

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23049/2013

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

.....
DATE

.....
SIGNATURE

In the matter between:

KUNENE NANDOS

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MAKUME, J:

[1] The plaintiff in this matter sustained injuries on the 30th January 2012 when he was involved in an accident involving a motor vehicle insured by the defendant in terms of the Road Accident Fund Act No 56 of 1966 and claimed

damages under various headings. He was a pedestrian at the time of the accident.

[2] At the commencement of the trial I was informed that the parties have settled the issue of liability in that the defendant has to pay the plaintiff 80% of the plaintiff's proven damages. The only outstanding heads of damages requiring a decision by this Court are the following:

2.1 General damages.

2.2 Loss of earning capacity.

As far as the claim for loss of earning capacity is concerned the defendant does not dispute the actuarial calculation by the plaintiff's experts. What is placed in issue is the basis on which the calculations were made.

[3] The plaintiff presented evidence by various medico-legal experts and laypersons in support of his claim. The defendant closed its case without presenting any evidence save for the joint minutes of the experts.

FACTUAL BACKGROUND

[4] Evidence gleaned from the various medico-legal reports demonstrates that the plaintiff was born on the 28th February 1986. He was 26 years old at the time of the accident. He is a Mozambican national and attended school up to Standard 8 in the year 2004 in Mozambique.

[5] During the year 2004 he moved to South Africa and started doing odd jobs including gardening and tiling. At the time of the accident he worked as a tiler and also did gardening. When he was discharged from hospital he went back to do the tiling job but complains that doing gardening work causes him severe back pain. He now works only three days in a week and also complains of being forgetful.

MEDICO-LEGAL EVIDENCE

[6] Dr Yusuf Osborne a specialist neurosurgeon reports that the hospital records from Baragwanath Hospital indicate that after the accident the plaintiff lost consciousness and was disorientated. His Glasgow Coma Scale on admission was 12/15 and improved to 15/15 later. He sustained an abrasion of the left hip and the elbow. There was an 8 cm laceration of the left thigh which was 3 cm deep. It is further recorded that the plaintiff had a base of the skull fracture. A horizontal fracture of the left temporal bone. The CT scan of the brain showed multiple small contusions on the left parietal lobe, right frontal lobe and the temporal lobe on the left gyrus rectus. On being discharged after seven days he was treated with Phenytoin.

[7] On examination by Dr Osman he complained of poor memory as well as lower back pain. He reported that the pain was aggravated by movement as well as by any heavy duty type of work.

[8] Based on his examination and assessment Dr Osman concluded that the plaintiff sustained at least a moderately severe to severe brain injury. He says that because of the severity of the brain injury long-term neuropsychological neurobehavioral and cognitive problems can arise. There is also a risk of him developing epilepsy later in his life.

[9] The plaintiff was also examined by Dr Digby S Ormond Brown a clinical psychologist who found that he sustained severe head injury in the accident. In his report Dr Brown notes that according to Dr Osman the plaintiff sustained a moderately severe brain injury.

[10] In his evidence Dr Brown pointed out that the CT brain scan demonstrates tiny little bleeds caused by diffuse axonal injury and says that this happens quite often in motor vehicle accidents. He says what happens is that the brain tissues are literally torn apart. There was severe injury to many areas of the brain evidenced by the swelling and the bleeding. This according to him results in long-term neuropsychological outcomes.

[11] Dr Brown found that the plaintiff's attention and concentration was markedly slow and that auditory multitasking was well below average, visual multitasking was abnormal even though taking into account his low level of education.

[12] His verbal and visual memory was tested and it was found that his short-term visual memory was erratic. The rate at which he was able to

acquire new information was significantly below the normal. His performance on a measure of short-term visual memory was seriously compromised. His learning curve was extremely shallow and he exhibited minimal benefit from repeating information. Dr Osman concludes that these conditions were not there prior to the accident.

[13] The doctor also looked at his visuo-spatial perception and construction praxis. This is a process by which an examination is carried out to see how a person with brain injury is able to fit loose items together in a pattern like fitting tiles or blocks. It was found that he had difficulty in accurately processing spatial information related to line orientation. He incorrectly rotated figures that he was required to copy through 90 degrees and through everything lying on his side. It was found that his capacity to reproduce geometric patterns using small coloured blocks was abnormal. The witness concluded that these results imply the presence of constructional apraxia .

[14] According to Dr Brown the plaintiff will have difficulty in carrying out his work as a tiler where patterns are essential. The plaintiff will do wrong patterns even with guidance and supervision. He says that the plaintiff will not be able to do proper work and since it is not practical to always supervise such work it will disadvantage him in the open labour market.

[15] He testified further that the plaintiff has a serious impairment of executive brain function. His planning was grossly abnormal. The plaintiff's

loss of mental flexibility implies that he will make many errors in the workplace. In a nutshell Dr Brown concludes that the plaintiff's frontal lobe malfunctions and all this is related to the accident in which he was involved.

[16] In dealing with the plaintiff's capacity for employment Dr Brown said that the presence of constructional apraxia implies that it is impossible for the plaintiff to work efficiently and accurately as a tiler. The brain damage prevents him from effectively engaging in his previous line of work. Dr Brown concedes that the fact that the plaintiff has continued to work as a tiler does not mean that he is competent to do so. He defers to the opinion of an industrial psychologist to comment further.

[17] Dr Ormond-Brown in commenting on the report by Dr June Calde Rossi an educational psychologist appointed by the defendant noted that Dr Rossi asked the plaintiff the following questions:

"My father's brother is the same person as my brother's father."

The plaintiff was unable to work out the difference. He concludes that the plaintiff has difficulty in processing spatial information and this has to do with conceptualising ideas related to his work. His parietal lobe was impaired. He further noted that Dr Rossi also found that because of his poor attention and memory the plaintiff would need to be supervised and would not be able to work independently. The plaintiff is inflexible as a result of the brain damage and needs to be supervised. The plaintiff could not follow the blocks and is accordingly not capable of running a business by himself unless his is

watched all the time. He comments that it will be impossible for a supervisor to be standing all the time watching him do his work.

[18] Finally in his evidence-in-chief Dr Brown was asked to comment on the following statement that appears on page 53 of the report by Dr Rossi where he says the following:

“Unfortunately no school reports were provided to establish his cognitive ability before the accident. He worked as a tiler after he arrived in South Africa may live with his uncle. Some of his neuropsychological difficulties could have pre-rated the accident and were compounded by it or could have been caused by it. Primarily school reports, collateral information from his teachers would need to be collated to make the decision.”

On this observation Dr Brown says that even though there were no school reports the examination carried out indicate that his pre-morbid cognitive condition and intelligence was slightly below average. His mental retardedness was 70%. He concludes that post the accident the plaintiff is now mentally retarded. His verbal and non-verbal scales are below average at $\pm 85\%$.

[19] In cross-examination Dr Brown stuck to his conclusion and conceded that the plaintiff will be able to do work as a tiler but under constant supervision in order to minimise errors. He continues that the plaintiff is still able to understand when given instructions but the problem lies with his being unable to execute those instructions because of the brain injury that he sustained.

[20] Dr David Shevel a psychiatrist confirmed the contents of his medico-legal report as it appears on pages 113 to 139 of the paginated papers. He noted the following neuropsychiatric signs in respect of the plaintiff namely:

20.1 That the plaintiff came across as being said and withdrawn.

20.2 He was hesitant when answering questions.

20.3 He lacked initiative and insight into his problem.

[21] His examination and assessment diagnosed the plaintiff to be suffering from post-traumatic organic brain syndrome which includes changes in cognitive functioning, mood and personality.

[22] He testified further that this condition will limit the plaintiff's insight in whatever he is doing as a result he will not realise the extent of his problems and he will have problems with understanding instructions.

[23] He says further that the CT brain scan showed contusions of the right frontal lobe. Many of the neuropsychological symptoms for example tendency to hyper insomnia, daytime fatigue, decreased socialisation, decreased energy and drive as well as the neuropsychiatric signs like possible dysphasia, lack of initiative, idiomatic, limited insight are all consistent of frontal lobe dysfunction.

[24] Dr Shevel urged further that the plaintiff's personality changes related to the head injury sustained will have a negative impact on his interpersonal skills and relationships with co-workers within any work environment. Furthermore, his occupational functionary has been adversely affected because of the injury to his lower back. This is exacerbated by his limited educational level. Dr Shevel concludes that taking a holistic view the plaintiff may well be functionally unemployable in the open labour Market.

[25] In cross-examination Dr Shevel told the court that the back injury will slow down the plaintiff's work rate as a tiler. He describes that dysphasia relates to disorder of the language as a result of brain injury.

[26] Mr Mphikeleli Klaas Mzangwa testified that he knows the plaintiff since the year 2010. They met at a construction company in Ennerdale Johannesburg. He and the plaintiff still work together. He does plastering whilst plaintiff does tiling. He earned R500,00 per week whilst the plaintiff earned R1 000,00 a week as a tiler. Since the plaintiff came back to work after he had an accident his work rate has slowed down. He works two to three times a week. There have been complaints about the quality of his work. He gets tired and complains of headaches and gets angry. He also does forget to come to work.

[27] In answering questions under cross-examination it turns out that the plaintiff taught the witness how to do tiling. The witness says that he now

works for the plaintiff and that the plaintiff pays him. The plaintiff is self-employed and has his own customers.

[28] He confirms that the plaintiff is no longer able to differentiate between right and wrong work as regards tiling. He the witness now tells the plaintiff what is right or wrong. He says the plaintiff is no longer as perfect as before. He does not place tiles straight like before. He confirms that the plaintiff does gardening during the week.

[29] In answering questions by the court he said that he and the plaintiff live in the same township and that plaintiff is self-employed. Socially he says that the plaintiff is not a talkative person.

[30] He confirmed that he and the plaintiff are friends but do not often socialise together. The plaintiff takes part in running (athletics) but does not play soccer. Since the accident the plaintiff no longer runs as fast as he used to before. He does not know if the plaintiff holds any qualifications concerning tiling. He does not know if the plaintiff can do any painting.

[31] Mr Cornelius Baloyi testified that he is the uncle to the plaintiff. The plaintiff lived with him for 7 years. When the plaintiff got injured in the car accident he was at that time living with his girlfriend.

[32] The plaintiff was a gardener and he the witness taught the plaintiff how to do tiling. The plaintiff became a good and proficient tiler and needed no supervision after some time. There were no complaints about his work.

[33] Since the plaintiff had been involved in the accident he no longer gets work for tiling like before and when he does get the work he just not finish it. The plaintiff works part-time between two to three days per week. The witness has decided to no longer give him subcontract work because he says that the plaintiff complains a lot and cuts the tiles wrongly.

[34] The plaintiff's girlfriend told him that the plaintiff is moody and short-tempered. He always complains of being tired and does not finish work allocated to him. He is forgetful and even forgets to come to work.

[35] Mr Baloyi confirms that besides tiling work the plaintiff does gardening but always complains of headache because he works outside in the sun.

[36] Since the accident he has worked about four to five times with the plaintiff. He confirmed that plaintiff can mix the grout for tiling as well as to pack the tiles for him to do the tiling. Whenever he did tiling he also noticed that he did wrong skirting. He does not know what standard or level of education the plaintiff achieved whilst in Mozambique. According to him the plaintiff is presently unemployed and survives on piece jobs.

[37] Mr Marc Peverett an industrial psychologist testified that he consulted with the plaintiff on the 4th November 2014. The purpose of his assessment is to evaluate his work and earning potential having regard to the consequences of the accident.

[38] Mr Peverett concludes in his report that the plaintiff demonstrates below average intellectual ability to solve problems of an abstract nature compared to others who have had nine years of schooling.

[39] In considering the plaintiff's employment prospects since the accident Mr Peverett says that in view of his young age at the time of the accident his psychometric profile, educational level, work experience as well as the reported income level of approximately R36 000 per annum in 2010 it is probable that his earning would have advanced significantly beyond R50 000 per annum prior to age 40. However because of the accident his future earnings optimistically would probably remain limited between March to R5 500 per annum at least when considering applicable wage tables for the informal sector.

[40] He says that the plaintiff's knowledge of tiling falls within the semi-skilled category because he received no formal training.

[41] He testified further that the R36 000 yearly income is based on a salary of R150 per day.

[42] The plaintiff thereafter closed his case. The defendant also closed his case without calling any witnesses except to rely on the joint minutes of the experts. Both counsels argued and made submissions without any heads of argument.

GENERAL DAMAGES

[43] The plaintiff is seeking compensation of R1 million general damages. The defendant referred this Court to the unreported decision of this Court namely the matter of *Makgetha Thabang v Road Accident Fund* Case Number 2010/17218 Gauteng Local Division, Johannesburg a judgment by Francis J delivered on the 8th September 2014 without indicating what a reasonable amount would be.

[44] Dr L Berkowitz a plastic and reconstructive surgeon appointed by the defendant notes that the plaintiff sustained extensive scarring on the right thigh, the right knee, the right leg, the left thigh below the buttock fold and the lower back and concludes that the plaintiff must have suffered severe pain for 48 to 72 hours following the scar revision. That he will thereafter experience moderate pain and discomfort for a further 7 to 10 days. Professor Chait concludes that although the plaintiff's scars could be improved surgically he will left with deforming scars. He says that the scars on the right knee could be subject to trauma and breakdown.

[45] The joint report of Dr Carl van Heerden and Dr F Reyneke both neurosurgeons knows that the plaintiff sustained a soft tissue injury to his lumbar spine that will require future treatment with physiotherapy. The neurosurgeons also agreed that the plaintiff sustained a head injury. They only differ to the severity thereof. Plaintiff's counsel referred me to the decision of *Myhill NO v Road Accident Fund* 2008 (5) B4 QOD 292 T.

[46] The injuries sustained by the plaintiff and the *sequelae* thereof are fully documented in the medical reports. In determining quantum for general damages I am required to exercise a broad discretion to award what I consider to be fair and adequate compensation. In so doing I have to consider a wide spectrum of facts and circumstances connected to the plaintiff and the injuries sustained by him including the nature, permanence, severity and impact on his life.

[47] The plaintiff was hospitalised for close to two weeks during which he experienced pain. According to his work colleague the plaintiff complains of back pain whilst working. His girlfriend says he is moody and gets angry and is irritable. He no longer runs or jogs as he used to before because of the back injury.

[48] In the *Myhill NO* matter (*supra*) the plaintiff who was a Mozambican national employed as a tailor and machinist sustained severe head injuries and an injury to his lower limbs. He was earning R350 per week. Evidence presented to court demonstrated that prior to the accident he was a hard

working person but that after the accident he was a totally different person. He could not work not even look after himself. The court awarded him an amount of R750 000 for general damages. In the present matter the plaintiff although having sustained moderately severe head injuries he is still able to work for two to three days per week and still looks after himself. He is not in the same position as the plaintiff in the *Myhill* case.

[49] In *Dlamini v RAF* 2010 (6A4) QOD 68 GSJ the plaintiff a 37 year old male sustained brain injury, fracture of the mandible, loss of teeth and soft tissue injury to the cervical and lumbar spine. He was hospitalised for three months after the accident and was left with neuropsychological *sequelae* because of the brain injury. He was no longer suitable for employment in the open labour market. He was awarded general damages of R850 000 in the year 2012.

[50] The plaintiff in the present matter did not sustain injuries as severe as in the *Dlamini* matter. It has also not been proved that the plaintiff is completely unemployable. He may have restrictions but only limited to the type of work he does. I am of the view that an amount of R750 000 is fair and reasonable compensation for the plaintiff under this heading.

FUTURE LOSS OF EARNINGS

[51] Concerning this head of damages Alex Munro based his calculation on information drawn from the report of Marc Peverett industrial psychologist

dated the 22nd January 2011. The defendant's counsel in argument informed the court that what is in dispute is the basis of the calculation and not the correctness of the amount. I expected the defendant to then present evidence in this regard however none has been forthcoming and I am therefore bound to consider the evidence before me.

[52] I have also taken note that in the joint minutes of the two occupational therapists namely Anne Reynolds and Kathy Wandram, the two experts in dealing with this head of damages agree that the plaintiff would be able to work as a tiler with appropriate rehabilitative and maintenance intervention, when considering his physical capabilities in isolation of his neuropsychological capacity. Further it was agreed that the plaintiff presents with difficulty in learning new skills with more than two steps. He will need extensive supervision due to limitation, he is limited to performing known tasks which are simple and repetitive.

[53] I am not persuaded that the plaintiff is totally unemployable. There is evidence that besides tiling the plaintiff is a gardener. Mr Baloyi says that the plaintiff has his own contract and employs him which means that if the plaintiff cannot physically do the tiling he has his employees to do the work. In calculating plaintiff's future loss of income Munro has followed the argument presented by Marc Peverett the industrial psychologist however Munro does not elaborate why he was asked to apply a higher contingency deduction of 45% to the injured income. All he says is that he was asked to do so. He does not say by whom and on what basis. In the absence of such explanation

I am not persuaded that the 45% contingency deduction is justifiable. I will in exercising my discretion need the necessary assessment.

[54] Marc Peverett says the following at paragraph 6.24 of his report:

“In terms of future earnings considering Mr Kunene’s skills base, educational level and pre-accident employment record future earnings at best would probably only ever remain confined to the informal sector involving variable labouring work as a gardener or vulnerable hawker.”

[55] The usual contingencies applicable to past and future losses of earning is 5% and 15% respectively. I am of the view that a 20% deduction instead of 45% would be appropriate in respect of future income in an injured condition. Accordingly his future injured income will translate to a sum of R10 780,00 thus reducing his total loss of income to the sum of R1 022 645,00. It is worth noting that the defendant fails to tender any evidence to rebut plaintiff’s case hence I have no reason to reject Mr Munro’s calculation save for what I have indicated as regards contingencies.

[56] All the awards should be reduced by a further 20% in terms of the settlement reliability.

[57] In the result I hereby make the following order:

1. The defendant is ordered to pay the plaintiff an amount of R1 872 645,00 which is made up as follows:

- 1.1 R850 000,00 for general damages.
 - 1.2 R120 800,00 for accrued loss.
 - 1.3 R901 845,00 for future loss of income.
2. The defendant is ordered to furnish the plaintiff with a certificate in terms of section 17(4)(a) Act 56 of 1996 to cover plaintiff's future medical expenses.
 3. The defendant is ordered to pay the costs of suit on a party and party basis on the High Court scale including the costs of the experts as well as the qualifying fees of the experts whose expert notices were served on the defendant.

DATED at JOHANNESBURG on this 28th day of MAY 2015.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF

ADV I SMITH

INSTRUCTED BY

MESSRS RAPHAEL & DAVID SMITH INC
35 Cradock Avenue
Rosebank
Johannesburg
Ref: KR/KH621

COUNSEL FOR THE DEFENDANT

ADV LLEWELYN

INSTRUCTED BY

MESSRS SISHI INC
Third Floor
Marble Towers
208/212 Jeppe Street
Johannesburg
Ref:Mr Sishi /nc/SAS3866
Tel: 011 421 0504

DATE OF HEARING

17 FEBRUARY 2015

DATE OF JUDGMENT

28 MAY 2015