[13] Post-accident he left Lenovo in April 2015 and joined Microsoft in May 2015. (These dates were wrong and should be one year earlier). The plaintiff told her that he left Lenovo because he was not coping. Disciplinary action was threatened against him. Pre-accident, he did not report any period of unemployment except for some seven months after he

matriculated in 1994. He also did not report any period of unemployment post-accident. The witness said that she thought that the plaintiff joining Microsoft was an impulsive decision on his part.

[14] In the event he did not complete his contract at Microsoft and complained of similar problems there as he had experienced at Lenovo. The Microsoft contract was renewable, but the witness did not know at whose option. The witness thought that there was a clear pattern here: the plaintiff resigns pre-emptively to being dismissed.

[15] The plaintiff's 2016-tax returns showed an annual income of R609 231.00 whereas his 2015-tax return showed an annual income of R977 924.00. At the time of the accident he was earning R65 742.00 per month. His 2017-tax return showed an income of R56 276.00 per month.

[16] The witness opined also that but for the accident she would have expected that he would have finished his MBA and therefore that he would have experienced further increases. He was 36 years old and had another ten years to increase his experience. He would have moved to the Middle East and would have earned in Dollars.

[17] He was an exception in his family; his father was a driver and his mother was unemployed. The plaintiff was now, having regard to the accident, earning less than he was earning before the accident. He has been employed at Samina since April 2015. He has had no promotions and only inflationary increases. His career has in effect stagnated.

[18] The witness could not say whether the prescribed medical treatment will improve the plaintiff's working capacity and deferred to medical practitioners in that regard. However it is noted that the witness' report does not envisage that the plaintiff recovers at all. The witness believed that the plaintiff has reached his ceiling post-accident, and his post-accident earnings are in fact lower than her estimate was.

- [19] It must be noted, again, that as was the case with the previous witness, this witness was asked leading questions virtually all along and this was despite the attention of counsel for the plaintiff again being drawn to that fact.
- [20] Cross-examined, the witness said that the plaintiff was from a humble background. When employed at Cell-C he was sent to GIBS for a Leadership Programme. She explained that many schools offer MBA degrees without a prior degree. She said that what she knew of Henley Business School she had read on the internet but was unable to give detail as to the MBA courses offered. She did receive his academic transcript from Henley Business School. She said that any relevant qualification would have advanced the plaintiff's position.
- [21] The witness said that she knew that an MBA is a Master's Degree and although it may not be an academic Master's Degree it would have improved the plaintiff's position. She accepted that she was not an expert at schooling and then conceded that she could not say whether or not the plaintiff would pass his MBA. It was put to her that in 2012 when he failed he was travelling a lot in Africa and that that could have been the reason for his failure. The witness could not exclude it but said that his general performance had dropped. She said that according to other experts the plaintiff has problems.
- [22] She accepted that there were no reports from Lenovo as to why he stopped working there and she had not been able to obtain collateral support for the plaintiff's explanation why he left Lenovo. She did speak to the previous HR Manager who said that she could not provide any information except to say that he was working well. He left Lenovo in April 2012 and joined Microsoft the very next month in May 2012. His earnings at Lenovo were R65 742.00 per month and at Microsoft R72 000.00 per month. His cost to company at Microsoft was almost the same as at Lenovo. At Lenovo his take-home pay was R41 588.50 and at Microsoft it was R45 782.76.

- [23] With reference to her report Exhibit F page 117 where she wrote that the plaintiff had “*opted*” for the position at Microsoft, she accepts that in fact he chose to be employed on a contract basis. She accepts that at Sanmina his cost to company is approximately R89 000.00 per month and that this is more than it was at Microsoft. His take-home pay now is R47 500.00 more than what it was at Microsoft. It was put to her that he changed jobs post-accident for higher salaries since in April 2014 he was earning R41 500.00 at Lenovo, in December 2014 R45 700.00 per month at Microsoft and in September 2018 at Sanmina, R47 500.00. The witness thought that the increases were marginal.
- [24] The witness confirmed that she was not able to confirm that he resigned for disciplinary reasons but said that she was inclined to believe the plaintiff. His increases were progressional and not promotional.
- [25] In re-examination his tax returns were again proved and the witness said that although the plaintiff has not had any nominal decreases in salary, he has not experienced any increases in real terms. From the time of the accident he has remained stagnant. He does not have any performance bonus now.

Dr Schnaid

- [26] The 3rd witness for the plaintiff was Dr Schnaid, an Orthopaedic Surgeon. He proved his report at Exhibit G page 16. The witness said that he had read Exhibit J, the defendant’s neurosurgeon’s report and concurred with it. In his own report under page 18 Exhibit G he confirmed that the “*current status*” comes from the plaintiff. He concurred with the conclusion on page 20 paragraph 12 he concurs with that conclusion. Concerning the head injury, he deferred. He stood by what he said concerning the cervical spine and the lumbar spine. He had regard to the report of the radiologists and suggested that usually one starts

with conservative treatment. He opined that if the back pain does not go away within one year, it is likely to recur.

[27] Concerning future medicals he thought that fusion of the lumbar spine would have to be investigated. This would if performed decrease his mobility. The witness said that he stood by his conclusion at page 22 paragraph 18. If the patient does have a fusion he will have to take off work. The witness said that the patient's work surrounds, implying physical activities such as carrying computers, will be compromised. He referred in this regard to page 21 paragraph 15 of his report.

[28] Cross-examined the witness said that paragraph 3 on page 17 he obtained from the hospital records and what the patient told him. The witness could not tell whether the hospital records spoke of a loss of consciousness. He then accepted ultimately that the hospital records do not refer to a loss of consciousness. He therefore concluded that it was the patient that must have told him that there was a loss of consciousness.

[29] The witness said too that it was the patient who told him that his highest grade that he had passed was Grade 12; he must have missed that the patient also had a diploma. The witness said that the plaintiff told him that he was a supervisor of computers.

[30] Ultimately the witness said that the patient suffered an injury of the disc and probably also a whiplash. It is to be noted that the report of the witness does not refer to an injury of the disc but only to soft tissue injury; and does not refer at all to a whiplash injury.

[31] When the witness was taxed concerning his assessment of the severity, overall, of the patient's injury and in particular why he added 20% for the head injury when he was not qualified to express an opinion on the head injury, he said that he had taken a course and he was able to express such an opinion. In questions from the court the witness said that he

could not say whether the degeneration of the disc is a function of the injury sustained in the collision.

[32] It is necessary to remark that this witness created a poor impression. He vacillated; he appeared to change his evidence, particularly in regard to the injuries which the plaintiff in fact suffered as indicated above, and he gave answers that in my view were opportunistic, such as the 20% severity assessment for the head injury which he had inserted.

Mr Sampson

[33] The next witness for the plaintiff was Mr Sampson who is a Clinical Psychologist. He has been in practice since 2010 and therefore would have had about eight years' experience when he testified. He confirmed his report Exhibit "H". He opined that the plaintiff suffered a frontal lobe injury. He concluded that the plaintiff suffered deficits as a result of the injury but the only material he had with which to compare the patient's pre-accident condition, was the evidence the plaintiff gave him and his inferences drawn from the plaintiff's job descriptions.

[34] The witness said that the maximum improvement of a person with frontal lobe injury is within a year so that if there will not have been improvement within a year then the *sequelae* of his injuries are permanent. The witness opined that the plaintiff's current functioning was not compatible with his pre-accident functioning.

[35] It has to be said that in the case also of this witness the bulk of the evidence that he gave in chief was the result of leading questions put to him by plaintiff's counsel.

[36] Cross-examined he said that his assessment was not to look for a head injury. And yet, as has been noted, the witness said that indeed the plaintiff did suffer a head injury; he re-

affirmed this later in questions from the court, despite his evidence in cross-examination that his assessment was not to look for a head injury.

[37] He accepted that the plaintiff's position pre-accident was that he was of *high average intelligence*. He said that by *high average intelligence* he meant that he expected of the plaintiff to obtain an aggregate in Grade 12 in the 50% range. He was asked in cross-examination to describe a student who obtains 70% aggregate and he said that this was reflective of a person with an *above average intelligence*.

[38] He accepted that normally a person with *high average intelligence* would obtain a matric exemption. When he was pushed and it was pointed out to him that the plaintiff did not obtain a matric exemption, he said that it was not the rule that a person of *high average intelligence* would necessarily obtain matric exemption.

[39] The witness confirmed that he obtained no collateral information from the plaintiff's previous employers. He said that that does not fall within his remit and he works with the information that he has at hand. He said that although he did not set out to look for a head injury, what his function is, is to look for deviation from expectation. He said that head injuries tend to exaggerate a person's pre-morbid weaknesses. He said too that he agreed with Dr Schnaid concerning the severity of the plaintiff's injuries.

[40] This witness too was unimpressive. He had not much practical experience by the time he compiled his report, being limited to some eight years. He was unprepared to make any concessions and overall created the impression that he would find a way partisan to the plaintiff, with words, to work around any perceived difficulty that the cross-examiner would put to him.

The plaintiff

[41] The next witness was the plaintiff himself. He is Mr T J and English is his first language. He is currently 41 years old and was 36 when the collision occurred on 28 October 2013. He described the collision. He was driving a Toyota Yaris. He was travelling in William Nichol Drive towards Sandton and stopped at a traffic light-controlled intersection when the light was red for him. A bus hit him from behind. He remembers only glass shattering as he was "out". He heard people around him. He found himself outside of his vehicle, across the intersection.

[42] He interrupted his explanation of the events by saying that at the time he was working at Lenovo in Bryanston as a Service Delivery Manager for South Africa and Africa. He managed the repair centres. He was earning between R48 000,00 and R49 000,00 per month besides benefits such as a cell phone allowance, fuel, 100% pension contribution by the employer and 80% medical aid contribution by the employer. The value of these benefits took his salary after tax to R61 000,00 per month.

[43] Currently he is an Operations Manager for a team of thirteen people with a company known as Sanmina. The product is to repair Motorola two-way radios and Zebra printers. At Lenovo he managed 32 to 40 countries with eight to ten people in each repair centre. His salary now is R45 000,00 per month after tax within which is included his pension and cell phone allowance.

[44] Returning to the collision itself he explained that when his car came to a standstill people were there to assist him and to help him out of his car. He was "confused". He spoke with the driver of the bus who said that he was sorry. After about 30 to 45 minutes the two of them drove separately to the SA Police Station in Randburg, each with his own car. Each gave his version and that appears at Exhibit C pages 23 and 24. Thereafter they went their separate ways.

[45] The plaintiff went to Olivedale Hospital but it was very busy there and he waited too long to be treated. He then drove to Lenasia Medi-Clinic where he was put on a drip and was given medication and underwent scans. The information which appears in Exhibit C pages 31 and following and particular page 39 was provided by him. He confirmed the correctness of the information supplied on Exhibit C page 33. Concerning his past medical history reflected on Exhibit C page 34, he confirmed this. He remembers that he had pain in the head, the back, and the chest. He phoned a friend to come and help him.

[46] He confirmed that X-rays were taken the same evening, and the results of the X-rays were explained to him but he did not really understand it. He then began referring to the hospital accounts at Exhibit L, as well as the detailed accounts appearing at Exhibit L and the X-rays at Exhibit C page 41 to 44.

[47] At this stage the court asked the parties seriously to consider whether the past hospital expenses could be settled, and adjourned to give the parties this opportunity. Subsequently the court was informed in chambers that the parties had settled the claim for past medical expenses at R10 000.00.

Ms Naidoo

[48] On the morning of 21 November 2018 at the request of counsel for the plaintiff, Ms Naidoo was interposed in the evidence of the plaintiff. She is employed at the SA Qualifications Authority and the purpose of her testifying was to confirm that the MBA which is offered by Henley Business School has in fact been properly registered in terms of the laws of this country. She explained that that MBA is accredited with the Council for Higher Education. She explained that although normally an honours degree is required by business schools before allowing an entrant to an MBA course, by virtue of government policy the notion of Recognition of Prior Learning (“RPL”) was introduced.

[49] In terms of this policy, educational institutions are entitled to allow an entrant to a course such as an MBA despite not having the required prior university degrees if such an entrant is able to show that he or she has by virtue of practical experience attained the required NQF level. She explained that her own qualifications are that of being a Pharmacist, with a Diploma in Marketing and a Certificate in Project Management. She is a Director in the Office of the CEO.

[50] Regrettably the leading questions persisted.

[51] In further cross-examination she explained that an entrant to the MBA course would, if he or she does not have an honours degree or equivalent, be required to be qualified at the NQF7 or 8 level. She explained that this policy was an attempt to redress racial discrimination of the past. It was not a free-for-all because the institution concerned would first assess the individual. RPL does not guarantee ultimately obtaining the qualification concerned.

[52] The witness said that she could not say what the pass rate is of those who entered the MBA course without having attained the necessary university degrees for entrants. She thought that it would be difficult for such a person to pass, but this depended on the individual. However, the likelihood of such a person obtaining the degree was regarded as being low.

The plaintiff (continued)

[53] The plaintiff then continued his evidence in chief. As with the case of Ms Naidoo, again the plaintiff was being put leading questions. He explained that his back was still a problem; that he experiences headaches; that his sleeping patterns have changed, and that his memory has gone and has gotten worse. Nothing has become resolved. He said that he has headaches every day that start in front of his head and then go to the back. He cannot sleep. He uses painkillers, both over the counter and prescribed, and the headaches are so bad that

he has a maximum of two, three or four hours of sleep per night. He explained that the headaches affect him at work in the middle of the day.

[54] He left Lenovo nine months after the accident because he was starting to have issues at work. He could not function as before. The issues were with his Line Manager. He found that he could no longer travel into Africa and flying was a problem but also he was becoming forgetful. His Line Manager said that he was not happy and so the plaintiff decided that he would have to leave so as to avoid being fired resulting in a bad employment record.

[55] He then originally agreed to do contract work with Microsoft for two years but after nine months he saw that this was not working out since he was experiencing the same problems as he had experienced at Lenovo. The option was put to him to resign with two months' pay and no disciplinary enquiry would be instigated, and to this he agreed.

[56] He could not find alternative employment for about two and a half months. He tried everything he could and reached out to previous colleagues. He was ultimately referred to the job that he has now taken up with Sanmina. This was at a substantially smaller scale than before: at Lenovo he had 300 to 400 people reporting to him, at Microsoft 25 were reporting to him and at Sanmina only 13. His salary at Lenovo was R61 000.00 per month, at Microsoft R45 000.00 and at Sanmina also about R45 000.00.

[57] At Lenovo he had a permanent position and a written contract. He was headhunted there. He joined them in April 2012 and since he was going to miss out the bonus which was due to him at Cell C, Lenovo agreed to pay him that bonus. The salary at Lenovo provided for increases depending on performance. The percentage annual increase was not stipulated but his boss said that it would be about 8%. The R61 000.00 per month was the end salary in 2014 when he left Lenovo. His payslip is at Exhibit D page 63.

- [58] He started his employment at Lenovo on 1 March 2012. After the accident he did not go back the next day nor for a week or two. He was paid fully for being off sick; he had received a doctor's note which he gave to his employer. Bonuses were payable depending on his KPI performances (Key Performance Indicators) and these were set by his director. He received performance bonuses at the end of his first year at Lenovo.
- [59] He proved his employment contract at Exhibit D page 87. He explained that the payment made to him which is referred to in paragraph 1.2 of Exhibit D page 86 was never required to be repaid by him. Clause 2 at page Exhibit D87 refers to three months' probation which he passed. He confirmed that he earned the salary reflected at Exhibit D page 87 clauses 3.1.1 and 3.1.2. Concerning the bonus requirement, he said that this was over-achieved.
- [60] When his salary was reviewed, his salary increased pursuant to Exhibit D page 88 clause 3.2.1. His bonus increased with reference to Exhibit D page 88 clause 3.2.3. He confirmed his additional employment benefits reflected at page D88 clause 4 and said that he received all of those benefits.
- [61] He had no outside interests as was referred to at Exhibit D page 91 clause 13. As to the nature of the difficulties he experienced with his manager, he said that this related to his failure to achieve his KPI's. He was not able to ensure that the centres in Africa for which he was responsible were doing well; he was becoming forgetful, and he was also experiencing problems with travelling into Africa.
- [62] He explained that after he finished his matric in 1994, he started working for Telkom in 1995 earning about R6 000.00 to R7 000.00 per month gross. There he was dealing with customer service related complaints. He was with Telkom for 7 years and got promoted twice from directing services, to the cell centre and later he was promoted to the finance team dealing with credit control.

- [63] He said that he progressed "*quite substantially*". He completed his National Diploma in Human Resources at Unisa. He was then employed with Cell C in 2002 earning between R12 000.00 and R14 000.00 per month in their cell centre. He left Cell C as a Senior Manager earning R55 000.00 per month. He had progressed within the first year to dealing with Customer Services Division where he was for one to two years. Then he was advanced to the Insurance Division where he spent one year, before he was appointed as an Insurance Manager for two to three years. He said that he was identified as a high performer which led to him being sent on a leadership course with GIBS.
- [64] While at Cell C he was identified as having managerial potential which led to him enrolling at HBS for his MBA. He wanted to further his career. He was able to manage the demands of his employment and his progression there, as well as his further studies. He passed his first year MBA.
- [65] He had selected HBS, although an MBA at Wits, GIBS, or Unisa were also mentioned. HBS was recommended, and to do the MBA part-time. It was internet-based although they had to spend three days per subject in a classroom during the course of the year. His immediate executive at Cell C permitted him the appropriate leave to attend the lectures. He made up for the lost hours. He was earning R55 000.00 per month when he left.
- [66] He proved Exhibit D page 72 which was his 2009 tax assessment at Cell C. He was a manager then but he could not say whether he was in fact a senior manager. His income per annum was then R330 448.00. He proved his diploma at Exhibit D page 69 and his leadership programme attendance at GIBS at Exhibit D page 70. He proved the letter received from Henley Business School confirming that he had been registered there at Exhibit D page 71.

- [67] He says that in 2012 he was headhunted by Lenovo. His ultimate intention was to join a multinational company so that he was able to “*progress out of South Africa*”. He said that his first year at Lenovo was quite successful and that he also passed his first year MBA.
- [68] By January 2014 he was experiencing a decrease in the level of his professional performance. He could not understand why this was happening. He was experiencing a significant impact on his memory and, later on, he realised that this was as a result of the accident. Initially he was able to do everything by way of his day-to-day tasks but this had changed. He has been married twice. He was not aware that he had not told the experts that he had been married before. His first marriage broke up because his wife had an affair.
- [69] The problems that he commenced experiencing related to his back pain, his headaches, his neck pain and his lower back pain. He said that his memory was changing and so too his emotions. He could not even recognise himself. He used to be outgoing and now he hated noise and cannot stand being around children. That fact had an impact on his second marriage. He said that he can no longer relate to himself. He said that he has been constantly depressed and cannot do the things he usually did before. It affected him also in the bedroom. That led to the breakup of his second marriage.
- [70] Over the years his pains have gotten worse. He had never intended leaving Lenovo but he was forced to do so. He would have worked until age 65 otherwise. He joined Microsoft after he had left Lenovo and was there earning R45 000.00 per month. He proved his payslip at Exhibit D page 64, 65, and 66, at R65 369.00 per month. There was a decrease in salary between 2013 and 2014 but he could not say why this was. His basic salary was now lower and also the travel allowance.
- [71] The senior certificate which he got from the Department was proved at Exhibit D page 67. He said that at Cell C there was a senior manager earning R45 000.00 per month. Taxed as

to how he was able to earn that much given his low matric results, he said that his family and the area in which he grew up were not conducive to attaining high matric results; the teachers were also poor. After matric he realised that his qualifications were not good enough and that is why he sought to improve himself.

[72] Asked why he did not pass his second year MBA he said that his job had become demanding and he was not able, because of his travels into Africa, to write the first sitting. When he sat down for the second sitting, he realised that he could remember nothing that he had studied for the examination. And he said that he had studied harder than he did the previous year.

[73] Now his aspiration is simply to keep down his present job. He says he is not even coping now. He keeps forgetting things and so he has to write down everything. When he was at Cell C he supervised about 100 staff members and at Lenovo about 400. At Microsoft he managed 25 staff members and currently even less. He has not attempted to resume his studies because he now realises that he no longer has the ability to do so. That realisation hurts him a lot.

[74] The witness proved his IRP5 returns at Exhibit D pages 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83. He also proved his payslip at Exhibit D page 85 at Sanmina. He explained that he has experienced a drop in real terms between the position he had at Lenovo and now at Sanmina. This is reflected in the pension, the medical aid, and the cell phone allowance. The difference is from R60 000.00 at Lenovo down to R47 000.00 now. He says that he is now earning less than he had earned before.

[75] He wanted, before the collision, to attain the directorship level, but this has now not been realised. It is getting tougher for him to achieve. He does not have the mental ability to do so and is in constant pain. He is no longer the same person. He has less energy. All of this is related to the collision.

- [76] Cross-examined he said that he had before experienced headaches but now he experiences headaches on a daily basis. This started about six months after the accident. He is using more painkillers now than before. He cannot think of anything else that would have caused the onset of the persistent headaches but the accident. He says that he now has a very bad memory.
- [77] It was put to him that he had been giving evidence all day, and that he had been able to remember numbers off the top of his head without them having been recorded. His response was that there were certain things that he could remember well and others not. He was not able to say what the type of things were that he could remember well and the things that he could not remember well. He says that he has no control over what goes in and what stays in.
- [78] It was put to him that he gave a good account of the accident. He explained that he cannot control what he can remember and what he cannot remember. He said that he did remember specifically his salaries. He was unable to say whether the leadership programme which he did at GIBS was accredited. He did not mention it to some of the experts and could not say why he had not. He accepted that it was an important qualification.
- [79] It was put to him that the industrial psychologist had said that any qualification post-diploma (including the GIBS course) would have propelled him into middle management; and yet he says he could not explain why he forgot to tell her about that. He simply forgot.
- [80] He said in his evidence that he had used LinkedIn, the software programme, to progress from Microsoft to Sanmina. It was put to him that on his LinkedIn profile it was stated that he was registered for an MBA between 2014 and 2017. He agreed. It was put to him that this was wrong and he agreed. He accepted that he stopped his MBA in 2014 and therefore could not have said that he was registered for an MBA between 2014 and 2017. He did his

second year exam for the MBA in December 2013. He did not amend his LinkedIn profile to match the fact that he was no longer doing the MBA. He accepted that the dates on the LinkedIn profile were incorrect. He accepted that he failed his MBA in 2014 and got kicked out in that year.

[81] He could not explain why the letter Exhibit D page 71 from Henley Business School did not report that he was kicked out of the MBA in 2014. He accepted that the letter from HBS speaks of an MBA of four years and seven months and yet his LinkedIn profile speaks of him being registered for an MBA between 2014 and 2017.

[82] His explanation was that sometimes he does stupid things and that fact gets to him. He said that he was still in the MBA programme when he amended his LinkedIn profile to reflect that he was registered for MBA from 2014 to 2017. When he amended the LinkedIn information, he was at that time registered for 2011 to 2014. Amending the programme information from 2011 to 2014, to 2014 to 2017, did not - he thought - present a serious problem. He says he thought that he was in denial and therefore anticipated that he would be still registered for the MBA from 2014 to 2017.

[83] He said that he only realised that he had a problem after he left Microsoft. When he left Lenovo he did not know that he had a problem. And when he left Microsoft he did not know what his problem was. It was when he was sitting at home for two months in 2015 that he realised that his problems were accident-related.

[84] His next job was with Sanmina and he then realised that something was wrong and that it was accident-related. He has now been with Sanmina for three years. He accepts that Sanmina is a large global company but said that in South Africa it only has two customers. He manages only thirteen people. He explained that at Cell C they had recommended HBS and he paid his own way at HBS.

- [85] He said that travelling did not affect his studies because his studies were always online. Later he said that travelling did not impact his studies "*in a big way*". He explained that he had prequalified which is why he was able to sit down for his examination. He said that he kept most of his reading material on his laptop hard drive.
- [86] His current problems are back pain, headaches and memory loss. Recently he has been experiencing mood swings as well. He went to a doctor when he started getting the headaches and the doctor said that these were stress-related. He however figured out that it was accident-related. He spoke to one of his friends about his headache problems and then realised that they were accident-related.
- [87] With reference to Exhibit D he said that he was earning R45 000.00 per month at Lenovo net and at Cell C R550 000.00 per year. When he left Lenovo he was earning R65 742.00 but net it was R45 000.00 per month. At Sanmina his gross income is R77 498.00 and net is R47 515.00, as reflected in Exhibit D page 85.
- [88] At Microsoft in 2014 he earned R72 000.00 gross and R45 000.00 net with no other benefits. The reason why there were no other benefits was because he was working on a contract. He would have been considered for a permanent job had he been able to stay in his contract for two years and had he been able to show a good performance. However that did not materialise. Between Lenovo and Sanmina his salary decreased he said. When he started at Sanmina his salary was R700 000.00 per year odd or R55 330.00 per month.
- [89] In questions from the court he explained that his mood swings began six months after the accident. It has gotten worse. His headaches have gotten worse. His back pains have gotten worse and his neck pains have also gotten worse. It is painful all the time except for between three and four hours per night when he gets some sleep.

[90] Before dealing with the re-examination it is necessary to record some impressions about the witness. He testified clearly and intelligently throughout the day and he was standing in the witness box throughout the day. It did not appear that headaches were debilitating while he was testifying. His memory was good and he was able to remember detailed numbers.

[91] The impression was created, when he was giving evidence about his selective memory, that he was being opportunistic when he said that he could remember certain things and not others; and yet he was unable to distinguish what he was able to remember and what not. It was particularly evident when he said that it was that inability to distinguish between what he could remember and what he could not remember that was actually getting to him.

[92] In re-examination leading questions were again put to him. He proved his net salary at Exhibit D page 81 at R57 276.00. The plaintiff then closed his case.

Discussion: introduction

[93] The parties submitted helpful heads of argument. Of particular assistance was the attention which Ms Docrat drew in her heads of argument to the fact that an expert witness having expressed an opinion on an issue is not determinative of whether the court accepts the opinion as being part of the reasoning of the court. She stressed, and I agree, that the opinion of an expert witness can only provide guidance to the court if the opinion is based on cogent reasons for the conclusions reached, and if the opinion is based on facts that are found to exist. It is also critical that an expert witness appreciates that she or he is there to assist the court and ought not to be partisan.¹

¹ Compare *PriceWaterhouseCoopers Inc and Others v National Potato Cooperative Limited and Another* (451/12) [2015] ZASCA 2 (4 March 2015); *Gentiruco AG v Firestone SA (Pty) Limited* 1972 (1) SA 589 (AD) at 616H; and more recently in this Division *Twine and Another v Naidoo and Another* (38940/14) [2017] ZAGPJHC 288; [2018] 1 All SA 297 (GJ) (16 October 2017).

- [94] The remaining issues in dispute in this matter, past and future medical expenses having been settled, and general damages being the subject of a referral to the Health Professions Council of South Africa's tribunal, is that of past and future loss of earnings or, as has been said, loss of earning capacity.²
- [95] In *Chakela v Road Accident Fund*³ I considered *Deysel, Rudman, Van Heerden v Road Accident Fund*⁴ and *Prinsloo v Road Accident Fund*⁵ and followed the following approach: that there is a conceptual difference between the question whether a plaintiff has suffered an impairment of earning capacity, and the question whether a plaintiff will in fact suffer a loss of income in the future. The question whether a plaintiff has suffered an impairment of earning capacity is one which the plaintiff has to discharge on a balance of probabilities.
- [96] However when it gets to the question whether a plaintiff will in fact suffer a loss of income in the future, that is a question of assessment in respect of which there is no *onus* in the traditional sense. This assessment involves the exercise of quantifying as best one can the chance of the future loss actually occurring.
- [97] The best place to start considering whether the plaintiff has shown a loss of earning capacity seems to me with the plaintiff's evidence and in particular the following five topics: Whether the plaintiff suffered a concussion? What were the plaintiff's injuries? What is the extent of the current headaches, back pain and neck pain? What is the extent of the current memory loss? What is the prognosis? I deal with these topics in turn.

Did the plaintiff suffer a concussion?

² See *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 252 (24 June 2011).

³ (33599/2015) [2017] ZAGPJHC 141 (5 June 2017).

⁴ (6644/2011) [2014] ZAGPPHC 958 (5 December 2014).

⁵ (3579/06) [2008] ZAECHC 193; 2009 (5) SA 406 (SE) (18 November 2008).

[98] It will be recalled that the plaintiff said that he lost consciousness in the collision. That is what he told Dr Schnaid, Mr Sampson, Mrs Cilliers and Dr Matchana. This version is not consistent with what he told Dr Visser nor with the hospital records. The most reliable evidence is the latter, given its contemporaneity. There the plaintiff himself gave the following account of the accident and its sequelae:

"Feeling dizzy – chest pain/seatbelt. Hit in the back of my car by a bus."

There is no reference to a loss of consciousness.

[99] The person who took the plaintiff's report at the Lenmed Clinic recorded the following:

"A male patient 36 years old came in Casualty walking with the history of he was involved in car accident. Patient verbalised that he was driving and safety-belt was on. Patient complaining of chest pain, headache, neck is sore. On examination patient looks stable."

Again, there is no reference to a loss of consciousness.

[100] It will be remembered too that the plaintiff drove himself in his car first to the police station, then to the Olivedale Clinic, and then to the Lenmed Clinic. Such action is, on the face of it, inconsistent with loss of consciousness.

[101] The plaintiff told Dr Matchana that he *"bumped his head"* on the steering-wheel, not that he lost consciousness. Dr Visser recorded the following:

"In the process, he struck his head on the steering-wheel and felt dazed. He got out of his vehicle and waited, sitting on the side of the road. He provided no detail about this period indicative of probable concussion."

There is no mention here of a loss of consciousness.

[102] In my view if the plaintiff had lost consciousness as a result of the bump of his head on the steering-wheel, that is the first thing he would have told the staff at Lenmed Clinic. His

relating of the events to the medical experts in preparation for this trial, to the extent that he now says he lost consciousness is, at best, an exaggeration.

[103] The point is not so much whether the plaintiff was injured to a lesser extent than he would have been had he actually lost consciousness; the point is that this part of the plaintiff's evidence is already an indication, borne out by later testimony to which reference is made below, that the plaintiff was inclined to exaggerate the *sequelae* of the injuries that he suffered in the collision.

What were the plaintiff's injuries?

[104] The next issue concerns the plaintiff's injuries. There can be little doubt that the plaintiff suffered no fracture, and that his injuries were limited to soft tissue injuries. This is actually recorded by Dr Schnaid in paragraph 3 of his report. The injury to the cervical spine was of a soft tissue nature; the X-rays demonstrated a vertebral block, at the level C2/3, but this was congenital. As regards the lumbar spine, the X-rays demonstrated some degeneration at the level L4/5 disc. Although Dr Schnaid initially vacillated about this, he conceded that he could not say that this was accident-related.

[105] What is one dealing with then? The agreed report of Dr Matchana, the Neurosurgeon, speaks of a "*mild head injury*". Dr Schnaid remarked – although this was of course not his expertise - that there were no neurological deficits, but that the soft tissue injuries have left the plaintiff with decreased right and left lateral flexion of his neck, as well as decreased extension.

[106] Beyond these injuries, one has the plaintiff's evidence that from about six months after the accident he started experiencing bad headaches, neck pain and back pain and that this pain has increased from that date to this, with no abatement, leaving him only pain-free during

his three to four hours of sleep. It is necessary now to consider the veracity of the plaintiff's evidence in this regard.

What is the extent of the current headaches, back pain and neck pain?

[107] As regards the headaches, back pain and neck pain, the plaintiff told Dr Visser that he relies on regular combination analgesia, and tends to use these on alternative days. His headaches are "*often daily*". But, contrary to his direct evidence, he also told Dr Visser that his condition has improved:

"He described how his condition has improved over the ensuing three years. Now his sleep is adequate. He emphasised that he takes care to maintain good sleep hygiene. For instance, he exercises hard in order to be sufficiently tired, prompting sleep. His appetite is now normal and his energy has improved."

[108] In the witness box the plaintiff was examined in-chief and cross-examined over a substantial period of time. Not once did he create the impression that he was unable to answer the questions put to him fully. There was no overt debilitation. He created the impression with me that he was attentive and intellectually attuned to precisely what the cross-examiner was seeking to establish. The plaintiff did not create with me the impression of a person who, in stressful circumstances such as giving evidence in the High Court, was unable through pain properly to discharge his remit.

[109] It is difficult to avoid the conclusion that the evidence of incessant pain is also an exaggeration. To be true, as will appear more fully later on, the plaintiff's post-accident work performance was certainly less impressive than his pre-accident performance. But that decrease is more probably than not a function of his general post traumatic poor attitude issues and low mood. Dr Visser himself described the plaintiff's mood as normal, but that it was accompanied by a slightly restricted and serious **affect**. That signifies that the plaintiff

was burdened by an observable emotional response to the accident and the soft tissue injury he sustained.

[110] So, the plaintiff has experienced headache, and back and neck pain, but he exaggerates it, more probably than not as a result of the disturbance of his emotional equilibrium.

What is the extent of the current memory loss?

[111] The plaintiff testified to a memory loss but, as will have appeared from his evidence particularly under cross-examination, this evidence was not persuasive. He was unable to explain convincingly why in some instances he could remember challenging detail, yet he professed memory loss in other instances, not evident in court. He did speak about managing to have devised a workaround by keeping an appropriate aide memoire, which would not have been necessary if his loss was not real.

[112] Some say there is no such thing as a good or a bad memory; rather, there is only a trained or an untrained memory. Whether this is science or homily, the plaintiff did not, despite pertinent cross-examination, evidence any memory loss in court. I accept that in the hurly burly of his normal daily life the plaintiff may from time to time experience forgetfulness, but whether that is a function of the injury he sustained or of perhaps emotional distraction, has – as I see it – not been shown on a balance of probability.

What is the prognosis?

[113] The plaintiff's post-trauma performance certainly appears poorer than his pre-trauma performance. He appears to have been more driven pre-trauma than post-trauma. The plaintiff's case is that, but for the accident, he would have completed his MBA in 2015, increased his salary by 32% in 2016 and 43% in 2017, and would thereafter have received annual inflationary increases in his salary. He would have remained employed until age 65.

In the alternative it is submitted that he would have increased his salary in line with the Paterson scales and salary tables as articulated by Dr Sugreen.

[114] The plaintiff contends that post-trauma he is now on a downward career trajectory, unable to fulfil his potential; that he has physical difficulties impacting his ability to work; that he is an unequal competitor in the labour-market; and that he is in need of “*accommodation*” in the workplace. The plaintiff then calculates his future loss of income by means of an actuary who applied a 5% contingency deduction of past income both but for the accident and having regard to the accident; and a 5% contingency deduction in respect of future income but for the accident. In respect of future loss of income having regard to the accident, a contingency deduction on four bases was made, being respectively 15%, 25%, 30%, and 40%.

[115] The calculation by the actuary was done on eight bases, and as of 29 November 2018. Calculation of the loss in basis 1 is split into four, and the calculation of the loss in respect of basis 2 is equally split into four. Basis 1 accepts that but for the accident the plaintiff’s salary at Lenovo as at the date of the accident would have increased annually thereafter with earnings inflation until retirement at age 65. In the case of basis 2 the actuary follows through on his instruction that the plaintiff would have completed his MBA and would have had those two significant jumps in remuneration, first on 1 May 2015 by some 32% and on 1 May 2016 by another 42%.

[116] In other words basis 2 is on the assumption that the plaintiff completes his MBA whereas basis 1 is not. Each of the two bases as I have said has four alternatives these being a function of varying contingency deductions in respect of future income.

[117] The calculations having regard to the accident proceeds from assumptions made of what the plaintiff actually earned post the accident, as salary assumptions set out in paragraph 2.3 of the report of the actuary.

[118] After having applied the statutory cap on future loss of earnings, it follows that the most liberal calculation is in bases 1C, 1D, and all of bases 2, being R5 866 918. The most conservative of the calculations then is in basis 1A which comes to R5 799 972. The past loss of earnings in all of these various scenarios comes to R909 890.

Discussion: conclusion

[119] I have a fundamental concern with this approach to the computation of the plaintiff's claim. But before that is discussed it is important first to consider whether the plaintiff has discharged the *onus* which rests on him to show that he has, in fact, suffered a loss of earning capacity at all.

[120] In this regard I have to say that the plaintiff's witness Dr Visser made a favourable impression upon me. His views were guarded and conservative. As I understand what he says, the prospect of the plaintiff recovering is more probable than not. The plaintiff is nonetheless not the person he used to be, whether this is a function of the plaintiff being overly sensitive and affected or not.

[121] I therefore accept that having regard to the accident the plaintiff has suffered a loss of earnings. Although the plaintiff has exaggerated his injuries and their sequelae, it does not follow that he has not suffered injuries and sequelae at all. He has, in my view, as a fact suffered soft tissue injuries that have impacted him, even if a meaningful dimension of it is ascribable to serious affect.

[122] But in my view the prospects of practically recovery are good. The injuries were sustained on 28 October 2013, more than five years ago. In two years from now, by 28 February 2021, more than seven years would have elapsed; and as I see it, he should by then have recovered if not emotionally then at least economically. Making allowance for the difficulties of predicting the future, it seems to me that, on balance, the plaintiff has indeed shown that

the accident has affected him into the future, that he is not the person he used to be, and that that result is contributing to him now not being as driven as he was before the collision.

[123] The principle of loss of earning capacity having been established, that leaves the question of the quantification. Accepting that his trajectory at Lenovo would have continued and that that represents his reasonable but for the accident projected position, having regard to the accident he experienced a dip in income in real terms. I have considered whether it is reasonable to argue that that dip will affect him for the rest of his working life.

[124] But in my view that is too speculative. If the plaintiff recovers practically fully, as I am projecting he will (if he wants to), then it seems to me very likely that in about two years from now, given the more than five years that have already elapsed since the accident, he will have likely achieved for all practical purposes the same level at which he will have been but for the accident.

[125] It will be evident from the above conclusions that I do not accept that the plaintiff has been disqualified intellectually from achieving any level of training or academic achievement that he would have achieved but for the accident. There ought therefore not to be any allowance for any differential in this regard. At the same time, I regard as speculative the proposition that the plaintiff would have attained his MBA, and I have not, in arriving at an appropriate quantum, taken it into account.

[126] This conclusion has the consequence that the plaintiff has established both a future and a past loss of earnings. In preparing this judgement I requested that the plaintiff's actuary calculate the plaintiff's loss on a variety of bases not covered in the report that was presented to court, on the bases set out below. I notified both attorneys of the request and the response, and although each side obviously held its trial positions, neither had objection to the process nor the calculations and their result.

[127] I have assumed that but for the accident, the plaintiff would have stayed at Lenovo (or similar) till age 65, and would have enjoyed inflationary increases all the way. That is obviously an assumption favourable to the plaintiff, as it is not apparent at all that future income in the private sector is always, and in any event given the current economic challenges, immune against the ravages of inflation.

[128] As to the having regard to scenario, I requested that the calculation be done on the basis that the plaintiff's future loss continues on the past loss trajectory assumed by the actuary, but that it ceases at respectively 28 February 2021, 28 February 2023, and 28 February 2015. I have applied a 15% contingency deduction on the having regard to scenario. This is higher than the but for scenario's figure of 5%, but in my view fair. On the basis that the plaintiff will likely have fully recovered economically by 28 February 2021, his loss of earnings and earning capacity aggregate R2 944 659. In my view that represents a fair computation of the plaintiff's loss, give the injuries and the sequelae.

[129] I have resolved not to allow the qualifying fees of Mr Sampson on the basis that he was not of assistance to the court. A special costs order against the defendant was asked, given its conduct in the litigation. But I consider that the persistent leading questions put to the plaintiff's witnesses balances the scale of objectionable conduct.

[130] In the result I make the following order:

- (a) The defendant is directed to pay to the plaintiff the sum of R2 954 659 which comprises:
 - (i) past and future loss of income: and/or income earning capacity: R2 944 659;
 - (ii) past medical, hospital and ancillary expenses: R10 000.
- (b) The aforesaid sum shall be paid within 30 days hereof into the trust bank account of Wadee and Wadee Attorneys which details are as follows :
 - Wadee & Wadee Trust account
 - First National Bank
 - Branch Code: 250737
 - Account No: [...]
- (c) The defendant is directed to furnish to the plaintiff an undertaking in terms of s.17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or rendering of a service to

him or the supplying of goods to him arising from the injuries he sustained in the motor vehicle collision which occurred on 28 October 2013 and the sequelae thereof, after such costs have been incurred and upon proof thereof.

- (d) The defendant is directed to pay the plaintiff the costs of the action on the High Court scale as between party and party, which costs shall include but not be limited to:
- (i) All costs orders already made;
 - (ii) The reasonable costs of the plaintiff's following expert witnesses: Dr Schnaid (orthopaedic surgeon); Drs Matisson, Scott & Tobias (radiologist); Anoett Rossouw (occupational therapist practice) (including Ms J Cilliers)(occupational therapist); Dr Visser (psychiatrist); Dr Sugreen (industrial psychologist);and GRS Actuarial Consultants (actuary).
- (e) Payment of costs is subject to the following conditions:
- (i) The plaintiff shall, if costs are not agreed, cause a notice of taxation to be served on the Defendant's attorney of record; and
 - (ii) The plaintiff shall allow the defendant 14 (fourteen) court days after taxation to make payment of the taxed costs.
- (f) It is noted, for the avoidance of doubt, that the plaintiff's entitlement to a claim for general damages has been referred for consideration to the HPCSA Panel.

WHG van der Linde
Judge, High Court
Johannesburg

Dates trial: 15, 16, 19, 21, 29 November 2018.

Date judgment: 28 February 2019

For the plaintiff: Adv. F F Docrat

Instructed by: Wadee & Wadee Attorneys
Plaintiff's Attorneys
Tel: (011) 854 2534
Ref: WWA/786/367
Email: joewadee@telkomsa.net
c/o Yousha Tayob Attorneys
1st Floor, 7 Bonanza Street
Selby Extension 19
Johannesburg

For the defendant: Adv. S Vukaya

Instructed by: T J Moadi Inc
Defendant's Attorneys
2nd Floor, Marble Towers
208-212 Jeppe Street
Cnr Von Wielligh Street
Johannesburg
Tel: (011) 025 4490/4991/6736

Ref: TJM/RAF/JHB/129217