

SOUTH AFRICA / JUDGMENT

T.J.K v Minister of Police (CIV APP FB 11/2022) [2023] ZANWHC 33 (6 March 2023) [2023] ZANWHC 33

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Reddy, Mongale

CASE / FILE NUMBER

CIV APP FB 11/2022

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FLYNOTES: LOSS OF INCOME – PROOF ACTUARIAL – Loss of income – Proof – Farmer unlawfully arrested, assaulted and detained by police – Injuries compromising ability to handle physical tasks of farmwork – Plaintiff not testifying – Lack of available information relating to his exact pre-morbid and post morbid expenses – Having knock-on effect because of symbiotic relationship between industrial psychologist and actuary – Court assessing loss of income at R400,000.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CIV APP FB 11/2022

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

T [...] J [...] K [...]

APPELLANT

AND

MINISTER OF POLICE

RESPONDENT

CORAM: HENDRICKS JP, REDDY AJ MONGALE AJ

DATE OF HEARING : 28 OCTOBER 2022

DATE OF JUDGMENT : 06 MARCH 2023

APPEAL JUDGMENT

REDDY AJ

Introduction

[1] The appellant, Mr T [...] J [...] K [...] is a farmer, who was 47 years of age at the time of arrest. The appellant was assaulted; unlawfully arrested and detained for a period of seven (7) days from 15 September 2015 to 22 September 2015. The appellant (plaintiff) instituted an action against the respondent (defendant),

the Minister of Police. The merits were conceded by the respondent. It therefore left the question of quantum for the consideration by the court a quo.

[2] The appellant was the sole witness who testified in respect of quantum. The respondent did not present any oral evidence. A number of expert reports were included under the cover of joint expert minutes. The relevance hereof will be elucidated hereunder.

[3] After due consideration of the evidence, the court a quo made the following orders:

(i) An amount of R250 000.00 was to be fair and reasonable for general damages as a result of the unlawful arrest and damages suffered;

(ii) An amount of R2 245 168.00 was to be fair and reasonable amount for the future medical expenses;

(iii) It was found that the plaintiff had not proven this claim for future loss of income or earning capacity.

[4] The appellant with leave of the court a quo appeals against orders (i) and (iii). The appeal is unopposed.

Background

facts

- [5] On the morning of 15 September 2015, at about 09h00, the appellant was about to have breakfast as was the practice at the farm. In the distance he noticed the movement of motor vehicles. Eventually, a motor vehicle with three (3) male occupants approached. One of the males alighted and issued an order that any dogs present should be controlled. As there were no dogs present, the appellant and those in his company remained silent. The male who issued the instruction made
- his way to where the appellant and those in his company were seated. He enquired who J [...] was. The appellant stood up and confirmed that he was J [...]. A discussion took place regarding the keys for a gate at the entrance to the farm. The appellant indicated that the entrance was used by Eskom and that the appellant did not possess those keys.
- [6] The appellant, upon providing this answer, was assaulted with an open hand. The appellant attempted to flee into the house but was halted when his belt was grabbed. The appellant was dragged outside the house. The other two males had by this time already alighted from the motor vehicle. An unprovoked assault began on the appellant by all three (3) persons using clenched hands and booted feet. The assault continued unabated, until the appellant fell. His attackers withdrew and joined those who originally were to have breakfast with the appellant.
- [7] After falling, the appellant gained some strength. He immediately stood up and fled by jumping over a fence. Once over the fence he called out to his attackers to follow him, to point out the gate he used to gain entry to the farm. Two of the males followed the appellant on foot, whilst the third came driving the bakkie in which they arrived. Once the appellant pointed out the entrance gate to the three males, he was instructed to get into the back of the bakkie. They drove back to the farmhouse.
- [8] Upon arrival at the farmhouse, a number of other motor vehicles had arrived at the farmhouse. Before alighting from the bakkie, the appellant's hands were placed behind his back. Whilst the appellant's hands were held behind his back, a fourth male joined the initial three males and a second assault was perpetrated on the appellant. This assault caused the appellant bleeding from the nose and face. At some point, during the assault the appellant was also hit with a piece of wood (stick) on the head. One of the male person's holding the appellant's hands at the back, released it, whilst remarking that the appellant did not want to fall down. The butt of a firearm was then used to hit the appellant on the neck, causing him to fall down. The appellant was rendered semi-conscious. Following this assault, the appellant remained laying where he had fallen, save for a point where some youngsters

dragged him to some shade. The appellant remained laying on the ground from approximately 09h00 until 15h00. As the appellant lay there, a female police officer commented that his testicles needed to be squeezed to wake the appellant. The female police officer indeed executed this indecent act, which immediately caused the appellant to stand up.

- [9] Given the condition of the appellant, he was taken by the police officers to Ganyesa hospital where intravenous treatment was administered. The treating doctor provided medication and cautioned that the appellant should be admitted. The police officers refused. The appellant was arrested on allegations of “stock theft” and detained at the Vryburg Police holding cells.
- [10] At the Vryburg cells, there were already two detainees present, arrested on an allegation of murder. These detainees searched the appellant. It is unclear whether they removed R100.00 from the appellant or whether it was handed over to them. The appellant had to sleep on the floor without any mattress, pillow or blanket. The latter was the position from his arrest and initial detention until his first appearance in court. The medication prescribed by the examining doctor at Ganyesa was never provided to the appellant by the police officers. In terms of nutrition, the food provided during his detention was commandeered by the two detainees the appellant found in the Vryburg Police cells. In any event, he could not eat because of painful teeth and his mouth being swollen. There was only one latrine positioned in the open, which excluded privacy when used.
- [11] The appellant’s physical condition was noted and recorded by the Magistrate at his first appearance in court. The detailed injuries of the appellant were further well documented through various expert reports during the subsistence of the appellant’s case. The appellant was subsequently released on bail of R1000.00 on 22 September 2015. The criminal case against the appellant was eventually withdrawn.

Grounds of Appeal

- [12] The grounds of appeal are formulated as follows:

“Unlawful arrest, detention and assault

- (i) The court a quo granted a globular amount of R250 000.00 in respect of the appellant’s claim for assault, unlawful arrest and detention.

(ii) We respectfully submit that the Court below should have granted an amount of R300, 000.00 in respect of the appellant’s

claim for unlawful arrest and detention and R300,000.00 in respect of the appellant’s claim based on assault.

(iii) The appellant made out a case in support of each separate claim and the Court below should have awarded the plaintiff compensation for both claims separately, alternatively, it should have given an appropriate globular amount in respect of both claims.

Loss of income or earning potential

(iv) The court below was, with respect, wrong in the finding that the appellant had failed to prove his claim for loss of income or income earning capacity instead of finding that the plaintiff had proved his claim for loss of income or income earning capacity in the amount of R1 329 212.00.”

The approach by a Court of Appeal

[13] It is trite that a court of appeal will not interfere with a trial court’s finding unless a material misdirection has occurred. The assessment of quantum remains a matter for the discretion of the trial court and a court of appeal will not interfere with the discretion unless there is a striking disparity between the award ordered by the trial court and what the appeal court would award. (See *Protea Assurance Co Ltd v Lamb*, Potgieter 1971 (1) SA 530 (A) 534H-535 (A); *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para [23])

[14] It is a principle of our law that a trial court’s findings of fact are presumed to be correct in the absence of a clear and obvious error. This presumption is rebutted, by an appellant convincing a higher court that the trial court’s factual findings were plainly wrong. A court of appeal should be mindful that the court a quo would have been steeped in the atmosphere of the trial and with this advantage been able to make the necessary credibility findings. (*R v Dhlumayo & Another* 1948 (2) SA 677(A) at 705 -706, *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) paragraph [5]; *Roux v Hattingh* 2012 (6) 428 (SCA) paragraph [12]).

[15] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA), Nugent JA stated as follows in respect of the discretion of a court on quantum:

“It is settled law that the trial Judge has a large discretion to award what he in the circumstances considers to be fair and adequate compensation for the injured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a “substantial variation” or as it is sometimes called a “striking

disparity” between what the trial Court awards and what this Court ought to have awarded.” (My underlining)

The first ground of appeal

[16] I propose to deal with the first order of the court a quo in respect of the quantum awarded to the appellant in respect of general damages premised on the assault, unlawful arrest and detention of the appellant. A general exposition of the approach to the assessment of damages for the unlawful arrest and detention, inclusive of the assault would be a logical point of commencing.

[17] The unrebutted evidence of the appellant is that he was subjected to a harrowing ordeal. It is incontestable that his freedom and security of person was impugned arbitrarily without just cause. This was in clear violation of the constitutional imperative of freedom and security of

the person entrenched in section 12 of the Constitution. In accentuating section 12, I am mindful of the synergy of other constitutional injunctions which collectively place a high premium on a precious right such as freedom and bodily integrity. (See *May v Union Government* 1954 (3) SA 120 at 130 C-F; *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at paragraph 17, *Rudolph and Others v Minister of Safety and Security and Another* 2009 (2) SACR 271 (SCA)).

- [18] In the determination of an award for damages for unlawful arrest and detention, a court is seized with a discretion to find what is fair and reasonable to all parties, taking due cognizance of public policy. In *Hulley v Cox* 1923 AD 234 at 246, the Appellate Division stated that:

“...we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment.”

In *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287 E-F Holmes J (as he then was) held that:

“[T]he court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense.”

- [19] Although there is a modern tendency to increase awards for general damages, the assessment of the quantum of general damages primarily remains within the discretion of the trial court. (See remarks by Brand JA in *De Jongh v Du Pisanie* 2004; *Corbett & Honey: The Quantum of Damages in Bodily and Fatal Injury Cases* 5 J2-103 para [60] – [66]).
- [20] In the attainment of an award that is fair and reasonable each case must be considered with due regard to its own particularities and exigencies. In *Visser & Potgieter, Law of Damages, Third Edition*, on pages 545 to 548, the following factors are set out which provides guidance to the assessment of damages:

“In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bona. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or ‘malice’ on the part of the defendant; the harsh conduct of the defendants; the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function.”

- [21] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93d-f (paragraph [26]), Bosielo AJA (as he then was) set out the following approach to the assessment of damages:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all facts of the particular case and to determine the quantum of damages on such facts.” (See also *Minister of Safety and Security v Seymour* 2006 (6) SA 325 (SCA) paragraph [17]; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) (2009) ZA SCA 39 paragraph [26 -29].”

- [22] In respect of the relevance of comparable awards our courts have consistently held that the assessment of damages with reference to past cases are fraught with difficulty. In *Seymour*, supra, the following was stated in respect of previous awards:

*“[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that. As pointed out by Potgieter JA in *Protea Assurance*, after citing earlier decisions of this Court: “The above quoted passages from decisions of this Court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”*

- [23] I now turn to the trilogy of facts that called for consideration by the court a quo, the assault, the unlawful arrest, and detention.

- [24] In *Thandani v Minister of Law and Order* 1991(1) SA 701 (ECD) at 707 Joubert J said the following about deprivation of liberty:

“...the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement”.

[25] In *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino* 2000 (4) SA 68 (WLD) at 86D, quoted in *Seymour supra*, the following was stated:

“Deprivation of one’s liberty is always a serious matter. The contention is reflected in the fact that our Constitution has entrenched the freedom and security of a person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

“(1) everyone has the right to freedom and security of person, which includes the right-

(a)Not to be deprived of freedom arbitrarily or without just cause

(b)Not to be detained without fair trial.”

[26] In *Olgar v The Minister of Safety and Security* 2008 JDR J582 (E) at para [16], the following was stated in respect of awards for wrongful arrest and detention:

"In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant."

[27] In *Minister of Police v Du Plessis* 2014

(1) SACR 217 (SCA) at paragraph [15] the following was stated:

“Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which have always even in the dark days of apartheid been judicially valued, and to ensure that excesses of the past would not recur. The right of liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values human dignity, the advancement of human rights and freedom. Put simply, we as society place a premium on the right of liberty.” (my underlining)

[28] Finally, in *Masisi v Minister of Safety and Security* 2011

(2) SACR 262 (GNP) the following is stated:

“[10] The purpose of an award for general damages in the context of a matter such as the present is to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress.

...

[18] The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly. In *Solomon v Visser and Another* 1972

(2) SA 327 (C) at 345A it was remarked that where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which result. To this I add that where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice.”

(My emphasis)

[29] The evidence of the appellant, illustrated an abuse by the servants of the respondents of the all-encompassing

powers they are enjoined with. This matter is a clear example of what happens when these powers are used with unlawful abandon, leading to a transgression by the respondents of its subservience to the Constitution. The South African Police Services are constitutionally mandated in terms of section 205 of the Constitution to prevent, combat, investigate crime, maintain public order, protect, secure the inhabitants of South Africa, their property, to uphold and enforce the law. (See *Carmichele v Minister of Safety and Security and Another, Centre for Applied Legal Studies Intervening* [2001] ZACC 22; 2002 (1) SACR 79 (CC). The disdainful conduct of the police officers as experienced by the appellant is a far cry from the lofty standards that has been aspired from the dawn of the interim constitutional order on 27 April 1994, until it was superseded by the final constitution on 4 February 1997.

These dates are significant as it was on these two dates that birth was given to our Bill of Rights. Our Bill of Rights embodies a catalogue of enshrined rights that may not be unjustifiably eroded.

[30] There is no underscoring the blatant and brazen treatment of the appellant at the hands of the police officers on what were clearly trumped up charges. The assault and subsequent detention of the appellant without any justification is aggravating. Notably there has been no explanation or justification for the cruel and inhumane treatment of the appellant.

[31] The Court a quo at paragraph [13] and [24] states as follows:

“[13] In Rahim v Minister of Home Affairs [2015] 3 All SA 425 (SCA) the Supreme Court of Appeal held the following factors to be relevant to the determination of quantum in a claim for unlawful arrest to be the following factors:

“To determine quantum of damages in cases involving deprivation of liberty the amount of satisfaction is calculated by the Court ex a equo et bono. The relevant factors to be considered are the circumstances under which the deprivation of liberty took place, the conduct of the defendants: and the nature and duration of the deprivation.

[24] Having regard to the duration of the detention, the nature and permanence of the injuries suffered (with specific regard to PTSD) and the circumstances of the assault and the detention, I hold the view that an amount of R250 000.00 (Two Hundred and Fifty Thousand Rand) would be fair and reasonable amount of compensation for general damages for the plaintiff for the unlawful arrest, assault and detention.”

[32] A reading of the judgment of the court a quo indicates that various principles extracted from precedent and authorities were not given due consideration. The high store placed

on inter alia the right to freedom, bodily integrity and the detention of the appellant in conditions that are consistent with human dignity were not afforded due weight. (See *Minister of Justice v Hofmeyer* 1993 (3) 131 (A) at 145J-146 A). Cumulatively considered, the court a quo did not apply the trite legal principles to the factual matrix placed before it despite quoting from the relevant authorities.

[33] The globular award in respect of the assault, unlawful arrest and detention exhibits a striking disparity between what the trial court awarded and what ought to have been awarded. It warrants interference by this Court. This Court awards a globular amount in respect of the assault, unlawful arrest and detention in the amount of R300 000.00

The claim of the loss of income or earning capacity.

[34] I now turn to address the second ground of appeal, which brings into sharp focus the claim of loss of income or earning capacity. The court a quo found that the appellant had failed to prove this head of damages. In dismissing this head of damages, the court a quo reasoned as follows:

“[46] The plaintiff claims to have experienced a decrease in profitability post-morbidly in that he could no longer perform the inherent demands of his work as a farmer, including physical labour, but also managing and supervising the activities on the farm.

[47] The plaintiff’s evidence did not include evidence about any loss of income and earning capacity, and as such this claim, has not been proved.” (my underlining)

[35] Whilst it is factually correct, that the appellant’s own evidence did not pertinently address the question of loss of income or earning capacity, a number of expert reports appositely dealt with this head of damage. To circumvent any ambiguity, I first address the admissibility of the respective expert reports before dealing with the factual accuracy of the contents of each report, the opinions and conclusions of the relevant experts.

[36] There certainly appeared to be general discord regarding the various expert reports that were tendered into the record. I remain fully alive to the impugned orders that are appositely before this court. It is borne out from the record that one of the traditional methods of introducing expert evidence was not used. Whilst the mechanics of Rule 38(2) of the Uniform Rules of Court were not utilised for purposes of admissibility, nothing turns on this elective. It is, however, pertinent to note that at page 3 lines 1-5 of the transcribed

record, the following is recorded in respect of a submission by Adv. Rossouw SC for the appellant (plaintiff):

“Mr Rossouw: Yes, Then Your Ladyship, I wish to hand up the latest updated actual calculation of Mr Sauer [?] and then there is bundle of photographs, depicting the situation of the holding cell. We hand this up by agreement.” (my underlining)

[38] Importantly the following is stated by Adv. Majoko for the respondent on the same page of the record at line 10:

“I see that there is an Industrial Psychologists report that we are going to rely on because we do not have on our side. I was not even furnished with that report , so I thought I would also make it clear to the Court that I do not have that report and Advocate Rossouw has also told me this, joint minutes for the neurologist[intervenes]”

Further at line 17 Adv. Majoko continues:

“That I do not have, so I thought maybe I must also make it so that the Court should know that. Other than that M’Lady. I agree with him with that he has said.”(My underlining)

[39] On this precursor Adv. Rossouw SC makes the following submission at page 6:

“The evidence will only be in respect of the detention, the circumstances of the detention, what he went through in the seven-day period and that is it.”

[40] At the behest of the court a quo and prudently so, the matter stood down for Adv. Majoko to peruse the industrial psychologist’s report as well as the joint minute of the neurologists, prior to any viva voce evidence being led.

[41] The admissibility of the industrial psychologist’s report was not addressed once the proceedings continued. It was only in closing address that Adv. Majoko stated as follows at page 44 line 16:

“When it comes to the loss of future earnings M’Lady we abide by the plaintiff’s report.” (My underlining)

[42] Any ambiguity as to which report Adv. Majoko was referring to is unequivocally expounded upon at page 45 lines 7-10:

“Yes M’ Lady and my last submission would be on future loss where we do not have any reports and we shall abide by the reports of the industrial psychologist.”

[43] In a joint practice note electronically signed by Adv. Rossouw SC and Adv. Majoko filed on 20 May 2021, the following is encapsulated under the heading:

“Agreement”

“The parties agreed that for the purposes of the adjudication of the plaintiff’s claim, the following will constitute admissible hearsay evidence/admissible evidential material before the court. The contents of the joint experts. The contents of all reports of the plaintiff’s experts in respect of which no reports of the like experts have been delivered by the defendant. The parties are of the view that the aforesaid will substantially curtail

the proceedings.”(My underlining)

[44] Given the pre-trial concessions and admissions ex facie the record, the respondent explicitly consented to the tendering of the evidence, which the court a quo overlooked.

[45] The various expert reports were clearly admitted in terms of section 3(1) (a) of the Law of Evidence Amendment Act 45 of 1988. The admissibility of such expert reports is succinctly dealt with in *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA), where the SCA stated as follows:

“[64] This raises the question as to the effect of an agreement recorded by experts in a joint minute. The appellant’s counsel referred us to the judgment of Sutherland J in Thomas v BD Sarens (Pty) Ltd

[2012] ZAGPJHC 161. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement ‘unless it does so clearly and, at the very latest, at the outset of the trial’ (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13). Sutherland J’s exposition has been approved in several subsequent cases including in a decision of the full court of the Gauteng Division, Pretoria, in *Malema v The Road Accident Fund* [2017] ZAGPHC 275 para 92.

[65] In my view, we should in general endorse Sutherland J’s approach, subject to the qualifications which follow. A fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. Where the matters in question fall within the realm of the experts rather than lay witnesses, it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants’ respective experts. There would be no incentive for parties and experts to agree matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue. In the present case the litigants agreed, in their pre-trial minute of 14 March 2014, that the purpose of the meeting of the experts was to identify areas of common ground and to identify those issues which called

for resolution.

[66] Facts and opinions on which the litigants' experts agree are not quite the same as admissions by or agreements between the litigants themselves (whether directly or, more commonly, through their legal representatives) because a witness is not an agent of the litigant who engages him or her. Expert witnesses nevertheless stand on a different footing from other witnesses. A party cannot call an expert witness without furnishing a summary of the expert's opinions and reasons for the opinions. Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management that the experts should meet with a view to reaching sensible agreement on as much as possible so that the expert testimony can be confined to matters truly in dispute. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation

(ie fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue.

[67] It is unnecessary, in the present case, to decide whether a litigant needs to have good cause for repudiating an agreement reached by his or her expert. Certainly litigants should not be encouraged to repudiate agreements for 'tactical' reasons. Whatever may have been the attitude to litigation in former times, it is not in keeping with modern ideas to view it as a game. The object should be just adjudication, achieved as efficiently and inexpensively as reasonably possible. Private funds and stretched judicial resources should only be expended on genuine issues.

[68] There may be cases where the expert rather than the litigant wishes to depart from what he or she previously agreed. The same rules of fair play apply. The expert should notify the attorney through whom he or she was engaged and due warning should be given to the other side. In such a case there will often be a further procedural requirement, namely the furnishing of a supplementary report by the expert whose views have changed.

[69] The limits on repudiation, particularly its timing, are matters for the trial court. The important point for present purposes is that repudiation must occur clearly and timeously. The reason for insisting on timeous repudiation is obvious. If the repudiation only occurs during the course of the trial, it might lead to a postponement to allow facts which were previously uncontentious to be further investigated. It might be necessary for a party to recall witnesses, including his or her expert. Whether a trial court would allow this disruption would depend on the circumstances. The trial court would be entitled to insist on a substantive application from the repudiating litigant.

- [70] My colleague has referred to the passage from Thomas dealing with the right of a trial court to depart from an expert's opinion. In the present case, however, the important matters which Edwards and Van der Elst agreed were, in my view, factual, albeit facts which forensic accountants are more adept than others at uncovering and analysing. In Thomas the court said that facts agreed upon by the experts are binding unless a litigant timeously repudiates the agreement.
- [71] I would add that even where the agreed matter is one of opinion, fair play will, as I have said, generally require that a possible rejection of the agreed opinion be timeously raised. This is for the reason that litigants will quite properly not spend their resources on establishing matters of expert opinion which are not in dispute. Indeed, they would rightly be upbraided for wasting court time by doing so. If a court is minded to reject the opinion on the available evidence, the litigants should be alerted to this so that they can consider adducing further evidence.
- [72] I agree with my colleague (para 20) that parties to legal proceedings cannot, by their agreement, compel the court to decide the case on incorrect legal basis. However, that principle is concerned with agreements or concessions as to the law, not facts and expert opinions. In the present case, the joint minute does not in my view record any agreements on matters of law.
- [73] My colleague has cited a number of local and foreign cases dealing with the assessment of contested expert testimony. I agree that in such cases a court must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning. Matters are quite different, in my respectful opinion, where experts in the same field reach agreement. In such a case, as I have said, a litigant cannot be expected to adduce evidence on the agreed matters. Unless the trial court itself were for any reason dissatisfied with the agreement and alerted the parties to the need to adduce evidence on the agreed material, the trial court would, I think, be bound, and certainly entitled, to accept the matters agreed by the experts. In the present case the trial court did not require the parties to lead further evidence on the matters on which the experts agreed. The trial court was perfectly entitled to act as it did. In *Coopers (South Africa)(Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976
- (3) SA 353 (A) Wessels JA foreshadowed that an expert's bald opinion, if uncontroverted, might carry weight (371G). All the more so, where experts for the opposing parties share the same opinion."
- [46] The court a quo therefore erred when it found that there was no evidence before it dealing explicitly with the loss of income or earning capacity. The evidence was before the court a quo and called for adjudication. This court is accordingly at large to consider the relevant expert evidence on this head of damage. In so doing, I am mindful of the guidance provided in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) where the following was stated:

“[36] ... 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. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority[1997] UKHL 46:[1998] AC 232(HL(E). With the relevant dicta in the speech of Lord Browne- Wilkinson we respectfully agree...”

- [37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has a logical basis, in other words that the expert has considered the comparative risks and benefits and has reached a ‘defensible conclusion’ (at 241 G-242 B).
- [40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess the likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an occurrence as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty percent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingly v The Chief Constable, Strathclyde Police 200 SC(HL)77 and the warning given at 89D-E that ‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the experts himself will apply to the question whether a particular thesis has been proved or disproved-instead of assessing as a Judge must do, where the balance of probabilities lies on a review of the whole evidence.”

Joint Minutes Orthopaedic Surgeons (Dr Oelofse/ Dr Deacon & Dr Ramokgopa)

- [47] The appellant was assessed by the appellant’s orthopaedic surgeons on 28 June 2017 and 7 April 2021, respectively. Dr Ramokgopa, the respondent’s orthopaedic surgeon assessed the appellant on 20 November 2020. The experts agreed in their joint minutes that the appellant sustained a right shoulder injury, back injury and head injury. The orthopaedic surgeons for the appellant included a right knee injury with a medical meniscus injury. In respect of the orthopaedic injuries, the joint minutes confirm the right shoulder injury with residual pain and a brachial plexus injury with residual weakness. There was consensus among the experts that the injuries sustained by the appellant had an impact on his amenities of life and will continue to do so in the future. There seems to be a manuscript endorsement on the joint minutes by the respondent’s expert emphasising the need for a neurologist assessment to confirm the brisk reflexes and the right lower limb weakness sustained upper motor neuron lesion. In respect of the appellant’s productivity and retirement the following was agreed as regards the injuries sustained:
- (i) Had an impact on the appellant’s productivity and working abilities.

- (ii) The appellant is now an unfair competitor in the open market.
- (iii) The neurological deficit is permanent.

Joint Minutes of Physiotherapy: Miss PJ Jackson and Miss S Jackson

[48] Miss Jackson, the appellant's physiotherapist examined the appellant on 22 January 2018 and Miss Mkansi for the respondent examined him on 18 November 2020. The appellant presented with muscle weakness affecting both hips and lower limb muscles. The appellant's expert further found weakness in the remainder of the muscles of the appellant's right arm, which the respondent's expert did not explore. There was an incomplete brachial plexus lesion on the right. There were sensory changes affecting the right side of the appellant's body. Muscle wasting was noted around the shoulder. There were indications of neural tension. The appellant's balance was compromised. He further displayed significant functional movement difficulties including activities of daily living (ADL). There were postural abnormalities with quite marked asymmetry. There was chronic pain reported on various parts of his body including his right shoulder, right leg, neck, thoracic and lumbar spines. The appellant's expert moreover noted the presence of headaches and right lower rib pain. The experts could not agree on the presence of pain and dysfunction in the right lower ribs which was not ventilated to the respondent's expert. The appellant had an increased risk of falls. In terms of the nature and frequency of intervention required, the experts resolved that the appellant experiences chronic pain in a variety of places which will require physiotherapy management, additional treatment will be needed to manage his posture, balance, ranges of motion and functional movement.

Combined Urological Report: Dr Francois Du P. Boezaart and Dr K.K. Injane

[49] The respective experts assessed the appellant almost three (3) years apart. The experts agreed that the appellant's complaints were found to be subjective and impossible to prove. The slight discrepancy in the size of his testicles was found could either be normal or the sequelae of a previous injury. The possibility could not be excluded that the alleged chronic testicular pains were as a result of previous trauma but it also commonly occurs due to other causes and often for no apparent reason. The epidermal cyst was very unlikely a sequelae of the allocated trauma. The possibility that the appellant's pains could be attributed to trauma was 50%.

Occupational Therapists: Joenita Fredrichs / Rita van Biljon (Date of Evaluation 12 April 2018, 2 years 6 months since the injury)

[50] The relevant background information provided by the appellant to the occupational therapists can be succinctly summarised as follows. On completion of what is now identified as Grade 10, the appellant left school. Post-secondary education nor other formal training at any tertiary institution was not pursued. The appellant was self-employed as a farmer since

2011. He farmed on a six hundred and eighty seven

- (687) hectare farm, ably supported by two assistants. The farming enterprise comprised of two primary farming ventures: livestock and the selling of wood. The livestock consisted 67 cattle, 105 goats and 95 sheep. In respect of the livestock the appellant intimated that he was actively involved in the herding of the various livestock either on foot or on horseback. During the mornings the various groups of livestock would be inspected to identify ailing animals which then would be treated by the appellant.
- [51] In respect of the wood selling, when the appellant was not involved with the livestock he would gather dead trees on the farm with the aid of a tractor. The pieces of wood at times would exceed a mass of 130kg and would require the strength of two persons to be moved. Once the wood had been moved, it had to be sawed and chopped into smaller pieces which had to be stacked. Apart from the farming component, the appellant was also seized with the general maintenance, the core of which required physical work in the form of building, the maintenance of kraal walls and fencing. The critical physical demands included standing, walking, elevated work, forward bending, crouching, kneeling and weight handling of mass not in excess of 130kg. A combination of physical demands balanced with essential skills and abilities were vital to the various capacities that the appellant occupied. The appellant's physical work demand level was categorised as medium work with aspects of heavy to very heavy work.
- [52] The injuries sustained impacted negatively on his farming enterprise. The wood component of the farm's operation had to be terminated due to the physical difficulties experienced. Livestock had to be sold. At the time of the assessment, the livestock numbered as follows: 35 cattle, 40 sheep and 28 goats. The two assistants were reduced to one. The appellant himself was effected physically as he was unable to ride a horse or be as hands on in the care of the livestock. The farm assistant is now required to play a more prominent role and execute duties that he used to undertake.
- [53] The physical examination in respect of the appellant found that he presented an asymmetrical posture, with his neck flexed to the left. His movement characteristics presented decreased weight bearing on the right leg. The movement of the right hand was not as smooth and well-controlled as the movements of the left hand. Left leg movements were smooth and well controlled. He could hardly lift his right heel off the floor. The movements of the right leg were not as smooth and well controlled as the left leg movements. In short, the appellant exhibited a number of physical limitations. These included:
- (i) Decreased muscle strength in the right upper arm.
 - (ii) Mildly restricted range motion in the right ankle.
 - (iii) Decreased weight bearing on the right leg.
 - (iv) The grip strength of the right hand is below the norm for his age.

- (v) Coordination difficulties with the right hand.
- (vi) Physical disability to occasionally sit, walk and stand.
- (vii) The inability to rarely execute work tasks, forward bend stand and climb stairs.
- (viii) The inability to crouch and kneel.
- (ix) Weight handling beyond 2kg was not recommended.

[54] Resultantly, the appellant did not meet the open market standards in respect of speed and accuracy, as such he was not suited to the open labour market. Sight should however not be lost of the fact that he was not employed in the open market but was self-employed as a farmer.

Clinical Psychologist: Dr C Hearne (Report inclusive of Addendum)

[55] The clinical interview coupled with the assessment process of the appellant ventilated the following:

- (i) He presents with symptoms of depression, anxiety and Post- Traumatic Stress Disorder, which can be directly attributed to the incident and sequelae thereof.
- (ii) This disturbance caused the appellant clinically to be significantly distressed, impaired socially, psycho-social and effected occupational functioning.
- (iii) From a physical stance, it was apparent that the injuries sustained in the incident and sequelae thereof continue to have a restrictive impact on his functioning compared to previous levels of functioning.
- (iv) These physical injuries have obliged lifestyle changes as he experiences physical impairment, enduring pain and discomfort.
- (v) The injuries are associated with fear pertaining to work and financial security accompanied by a general assault on priorities of daily life. This may impact on the appellant's levels of motivation across all activities of daily life.
- (vi) Limited employment opportunities may be experienced compared to pre-incident scenario due to his physical injuries.
- (vii) From a cognitive perspective, the appellant has become socially withdrawn when compared to his premorbid status. Overall, his psychological challenges make him a vulnerable individual.
- (viii) The incident has resulted in various losses, inter alia loss of emotional stability, loss of cognitive efficiency, loss of employability, loss of meaningful interaction, loss of amenities, loss of independence and enjoyment. The lapse in time since the incident and the second assessment may have resulted in the emotional, psychological and psycho-social after effects are likely to have become entrenched.

Dr JJ Du Plessis (Neurologist date of examination: 26 June 2018)

- [56] On the conclusion of the neurological examination of the appellant by Dr du Plessis, the appellant's expert, it was found that the appellant probably had pre-existing problems with his lumbar spine. It was unlikely that L5 spondylolysis has been caused by the assault. A fifty percent apportionment should be applied to his lumbar injury. It was found that the appellant had sustained a mild concussion. A moderate soft-tissue injury to the appellant's neck was noted. A right brachial plexus injury which was categorized as mild, which should not result in significant functional impairment. In respect of the lumbar injury, this was superimposed on L5 spondylolysis and has probably caused the L5-S1 spondylolysis and nerve root pain in the right leg. No bodily scarring occurred, however moderate impairment of spinal movement has occurred.
- [57] A recovery period at that time was approximated at 6 weeks. It was noted that the appellant displayed signs of inappropriate illness behaviour or symptom magnification but some of the symptoms are real. Moderate pain and discomfort was experienced for 6 weeks post the incident. He still had severe pain in his neck and lumbar spine. The appellant suffered loss of amenities of life. The appellant would require future medical treatment for headaches and neck pain. The appellant had a 20% chance of undergoing surgery to his cervical spine. In respect of loss of earnings, it was found that no loss has occurred as a result of the neurocognitive sequelae of a brain injury. His loss of earning capacity as a farmer due to his neck and lumbar injuries is approximately 12% disregarding his pre-existing status.

Dr Ncumisa Lihle Jilata (Specialist Neurosurgeon: Date of interview 19 November 2020)

- [58] The specialist neurosurgeon for the appellant found that he sustained a mild traumatic brain injury in the form of a grade 2 concussion. He also sustained some blunt trauma to the mid thoracic spine and will need continued pain medication to treat it. The appellant suffered acute pain for at least two weeks after the incident. The appellant's

ability to enjoy life had been affected by chronic headaches and chronic back pain he suffered. In respect of loss of earning capacity; this was deferred to the expertise of an occupational therapist and industrial psychologist to do an official assessment

and give an expert opinion.

Occupational Therapist: Petronella Radzuma date of assessment: 18 November 2020

- [59] The occupational therapist for the appellant assessed the functional status of the appellant including the functional effect of any injuries he sustained in the incident through:

- (i) A series of standardized and non-standardized tests and work samples.
- (ii) A detailed interview.
- (iii) Available medical documentation and medical reports.

[60] The level of his pre-incident job was medium work. His duties included farming of cattle, sheep, vegetables, peanuts, soya, maize, cutting of wood, the operating of a tractor, purchasing of feeds for the livestock and the supervision of two employees. The physical demands included frequent standing, stooping, walking, mounting of horses and the occasional squatting, elevated work, which included the lifting and carrying of medium weight objects.

Industrial Psychologist: Mr Ben Moodie

[61] The industrial psychologist of the appellant indicates that the appellant was born on 7 February 1968 and is one of a family of five children. At the time of the interview he resided with his three children, his wife having divorced him after the incident. His highest level of education was reported to be Grade 10. On the completion of his secondary education, no further training or qualification was pursued. His career history commenced in 1989 and culminated in his resignation at the Two Rivers Platinum Mine in

2009. Although the period of employment was not continuous as there appears to be break in the history of employment between 1995 -1998, the appellant consistently when employed was a contributing member to a Provident Fund.

[62] In 2010, the appellant commenced farming on Rekopile Farm, a farmland of 687 hectares provided by the Communal Property Association. The focus of the farm was the breeding of livestock and the production of tomatoes, corn and beans. Wood was also being sold to the community. The growing of nuts was added to increase income. As reported to other experts the appellant was hands on, in the farming operations.

[63] The appellant indicated that pre-morbidity he enjoyed good general health without having suffered illnesses nor injuries. As such he was never hospitalized. The history of the incident, the treatment received and the injuries sustained does not dictate repetition. At the time of the evaluation, he reported a number of physical deficiencies. A number of psychological and cognitive concerns of the appellant were noted in previous expert reports. Of importance and relevance was the concerns raised by the appellant in respect of his employment. The following extract from Mr Moodie's report provides an overview of the appellant's earning capacity.

PSYCHO-LEGAL REPORT Ben Moodie INDUSTRIAL PSYCHOLOGISTS PTY LTD

Profit as estimated as per the claimant:

Year Income

p. annum Expenses

p. annum Profit

p. annum 2010 Selling Livestock: R100000,00 Selling Vegetables: R70000,00 Selling Wood: R10000.00 Total: R180000.00 Staff salaries: R48000,00 Electricity: R30000.00 Maintenance on bakkie: R3000.00 Petrol: R30000,00 Hire of equipment: R15000,00 Total: R126000,00 R54000.00 2014 (pre) Selling Livestock: R150000.00 Selling Vegetables: R90000,00 Selling Wood: R15000,00 Total: R255000.00 Staff salaries: R48000.00 Electricity: R36000.00 Maintenance on bakkie: R3000.00 Petrol: R36000.00 Hire of equipment: R15000,00 Total: R138000,00 R1 17000.00 2015 (post) Selling Livestock: R200000,00 Selling Vegetables: R50000.00 Selling Wood: R10000,00 Total: R260000.00 Staff salaries: R102000.00 Electricity: R36000.00 Maintenance on bakkie: R3000.00 Petrol: R60000.00 Hire of equipment: R35000.00 Irrigation pipes: R7000.00 Total: R189000.00 R71000,00 2019 Selling Livestock: R18000.00 Selling Vegetables: R70000.00 Selling Wood: R1 5000.00 Total: R265000,00 Staff salaries: R102000.00 Electricity: R40000.00 Maintenance on bakkie: R3000.00 Petrol: R70000.00 Hire of equipment: R15000.00 Total: R230000.00 R35000.00

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PSYCHO-LEGAL REPORT Ben Moodie INDUSTRIAL PSYCHOLOGISTS PTY LTD

The claimant provided writer with tax invoices pertaining to the cattle he sold at auctions post-incident. This can be summarized as follows:

Auctioneers Cattle sold Amount received after deductions Noord Kaap Lewendehawe Vryburg Koöperasie Bpk Calf x 1 R5935.80 Cow x1 Calf x 2 R 21082.51 Cow x1 Calf x1 R7355.00 Calf x2 R11463.81 Calf x 3 R12213.10 Calfx3 R12485.80 Karoo-Orchse Vryburg (Edms) Bpk Calf x1 R7320.00 Calf x1 Cow x1 R15220.00 Calf x 1 R7360.00 Calf x 1 R17310.00 Calf x 1 R6580.00 Calf x 1 R 5460.00 Calf x 1 Cow x 1 R11560.00 Andre Kock and Seuen Bk Calf x 1 R 36620.00 Calf x1 R 7010.00 Calf x 1 R 3590.00

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Actuary: Johan Sauer

[64] The appellant's actuary compiled an actuarial report dated 7 July 2020. The figures in the actuarial report were calculated as at 1 July 2020. The primary source of information for the actuarial report was the report of the Industrial Psychologist, Mr Ben Moodie. The actuarial certificates are set out below.

Actuarial Certificates

Loss of Income

Mr T.J K [...]

Had the accident not happened Now

Now that the accident has happened

Difference: loss

573 037

28 652

243 826

12 191

329 211

16 461

544 385

1 340 468

134 047

231 635

271 370

81 411

312 750

1 069 098

52 636

1 206 421

189 959

1 016 462

Retire at age 65

Past earnings

Less contingency deductions (5% /5%)

Total loss of past earnings

Future earnings

Less contingency deductions (10%/30%)

1 329 212

Total loss future earnings

Total loss of earnings

Had the accident not happened Now

Now that the accident has happened

Difference: loss

573 037

28 652

243 826

12 191

329 211

16 461

544 385

1 689 725

168 973

231 635

338 398

101 520

312 750

1 351 327

67 453

1 520 753

236 879

1 283 874

Retire at age 70

1 596 624

The law on loss or earnings or earning capacity

[65] The law in respect of a claim for loss of income or earning capacity is trite. The appellant must be placed in the position he would have been in had the injuries not occurred. It is recognized that earning capacity may constitute an asset in a person's patrimonial estate. If the loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. [Prinsloo v Road Accident Fund 2009 (5) SA 406(SECLD)]

at 409C-410A). It is therefore incumbent on the appellant to establish on a balance of probabilities that as a result of the incident he has lost future earning capacity. (Rudman v RAF 2003 (SA) 234 (SCA). Put differently, if one were to regard the loss as one of future earnings one may ask the question “what income will the plaintiff actually lose as a result of the respondent’s wrongful act?” (Gough “The Lost years” The claim for loss of earnings (1983)).

- [66] The future loss represents the difference between the pre-morbid and post morbid figures after the application of the appropriate contingencies. The court is enjoined with a wide discretion which needs to be exercised judicially when it determines the fair and reasonable compensation for loss of income or earning capacity. In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA the following was stated:

“In our law under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss, if such loss

diminishes the estate”.

- [67] In *Southern Insurance Association v Bailey* NO 1984 (1) 113G at 114A, Nicholas JA stated as follows:

*“Any enquiry into damages for the loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs, or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. 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. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. 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. See *Hersman v Shapiro & Co* 1926 TPD 367 at 379 per Stratford J). (See also *Road Accident Fund v Guedes* 2006(5) SA 583 (SCA) at 586)”*

- [68] In the determination of the appellant’s loss of earning capacity two established methodologies are followed. The first is establishing a reasonable and fair amount based on the proven facts and prevailing circumstances. This requires a determination of a once off payment that the court regards to be fair and just in the circumstances. The next approach is to establish an amount by mathematical calculation based on the proven facts of the case. (See *Southern Insurance Association v Bailey* NO supra at 98).

- [69] In respect of contingencies, the seminal authority consistently quoted is *Goodall v President Insurance Co Ltd* 1978 (1) SA (W) at 392H- 393G where the following was stated:

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.

When assessing the damages for loss of earning or support, it is usual for a deduction to be made for the general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the court....”

[70] In casu, the appellant’s actuary made allowance for the necessary contingencies. The determination of contingencies, however, remain within the discretion of the Court.

Discussion

[71] The foundational facts surrounding the circumstances of the incident as related to the industrial psychologist Mr Ben Moodie expose some inconsistencies as opposed to the appellant’s viva voce evidence before the court a quo. The appellant did not testify to his loss of earnings or earning capacity. This is peculiarly relevant as alluded to in MN and The Road Accident Fund Case 1323/2013 OFS, that a solid veracity of facts is essential. The court a quo was therefore deprived of hearing from the appellant in this regard. In respect of the report that focused on the appellant’s estimated profit, it does not contain details of the estimated profit

for the years 2011, 2012, 2013, 2016, 2017, and 2018. Notably, whilst I accept that estimated profit was based on speculative hypotheses,

it does not augur well for the appellant if there is no full and frank disclosure. The appellant in 2010, commenced farming on

Rekopile Farm, as provided for by the Communal Property Association. There was no disclosure regarding any grants, if applicable, that were awarded to assist with the start-up phase of farming on a 687 hectare farm. In respect of the appellant’s own source of funding, there is secrecy. The proof that is attached to re-inforce evidence of his profit margin is at best scant. The ripple effect of inadequate disclosure raises serious questions in respect of the appellant’s compliance with the tax laws of the Republic of South Africa, which markedly is absent in the calculations.

[72] This Court is acutely aware that the appellant did not testify in respect of his loss of earnings or earning capacity. It would have been enlightening to have heard directly from the appellant on how he sees the future. It would have undoubtedly been invaluable in assessing the future of the appellant. As already alluded to, the various expert reports were admissible evidence which fell for due consideration. The absence of evidence of the appellant coupled with factually inaccurate evidence of the appellant regarding the loss of earnings or earning capacity effects the quantification method that would be employed. It is virtually an impossible task to determine with any accuracy the post-morbid progression in the absence of evidence from the appellant on how he sees the future.

[73] It is clear that the industrial psychologist was astute to the factual shortcomings of the appellant in respect of future earnings or earning capacity. In paragraph 5.10 of the industrial psychologist report the following is recorded:

“5.10Although it is difficult to quantify the claimant’s loss of income as a result of a lack of available information relating to his exact pre-morbid and post morbid expenses, it can be agreed upon that he would have experienced a decrease in profitability if one considers that he could no longer perform the inherent demands of his work as a farmer which would have included his physical labour, but also managing and growing the farm as he reportedly did pre-morbidly.” (My underlining)

[74] The concession by the industrial psychologist is candid, and is borne out by the facts. There is a knock-on effect of this observation which relates to the symbiotic relationship between the industrial psychologist and the actuary. In *MT v RAF* 2021 All SA 285 (G), the reasoning with which I align myself, the role of the industrial psychologist and actuary were 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 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 the 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 to 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 be 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 to 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.” (My underlining)

[75] The mathematical approach enunciated in Bailey, supra, cannot for the reasons as aforesaid, be employed by this Court. This finding does not extinguish the appellant’s claim for loss of earnings or loss of earning capacity. I align myself with what was stated in Road Accident Fund v Maasdorp [2003] ZANCHC 49, that:

“The question of loss of earning and loss of earning capacity is a vexed one and is often considered by our courts. Usually, the material available to the court is scant and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earning and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court.”

[76] In Hendricks v President Insurance Co Ltd 1993(3) 158 at 166 E-F the following was stated:

“The principle applicable to the assessment of damages has its ratio the policy that the wrongdoer should not escape liability merely because the damages(s) he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damage(s) and the wrongdoer is liable to pay compensation or solatium.”

[77] In Mvundle v RAF Unreported North Gauteng High Court Case 63500/2009(17 April 2012)

“ [42] It is trite that damages for loss of income can be granted where a person has suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff’s performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his /her choices should he/she decide to find employment.”

Conclusion

[78] In respect of both grounds of appeal, the court a quo, erred. This court is the at large to interfere. The principles that find application by way of judicial precedent regarding the assault, unlawful arrest and detention were not adhered to, notwithstanding the citing of Rahim. Regarding, the loss of earning or earning capacity, this Court found that there was admissible evidence before the court a quo that fell for consideration. The content of the reports have been succinctly summarised by this Court and the weight of the expert evidence has been assessed. After due consideration of the evidence available to this Court, I am satisfied that there was a loss of earning and/or earning capacity. It is so that the respondent should not escape liability merely because the damages that were caused cannot

be quantified accurately. In the premises, in respect of loss of earning and/or earning capacity, I award an amount of R400 000.00.

Order

[79] In the premises, the following orders are made:

- (1) The appeal is upheld, to the extend indicated below;
- (2) Paragraphs (i) and (iii) of the order dated 15 October 2021 is set aside, and substituted with the following order:
 - (i) The defendant is ordered to pay the plaintiff the total amount of R2 945 168.00(two million nine hundred and forty five thousand one hundred and sixty eight rand).
 - (ii) The defendant is ordered to pay interest on the amount of R2 945 168. 00 (two million nine hundred and forty five thousand one hundred and sixty eight rand) at the legal prescribed rate, a tempore morae, from the date of summons.
- (3) The defendant is ordered to pay the costs of appeal, including the costs of the application for leave to appeal, which costs shall include the costs consequent upon the employment of two counsel, Senior and junior where applicable.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

I agree

K MONGALE

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree and it is ordered.

RD HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

Attorney for Plaintiff: Nienaber & Wissing Attorneys

10 Tillard Street

Mahikeng

Tell: 018 381 0098

Counsel for Defendant:

Attorney for Defendant: The State Attorney

1St Floor East Gallery

Mmabatho

Tel: 018 384 0629

Date of Hearing:

28 October 2022

Date of Judgment:

06 March 2022

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