HIGH COURT OF SOUTH AFRICA, WESTERN CAPE DIVISION,
CAPE TOWN

Case No.: 22457/2017

Before the Honourable Ms Acting Justice Mthimunye

In the matter between:

DIERCK ROBERT INGE RECKLIES Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Date of hearing**: 23 May 2024**

JUDGMENT DELIVERED ON 21 AUGUST 2024

MTHIMUNYE, AJ:

Introduction

[1] On 3 October 2017 the Plaintiff while driving his motor vehicle was struck by a vehicle driven by the insured driver, resulting in him suffering bodily injuries.

[2] The matter came before me on 16 April 2024. The issue of liability was settled in that Defendant agreed to pay 80% of Plaintiff's proven damages.

[3] The Defendant also gave the Plaintiff an undertaking in accordance with section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the RAF Act") to compensate the Plaintiff for 80% of the costs associated with the future accommodation of Plaintiff in a hospital or nursing home, treatment, services or goods arising from the mentioned motor vehicle accident.

[4] The only issue for determination were claims for past medical and hospital expenses, loss of earnings and earning capacity and the contingency deduction applicable thereto. The Plaintiff's claim for loss of earnings is R 4 856 000.00 (four million eight hundred and fifty-six thousand rand). The amount comprises R 1 726 200.00 (one million seven hundred twenty-six thousand and two hundred rand) for past loss of earnings and R 3 130 500.00 (three million one hundred and thirty thousand five hundred rand) for future loss of earnings.

[5] At the commencement of the proceedings, the Plaintiff applied for an order in terms of Rule 38(2) of the Uniform Rules of Court to adduce evidence of its expert witnesses on affidavit. This application was not opposed by the Defendant who submitted that she had no instructions and left the decision in the hands of the court. After considering the matter and exercising my discretion I found that it was in the interest of justice and cost saving for the Plaintiff's to present its expert witness evidence by way of affidavit. Pursuant to that order, the Plaintiff led the evidence of the following witnesses on affidavit:

5.1 Registered neurosurgeon: Dr Zayne Domingo, affidavit was accepted and marked "E2"

5.2 Ear, nose and throat surgeon: Dr John Steer, affidavit accepted and marked "E5"

5.3 Neurologist: Dr John Reid (affidavit accepted and marked "E1"

5.4 Psychiatrist: Professor Tuviah Zabow, affidavit accepted and marked "E3"

5.5 Orthopaedic Surgeon: Dr Hein Senske, affidavit accepted and marked "E4"

[6] The issue for determination is whether the Plaintiff has succeeded in proving a claim for past medical and hospital expenses, and the loss of earnings and earning capacity. To make that determination on these issues I briefly summarise the evidence of all witnesses and expert witnesses. I start by summarizing the evidence of the Plaintiff as set out in the summons.

[7] The Plaintiff, Mr Dierk Recklies an adult male person who was born on 13 July 1966 and resides in 5 C[…] Street, D[…] Z[…] I[…], Paarl in the Western Cape, averred in his particulars of claim that on or about 3 October 2017, at the intersection of Jan Van Riebeeck and Alboretum Street, a collision occurred between a grey Audi motor vehicle bearing registration number C[…] ("the insured vehicle"), driven by one Rudolf Heyns ("the insured driver"), and the Plaintiff's silver Mercedes Benz motor vehicle bearing registration number C[…], which was driven by him. The Plaintiff avers that the collision was caused by the sole negligence of the insured driver, resulting in the Plaintiff sustaining serious bodily injuries. Plaintiff further avers that as a result of these bodily injuries he had sustained, the Plaintiff incurred medical and related costs in the past, and that he will still incur medical and related costs in the future. He further averred that the bodily injuries he sustained consisted of a right occipital fracture, bilateral occult fractures of mastoid air complexes, intracranial haemorrhage including haematoma and right subdural haemorrhage, fractures of left inferior and superior pubic rami and closed fractures to the lumbar spine, including fracture of left transverse process of L2, posterior lower rib fractures and left adrenal gland injury and abdominal injury. Plaintiff further averred that he had suffered past and will suffer a future loss of earnings. Alternatively, that a past and future loss of earning will be suffered by him in the future on a permanent basis and for life.

[8] The Plaintiff estimates that the amount to be awarded for his past hospital, medical and related expenses, based on the substantiating vouchers, will amount to R200 000.00 (two hundred thousand rand). Additionally, the Plaintiff estimates that the to be awarded for his future hospital, medical and related expenses if proven is

R800 000.00 (eight hundred thousand rand). The Plaintiff also averred that at the time of the collision he was self-employed engineering technician and but for the collision, the resultant injuries and the sequelae he would have continued to manage his own business, remaining actively involved in the operational and technical aspects thereof, following the career path and earning the income as detailed in the reports of the Industrial Psychologist, Dr Hannes Swart, the Forensic Accountant, Mr Mark Edwards and as set out and calculated in the actuarial report prepared by Munro Forensic Actuaries. All these reports were handed into the record.

[9] The Plaintiff further in his particulars of claim also claims general damages in the estimated amount of R1 600 000.00 (one million six hundred thousand rand) based on the sequalae as set out in the expert reports. I now turn to deal with the expert witnesses' evidence.

Registered neurosurgeon: Dr Zayne Domingo

[10] **Dr Domingo** a registered neurosurgeon examined the Plaintiff during August 2020. The information as contained in his report, was gathered from an interview and assessment of the Plaintiff, the RAF1 documents completed by Dr K Noble dated 27 March 2017 and Dr S Bandeker dated 7 June 2018, Paarl and Tygerberg Hospital records. From the interview, examination and documentation Dr Domingo opined that as result of the significant blow the Plaintiff sustained to his head during collision he noticed skull base fractures. He opined that as a result of these skull fractures the Plaintiff had been left with poor hearing in the right ear. Further based on the severity of the brain injury, residual cognitive problems were to be expected. Dr Domingo also noted that, the soft tissue injuries sustained by the Plaintiff to the cervical and lumbar spine fractures were indicative of the forces that were applied to the spine at the time of the accident. He confirmed the pain the Plaintiff experiences since the accident is chronic and permanent in nature.

[11] As far as the chronic pain and suffering is concerned Dr Domingo stated that the Plaintiff continuous to suffer from sequelae of his head and spinal injury with residual symptoms of intermittent headaches, back and neck pain. He stated that there is a possibility that the Plaintiff will be mildly disabled as a result of the chronic

pain. Furthermore, he has only suffered a mild loss of the amenities of life. Dr Domingo stated that the Plaintiff was unable to return to his work as an engineer after the collision.

[12] In paragraph 16 of his report, Dr Domingo foresees that the Plaintiff will incur the following future medical expenses:

> *"16.1 An allowance of R 5 000.00 should be sufficient for simple analgesia.*
>
> *16.2 An allowance of R15 000.00 will be adequate for rehabilitation physiotherapy.*
>
> *16.3 Mr Recklies is at a risk of developing late post traumatic epilepsy. The risk is 5%. An allowance of R 15 000.00 will need to be made available to the assessment and treatment of seizures should they occur."*

[13] Dr Domingo reported that an opinion had to be obtained from a neuropsychologist and occupational therapist with regard to the Plaintiff's loss of earnings.

Ear, nose and throat surgeon: Dr John Steer

[14] **Dr John Steer** reported that Plaintiff suffers from bouts of vertigo and confirmed that this was clearly related to the cerebral trauma which are experienced as occasional blackouts. He confirmed that the Computerized tomography (CT) scan was consistent with the Plaintiff suffering multiple intracranial bleeds, bilateral fractures of the mastoid bones and a right petrous temporal fracture. Dr Steer found that the petrous temporal bones essentially contained in the middle ear and the hearing ossicles being disrupted by the fracture. The witness noted from the audiology report that, as a result of right petrous temporal fracture, the Plaintiff was subsequently fitted with a unilateral right-side hearing aid at Paarl Hospital Audiology Department on 7 September 2018.

Neurologist: Dr John Reid

[15] **Dr John Reid's** assessment confirmed that his examination of the Plaintiff revealed that the Plaintiff suffered from poor short- term memory, short attention span, anosmia, poor hearing on the right and nystagmus. He concluded that the Plaintiff's reading, writing, spelling, general knowledge keeping and problem- solving skills and arithmetic were impaired. Furthermore, he diagnosed Plaintiff with moderately severe head injury, skull fracture, disruption of the ossicular chain of the right ear and, bilateral parietal contusions caused, neurocognitive compromise, impaired hearing on the right, anosmia and limitation of neck movements. Dr Reid suspects that the Plaintiff's earning potential has been reduced by 50%.

[16] Dr Reid also made the following observations:

(a) Risk for epilepsy is only marginally elevated. Twice annual follow up by a neurologist is indicated.

(b) No Surgical intervention will alter the Plaintiff's neurocognitive compromise.

(c) Plaintiff suffers from post-traumatic depression and needs anti-depressants.

(d) Life expectancy of Plaintiff could be restricted to 3 – 5% below norm given the sorry state of his lungs and his ongoing smoking habit.

(e) Patient appears to have recovered from rib fractures and pelvic trauma.

[17] In terms of the narrative test Dr Reid concluded that in accordance with paragraph 5 of the RAF4, the injuries sustained by the Plaintiff were severe and resulted in serious long-term impairment with respect to his work and personal life. Furthermore, he reported that the Plaintiff is a chronic smoker with obstructive airway disease.

Psychiatrist: Professor Tuviah Zabow

[18] **Prof Tuviah Zabow** confirmed that the Plaintiff was transferred from Paarl Hospital to Tygerberg hospital on the same day the collision occurred. Further he confirmed that the Plaintiff sustained a severe head injury and other polytrauma injuries, with residual physical and mental deficits. The Plaintiff tried to return to work unsuccessfully for short periods. Although he had no evidence, the Plaintiff was employed as an engineer with his own workshop since 2016. Prof Zabow's prognosis was that the Plaintiff's productivity will remain unchanged and limited as a result of his impairments. Furthermore, that the Plaintiff's functional capacity in his personal, social and occupational areas has changed and be reduced from previous with the loss of amenities and quality of life change.

Orthopaedic Surgeon: Dr Hein Senske

[19] **Dr Hein Senske** in his report referred to the opinions of Dr Reid, Dr Domingo, Prof Zabow and agreed that the Plaintiff will suffer from constant pain and discomfort. According to Dr Senske's assessment the Plaintiff will also have a restriction of movement and difficulty with performing any normal duties or ability to work. He stated in his report that he was of the opinion that the Plaintiff will have to retire 2 to 3 years earlier than the normal retirement age due to the orthopaedic injuries sustained in the accident. Furthermore, the accident and accompanying injury according to Dr Senske did not have a detrimental effect on the Plaintiff's life expectancy.

[20] Doctors Johan Reid, Zayne Domingo, Hein Senske and Prof Tuviah Zabow, confirmed in their medico-legal reports, that the Plaintiff had sustained a traumatic brain injury of moderate severity, in addition polytrauma injuries and suffers from constant pain. Furthermore, as a result of these injuries the Plaintiff is no longer able to function as before the accident occurred. Their evidence further is uncontested that as a result of his polytrauma injuries the plaintiff's cognitive and physical abilities have been affected, resulting in him currently and in the future experiencing difficulty in performing normal duties.

[21] I now turn to the expert witnesses who gave evidence in court with regard to their qualifications, findings and opinions as set out in their reports.

Clinical and Neuropsychologist: Mignon Coetzee

[22] Mignon Coetzee testified that the Plaintiff informed her that he had officially taken over the business of Trotex Engineering since 2016 and continued to run it until his accident in October 2017. Subsequent to the accident there had been a gradual decline in the business until it halted completely in 2019. In her report Ms Coetzee emphasized that the Plaintiff sustained polytrauma as a result of the head injury. She opined that the severity is determined principally by 2 parameters, namely GSC (Glasgow Coma Scale) and the period of post-traumatic amnesia. She further stated that neuropsychological sequelae add more information, regarding the seriousness of the head injury.

[23] She explained that the Plaintiff has deficits with reference to thinking, plus behaviour and personality, which prefaced the cancellation of some business contracts. Referring to the Plaintiff's early recovery from some of his initial deficits, she emphasised that it was permanent, irreversible and long-term sequelae, from which there will be no improvement.

[24] When asked about her evaluation of Plaintiff, she explained that there is firstly a cognitive evaluation component, which involves the administration of a wide battery of tests, which establish the Plaintiff's pre-injury innate functioning, plus areas of (post-injury) compromise.

[25] In explaining the Plaintiff's post morbid functioning, Ms Coetzee emphasized and highlighted the Plaintiff's slowness of processing information. She agreed with Dr Dale Ogilvy, the language and speech therapist that the Plaintiff is experiencing communicative difficulties. Ms Coetzee further highlighted the Plaintiff's difficulties with both receptive and expressive communication.

[26] With regard to the Plaintiff's psychological sequelae, Ms Coetzee explained the Plaintiff's emotional psychological response to his losses. She further testified

that the other aspects of the Plaintiff's injuries, namely the organic aetiology of his head injury has led to mood disruptions, which she believes is a critical component in the demise of the Plaintiff's business. She further testified that the Plaintiff's current miniscule earnings are a fair projection of the future, and that this will also gradually dwindle.

[27] Ms Coetzee further testified that although the Plaintiff was 51 years old at the time of the accident, the difficulties he is currently experiencing cannot be attributed to his age. She explained that the head injury sustained by the Plaintiff occurred with sudden decline whereas ageing happens gradually. In other words, according to her, there was a dramatic shift in the Plaintiff's functioning after the motor vehicle accident.

[28] During cross examination she gave detailed information as to why the Plaintiff did not have to appoint a *curator bonis* to manage his affairs on his behalf. She testified that the Plaintiff's preserved intellectual ability and his insight into his deficits and his strong drive to provide for his family, indicated that the Plaintiff could manage his own affairs without restrictions, if he were to take his time slowly when taking financial decisions. She further testified that the Plaintiff is a very responsible man, even in his injured state. She was adamant that although the deficits had a devastating impact on the Plaintiff's career in that he cannot provide a reliable service to his customers, he however can sit quietly and decide where to invest his money, make notes and listen to an advisor.

[29] The Defendant suggested to her that the Plaintiff still had the capacity to be employed, to which she responded that the nature of the Plaintiff's deficits is the cause of the problems he experiences in the workplace. Resulting in disciplinary, performance issues and loss of employment for the Plaintiff. She explained that these deficits are the reason why a person earning capacity gradually whittles away until a person becomes unemployable.

[30] When put to Ms Coetzee during cross examination by the Defendant that the last paragraph of her report was contrary to her evidence that the Plaintiff can think where to invest money and that he could possibly appoint someone to do the day to

day work. Ms Coetzee response was that work was not just about sitting and thinking, but also about customer relations and sticking to deadlines and that with the reference to his ability to sit with a financial advisor and discuss investments, although the Plaintiff may need multiple meetings and time, he can intellectually grasp that.

[31] In conclusion Ms Coetzee's evidence was briefly that looking at the Plaintiff's injury, no further significant recovery will occur and that whereas there had been some recovery in the first two years, this then plateaus and remains the same, and noted that the Plaintiff was now more susceptible to dementia then at an earlier age.

Speech and Language Pathologist: Dr Dale Ogilvy

[32] Dr Ogilvy testified that she undertook various consultations with the Plaintiff and his partner, Ms Keenen Klinker. She confirmed that the assessments of the Plaintiff consisted of formal test batteries and further that she observed the Plaintiff's communicative interaction.

[33] She confirmed the history of the Plaintiff as incorporated in her report and corroborates the evidence of Ms Coetzee. She highlighted the Plaintiff's physical difficulties, with particular reference to his hearing impairment. She noted that although the Plaintiff's hearing improved after he underwent surgery in 2020, there was still an impairment in that he remained with a moderate to severe hearing loss. She further testified that the deficits she found on testing the Plaintiff is fully in keeping with traumatic brain injury following a motor vehicle accident. She reasoned that the deficits are pathological and neurogenic as a result of a breakdown of communication and cognitive functioning after the head injury.

[34] During her evidence, Dr Ogilvy confirmed that the deficits experienced by the Plaintiff impacted on him vocationally. She stressed that communication is the most critical in functioning at work, in whichever field one was in. This breakdown in communication by the Plaintiff has significantly compromised his work performance, resulting in the Plaintiff losing clients and a loss of trust from clients, not allowing him to be employable in any form of job.

[35] During cross examination she was adamant that no person can get communicative impairments as a result of Guillain-Barre Syndrome with which he was diagnosed. She testified that this condition involves a loss of motor and sensory function, which according to her the Plaintiff had no motor programming symptoms.

[36] I find both Ms Coetzee and Dr Ogilvy to be credible, consistent witnesses who confirmed the Plaintiff's injured state and pre-morbid abilities. They were both of the opinion that as a result of the cognitive deficits experienced by the Plaintiff he was no longer employable.

Forensic Accountant: Mr Mark Edwards

[37] During his testimony Mr Edwards explained the history that led to the Plaintiff "taking over" the company Trotex in 2014 from the Schonaus, the previous owners of the company. He explained that the Plaintiff had been owed a bonus, and in lieu thereof he took over the business of Trotex and its loan accounts. Mr Edwards explained that during 2016 while the Plaintiff was in the process of applying for renewal of his work permit, the shares of the business was registered in the Plaintiff's life partners name. This is confirmed by the Companies and Intellectual Property Commission (CIPC) that the business is registered in the Plaintiff's life partner's name Ms Klinker as 100% (percent) shareholder of Trotex.

[38] Mr Edwards confirmed during his evidence that he studied the Plaintiff's IRP5's, payslips in the year of the accident, the business annual financial statements and the income tax assessments. He testified that he was informed by the Plaintiff, that the Plaintiff took effective control of the business when the shares were transferred to Ms Klinker. In his report Mr Edwards sets out as follows how he calculated the Plaintiff's pre-accident and post-accident situations:

Pre- Accident Period

[39] Mr Edwards explained that in calculating the Plaintiff's pre-accident financial situation, he firstly took the Plaintiff's salary earnings uploads by relying on the

Plaintiff's IRP5 certificates which were issued to the Plaintiff by Trotex. He also considered the Plaintiff's payslips which were issued in the year the accident took place. He explained that by doing so, it allowed him to split the months before and after the accident where the IRP5 did not.

[40] He explained that the Plaintiff's earnings during the period of 2016 compromised of two parts, his salary from the business as well as the profits earned within the business. He testified that in the financial years 2015 to 2018 the Plaintiff had been issued with an IRP5 certificate which reflect the Plaintiff's total annual earnings from the business. He then refers to the Plaintiff's payslips, using it assess how much the Plaintiff earned in the year March to September 2017 versus October to February 2018. He also assessed the various fringe benefits in addition to the salary, paid to the Plaintiff during the financial year 2017 and 2018. These included his home internet, electricity and water, even though he could not find any evidence that these items were being paid by the income statements. He testified that the Plaintiff's telephone accounts, private petrol, motor vehicle expenses and personal insurance were paid for by the business. He further testified that in summary the total earnings of the Plaintiff before tax earned in the financial year of 2018 was R160 152.00 which equates to R22 930.00 per month before tax.

[41] He noted further that the salary of the Plaintiff had substantially increased in the 2016 financial year with 14% in that financial year and by 41.9% when the Plaintiff "took over" the shares at Trotex in 2017 (underlined for emphasis) in lieu of a loan that was owed to him by the previous business owners. He conceded that they did not receive any financial information in respect of the Plaintiff's earnings from the financial year 2019 to 2020. He testified that it was very clear from the payslips he considered, that the Plaintiff was unable to continue paying himself during the last five-month period while at Trotex. He testified that Trotex seized operations in November 2019.

Post- Accident Period

[42] Mr Edwards referred the court to page 261 of his report and summarised what he knows of the Plaintiff's post-accident salary earnings. According to him the

Plaintiff was unable to draw a salary from the business (Trotex) after he withdrew R5 000 in 2018. The Plaintiff was unable to pay an accountant during this period; therefore, no returns were submitted to him. The tax returns that was submitted to SARS indicated that the business was dormant and had no profits. Mr Edwards testified that from his discussion with the Plaintiff it was evident that the Plaintiff was unable to maintain his lifestyle after the accident, in so far that the Plaintiff fell into arrears in respect of his private residence and children's school fees. He further testified that it was impossible, based on the available evidence to determine the exact quantum of the Plaintiff's earnings if any in the financial year of 2019 and 2020, and that he is of the opinion that it will be minimal.

[43] Mr Edwards testified that after Trotex closed their doors in 2019, the Plaintiff started a new business, ("Blue Eagle") which mainly did maintenance jobs.

Blue Eagle (new business)

[44] Mr Edwards testified that he used the Plaintiff's statements for the period June 2021 until February 2022, during which Blue Eagle operated to quantify what the Plaintiff was earning at that time. He found that the business operated for about nine months and received UIF benefits for that period. He testified that he tallied up the income received during these nine months, amounting to R96 000.00. He also calculated what he perceived as business-related expenses, amounting to R45 000.00. He then determined that the Plaintiff 's business venture Blue Eagle made a profit of about R 50 000.00.

[45] Mr Edwards testified that it was evident from the Plaintiff's bank statements that after every job he completed, money was paid into the Plaintiff's bank account and withdrawn on the same time to pay the wages of the people who assisted the Plaintiff with the maintenance jobs. According to him Plaintiff made a nett profit of R 5 400.00 per month.

[46] Mr Edwards was uncertain as to the Plaintiff's projected future injured earnings of Blue Eagle due to the limited history he received of only 9 months. He assumed that if the Plaintiff had the ability to grow or sustain Blue Eagle, his

maximum earnings would have been between R 7 500.00 to R 10 000.00 per month. He recommended that higher than usual contingencies should be applied to the Plaintiff's projected earnings, because of the Plaintiff's physical and reported cognitive deficits. He further referred the determination of those contingencies to the court.

[47] Mr Edwards opined that were it not for the accident the Plaintiff would have continued to earn a basic monthly salary from Trotex and that the Plaintiff's salary would have continued at the pre-accident level of approximately R 22 900.00 per month. Further he stated that the Plaintiff would have continued earning that basic monthly salary onwards until his eventual retirement from Trotex. He assumed that the salary of the Plaintiff would have increased in line with inflation plus 1% per annum. He also assumed that the Plaintiff would have continued to earn the fringe benefits he was earning from the business pre-accident.

[48] He testified that he calculated the Plaintiff's future loss of earnings by assuming that were it not for the accident the Plaintiff's would have continued earning an income from the profits made by Trotex as well as draw a monthly basic salary. This scenario would have continued until the Plaintiff's eventual retirement in the uninjured and injured scenarios respectively.

[49] During cross examination Mr Edwards testified that the Plaintiff suffered a past loss of earnings in respect of his salary and fringe benefits amounting to R1 100 422.00 He conceded that although he stated that the Plaintiff had suffered a loss in respect of the business Trotex, he is aware that 100% of the shares of the business is registered in the Plaintiff's partners name Ms Klinker and referred the issue to the court to make the final determination with regard to the allocated projected future profits of Trotex to the Plaintiff. *(underlined for emphasis).* He further testified that the past loss of business profits after tax calculated amounted to R 1 044 015.00 from the day of accident to February 2022. The total past loss being the sum of salary plus profits, amounting to **R 2 144 437.00**

[50] In terms of his assumptions, Mr Edwards at page 15 of his report set out the Plaintiff's projected past loss of earnings, to 29 February 2022 by referring to the calculation presented in annexure "B" at page 272 of the court file, as follows:

Injured Earnings		
Total Salary, Fringe Benefits and Blue Eagle Income, after tax.	(A)	174,977
Total Net Profit from Trotex Engineering, after tax.	(B)	118,159
Uninjured Earnings		
Total Salary and Fringe Benefits, after tax.		1,275,399
Total Net Profit from Trotex Engineering, after tax.	(C)	1,162,174
Past Loss of Income to 28 February 2022		
Total Salary and Fringe Benefits, after tax.	(C) - (A)	1,100,422
Total Net Profit from Trotex Engineering after tax.	(D) – (B)	1,044,015

Total Past Loss of Income (Salary, Fringe Benefits plus Net Profits)
2,144,437

[51] In terms of his report these past losses were stated before the deduction of contingencies, or the application of the RAF cap. Mr Edwards deferred the deduction of contingencies, and the RAF cap to the appointed actuary. He opined that the Plaintiff is expected to suffer an ongoing loss of income until his eventual retirement and that his loss of earnings should be calculated based on projected future earnings in the Uninjured and Injured scenarios.

[52] With regard to the Plaintiff's Future Uninjured earnings he noted in his report that the Plaintiff's projected salary and fringe benefit earnings in financial year 2022 was R338,991.00 before tax and R279,007.00 after tax. He opined that it is expected to be in line with normal earnings inflation (inflation plus 1% real growth) until the Plaintiff's retirement. He further estimated that the Plaintiff earned an average of R5,430.00 per month from his handyman business, Blue Eagle during the last 3 months from December 2021 to February 2022. He deferred to the Industrial Psychologist Mr Swarts comments to consider the Plaintiff's residual earning

capacity in suitable employment in the future. He referred in his report that he considered the opinion of Dr Hein Senske, the Orthopaedic Surgeon, that the Plaintiff will need to retire 2 to 3 years earlier than normal due to the orthopaedic injuries that he had sustained.

[53] Mr Edwards was an experienced honest witness and assisted the court with regard to calculation and explanation of the two different components of the Plaintiff's loss of earnings. The earnings including the Plaintiff's salary and business profits and the alternative of Plaintiff's salary without the business profits.

Occupational Therapist: Ms Marlene Joubert

[54] She was called to testify with regard to the Plaintiff's physical deficits post-accident. She explained the Plaintiff's neck disability and hearing loss. The Plaintiff had limitations with his right leg, experienced difficulty squatting and was slower with repetitive stooping. In terms of the Workwell assessment she used the Plaintiff's grip strength was decreased in both hands. She referred to photographs to illustrate the Plaintiff's tolerance for sitting, walking and standing. The Plaintiff post-accident informed her that he could not work for 3 months after the accident neither could he take on any new projects, resulting in the Plaintiff having difficulty getting new clients and existing clients doubting that he could cope. She concluded that the Plaintiff's safe residual capacity was sedentary to light work, as the Plaintiff had difficulty with medium work. With reference to his physical deficits, she explained that the Plaintiff's work was physical in nature, therefore he would be unable to secure employment suited to his former or current employment. She was a consistent witness, who gave concise explanations as to her findings

Industrial Psychologist: Dr Hannes Swart

[55] He highlighted the Plaintiff's career from when he was in Germany until he came to work in South Africa. With no documentary proof of the Plaintiff's qualifications, Dr Swart testified that the Plaintiff was a qualified artisan. His explanation for this conclusion was that the Plaintiff would not have been able to commission equipment unless he was a qualified artisan. He indicated that industrial

psychologists rely on salary surveys, job grading and similar resources to determine loss of earnings or earning capacity of a person. He conceded that he had no skill with figures.

[56] He stated that when having to determine an individual's retirement age one is often led by what one thinks is the usual retirement age (60 – 65 years). He explained that one has to consider a person's ability to be financially secure as well as their work ethic in deciding as to an individual's retirement age. His evidence was that the Plaintiff was 51 years old at the time of the accident with a huge debt on his books which would have remained outstanding until 2026, when the Plaintiff would have reached the age of 58 years. Further the Plaintiff was not sound as at the date of the accident, making it less likely that the Plaintiff would retire at the normal age of retirement. He based this opinion on the fact that the Plaintiff was dedicated to his work and has high work ethic, was never without work and supported a large family of five.

[57] During cross examination he indicated that although he did not see any proof of the Plaintiff's qualifications, he had no doubt that the Plaintiff was a qualified artisan as the Plaintiff had done his job competently for more than 30 years. Although Dr Swart was a consistent witness and did not waiver in cross examination, his explanations and findings with regard to the Plaintiff's qualifications is mere speculation and not on any concrete or documentary proof.

[58] Dr Swart in a joint minute with the Industrial Psychologist of the Defendant Ms Zelda Pieters deferred to Mr Edwards report. They agreed on the following aspects:

(a) With Plaintiff's renumeration and details as set out in Mr Edwards report.

(b) Plaintiff sustained very limited self-employment after the accident.

[59] They disagreed on with the following:

(a) Dr Swart was of the opinion the Plaintiff would have been compelled to work until the age of 70 years of age in terms of the financial position he held in the business, whereas Ms Pietersen was of the view that the Plaintiff would have continued his role in the business as Engineering technician until he retired at the age of 60 - 65. She basis her opinion on the Plaintiff's pre-morbid medical history.

(b) According to Dr Swart the Plaintiff is unemployable, whereas Ms Pieters was of the opinion that although the Plaintiff has been compromised he is still able to do light/ sedentary type of work, and would likely continue to be self-employed with accommodation. She opined that considering the Plaintiff's current limitations his residual earning capacity is likely to be between R5 000 to R10 000 per month, with vast periods of unemployment.

Actuary: Mr Boshoff

[60] Mr Boshoff explained that he had been informed by the Plaintiff's attorney that the issue of liability had been resolved on the basis of an 80/20 % (percent) apportionment in the Plaintiff's favour. In his report dated 11 April 2024, Mr Boshoff allowed for uninjured loss of earnings inflation and increases of 5% (percent) above earnings inflation per year until retirement age of 70. With regard to injured earnings

[61] He explained that the assumptions he made with regard to the Plaintiff's uninjured earnings were as summarised in Mark Edwards report. He drew the court's attention to the manner in which he dealt with the issue of tax and dividends as from March 2026. He confirmed that he had provided for assumed (post-morbid) retirement at age of 70. He further testified as to how the statutory cap worked with reference to the case of **Sil and Others v RAF [2012] ZAGPJHC 117.** He explained that without the cap, the loss suffered by the Plaintiff amounted to **R 6 973 000.00** after contingencies. He testified that after they applied apportionment and the cap the loss was **R 4 553 300.00** before 1 May 2024. He, subsequent to the initial report, recalculated the loss to reflect what it would be as at date of trial, which amounted to **R 4 856 700.00**. He continued to explain that the amended calculation was exactly the same, the only difference being that the calculation prior to 1 May 2024, is not

subject to mortality or discount as the past component was known. He testified that, as a calculation is done at some later point in time, the past component becomes a larger component of the calculation whilst the future component becomes reduced. This is so because they have moved a year or two from the previous calculation and therefore the elements of mortality and discounting, has less of an impact which will consequently increase the loss.

[62] He explained that because much of the loss is above the cap, the increase in contingencies will have no to very little effect. Even if the court was to rule that the contingencies had to be varied to 15% post-morbidly or uninjured future earnings, the calculation will have to be done by an actuary to ensure that the calculations are correct. He further explained that in actuarial practice they refer to 15% as standard contingencies, which they draw from the expertise of Dr Robert Koch, whose recommendation is that one allow for an uninjured contingency of 0,5% per year. He held that it logically holds up because contingencies are there to make allowances for uncertainties of life, one does not explicitly account for. He acknowledged that the contingencies seek the prerogative of the Court, but contended that in this instance it made perfect sense to him that the contingency should be lower since they had a shorter time period under consideration.

[63] During cross examination he indicated that Mark Edwards recommended that they project the Plaintiff's earnings, at inflation plus 1.5%, which in their calculation would be earnings, inflation plus 0.5%. According to him, this translates to a half percent difference between price inflation and earnings inflation.

Actuary Calculations:

Capital value of loss of earnings (Excluding the RAF cap; before apportionment)

	Uninjured earnings	**Injured Earnings**	**Loss of Earnings**
Past Loss	R 3 632 800	R 188 500	
Less contingencies	2.5%	-	

	R 3 541 980	**R 188 500**	**R 3 353 480**
Future Loss	R 5 417 900	R 304 200	
Less contingencies	7.5%	10%	
	R 5 011 558	**R 273 780**	**R 4 737 778**
TOTAL LOSS OF EARNINGS			**R 8 091 258**

Capital value of loss of earnings (Including the RAF cap, after contingencies and apportionment)

Past Loss of Earnings	R	1 726 200
Future Loss of Earnings	R	3 130 500
Total	**R**	**4 856 700**

[64] Mr Boshoff indicated that the calculation was done by using the instructions of Plaintiff's counsel, the sources and reports of the Industrial psychologist report by Dr Hannes Swart and the forensic accounting report by Mark Edwards.

[65] In his amended report requested by the Court, Mr Boshoff allowed for earnings inflation and increases of 0,5% (percent) above earnings inflation per year until retirement age of 65.

Plaintiff's Life Partner: Ms Keenan Klinker

[66] The final witness called by the Plaintiff. She confirmed that the Plaintiff was running the business (Trotex) even though it was registered in her name and she was a 100% shareholder, pre-accident as well as post-accident. She explained that in 2016 the Plaintiff's visa was still in progress when the shares were transferred in her name instead of the Plaintiff's. She testified she did not have a clue of running the business.

[67] She indicated on the same evening the accident occurred, she went to see the Plaintiff at Tygerberg Hospital. Upon her arrival at the hospital she found the Plaintiff in a poor state and being assisted at Emergency. She highlighted the

orthopaedic injuries Plaintiff suffered after he was discharged from hospital. Subsequent to the Plaintiff being discharged from hospital, she noticed the Plaintiff being furious all the time, he could not see properly and was experiencing a lot of pain. They also had to get the Plaintiff crutches and a wheel chair as he was unable to walk. Eventually, due to the Plaintiff experiencing all these deficits and being unable able to procure new clients, Trotex had to ultimately close their doors and stopped operating in 2019. She confirms the Plaintiff subsequently opened a new business Blue Eagle, which performed handy man jobs but similarly did not flourish.

[68] During cross examination, when asked whether she knew if the Plaintiff ever tried to get Trotex registered in his name, she did not respond and instead explained that she is not well-versed in the Plaintiff's visa situation. She testified that, according to her knowledge, when the Plaintiff applied for his visa it took more than a year to come back. Furthermore, that the Plaintiff applied in 2016 for his visa and had, at the time of the accident, not yet received his visa.

Submissions by the parties

Defendant's argument

[69] Ms Thomas appearing on behalf of RAF argued that the Plaintiff was able to start a new business post- accident and able to earn R 5 430.00. Counsel contended that the Plaintiff is not totally unemployable. She further, argued that the amount of R 5 430.00 should be taken for his injured earnings also considering increases. The business Trotex when transferred to the Plaintiff's partner was in debt. The profits generated should therefore be excluded as the business is not in the Plaintiff's name. The Defendant argued that evidence by forensic accountant Mr Edwards that he compared the company to other companies with the same trade is an unrealistic approach, seeing that the Plaintiff only had five people working for him.

[70] Lastly, they argued that the contingencies applied by the Actuary are too low and do not account for the Plaintiff's age and the business being in debt. The RAF is of the view that the contingencies to be applied are 5% and 15% pre- accident; 5% on past earnings and 25% on future earnings.

Plaintiff's argument

[71] The Plaintiff's argument is that the Industrial psychologists agree that the Plaintiff was self-employed for the major part of his immediate pre-traumatic years, and that the remuneration particulars and details relating to the interpretation of the Plaintiff's income, as documented in the report of Mr Edwards, should be applicable when determining the Plaintiff's loss of earnings pertaining to his **uninjured career path**.

[72] They argued that the salaried income, as well as the business profits as testified by Dr Hannes Swart and confirmed by Mr Mark Edwards, should be utilised in calculating the Plaintiff's pre-morbid income, assuming that the Plaintiff would in all likelihood have retired at 70 years of age. They argued that the Plaintiff's earnings as at March 2021, would have been R 279 007.00 per year (gross salary) and R308 881.00 per year, increasing at 0.5% above earnings inflation per year (profit from Trotex).

[73] They further argued that Mr Boshoff testified that they have allowed for earnings inflation until retirement age 70, in respect of the salaried income and 0.5% above earnings inflation per year until retirement age of 70 in respect of the profit from Trotex. Counsel argued that without evidence to the contrary, the above scenario should be accepted as the Plaintiff's uninjured career path.

[74] With regard to the Plaintiff's **injured career path** it is contended that according to the evidence presented the Plaintiff started a new business venture in the form of Blue Eagle out of desperation following the closing of the Trotex business. They contended that Dr Hannes Swart testified that the prescribed income as per Mark Edwards report of R 5 430.00 per month from the Plaintiff's venture, should be regarded as a high- water mark. They further contended that Mark Edwards testified that he recently received further updated bank statements from the Plaintiff, wherein, after he had analysed it, was clear that the business venture came to a standstill. This resulted in the Plaintiff's income from Blue Eagle being meagre and to a certain extent negligible. Counsel for Plaintiff contended that given the

medical evidence referred to above, the Plaintiff should be regarded as unemployable as from date hereof.

[75] Counsel contended that Mr Willem Boshoff, the actuary, testified that they had an updated actuarial calculation which is based on the reports of Mark Edwards and Dr Hannes Swart. Further, it was contended, that the contingencies applied thereto are in line with the legal principles as referred to in **RAF v Kerridge** [supra] and the Quantum Year Book by Robert J Koch. They further contended that the calculation of the capital value of the Plaintiff's loss of earnings, (after contingencies and with the RAF cap) results in the following:

Past Loss of Earnings	R 1 726 100.00
Future Loss of Earnings	R 3 130 700.00
Total:	**R 4 856 800.00**

[76] In conclusion, Counsel for the Plaintiff submitted that the Court make an award in the Plaintiff's favour in the following terms:

(a) Directing Defendant to pay to Plaintiff the sum of R 4 856 800.00 in respect of his claim for past and future loss of earnings.

(b) Directing Defendant to indemnify Plaintiff against any claims for past hospital and medical expenses relating to the accident which occurred on 3 October 2017.

(c) Directing Defendant to pay Plaintiff's cost of suit on an attorney and client scale, such costs to include the qualifying expenses of all experts witnesses in respect of whom Plaintiff has given notice in terms of the provisions of rule 36(9)(a) & (b) of the Rules of Court.

The Legal Principles

[77] The Appellate division in **President Insurance Co Ltd v Matthews 1992 (1) SA (A)** at 5C-E, it was stated:

"It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in the consequence of another's negligence. Such damages include the loss of future earnings and/or future earning capacity." The calculation of the quantum of a future amount, such as loss of earnings or loss of earning capacity, is not necessarily a matter of exact mathematical calculation. By its nature, such an enquiry is speculative, and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate". In **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)** Nicholas JA stated that the court has to adopt two possible approaches when considering an estimate as to the loss of earning capacity*, "One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non-possums attitude and make no award."*

[78] It is trite that an expert witness is required to assist the court to decide on the facts. The facts expressed by the expert must be based on the correct facts and not mere speculation. The court is not bound by any conclusion or finding by an expert, as an expert's report and evidence is only part of all the evidence to be considered in determining the issues before court. The court is bound to consider reliable evidence put before it, that can be proven. The way courts deal with expert evidence is explained in **Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA) at [37]** to the effect that a court will accept evidence of a witness if, and when it is satisfied that such an opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'. At paragraph 36, the court said that:

"[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning."

[79] It is apparent from the evidence of the Plaintiff's witnesses and from the cross-examination by the Defendants counsel that the following issues are in dispute:

79.1 The alleged income of Plaintiff from Trotex

79.2 Contingency to be applied

79.3 Loss of earnings past and future

79.4 Liability of Defendant for Hospital expenses

Discussion

[80] In the present matter it is not in dispute that the Plaintiff sustained serious injuries in the accident and that he still suffers from the sequelae of those injuries. It is common cause that he was an employee of Trotex and received a monthly basic salary.

[81] It is accepted that the Plaintiff's life has changed both from a physical, cognitively and emotionally. According to the experts he is still enduring pain and suffering and is unable to perform his work as he used to pre-accident. Dr Domingo the orthopaedic expert anticipate that the Plaintiff's physical condition will require various medical interventions, recommending the types of interventions necessary and the estimated costs thereof. The costs of these interventions have also been secured by way of an undertaking furnished by the RAF to pay 80% for future medical, assistive devices etcetera.

[82] Two issues were raised by the Defendant during cross examination of the witnesses and in their heads of argument. Those were: (a) whether the profits of the business Trotex should be excluded as part of Plaintiff's loss of income and, (b) whether the contingencies applied by actuary is too low.

[83] The Plaintiff furnished the Court with the actuarial report with evidence of the actuarial calculations. These calculations provide a logical foundation in an attempt to determine the value lost suffered by the Plaintiff.

[84] In **MT v RAF <u>2021 All SA 285</u> (G)** the role of the Actuary was described as follows:

> *"The Actuary- The parties routinely seek to assist the court in its assessment of the appropriate amount payable by the resort to the expertise of an actuary. Actuaries rely on look-up tables which are produced with the reference to statistics. Such statistics are derived from inter alia from surveys and studies done locally and internationally in order to establish norms, representatives and means. From these surveys and studies, baseline predictions as to likely earning capacity of individuals in situations comparable to that of the Plaintiff are set. These baseline predictions are often applied to a Plaintiff's position using various assumptions and scenarios which should have some foundation in fact and reality.*
>
> *The general position of the actuary is to posit the Plaintiff as she has proven to have been in her uninjured state and then apply assumptions (generally obtained from the industrial psychologist) as to her state with the proven injuries and their sequela. The deficits that arise between these scenarios (if any) are then translated with reference to various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the Plaintiff both pre and post morbidity. The loss is calculated as the difference in earnings derived between the pre-accident or pre-morbid state and post-accident or post morbid state. In this exercise, uncertainty as to the departure from norms such as, early death, the unemployment rate, illness, marriage, other incidents and other factors unconnected with the Plaintiff's injuries which would likely, in the view of the court to have a bearing both on the established baseline used by the actuary and on the manner in which the Plaintiff given his particular circumstances would fare as compared to established norm are dealt with by way of "contingency" allowances. These are applied by the court*

dealing with the case in order to adjust the loss reflect as closely as possible to the real circumstances of the Plaintiff. This is a delicate exercise which is an important judicial function. The report of the industrial psychologists is pivotal to the actuarial calculation. This is because the actuarial calculation must be performed on an accepted scenario as to income, employment, employment prospects, education, training, experience and other factors which allow for an assessment of the likely career path pre- and post the injuries.

It thus stands to reason that, if the base scenarios adopted by the actuary are fallacious, the actuarial calculation is of no value to the court or to the RAF officials engaged in negotiating a settlement. If the income at the date of accident is over-stated even by a few thousand rands this would lead to a significant inflation of the proposed loss in that the calculation is exponential. Thus, for example the difference between income of R5000 per month as opposed to one of R7000 is calculated over a period of 15 years is R610 000 extra on the claim. Thus, even a relatively modest claim is easily and significantly inflated by means of this ploy."

[85] It is trite that the loss of income can be granted where a person has suffered or will suffer a true patrimonial loss in that his employment situation has manifestly changed. A person has to prove on a balance of probabilities that had suffered a loss of earning and or earning capacity.

[86] I turn now to deal which each issue in dispute raised by the Defendant respectively.

Exclusion of business "Trotex" profits

[87] The basis for this argument by the Defendant was that the business is not registered in the Plaintiff's name, but instead in his life partners, Ms Klinker's name as 100% share owner. They submitted the assumption made by the experts that the Plaintiff has earned profits from the business is based on mere speculation. The Plaintiff led evidence of Ms Klinker who confirmed that Trotex was registered in her

name and that she holds 100% of the business shares even though the business was run by the Plaintiff. She gave no satisfactory explanation as to why, from 2016 until 2017 when the accident occurred, Trotex was not transferred into the Plaintiff's name as the owner of the business.

[88] Mark Edwards the expert forensic accountant in his report referred to the occupational therapist' report of Ms Marleen Joubert, in which she stated that the Plaintiff's girlfriend Ms Keenan Klinker "took over the company" in 2016 and that Ms Klinker and the Plaintiff had been running the business together since 2016.

[89] Mr Edwards in his report, to a certain extent, conceded that although he considered that it was reasonable to conclude that the past and future profits of Trotex should be treated as belonging to the Plaintiff, it is contrary to the actual ownership of shares. He further acknowledges that he is aware that his finding is possibly contrary to the relevant case law Rudman//RAF and rightfully so deferred the issue of whether treating the profits in determining the Plaintiff's loss of earnings to the court. At page 5 of his report he states the following:

> *"The Plaintiff states that all profits of the business were used at his discretion in order to fund his personal expenses.*
>
> *Considering the evidence, above, it seems reasonable to conclude that the past and projected future profits of Trotex should be treated as belonging to the Plaintiff when quantifying his claim for damages. This is contrary to the actual ownership of shares, but in line with the substance of the matter, as opposed to the form.*
>
> *I am aware that this finding is possibly contrary to the relevant case law in respect of these matters, Rudman//RAF in particular. I therefore defer to the courts to make a final determination in regard to the treatment of these profits in determining the Plaintiff's loss of earnings."*

[90] The only documentary proof used by Mr Edwards, for quantifying the Plaintiff's loss, are the Plaintiff's personal IRP5 certificates for tax years 2015 – 2018,

together with salary advises for the period of March 2015 to September 2017. He explained that the salary advises were useful evidence in that it showed that the Plaintiff's basic monthly salary ceased to exist almost immediately. According to Mr Edwards, the Plaintiff's salary advises show that the Plaintiff's salary earnings were R 144 142.00 during the period from March 2017 to end September 2017. Further, that the Plaintiff's IRP5 certificate for the full 12 months from March 2017 to February 2018, showed that he earned R149 598.00. Mr Edward further indicated in his report that, although the Plaintiff indicated that he had received various fringe benefits from the business during the 2017 and 2018 financial years, he could not find any evidence of the business paying the Plaintiff's water, home internet and electricity, and thus excluded those expenses.

[91] The fact that the Plaintiff claimed to Mr Edwards that he was using the profits of the company at his discretion, is contrary to the evidence of the accounting financial statements attached to the report of Mr Edwards. Despite the fact that there was no evidence which indicates Trotex business profits being paid to the Plaintiff, Mr Boshoff the actuary, still included it in his calculation. The financial records of Trotex refer only to salaries, confirming that only a basic salary was paid to the Plaintiff, corroborating the bank statements, including the Plaintiff's IRP5 certificate, submitted to Mr Edwards. Gleaning from the Plaintiff's salary advises at page 126 to 154 of the trial bundle, marked Annexure "A", there is no evidence of any fringe benefits or business profits paid to the Plaintiff. From pages 202 to 213 of the same trial bundle, it is evident from the Plaintiff's IRP5's that he was registered as an employee at Trotex, and receiving a monthly basic salary.

[92] Based on the above I am not satisfied that there is any reliable or documentary proof that shows that the profits of Trotex was paid to the Plaintiff in the pre-morbid or post-accident period. I agree with the Defendant that it is mere speculation to assume that these business profits were paid to the plaintiff. Further on the evidence of Dr Swart the industrial psychologist there is no prove that the Plaintiff had any qualifications of being a qualified artisan. I am satisfied that the only the Plaintiff's pre and past loss of earnings based on his monthly salary have been proven and should be awarded. Consequently, it follows that the business profits of Trotex should be excluded.

[93] Despite Mr Boshoff basing his assumptions and calculations on Mr Edwards' report, the actuary failed to follow it comprehensively. Specifically, he only calculated the Plaintiff's past and future loss of earnings by combining Plaintiff's monthly salary with the business profits of Trotex. This approach neglected the important scenario of evaluating the loss of earnings based solely on the plaintiff's salary excluding the profits from the business.

[94] In **Road Accident Appeal Tribunal & others v Gouws & another [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA)** para 33, the court stated *"[c]ourts are not bound by the view of any expert. They make the ultimate decision on issues which experts provide an opinion.'*

The facts on which the expert witness express an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning it must be based on corrects facts. Incorrect facts militate against the proper reasoning and the correct analysis of the facts paramount for the proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion based on the incorrect facts is not helpful to the court.

[95] In this matter Mr Boshoff during his evidence based his actuarial calculation only on the scenario where both Plaintiff's salary plus nett profits of the business, Trotex was used. The court then during the evaluation of the evidence directed that Mr Boshoff do a recalculation on the scenario of loss of earnings excluding the business profits. I applaud him for his quick response to the court's directive. I am satisfied with the amended actuary report dated 14 August 2024 and find the calculations to be satisfactory and reasonable.

Contingencies

[96] As indicated the Defendant disagrees with the percentage of the contingency deductions applied to the future loss of earnings. It is trite that the percentage of the contingency deductions is in the discretion of the court, which discretion must be judiciously exercised, taking all relevant factors into consideration. The parties made

their submissions in respect of their respective cases in court with regard to the applicable contingencies.

[97] Regarding **contingencies** and the approach to a claim for loss of earning capacity, Counsel for the Plaintiff correctly referred the Court in their heads of argument to the Supreme Court of Appeal decision **RAF v Kerridge 2019 (2) SA 233 (SCA) at para 44**, where it was remarked as follows:

> *"Some general rules have been established in regard to contingency deductions, one being the age of the claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill-health, death and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This Court, in Quedes, relying on Koch's Quantum Year Book 2004, found that the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This of course, depends on the specific circumstances of each case but it is a convenient starting point."*

[98] Contingencies of 2.5% uninjured past loss and 7.5% uninjured future loss and 10% injured future loss respectively have become accepted as normal contingencies. However, each case is unique and should be determined on its own circumstances. In determining what percentage of contingency deductions should be applied, the guideline of the sliding scale of a half percent per year to retirement age, i.e. 25% a child, 20% for a youth and 10% in regards to a middle-aged person may be appropriate. Deductions used in practice range from 0% - 60%; with 10% - 20% being the most common; whilst recognition have been given to the principle that a short period of exposure to the risk of adversity justifies a lower deduction than

would be appropriate to a longer period. At the time of the accident the Plaintiff was 51 years old and is currently 57 years old. I agree with the contingency deduction to the Plaintiff's claim for the total loss of income is appropriate but that it should be applied to the past and future salary earnings of the Plaintiff only and net profits generated by Trotex should be excluded from the calculation.

Loss of Earnings and/or Earning Capacity

[99] Looking at the loss of future earnings and the age of retirement of the Plaintiff it is clear that there are different opinions from the experts. The loss of future earnings is assessed on the supposition that the Plaintiff ran the business Trotex until his accident 2019. After the accident there was a gradual decline in the business. According to the clinical and neuropsychologist the Plaintiff would be able to manage his award from RAF without the assistance of a *curator bonis*, because of his preserved intellectual ability, his insight into his deficits and his strong drive to provide for his family she did not want to impose restrictions on him. The neuropsychologist explained that the Plaintiff can take his time slowly when making financial decisions. Further that the Plaintiff in his injured state is committed to his family and determined to provide for them.

[100] Dr Senske is of the opinion that the accident and accompanying injuries had no detrimental effect on the Plaintiff's life expectancy.

[101] Dr Reid on the other hand reported that the Plaintiff is a chronic smoker with obstructive airway disease. Furthermore, that the life expectancy of Plaintiff could be restricted to 3 – 5% below norm given the sorry state of his lungs and his ongoing smoking habit. After considering the findings of the experts I am of the opinion that as the Plaintiff was not the registered owner of Trotex but merely a registered employee that after 2019 when the business closed down he would only have earned a basic monthly salary till November 2019. Therefore, his loss of past loss of earnings should be calculated from date of accident to November 2019. With regard to his future loss of earnings it is clear from the evidence that from November 2019 to 2020 the Plaintiff started a new business Blue Eagle, accordingly his monthly

income should be calculated using the aggregate of the business. I agree with the Defendant that loss of earnings should be allowed until the retirement age of 65.

[102] After due consideration of evidence available to this court, I am satisfied that there was a loss of earning and/or earning capacity. I am further satisfied with the age of retirement and the contingency deductions as set out in the actuarial calculations in the report dated 14 August 2024.

Past medical and hospital expenses

[103] It is not in dispute that the Plaintiff was hospitalised. There are however no supporting vouchers submitted into record to quantify the medical costs that were incurred by the Plaintiff. In order for the Plaintiff to succeed in his claim for loss of past medical and hospital expenses, the Plaintiff has to prove their claim with documentary evidence. The testimony of the witnesses is not sufficient to discharge the onus that the Defendant is liable to pay for the past medical or hospital expenses. On this basis the claim for past medical and hospital expenses against the Defendant should fail.

Conclusion

[104] After due consideration of the evidence available to this Court I am satisfied that on a balance of probabilities the Plaintiff had suffered a brain injury and polytrauma injuries which resulted in a loss of earnings. I am satisfied with the actuary's report dated 14 August 2024. The report was a recalculation of the potential loss of earnings suffered by the Plaintiff based purely on the Plaintiff's pre-accident earnings as per salary slips (pay slips) for months of March 2015 to September 2017, with inflationary increases allowed until retirement age 65. Additionally, it also reflected a recalculation of the Plaintiff's injured earnings based on his monthly income received from the business, Blue Eagle, using the aggregate of the Plaintiff's monthly income as per Absa Bank statements for the period 1 June 2021 to 23 February 2022, coupled with inflationary increases until retirement age of 65 years.

[105] I further find the contingencies as set out in the actuarial report dated 14 August 2024, of 2,5% and 7,5% applied on the past and future earnings respectively as reasonable and sufficient.

Order

[106] Consequently, I make the following order:

(a) The defendant is liable for 80% (percent) of Plaintiff's proven or agreed damages

(b) The Defendant shall pay the Plaintiff an amount of R2 437 806 loss of earnings for damages sustained by Plaintiff during the motor collision which occurred in 3 October 2017.

(c) The Defendant shall pay the Plaintiff's costs of suit on an attorney and client scale, including costs of counsel taxed on scale "C" as directed in terms of Rule 67A of the Uniform Rules of Court, costs to include the qualifying expenses of all the expert witnesses in respect of whom the Plaintiff has given notice of the provisions of Rule 36(9)(a) & (b) of the Rules of Court.

(d) The defendant shall pay the capital amount referred in clause (b) above within 14 calendar days into the attorney's trust account.

(e) Payment of the taxed or agreed costs reflected above shall likewise be effected within 14 days of taxation / settlement and shall likewise be effected by way of electronic transfer into the Plaintiff's attorney's trust account.

(f) In the event that costs are not agreed upon the Plaintiff shall serve the Notice of Taxation on the defendant's attorney of record.

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MTHIMUNYE, AJ

JUDGE OF HIGH COURT

Counsel for the Applicants:	Adv Eugene Benade
Counsel for the Respondent:	Ms Claireese Thomas (State Attorney)
Attorneys for the Applicants:	Kirstie Haslam (DSC Attorneys)
Attorneys for the Respondent:	Ms Claireese Thomas
Argument took place on:	23 May 2024