SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 093/2017

In the matter between:

GLENN MARC BEE **APPELLANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Glenn Marc Bee* v *The Road Accident Fund* (093/2017) [2018] ZASCA 52 (29 March 2018)

Coram: Seriti and Mathopo JJA and Rogers, Hughes and Schippers AJJA

Heard: 5 March 2018

Delivered: 29 March 2018

Summary: Delict – claim for damage to earning capacity – plaintiff and his brother each owned 50 per cent of close corporation – present case distinguishable from *Rudman* – plaintiff's claim permissibly quantified with reference to corporation's diminished profits.

Delict – collateral source rule – plaintiff's post-injury earnings, to extent they exceeded a market related salary for his reduced role, the result of benevolence – correctly disregarded.

Practice – effective case management – joint minute of experts reflecting agreement on various matters and isolating matters still in dispute – such agreement defines issues for trial in absence of timeous repudiation by a party.

ORDER

On appeal from: A full court of the Western Cape Division, Cape Town (Nuku J, Hlophe JP and Steyn J concurring), sitting on appeal from a judgment of the same division (Van Staden AJ).

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

'(i) The appeal succeeds to the extent set out below.

(ii) Para 1 of the trial court's order is amended by substituting, for the amount of R7 532 400 in respect of future loss of earnings, the amount of R7 061 625.

(iii) Save as aforesaid, the appeal is dismissed.

(iv) The appellant shall pay the respondent's costs of appeal, including the costs of two counsel to the extent that two counsel where employed.'

JUDGMENT

Seriti JA:

[1] On 24 November 2007, the appellant, a 48 year old male, was knocked down by a motor vehicle whilst cycling. He sustained severe physical injuries and was hospitalized until 21 December 2007. He continued receiving treatment at home and returned to work on an ad hoc basis from January 2009.

[2] As a result of the accident, the appellant instituted an action in the Western Cape Division of the High Court of South Africa. Merits were conceded and on 16 October 2014 the trial proceeded only on quantum. On 17 April 2015 the trial court (per Van Staden AJ) granted an order in terms whereof the respondent was directed to pay the appellant an amount of R12 894 600.12 being the sum of R412 586.12 for medical expenses, R900 000 for general damages, R4 049 614 for past loss of earnings and R 7 532 400 for future loss of earnings, and costs.

[3] Thereafter, with the leave of the trial court, the respondent appealed to the full court of the Western Cape Division against the award for damages in respect of past and future loss of earnings only.

[4] On 20 September 2016, the full court (Nuku J, with Hlophe JP and Steyn J concurring) granted an order in terms of which the appeal was upheld with costs and the award for past and future loss of earnings were set aside. With special leave granted by this court, the appellant appeals

against the decision of the full court.

[5] At the time of the accident the appellant worked for Bee Painters and Waterproofing CC (BPW). He worked with his brother Mr Russ Bee (Russ) and they each held 50 per cent of the member's interest in BPW. The business had two offices, one in Cape Town and the other in Durbanville. The appellant was running the former office and Russ was running the latter office. The major work of the business was the painting of residential, commercial and industrial properties. BPW had a small permanent labour force and internal labour force of painters and decorators. They largely relied on a subcontracted labour force.

[6] The appellant was the face of the business. He attended to the marketing of BPW, visiting clients and potential clients, preparing quotations and dealing with staff matters. In addition, he also conducted site inspections.

[7] The business also employed sales staff. One of them was Mr Brandon Swartz (Swartz) who was a senior sales executive. He earned a basic salary of R 15 000 per month. He worked for BPW for about 12 years, from the year 2000 to 2011. His functions were almost the same as those of the appellant. At BPW he was the only one who worked with roofing. He testified that after the accident the appellant performed the same functions but at a lower level. He further testified that they all handled their projects individually, all invoiced separately and their names appeared on those invoices. BPW kept a very strict record of invoices, so it was convenient, at the end of each month, to ascertain which individual was responsible for which portion of turn over. As stated earlier Swartz earned a basic salary of R15 000 per month and also

earned a commission of about 40 per cent for any sales above the target of R70 000. He confirmed the correctness of the sales and salary analysis mentioned hereunder relating to him.

[8] Mr Jarrad Bee (Jarrad), the son of Russ was employed by the business, on a full time basis from the end of 2010. He has taken over some of the appellant's duties and also assisted the appellant in carrying out some of his duties. In fact, Russ testified that Jarrad did everything that the appellant was doing and even more. Jarrad was earning about R25 000 per month and he was not earning a commission. The salaries or drawings of the appellant and Russ were determined by the two of them. They were determined at the beginning of the year.

[9] Jean-Marie van der Elst (Van der Elst), a forensic accountant who testified on behalf of the respondent, prepared sales and salary analysis report. He testified that when they prepared the said report they considered financial information they obtained from BPW and Mark Dale Edwards (Edwards), a forensic accountant who testified on behalf of the appellant. The documents they perused included annual financial statements for the financial years 2002-2013; draft income statements for the financial years 2007-2014, draft trial balance for the financial years 2013-2014, salary records, including IRP forms, tax returns and assessment forms of the appellant, Russ and Swartz. The sales revenue analysis indicates that the appellant and his brother were contributing almost evenly to the generation of revenue of BPW.

[10] The sales revenue analysis prepared by Van der Elst for the period 2007 to 2014 indicated that the appellant generated sales worth R11 550 302 and his brother Russ generated sales worth R12 292 095.

Between 2007 to 2010 and 2012 and 2013, the appellant generated sales worth more than those generated by Russ. Only in 2011 and 2014 did Russ generate sales worth more than those generated by the appellant.

[11] The salary analysis further indicated that in 2008, the appellant earned almost 50 per cent of his brother's salary and between 2009 to 2013, the appellant and Russ earned almost same salaries and in 2014 appellant earned far less than what his brother earned.

[12] Jarrad and Russ attempted to dispute the correctness of the sales analysis mentioned earlier. They suggested that the sales allocated to the appellant were actually not his sales but they failed to provide any justifiable reasons for their suggestion that the appellant was not entitled to the allocation of the said sales. Edwards, who testified on behalf of the appellant could also not provide a sound reason why the sales were allocated to the appellant if they were not his sales. As stated earlier, Swartz testified that BPW kept a strict record of the invoices.

[13] As stated earlier, Van der Elst testified that the sales analysis and salary analysis were compiled by them from the documents they obtained from the business. They requested other financial documents but they were not provided with same. The documents which were not given to them despite request thereof are journals, sales ledgers and salary ledgers for the financial years 2008-2014 and order books for financial years 2007-2008. Van der Elst during his testimony referred to an IRP5 certificate which pertained to the appellant's salary for the 2012 financial year. It reflected a total figure of R670 161, and the same figure appeared on the salary analysis referred to earlier. In my view, the figures as reflected in the sales and salary analysis contained information obtained

from the business and therefore can be relied upon. There is no reliable evidence which suggests that the salary and revenue analysis prepared by Van der Elst are not reliable.

[14] There is no reason to doubt the correctness of the information contained in the sales and salary analysis document mentioned earlier. The sales allocated to the appellant in 2008 when he was at home could be sales from one or some of his old clients who came to the business during his absence. Repeat business could possibly account for the 2008 sales allocated to the appellant. Jarrad testified that the sales allocated to the appellant could be business from the appellant's old clients.

[15] There is evidence that the appellant expressed the view that he was still employable in the sales sector as a result of his extensive knowledge of the technical side of the paint business, as well as the fact that he was renowned in the industry and had a good name, although he could not work at the same levels or function with the same capacity as before. BPW's website, at the time of the trial, which was several years after the accident still represented that the appellant was the 'CEO' of the business. The appellant's pre-accident roles in BPW were represented as Technical Officer and Sales, whereas his post-accident position focuses on Sales and Project Management.

[16] It is interesting to note that the further particulars delivered to the respondent and signed on 23 January 2014 stated that '[s]ince 1980 to the current date plaintiff has been employed as the chief executive officer of BEE Painters and Waterproofers'. It is further stated that '[a]fter the accident Plaintiff continued to receive his full salary from BEE in the form of ex gratia payments'.

[17] Jarrad's appointment and his taking over the many of the functions of the appellant had enabled BPW, to a very large extent, to function normally despite the appellant's injuries. The appellant contributed immensely to the revenue stream as pointed out in the sales revenue analysis. In the financial years, 2009, 2010, 2012 and 2013 the appellant generated more sales than those generated by Russ despite the sequelae of the accident. The salary analysis indicates that the appellant and his brother were paid reasonably consistent salaries from 2006 to 2014. The 2012 income statement confirmed that in 2012 the appellant generated sales worth R2 072 234 and his brother generated sales worth R1 778 677.44. The evidence suggests that the appellant's contribution to the business remained substantial and consistent justifying the sales revenue allocated to him and the salary that was paid to him. There are also clients' testimonials dated 21 October 2014 which showed that the appellant was still fully functional prior to and after the accident, during which period, the appellant generated a significant portion of BPW's sales revenue.

[18] In his heads of argument the respondent's counsel, correctly so, contended that the evidence tendered and the financial documents of BPW indicated that BPW's average revenue turnover remained constant throughout the period preceding and subsequent to the accident. In 2007 the turnover was R7 083 183 and in subsequent years remained generally constant averaging between R4 million to R9 million per annum. The proposition that post-accident these figures would have been higher and in line with the building index has no factual basis. There is neither evidence nor historical data to support the proposition that post- accident the financial performance of BPW would have been higher than they were and in line with the building index.

[19] The financial documents of BPW indicate that the appellant received a certain amount of money, over the relevant period as a salary. There is no indication of any profits received by the appellant. If the salary included profits, there is no indication of what portion of the money paid to the appellant constituted profit and what portion was his salary.

[20] In his heads of argument and during oral argument, the appellant's counsel relied on the pre-trial and joint minutes, particularly the joint minutes of the forensic accountants. He further submitted that in open court, during the trial the respondent's counsel agreed to an order that no evidence could be led which contradicted the content of the joint minute signed by Edwards and Van der Elst. Some of the agreed facts as contained in the pre-trial minutes and the joint report of forensic accountants are inconsistent with the reliable and admissible evidence led before the court. In my view, it was incorrect for the respondent's counsel to make the concession referred to above and it was also incorrect for the court to make such an order as the order and the concession are not consistent with the reliable evidence led in this case. In the following paragraphs I shall deal with the joint minutes of the forensic experts.

[21] The appellant's counsel further submitted that what was paid to the appellant from the time of his injuries until his return to work in January 2009 was entirely gratuitous and that fact was admitted to during the trial by the respondent's counsel. Counsel for the appellant further referred to the joint minutes of the appellants and respondent's experts wherein it was agreed that part of what the appellant received after his injuries was gratuitous. I do not agree with this submission. The evidence led in this

case does not support that proposition. The financial records of BPW only indicates revenue generated by the appellant and the salaries paid to him. There is no indication of any gratuitous payments made to the appellant.

[22] It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning. In *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para 15, this court said '[l]astly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion. Absent any reasoning the opinion is inadmissible'. In *Road Accident Appeal Tribunal & others v Gouws & another* [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33, this court said '[c]ourts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion'. (See also *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* [2002] 1 All SA 384 (A) para 34.)

[23] The facts on which the expert witness expresses 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 correct facts. Incorrect facts militates against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court. (See also *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA

113; 2015 (1) SA 139 (SCA) paras 15 and 16; see also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F.

[24] In *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 para 13, Sutherland J said: '[w]here two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the court, it does not follow that a court is bound to defer to the agreed opinion. In practice, doubtlessly rare, a court may reject an agreed opinion on any of a number of grounds all amounting to the same thing; ie the proffered opinion was unconvincing'. In *Malema v Road Accident Fund* [2017] ZAGPJHC 275 para 94 Molahlehi J expressed the same view.

[25] In *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579; 113 S. Ct 2786 (1992), which concerned scientific testimony, the Supreme Court of the United States dealt with, inter alia, the admissibility of expert opinion in terms of the Federal Rules of Evidence and particularly rule 702. In its summary at 507 the court said 'but the Rules of Evidence especially Rule 702 do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand'.

[26] In the European Union and United States Antitrust Arbitration cases expert evidence is utilised. The tribunal, if it deems fit, can appoint an expert to prepare a report and lead evidence before the tribunal. The expert evidence is not binding on the tribunal even if the evidence is led by the tribunal appointed expert. The tribunal is required to give reasons, if it rejects the evidence of an expert witness. The evidence of an expert

witness, even if such expert witness is appointed by the tribunal, is not binding on the tribunal unless the tribunal is satisfied that such evidence is reliable. (See G B P Landolt and W Kluwen (eds) *EU and US Antitrust Arbitration* (2011) vol 1 at 284; and J F Poudret and S Besson *Comparative Law of International Arbitration* 2 ed (2007))

[27] The England and Wales Court of Appeal (Civil Division), in *Huntley (also known as Joseph Paul Hopkins)(A Protected Party by his Litigation Friend, Alison Jane McClure) v Simmons* [2010] EWCA Civ 54, dealt with expert opinion and the joint statement of two neuropsychologists. One of the parties made the point that the judge was bound by the joint statement as to the conclusion that the judge should reach. The judge rejected this submission, holding that the joint statement was only part of the evidence before the court. The court of appeal, civil division agreed with the view of the trial judge.

[28] In *Moloi v The State* 1995 BLR 439 (CA), the court of appeal dealt with the admissibility of expert witnesses. The court said that such witnesses must speak in detail to the facts upon which their opinions and conclusions are based. The court went further and quoted with approval the statement of Ramsbottom J in *R v Jacobs* 1940 TPD 142 at 14-7 where he said:

'Expert witnesses are witnesses who are allowed to speak as to their opinion, but they are not the judges of the fact in relation to which they express an opinion, the court . . . is the judge of the fact . . . . In cases of this sort it is of the greatest importance that the value of the opinion should be capable of being tested, and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it.'

[29] In *The State v Thomas* (CC 19/2015) [2016] NAHCMD 320 (19 October 2016), the mental condition of the accused, which was in question, was enquired into by two psychiatrists and they produced reports. In respect of the experts' reports, the court at para 29 said:

'When dealing with expert evidence the court is guided by the expert witness when deciding issues falling outside the knowledge of the court but within the expert's field of expertise; information the court otherwise does not have access to. It is however of great importance that the value of the expert opinion should be capable of being tested. This would only be possible when the grounds on which the opinion is based is stated.7 It remains ultimately the decision of the court and, although it would pay high regard to the views and opinion of the expert, the court must, by considering all the evidence and circumstances in the particular case, still decide whether the expert opinion is correct and reliable.'

See also *State v Apadile* 2011 1 BLR HC.

[30] In my view these pronouncements indicate that if an expert witness cannot convince the court of the reliability of the opinion, and his report the opinion will not be admitted. The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision. The court, in such instance, will be entitled to test the reliability of the joint opinion, and if the court finds the joint opinion to be unreliable, the court will be entitled to reject the joint opinion. The court is entitled to reject the joint report or agreed opinion if the court is of the view that the joint report or opinion is based on incorrect facts, incorrect

assumptions or is unconvincing.

[31] The court cannot base its decision on unreliable evidence. There is no valid reason why a court should be precluded from considering and taking into account reliable evidence placed before it. For the court to ignore reliable and credible evidence tendered, in my view, defeats the ends of justice. The purpose of the Road Accident Fund Act 56 of 1996 is to compensate victims of motor vehicle accidents for loss or damage caused by the driving of a motor vehicle. The court can only make a proper determination of the appropriate compensation to award if it takes into account all the relevant evidential material and not be restricted to the joint minute of experts, which joint minute is based on erroneous assumptions and incorrect facts. If the court ignores reliable and credible evidence placed before it, that would undermine the purpose of the Road Accident Fund. The Road Accident Fund is a State organ which is funded by a fuel levy and it must disburse its fund strictly in accordance with its enabling legislation.

[32] The forensic accountants Edwards and Van der Elst prepared and signed the joint minute. The joint minute contains various assumptions, some of which are not supported by any evidence or are inconsistent with the evidence led. They agreed that certain portion of the appellant's earnings is deemed to be gratuitous in nature despite the fact that there is no evidence to support such suggestion. Further they averred that the appellant’s earnings prior to the accident include both his salary and share of the profits despite the fact that there was no oral or documentary evidence which indicates what profits, over the relevant period was earned by the appellant. The financial records of BPW refer only to the salary the appellant earned. The forensic accountants agreed that the

appellant's pre-accident salary would have grown at the level of the 2008 financial year, adjusted to accommodate the Consumer Price Index during the post-accident period. There is no evidence to support these assumptions. The salary of the appellant after the accident is known and there is no reason why the known salary of the appellant from financial years 2008 to 2014 should not have been utilised.

[33] At the end of the joint minute, the accountants state that the joint minute is based on the information made available to them. They further stated that 'should additional information become available, we reserve the right to amend our report and conclusions accordingly'. As stated earlier Van der Elst testified that they requested other financial documents but they were not given the said documents. The documents requested by Van der Elst included salary ledgers and source documents of the company such as order books and sales ledgers. Edwards, when testifying, said that since they have reached an agreement, the documents requested by Van der Elst were no longer necessary. This suggests that the joint minute was concluded and signed despite the fact that BPW failed to and or refused to provide Van der Elst with the financial documents he requested. It is not known whether Van der Elst would have signed the joint minute if he had received the requested documents.

[34] The accountants agreed that for financial years 2007 and 2008, the appellant earned certain amounts of money, which figures are not consistent with the figures obtained by Van der Elst from the financial records of BPW. The joint statement is therefore not reliable and the court cannot rely on it. It contains incorrect information and incorrect assumptions, and was also completed without certain important information being taken into account, which Van der Elst thought was

necessary. There is no justifiable reason why Edwards or BPW failed to provide Van der Elst with the requested documents. The underlying facts and assumptions which underpins the joint minute are erroneous and consequently the court cannot rely on these joint minutes.

[35] The appellant is not an ordinary employee of BPW. He held 50 per cent of the member's interest in BPW and he would have been entitled to 50 per cent of the profits of the close corporation. There is no evidence which indicates which portion of the amounts received by appellant was profit or salary or gratuitous payments. Gratuitous payments are not applicable to the appellant because of his interest in the close corporation and revenue he generated over the relevant period. The financial documents of BPW, including the IRP5 certificate made no mention of any gratuitous payments paid to the appellant. The suggestion that portion of his salary constituted gratuitous payments has no legal nor factual basis.

[36] The appellant's counsel submitted that the medical evidence of Dr Zayne Domingo (a neurosurgeon) and Dr Theo le Roux (an orthopaedic surgeon) suggested that the appellant should retire early. Dr Le Roux suggested that the appellant would probably have to retire at age 60. On the other hand Ms Joan Andrews and Ms Julia Buchanan, the appellant's and respondent's occupational therapists, in their joint minute agreed that the appellant should manage to continue working in his current accommodated position until the age of retirement. Furthermore, the industrial psychologists Mr Richard Hunter and Mr Dawie Malherbe are of the view that the appellant might work until normal retirement age.

[37] In the 2013 financial year, which is six years after the accident, the appellant generated substantive revenue, which was higher than the revenue generated by his brother. In the 2014 financial year, which is seven years after the accident, the appellant generated moderate revenue which was less than the revenue generated by his brother.

[38] The respondent's counsel contended that the generally accepted principle is that injuries and the sequelae thereof are most acute closer to the occurrence, whereafter they stabilise until a plateau is reached where no significant improvement or deterioration is expected.

[39] The appellant, six to seven years after the accident, was still generating decent revenue for BPW. In 2008 when he was not at work, his old clients, probably because of his reputation in the industry, made it possible for him to be allocated sales revenue in the amount of R878 554 which was higher than the R566 716 sales revenue allocated to his brother. In 2013 financial year, the appellant generated sales worth R1 455 698 and his brother generated sales worth R1 305 026. From an analysis of the evidence, the appellant has failed to prove that he will, as a result of the injuries retire early. There is no reason why the appellant should not continue working until 65 years of age, as the historical data, namely revenue that he generated from 2009 to 2014 suggests that he will be able to work until normal retirement age and also maintain his interest in the close corporation until he retires.

[40] Brandon Swartz, who was referred to as the managing director and the general manager of the business was involved with the business since before the appellant's accident - Swartz left the business in 2011 - considering his role in the business as stated above, and his contribution

to the company, his departure from the company could be part of the reasons for the drop in revenue in the 2012 financial year. In the 2012 financial year, the appellant's efforts contributed to the revenue of BPW more than that of Russ. So the appellant's injuries could not have been the reason for the poor performance of BPW in the 2012 financial year. It is also not clear what was the correct financial position of BPW in the 2012 financial year. The income statement indicates that he earned R392 768.99 and the IRP5 certificate of the same year indicates that he earned R670 161.

[41] With regard to the determination of whether the appellant was entitled to past loss of earnings, the appellant failed to prove what salary was actually paid to him over the relevant period. It is therefore not possible to determine whether any gratuitous payments were made to the appellant and if so, how much was paid to the appellant in this respect. This is one of the reasons why the appellant should not have been awarded any amount for past loss of earnings.

[42] The appellant based his claim for past as well as future loss of earnings on the salary he allegedly received or allegedly would have received from BPW as well as profits he would have shared in. The appellant has failed to prove his salary pre and post-accident nor any profits that he received from BPW over the relevant period. In order for the appellant to succeed, he needed to prove his salary and profits over the relevant period which he failed to do.

[43] There is no evidence which suggests that BPW had actually suffered loss of turnover due to the appellant's injuries. The performance of BPW remained almost constant pre and post the injuries of the

appellant. The sales generated by the appellant both before and after the accident were consistent and he received almost constant payments or salaries throughout the relevant period. The appellant has failed to prove that BPW had actually suffered a loss of income due to his injuries and that his patrimony was, as a result, diminished. The appellant's appeal cannot succeed.

[44] In the result I would order that the appeal be dismissed with costs, which costs would include costs of two counsel.

L W Seriti
Judge of Appeal

Rogers AJA (Mathopo JA and Hughes and Schippers AJJA concurring)

[45] I differ from Seriti JA's conclusion. In my view the appeal should be upheld and the trial court's award should, save for at downward adjustment, be reinstated. I shall use the same abbreviated references appearing in my colleague's judgment.

Approach on appeal

[46] I start by emphasising two interrelated principles to be observed by an appellate court in an appeal against an award of damages. Firstly, the trial court's factual findings are presumed to be correct in the absence of demonstrable error. To overcome the presumption, an appellant must convince the appellate court on adequate grounds that the trial court's factual findings were plainly wrong. Bearing in mind the advantages

enjoyed by the trial court of seeing, hearing and appraising the witnesses, it is only in exceptional circumstances that an appellate court will interfere with the trial court's evaluation of oral evidence (*R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706; *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5; *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) 428 (SCA) para 12).

[47] Second, where damages are a matter of estimate, an appellate court will not interfere with the trial court's assessment unless there was a misdirection or unless there is a substantial variation between the trial court's award and what the appellate court would have awarded or unless the appellate court thinks that there is no sound basis for the award (*Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 200; *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809B-D).

[48] In the present case the calculation of damages (prior to the application of contingencies) rests on underlying assumptions which are matters of estimation. Among these are (a) the market-related salary the appellant could command in his injured condition; (b) how much better BPW would have performed if the appellant had continued at the helm in an uninjured condition; (c) when the appellant would have retired in his uninjured condition and when he is likely to retire in his injured condition. In keeping with the authorities I have cited, an appellate court should not interfere merely because it would have been inclined to estimate these matters differently to the trial court. The appellate court may only interfere if there was misdirection on the part of the trial court in arriving at the assumptions or if the assumptions were substantially different from those the appellate court would have used. A different way of putting this is that if, in the absence of misdirection, the trial court's

assumptions are within a reasonable range, the appellate court should not interfere just because it would have adopted other reasonable assumptions.

Background

[49] The appellant's claim for loss of earnings proceeded along the following lines:

(a) His injuries substantially impaired his ability to perform the functions he previously performed as BPW's chief executive officer and as a 50 per cent member of the corporation.

(b) As a result, BPW generated a lower turnover and profit than it would have done had he not been injured.

(c) But for his injury, he would have received half of the additional profit BPW would have earned over and above the profit it actually earned.

(d) The additional profit BPW would have earned would be fairly assessed by assuming that BPW's turnover immediately prior the accident would have fluctuated thereafter in accordance with the Western Cape Building Index (WCBI) and by making reasonable assumptions as to the gross profit margin applicable to the additional turnover and as to the additional variable expenses that would have been incurred to earn the additional turnover.

(e) As to the lower profit that BPW actually earned, the half share that BPW paid him was not earned by him but was paid to him out of benevolence.

(f) Because he nevertheless did render some service to BPW in his injured state, albeit at a very reduced level, he accepted, for purposes of his claim, that a portion of the half share that BPW paid him should be reckoned as true earnings rather than as benevolent payments, such

portion to be determined by a market-related salary for the reduced functions he performed. This would be deducted in calculating his loss of income.

(g) The balance of the payments which BPW made to him were benevolent payments and should, in accordance with the collateral source rule, be disregarded in determining his loss of income.

[50] The non-expert evidence tendered in support of the appellant's case came from the appellant himself, his wife Cathy, his brother Russ and his nephew Jarrad. The only non-expert evidence adduced by the respondent was that of Swartz, a former employee of BPW.

[51] Each side engaged experts in the following disciplines: forensic accountancy; neurosurgery; orthopaedic surgery; industrial psychology; occupational therapy and clinical neuropsychology. The appellant did not call his occupational therapist and neither side called their clinical neuropsychologists. In accordance with the trial management procedures applicable in the Western Cape High Court, the matter could not be certified as ready for trial until the experts had met and signed joint minutes. This was done. The joint minutes reflected a large measure of agreement among the experts. The most important differences were those between the forensic accountants, Edwards for the appellant, Van der Elst for the respondent. Although there were some differences among the other experts, it was not suggested during argument that these differences were of great moment.

The forensic experts and pre-trial procedure

[52] The appellant's approach to the computation of his loss of earnings called for an investigation of BPW's financial affairs and performance

prior and subsequent to the accident. This was done by the forensic accountants. Edwards' report was served on 4 September 2013. In a pre-trial minute signed by the attorneys on 14 March 2014 it was recorded that the respondent had engaged Van der Elst to conduct investigations and that upon receipt of his report the forensic accountants would meet 'with a view to identifying areas of common ground and issues of difference for resolution'.

[53] Van der Elst completed his report on 9 May 2014. He recorded the information available to him, including BPW's annual financial statements for the years 2002 to 2013, its draft income statements for the years 2007 to 2014, its draft trial balances for the years 2013 and 2014 and salary records, including IRP5 forms, tax returns and assessments for the appellant, Russ and Swartz. He also recorded that he had requested, but not received, BPW's general, sales, debtors and salary ledgers for the years 2008 to 2014 and its quotation and/or order books for the years 2007 and 2008. (In relation to BPW's financial affairs, the years referred to are its financial years ending on the last day of February.) The concluding paragraph of his report stated that, should this or other additional information be made available, it could have a material impact on his conclusions and he reserved the right to amend his report accordingly.

[54] As envisaged in the pre-trial minute of 14 March 2014, Edwards and Van der Elst met and signed a joint minute on 16 May 2014. They recorded in the opening paragraph that they had received additional financial and operational information not available at the time of writing their initial reports. Based on all the information to which they had access, they agreed on the following aspects of the appellant's claim:

(a) the figures for BPW's turnover, gross profit, variable expenses and net profit for the three years preceding the accident (2006-2008);
(b) that, following the accident, BPW had underperformed, having regard to its pre-accident performance and the WCBI;
(c) that this underperformance is likely to have been caused by the appellant's injuries, save for a once-off disruption in the 2012 financial year when Swartz was dismissed and in respect of which the experts made an agreed adjustment;
(d) that the WCBI report of March 2014 should be used to determine how, if the appellant had not been injured, BPW's turnover would have fluctuated after the accident and until 28 February 2014;
(e) that as from 1 March 2014 a more conservative growth figure should be assumed, a matter on which they deferred to the actuaries (in the event the appellant did not press for more than an annual adjustment to keep pace with inflation and this assumption was not challenged);
(f) that it was reasonable to assume that variable expenses would amount to 25 per cent of the additional turnover;
(g) that it was reasonable to assume that fixed costs would increase at 7.5 per cent above inflation;
(h) the amounts BPW paid the appellant as 'salary' in the years 2009 to 2014;
(i) that there was a gratuitous (ie benevolent) element in the payments so made to the appellant.

[55] According to the joint minute, there were three matters on which they disagreed:
(a) the gross profit margin to apply to the additional turnover BPW would have earned but for the appellant's injuries;
(b) how to determine the gratuitous element of the payments BPW made

to the appellant;
(c) the application of the *Rudman* decision to the losses sustained by BPW in its 2009 and 2012 years.

[56] The last of these points concerned the decision of this court in *Rudman v The Road Accident Fund* 2003 (2) SA 234 (SCA). In that case it was accepted that in appropriate circumstances the loss suffered by a company or corporation through which the claimant conducted business could provide a measure of the claimant's loss but the court cautioned that this would not always be justified. On the facts of the *Rudman* case, this court held that the claimant had failed to establish that he suffered any loss of income.

[57] In the present case, the facts which the experts agreed showed that this was an appropriate case in which to assess the appellant's loss of income with reference to the financial affairs of BPW. This is what they both did. Because of their differing assumptions on the appropriate gross profit margin and the gratuitous element of the appellant's post-injury 'salary', and because of their differing approaches to the 2009 and 2012 losses, they arrived at different amounts for the appellant's past losses over the period 2009 to 2014 but both of them accepted that the appellant had suffered a past loss, computed in accordance with the methodology I have described. Their calculations of the future loss (ie as from 1 March 2014) also differed because of the same differences in assumptions but again they both agreed that that the appellant had suffered a loss of future income.

[58] In regard to the past loss, the methodology was uncontentious for those years in which BPW made a net profit. For those years they agreed

that the appellant's loss was half of the additional net profit which BPW would have earned plus so much of the appellant's half share of the actual net profit as represented a gratuitous payment. However in 2009 and 2012 BPW suffered a net loss. If the experts had followed a consistent methodology, the appellant's loss of income in those years would have been determined by the difference between the net profit BPW would have made and the negative losses it in fact suffered. Van der Elst, however, was instructed by the respondent's legal team that for 2009 and 2012 he was to 'apply *Rudman*', apparently meaning that a half-share of BPW's net losses should not be attributed to the appellant. Van der Elst did not say that the appellant suffered no loss of income in those years; he understood the effect of his instructions to be that, for the purpose of determining the appellant's loss in those two years, BPW's net profit/loss should be taken as zero rather than as a negative number. This naturally reduced the appellant's claim for loss of income for 2009 and 2012.

[59] In the final paragraph of the joint minute the experts recorded that the content of their minute was based on the information made available to them and excluded relevant contingencies. There was then this concluding sentence:

'Should additional information become available, we reserve the right to amend our report and conclusions accordingly.'

[60] On 10 June 2014 the parties' attorneys signed a further pre-trial minute which recorded that joint minutes by the various experts had been filed. In regard to the forensic accountants, the minute recorded that there was a difference of opinion between the forensic accountants with regard to the calculation of the appellant's claims for accrued and future loss of

income, the differing results of their analyses being reflected on the last two pages of the experts' joint minute. The judge presiding at the case management meeting certified the case trial-ready.

[61] On 8 October 2014 a supplementary report by Van der Elst was served. Van der Elst confirmed the views expressed by him in the joint minute. The main purpose of the supplementary report was to deal with the claim for future loss of earnings in the light of the actuarial report the respondent's attorneys had commissioned.

The trial

[62] The trial got underway on 16 October 2014, Edwards being the appellant's first witness. No mention was made of any 'additional information' which had become available and which might affect the matters agreed in the joint minute. However, when the respondent called Van der Elst on 13 November 2014, he testified that the WPBI report issued in October 2014 (covering the period to the end of August 2014) indicated that there had been a significant downturn in the industry. If this later index report (which had not been available when the experts concluded their joint minute) were used, the base value of BPW's uninjured turnover for purposes of calculating the appellant's loss of future income would be significantly lower than the figure arrived at by using the WCBI report of February 2014. Van der Elst also testified that he had wanted access to additional source documentation which had not been forthcoming and that the information which formed the basis of his agreement with Edwards in the joint minute was inferior to the source documents.

[63] If Van der Elst considered the information available to him inadequate to express agreement with the content of the joint minute (I do not think it was), he should not have signed it. The concluding paragraph of the joint minute does not suggest that the available information was inadequate; it merely reserved the right to each expert to depart from the contents of the minute if additional information became available. Apart from the WCBI report of October 2014, no additional information became available. Accordingly, the precondition for a departure from the joint minute was not met except perhaps in relation to the October 2014 report. It did not assist Van der Elst to complain that he wanted access to additional source documentation. If he considered such documentation important, he should have insisted that the respondent's attorneys call for further discovery or subpoena the documents from BPW.

Effect of agreement between experts

[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.

[74] The judgment of the English Court of Appeal in *Huntley v Simmons* [2010] EWCA Civ 54, cited in para 27 of my colleague's judgment, is in my respectful view distinguishable. In that case a joint report by neuropsychologists for the plaintiff and defendant respectively was filed on the question whether a patient reasonably required 24-hour care for the rest of his life. However, both sides led other conflicting expert evidence on the same question. Waller LJ, in giving the Court of Appeal's judgment, emphasised that where a joint report was filed 'either party is entitled to make clear that the opinion expressed in the joint statement is simply evidence that must be assessed as part of all the evidence' (para 9) and that in the case under consideration 'those representing the defendant had made clear that the Joint Statement was not "agreed" evidence' (para 14). It was in those circumstances that the trial court had been entitled to weigh the cogency of all the expert evidence. It seems to me that the salutary practice proposed by Sutherland J in *Thomas* has as its purpose to make clear what was evidently made clear by the defendant in *Huntley*, leaving the plaintiff in no doubt as to what is in issue.

Implications of the joint minute in the present case

[75] At no stage did the respondent repudiate the facts agreed between the forensic accountants. If Van der Elst wished to testify inconsistently with the agreed facts, he should have informed the respondent's legal representatives and the latter should in turn have clearly and timeously notified the appellant's legal representatives. Van der Elst, and no doubt the respondent's legal representatives, knew before the trial began that he had wanted additional source documents but had not obtained them. If this was a valid ground for repudiating the agreement in the joint minute, it could have been notified to the appellant before the start of the trial.

This was not done. To make matters worse, Edwards was not cross-examined on the deviations Van der Elst wished to introduce.

[76] Unsurprisingly, therefore, the appellant's counsel objected when Van der Elst began to testify that the WCBI was not an appropriate benchmark for determining BPW's uninjured turnover because of a supposed inadequate correlation between the index and BPW's pre-accident turnover. The matter stood down so that the issue could be properly argued. When the trial resumed after the intervening weekend, the submissions by counsel led to an agreed ruling that the respondent's counsel was not permitted to adduce evidence from Van der Elst inconsistent with the joint minute. The appellant's counsel also placed on record that if evidence was going to be adduced from Van der Elst which was not inconsistent with the joint minute but which was not foreshadowed in his expert report, the appellant insisted on a supplementary expert summary. No supplementary expert summary was served.

[77] Even if the ruling mentioned above was not an agreed one, it would be accord with the principles laid down in *Thomas*. It was for the trial court to determine whether Van der Elst should be permitted to depart from the joint minute. Even after the ruling, Van der Elst on occasion sought to cast doubt on agreed facts and the trial court had to remind him that this was impermissible. If the respondent was unhappy with this state of affairs, it should have brought a substantive application. This would almost certainly have required a postponement because, until Van der Elst testified, the appellant had conducted its case on the basis of the facts agreed in the joint minutes.

[78] Given the agreed ruling by the trial court, it was not open to the court a quo, and it is not, I respectfully consider, open to this court, to go behind the facts agreed in the forensic accountants' joint minutes. Apart from the fact that intervention by an appellate court would be impermissible, it is simply not possible to say on the record whether the facts agreed in the forensic accountants' joint minutes are or are not the correct facts. Because the appellant did not come to court to litigate uncontentious matters, we cannot say that we have all the relevant evidence and documents pertaining to those facts. My colleague's finding that the matters agreed by the experts were refuted by the evidence presupposes that all the evidence bearing on these matters was adduced. In view of the joint minute of the experts, it was unnecessary for the appellant to adduce all the evidence, so findings reached on the record are, in my respectful view, inherently unsafe.

[79] The respondent's argument which found favour with the full court seems to me to amount to trial by ambush. This is something which no court in South Africa can countenance.[1] Insofar as damage to earning capacity is concerned, the litigants went to trial on the basis that the three issues identified in the forensic accountants' joint minute needed to be resolved. After both sides had closed their cases and for the first time in argument before the trial court, the appellant was faced with a contention that he had failed to prove the fundamental factual matters accepted by both forensic accountants in their joint minute. The injustice of that approach seems to me to be manifest. The trial may have taken a very

[1] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) para 22; *Molusi v Voges NO* [2015] ZASCA 64; [2015] 3 All SA 131 (SCA) para 19.

different course had the agreed ruling not been made. One cannot assume that the appellant would not have applied to reopen his case.

[80] In my opinion, therefore, that the only issues which could legitimately have been ventilated in the appeal before the court a quo were (a) the appropriate gross profit margin assumptions; (b) the gratuitous component of the appellant's 'salary'; (c) the application of *Rudman* to the net losses sustained by BPW in 2009 and 2012. The court a quo did not decide any of these issues. Instead it decided, contrary to the facts agreed by the forensic accountants, that the appellant had failed to prove that BPW's performance was affected by his injuries or that he personally had suffered any loss, and that accordingly, and as in *Rudman*, his claim for loss of earnings should have been dismissed. This disregard of the agreed facts was not permissible.

Rudman v Road Accident Fund

[81] It might be contended that the applicability of *Rudman* is a legal rather than a factual question and that a court is not bound by a legal concession. Such a contention is fallacious. *Rudman* did not lay down new law. The judgment was wholly concerned with the factual question whether the claimant had proved a patrimonial loss. The respondent's consistent position in *Rudman* was that the claimant had not suffered a patrimonial loss. The trial court analysed the evidence and concluded that he had not suffered a patrimonial loss; this court agreed with the factual analysis.

[82] In the present case, by contrast, the very facts agreed by the experts established that the appellant had suffered a loss and that such loss was directly related to the impaired performance of BPW. Whether

that was so was a factual question, not a legal one. The experts agreed on the facts. They differed on three aspects affecting the quantification, not the existence, of the appellant's loss.

[83] In my view, the appellant's situation is distinguishable from the claimant's in *Rudman*. The court there said that a physical disability which impacts upon a person's capacity to earn does not necessarily reduce his patrimony: 'It may in some cases follow quite readily that it does, but not on the facts of this case' (para 11). When the judgment is read as a whole, this conclusion appears to have been based on the following considerations. Almost all the shares in the company were held by a family trust. The claimant himself held only 2.5 per cent of the company (para 2). There was thus not a necessary correlation between the company's profitability and his own income as the manager of the company's business. Although there was evidence that the company earned less revenue because of the claimant's injury, there was no proof that this reduced the value of his nominal shareholding in the company or that he received less from the company than before (para 13). Indeed the claimant expressly disavowed any connection between his drawings from the company and his alleged patrimonial loss (para 9). Furthermore, the claimant's earning capacity had to be considered as a whole. Although he suffered physical injuries which affected his ability to hunt, his intellectual capacities were unimpaired. The claimant was not employed as a professional hunter and his earning capacity could not be confined or compartmentalised as if he were. His real function was that of the company's chief executive officer. That was a function he still performed. He remained the driving force behind the entire enterprise. On the evidence, his injuries did not impair his ability to do what mattered most – to see to it that the family empire which he had founded

continued to flourish in all its spheres for the benefit of himself, the trust, the company and ultimately the family (para 13).

[84] The present case is quite different. The appellant's injuries included brain damage which has impaired his intellectual, mental and emotional functioning. The expert and factual evidence was all in one direction. Before the accident he was BPW's de facto chief executive. Apart from outstanding managerial abilities and an excellent manner with customers and staff, he was recognised for his wide knowledge and expertise in the field of waterproofing and painting with a unique ability to quote for projects quickly and accurately. After the accident the appellant could not remotely function at his pre-injury level. The work he continued to perform was closer to that of a site supervisor though even this work he could not perform efficiently. He would take several hours to do things which previously would have taken him half an hour or less. He repeated himself when giving instructions to staff. He became short tempered and at times abusive. He panicked on the one occasion that he answered a repeat-customer's request to visit a block of flats to quote on a job.

[85] It is as well to recall, here, what some of the experts said:

(a) In their joint minute the neurosurgeons agreed that the appellant's traumatic brain injury, with residual neuropsychological deficits, would impact significantly on his employability. In oral evidence they express themselves more strongly, saying that the appellant is unable to work in the open labour market and could not hold down a job except with a sympathetic employer.

(b) The occupational therapists agreed that the appellant's employability had been compromised, that his current job was 'probably sheltered, due

to family ownership', that his work abilities would probably not improve significantly in the future, and that his ability to secure alternative work was likely to be difficult. The appellant did not call his occupational therapist. The respondent's occupational therapist, who only interviewed the appellant once, said that, 'on a borderline basis only', the appellant was able to hold down an appropriate job 'but with more than reasonable accommodation'. Accommodation was needed because of his reduced physical and mental capacities. Although BPW was extremely accommodating, the appellant was still not able to do his old job.

(c) The clinical neuropsychologists agreed that the appellant had sustained a severe traumatic brain injury; that he displayed dysexecutive symptomology; that he met the criteria for a diagnosis of Cognitive Disorder NOS (distractible, dysnomia, inefficient and borderline new learning, severely defective recognition, at times defective fine motor speed and performance); that he had undergone a personality change (less tolerant, more agitated, frustrated and anxious); that he experienced mood swings, fatigued rapidly and had become socially withdrawn; that he had been unable to return to his pre-morbid levels of occupational functioning; that his continued employment in the family business 'was protected employment'; and that he 'would not be able to gain employment in the open labour market'.

(d) The industrial psychologists concurred that his working ability had been impacted and that this was permanent though they did not agree on the extent of his residual functioning. The view of the respondent's industrial psychologist, based on information from the appellant and his brother, was that the scope of his work had been reduced to 60 per cent of his pre-morbid functioning and that this was where it would remain. The appellant's industrial psychologist regarded the appellant as unemployable in the open market.

[86] The evidence of the lay witnesses supported the view of the experts that the appellant would battle to find alternative employment. His brother Russ testified that the appellant definitely was unable to perform at his previous level. He estimated that the appellant was only functioning at around 10 per cent to 15 per cent of pre-morbid capacity and that BPW's business had gone backwards. He did not think his brother should be working at all:

'He is an absolute nightmare. He is aggressive. As I say he has sworn at my kids a couple of times. He is not productive. He doesn't have logical thinking. He is stressed out. He is an absolute mess. He is really an absolute mess.'

When asked in cross-examination whether the appellant still had some goodwill (ie drawing power for customers), Russ answered:

'That's a difficult question to answer. Do people like him? Absolutely they like him. Is he producing? Absolutely not. Can he produce? Absolutely not.'

[87] The appellant's nephew was asked whether, in his opinion as a young man coming into the business, it was worthwhile to have the appellant there. Jarrad replied:

'Definitely not, you know the fact that he is, his title is our CEO, he is far from there. The functions that he performed and the responsibilities that [he] held prior to the accident he is not able to fulfil any more. Currently he is basically a glorified site supervisor. So definitely not, we would not employ someone in the price range that he cost per month and what he does.'

[88] The appellant himself testified that he no longer knows about new products, he cannot adsorb information and he struggles to retain information. He finds it very frustrating. He could now only quote on small jobs and do site management. He was asked whether his injuries had affected BPW's business. This was his answer:

'Ja, there's no question about it. I really believe that had I been able to put the kind of

time and effort into it that Russie and Jarrie does and Sean does, you'd have someone else powering ahead the way they do and, as I said, they protect me a lot and it's wonderful to feel wanted in that situation but I'm a frigging drain on the business.'

[89] The witnesses gave many practical examples in support of these general statements. The respondent's own lay witness, Swartz, confirmed in chief that the appellant's capacity had definitely been reduced when he returned to work and it remain so until Swartz left the company in the middle of 2011. When asked to explain his answer, he said:

'He spent a lot less time at the office. He was definitely more at home. His ability to function was definitely less. He battled with memory. He battled with trying to work on the bigger tenders, to work with the various figures and the calculations... .'

In cross-examination he agreed that prior to the accident the appellant had been sharp in all aspects of the business and could do big quotes – he could, as Russ put it in a vivid metaphor, 'quote to paint Table Mountain'. After the accident he was unable to do large quotes and did substantially less office management. When the joint minute of the neuropsychologists was put to him, there was nothing with which he disagreed and he was able to confirm a number of their findings.

[90] As to the fact that at the time of the trial the appellant was still recorded on BPW's website as being the corporation's chief executive officer, the appellant and Russ were not asked about this. When the information on the website was put to Jarrad in cross-examination, he said a lot of the content was nearly a decade old and that they intended to create a new website shortly. He also said that BPW was a family business: 'We would want to make him still feel part of the business, we don't want to you know make him feel insignificant in the business.'

[91] My colleague considers that Jarrad's appointment enabled BPW to a very large extent to function normally despite the appellant's injuries. Even if this conclusion were not foreclosed by the agreement between the experts, I do not think it is justified on the evidence, bearing in mind the trial court's factual findings. When Jarrad testified in October 2014 he was 25 years old. He had joined the business full-time shortly after the appellant's accident. Despite having been in the business for more than four years, he said he had only been able to take over some of the appellant's duties. He had not yet achieved some of the appellant's pre-accident skills. He was asked whether he and the post-morbid appellant in combination were equal to the appellant in his pre-morbid condition:

'Definitely not. Like I say, Glenn had a client base of 30 years, he had 30 years of work experience in this industry, knowledge that I haven't achieved and obviously only comes with time. So definitely not.'

[92] The witnesses called by the appellant impressed the trial court as honest and credible. The trial court's assessment of the appellant fortified the views expressed about his deficits. The trial judge noted that the appellant lost concentration on a number of occasions and was not able to follow the thread of the questions. The trial court found as a fact that prior to the accident the appellant was functioning as BPW's chief executive officer; that after the accident he was not employable in the open market; and that his post-accident employment at BPW was functionally at the level of a site manager for smaller jobs. There were ample grounds for this finding and certainly no basis for disturbing it.

[93] My colleague says that Swartz's departure, rather than the appellant's injuries, may have been the reason for BPW's poor performance in the 2012 financial year. The parties were, however, alive

to this extraneous impact on BPW's performance. The experts made an agreed upward adjustment to BPW's 'injured' turnover to reverse the negative effect of Swartz's departure. The figures contained in their joint minute reflect this adjustment. Despite the adjustment, BPW earned substantially less turnover than would have been the case if its business had followed the trajectory of the agreed WCBI index.

[94] The trial court found Edwards to be an impressive witness who was knowledgeable and applied a degree of conservatism in reaching his conclusions. Van der Elst, by contrast, did not impress the trial court which considered that not much reliance could be placed in his evidence. The trial judge noted various justifiable criticisms by the appellant's counsel of Van der Elst's evidence.

[95] There was thus ample evidence, quite apart from the forensic accountants' joint minute, that the appellant's reduced abilities had negatively affected BPW's operations. Because he had a 50 per cent membership of BPW, and because he and his brother shared BPW's net profits (whether by way of salary or distributions), a decrease in BPW's net profits would translate into a loss of income for the appellant.

The sales allocated to appellant

[96] The respondent's counsel placed considerable emphasis on the fact that in BPW's management accounts for the period 2009-2014 a significant part of the corporation's turnover was identified as sales generated by the appellant. This was said to be inconsistent with a contention that the appellant's injuries had compromised his ability to earn substantial revenue for the corporation. Russ and Jarrad explain this apparent anomaly. They said that the corporation obtained quite a lot of

repeat business. If persons who had been the appellant's customers prior to the accident gave the corporation repeat business, the sales would be allocated to the appellant. However, the quoting for these jobs, if they were larger assignments, would be done either by Jarrad or by the appellant with Jarrad's assistance. To the extent that the appellant was involved in setting up the sites for these jobs, his work suffered from all the inefficiencies I have already described. The allocation of the sales to the appellant was of no practical importance because neither he nor Russ earned commission on their sales.

[97] Apart from the fact that Russ and Jarrad were assessed by the trial court to be honest and credible (an assessment we have no grounds on appeal to disturb), their explanation accords with the known facts. For all practical purposes the experts were agreed that the appellant was unemployable in the open job market. It would be miraculous if, with all his deficits, he could have continued to generate the same sales as before. The truth of their explanation is corroborated by the fact that sales running into hundreds of thousands of rands were allocated to the appellant during the period of more than 13 months immediately following the accident when he was not at work at all. I thus cannot, with respect, agree with my colleague's finding that the sales allocations can be relied upon as evidence of the appellant's true earning abilities (paras 13-14).

The three disputed issues arising from joint minute

The gross profit margin

[98] For the reasons I have given, the parties were bound by the methodology and factual assumptions agreed in the joint minute between the forensic accountants. Of the three points of difference between the

accountants, the respondent's counsel did not argue that the trial court had erred in preferring Edwards' assumptions regarding gross profit margins to those of Van der Elst. Indeed Van der Elst said in cross-examination that, after Edwards' testimony, he and Edwards had discussed the gross profit margin assumptions. He had told Edwards that he did not think that Edwards' approach was unreasonable and he believed Edwards would confirm that Van der Elst's approach was also not unreasonable. In truth Edwards had by this time explained during his testimony why he regarded Van der Elst's approach as unreasonable. At any rate, and even if Van der Elst's assumption was not unreasonable, we cannot interfere with the trial court's finding just because he preferred one reasonable assumption over another.

The 2009 and 2012 losses

[99] The second point of difference, namely the effect of *Rudman* for the two years where BPW suffered net losses, was also not the subject of any argument before us. Van der Elst in cross-examination was unable to explain why *Rudman* supposedly had the effect that BPW's losses should be ignored, stating no more than that he had followed his instructions.

Gratuitous component of appellant's earnings

[100] The third point of difference was how to determine the gratuitous component of the 'salary' which the appellant received from BPW after the accident. The forensic accountants agreed that a component of this salary was gratuitous and should thus not be deducted in arriving at the appellant's loss of earnings. Underlying this agreement is one of the well established exceptions to the general rule that an injured person can recover no more than his net loss, namely the exception that amounts which the injured person has received on account of a third party's

benevolence or charity need not be brought into account. The exception is founded on essential notions of justice and fairness. The third party's benevolence is directed at the injured person, not the wrongdoer:

'It would be revolting to the ordinary man's sense of justice and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relatives or of the public at large and that the only gainer would be the wrongdoer.'

(*Parry v Cleaver* 1970 AC 1 at 14, quoted by Rumpff JA in *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150F-H.)

[101] If, out of benevolence, an employer allows an injured employee to return to work and to perform such limited tasks as he is able to do, and continues to pay him a salary, the injured employee is not obliged to deduct such salary when quantifying his loss of earnings. *Byleveldt* was just such a case. It is apparent from the majority judgments that a court must examine the substance of the matter. The fact that an amount labelled as 'salary' is paid does not mean that the recipient has earned it or that it is not in truth a payment motivated by benevolence.[2] There are judgments to similar effect in England,[3] Canada[4] and Australia[5] where the same exception applies. The judgment of the Court of Appeal for British Columbia in *Kask v Tam & another* 1996 CanLII 1929 (BCCA) is quite close to the present case, involving as it did an injury to one of two brothers who ran a company.

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[2] Other cases to similar effect in this country include: *Henning v South British Insurance Company Ltd* 1963 (1) SA 272 (O); *Campbell v Van Niekerk* 1967 (2) PH J27 (D); *Road Accident Fund v Coughlan NO* [2011] ZAWCHC 10 (2 March 2011), a judgment of a full court confirming the decision of the trial judge that any 'salary' the claimant received from a family company following his injury was the product of benevolence (paras 43-45); *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ) at 261I-262A.

[3] *Dennis v London Passenger Transport Board* [1948] 1 All ER 779; *Cunningham v Harrison* [1973] 3 All ER 463 (CA) at 468c.

[4] *Gillis v Breau* (1971) 19 DLR (3d) 615

[5] *Zheng v Cai* [2009] HCA 52.

[102] The fact that a 'salary' of the foregoing kind, paid to an injured employee out of benevolence, is recorded in a company's financial records as a salary rather than a donation is neither here nor there. I should think it extremely likely that a company which pays an injured employee a benevolent salary would record the amount as a salary, deduct employee's tax and so forth. We are not here concerned with any question which might arise between the company and the fiscus. In *Byleveldt* Wessels JA, who delivered one of the two majority judgments, said that it may have suited the employer to treat his benevolence as salary for services rendered since he could record the payments as a business expense in his books (166G-H). Prof Boberg, commenting on the judgments in this case, including Trollip JA's dissenting judgment, observed as follows:

'The approach of Trollip JA, it is respectfully submitted, is unrealistic. No doubt an employer's motive for hiring an employee is normally irrelevant, and the court cannot concern itself with the quality of the employee's counter-performance. If Byleveldt had secured employment with a new employer who had perhaps not appreciated the full extent of his incapacity, and who had thereafter kept him on the payroll through contractual obligation, ignorance or inertia, the learned judge's reasoning would have been correct. But it was not so. All the evidence indicated that Byleveldt had been re-employed by his former employer purely as an act of charity. The fact that he chose to clothe his bounty in an "employment contract" – whether because it was economically more advantageous (as Wessels JA suggested at 166) or perhaps out of respect for Byleveldt's dignity – could make no difference. When he entered into the contract with full knowledge of Byleveldt's inadequacy he gave charity, and each month that he paid Byleveldt his "wages" and tacitly renewed the contract (which he could presumably have terminated on due notice) he repeated that charity. Moreover, one may challenge Trollip JA's assertion that it was irrelevant that "those wages were excessive in relation to the quality of the services rendered" (169). In another branch of the law, a sale at a price deliberately far below the true value of the *merx* constitutes a donation of the excess. Was this not a donation of the amount by which

the wages exceeded the value of Byleveldt's services (which was nil)?
For this reason the realistic approach of the majority, who went behind the "employment contract" and gave effect to the true character of the benefit which accrued to Byleveldt, is to be preferred.'
(P Q R Boberg *The Law of Delict* at 587.)

[103] The legal principle not being in doubt, the question whether the 'salary' received by the appellant must be brought into account is a factual one, namely whether its receipt was prompted by considerations of benevolence on the part of BPW. The appellant and Russ did not have written employment contracts with BPW. It was not suggested that there was a pre-existing contractual arrangement which entitled the appellant to continue receiving the salary of a chief executive officer despite his severe impairment. The respondent's counsel submitted that, by virtue of his 50 per cent membership of the close corporation, the appellant had a proprietary right to half of the corporation's profits. This submission is fallacious and does not in any event meet the point that the appellant was not entitled to receive, as salary (as distinct from profit-share), an amount equal to what he received before the accident. His salary entitlement would have been affected by the reduced functions he was able to perform.

[104] The fallacy in the submission is that it assumes the permanence of BPW and the appellant's 50 per cent membership interest. A domestic partnership of this kind is anything but permanent. Legally Russ could not be compelled to continue in a business in which he and the appellant each held 50 per cent but to which the appellant could no longer meaningfully contribute. A close corporation can be wound up on the same grounds as a company, including that it is just and equitable to do so. If the appellant declined to surrender his interest in the corporation,

Russ could apply for its liquidation and the application would inevitably succeed. Russ could then start in the same line of business for his own account. If the evidence established that Russ only continued in a 50/50 arrangement with his brother out of benevolence, the court should have regard to the substance of the matter and treat any payments derived by the appellant as a member of the corporation as the product of benevolence.

[105] Apart from the fact that the forensic accountants agreed that a portion of the appellant's receipts were gratuitous, the trial court found this to have been the case and there were ample grounds for that finding. I have already referred to some of the evidence describing the appellant's abilities prior to the accident and the devastating effect of his injuries on his post-accident performance. It would thus not occasion surprise that Russ only remained in the 50/50 relationship out of benevolence. One would not have expected the 50/50 relationship to have endured between persons dealing with each other at arm's length. Russ' evidence was thus entirely plausible when he testified that the only reason for the appellant still being involved in the corporation was that the appellant is his brother. His evidence was that if the appellant was not his brother he would definitely not be working for the corporation any more. When asked why he kept his brother on, his reply was: 'It's my brother, he would have done the same for me.' If it had been anyone else, he would have 'pulled the plug' a long time ago: 'I would have taken that 50 per cent that I own … and I would have called it a day long ago.' This evidence was not challenged in cross-examination.

[106] One should also bear in mind that it would be natural for Russ to want to bring his son Jarrad into the business as a partner, particularly

since the appellant can no longer pull his weight. While I do not think, on the evidence, that in the years immediately following the accident Jarrad was close to being the appellant's pre-morbid equal, Jarrad is likely to become an increasingly valuable member of staff as he acquires experience and assumes greater responsibilities. If Jarrad were eventually to become a complete substitute for the appellant, it is unrealistic to suppose (except on grounds of benevolence) that the appellant could continue as member of the corporation while Jarrad remained a modestly remunerated employee.

[107] It is worth reflecting, for a moment, on the far-reaching and unjust effect of the court a quo's decision. The appellant was not only deprived of his claim for the loss of past earnings over the period 2009 to 2014. He was also denied any claim for loss of future earnings over the eleven-year period from March 2014 until his likely pre-morbid retirement age of 65. Since the appellant is effectively unemployable outside of the family business, he would – if the court a quo's judgment stood – have no income were Russ to terminate the partnership (ie liquidate the corporation), and he would have no compensation for the loss of his income. This loss to the appellant can be avoided only for as long as Russ maintains his benevolent disposition. The responsibility for making good the appellant's loss is thereby shifted from the wrongdoer (here represented by the respondent) to BPW and Russ. The law should not, and does not, compel such an unpalatable result.

[108] The trial court was thus entitled to find that a part of the appellant's post-injury salary was gratuitous, ie the product of benevolence. Indeed, the respondent's counsel during the course of the trial specifically invited the judge to record that the respondent admitted

that all the amounts received by the appellant over the period of 24 November 2007 (the date of the accident) and January 2009 (when the appellant first returned to work in a reduced capacity) were gratuitous. In regard to the period as from January 2009, the only remaining question was the method of determining the gratuitous portion. The experts offered two different methods. In the present appeal the respondent's counsel did not argue that the trial court had fallen into demonstrable error by preferring Edwards' method to Van der Elst's.

Concluding matters

[109] In regard to Van der Elst's belated introduction of the WCBI October 2014 report, the respondent's counsel submitted that, if we were to overturn the court a quo's application of *Rudman*, we should remit the matter to the trial court for a calculation of the appellant's loss of future earnings in accordance with the October 2014 report. In view of what I have said concerning the binding nature of agreements between experts, I do not think this course is justified.

[110] I gather from the evidence that these reports are issued monthly. When presenting a case for trial, a cut-off date has to be chosen. The experts agreed to choose 28 February 2014 as the cut-off date and to use the WCBI report of March 2014. No reference was made, during Edwards' testimony, to the possible use of a later date and a later index report. And despite the clear recordal by the appellant's counsel, no supplementary expert report was filed before Van der Elst testified in support of the use of the later index report. From the limited cross-examination of Van der Elst regarding the later report (limited, because the appellant's legal representatives had not been timeously notified of the point), its reliability and accuracy are not beyond doubt. It would be

unfair to use the later report without affording the appellant the opportunity of reopening his case. And of course by now there will be more recent reports. Either side could cherry pick the report which happened to set the starting value for the calculation of the prospective loss at a higher or lower amount. The parties should thus be held to the agreement of their experts.

[111] My colleague considers that the appellant failed to prove that, in consequence of his injuries, he would probably retire early. He bases this conclusion in part on his finding that over the period 2009 to 2014 the appellant generated the sales allocated to him in the management accounts. For reasons I have explained, those allocations do not, in my opinion, reflect the appellant's earning abilities. If the appellant receives no compensation for the damage to his earning capacity, he may have no choice but to soldier on past the age of 60. It is clear, however, on the evidence that it would not be reasonable to expect him to do so.

[112] His wife described in great detail the fatigue from which he suffers and how agitated he becomes on Sunday evenings at the prospect of another working week. She said that he struggled every day to get up and go to work. The appellant testified that he felt 'absolutely beaten' at the end of each working day. He has to take a nap before dinner. Sunday nights were 'horrid because Monday comes again for five days'. He described weekends as being for him a 'lifesaver', they made it possible for him to get 'through the five days of hell'. Asked why he was still working, he answered that he had to pay the bills. Neither the appellant nor his wife were challenged in cross-examination about this evidence. The trial court accepted it as truthful. An appellate court in my view can have no basis for disturbing the finding.

[113] As to the possibility that the appellant, uninjured, may have retired earlier than 65, it is clear that pre-morbidly he found his work enjoyable and energising, quite the opposite of his post-morbid disposition. The trial court was entitled to find that he would probably have retired at 65.

[114] I conclude by mentioning the contingency deductions made by the trial court: 5 per cent in respect of past loss of earnings, 20 per cent in respect of future loss of earnings. Since the only unknown factor in regard to the past loss of earnings was how BPW would have performed if the appellant had not been injured, the 5 per cent deduction made allowance for the possibility that the business might have lagged behind the WCBI. One should bear in mind that there is the possibility that BPW's business might have out-performed the index and that the contingencies of life are not always negative.

[115] In regard to the future loss of earnings, the standard actuarial calculation would have taken account of the appellant's mortality risk (ie life expectancy). The trial court observed that the 'normal' contingency deduction for future loss of earnings is 15 per cent but increased this to 20 per cent because of the long-term survival risks of the family business and the possibility that the appellant premorbidly might have retired before the age of 65.

[116] I do not think, with respect, that one can speak about a 'normal' contingency deduction for loss of future earnings, at least not without taking into account the age of the claimant. For obvious reasons, the younger the victim, the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path. Since the appellant's future loss of earnings

only spanned eleven years, a 15 per cent contingency deduction might, absent special circumstances, have been at the high end.

[117] Nevertheless, I think the trial court was right to find that in this particular case there were reasons justifying an above-average contingency deduction. And while the factors the trial court mentioned were certainly relevant, there were additional factors which seem not to have been taken into account. These are the following:

(a) Although the appellant was a very important part of the success of BPW, the fortunes of the corporation also depended on the synergies between himself and Russ. If Russ were to pass away prematurely or become unable to work, this might affect BPW's performance.

(b) The same may be true in respect of other valuable members of staff, as illustrated by the impact that Swartz's departure in June 2011 had on the business.

(c) In regard to the appellant himself, he was – premorbidly – somewhat more at risk of injury and disability than the average 54-year-old, given his passionate involvement in cycling and surfing. These are activities with which he would have continued, but for the accident on 24 November 2007.

(d) The appellant was and is diabetic. Although the evidence was that his diabetes was under control, it is a condition which can give rise to health complications.

[118] In all the circumstances, I consider that the contingency deduction for future loss of earnings should be increased to 25 per cent. In regard to the costs incurred in the court a quo, this limited success for the present respondent would not have made it the substantially successful party in

the full court appeal. Its case in the court a quo was that the appellant was not entitled to anything in respect of damage to his earning capacity. That case, as the majority of us find, should have failed. There is no indication that in the court a quo the respondent advanced, in the alternative, that the award should be reduced by increasing the contingency deduction

[119] I thus make the following order:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the court a quo is set aside and replaced with the following order:

'(i) The appeal succeeds to the extent set out below.

(ii) Para 1 of the trial court's order is amended by substituting, for the amount of R7 532 400 in respect of future loss of earnings, the amount of R7 061 625.

(iii) Save as aforesaid, the appeal is dismissed.

(iv) The appellant (the Road Accident Fund) shall pay the respondent's (Mr GM Bee's) costs of appeal, including the costs of two counsel to the extent that two counsel where employed.'

O L Rogers

Acting Judge of Appeal

APPEARANCES

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