

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

CASE NO.: 43669/2008

DATE: 8/06/2010.

In the matter between:

M L MAVIMBELA

PLAINTIFF

VS

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

WEBSTER J

1. The plaintiff, an adult male, employed as an administrative official in the Department of Public Works, was injured in a motor collision on 23 December 2006. He has instituted an action for damages arising from the injuries and the consequences arising from such injuries, against the defendant in accordance with the provisions of section 17 of the Road Accident Fund Act no. 56 of 1996 ("the Act").
2. Various reports by experts were exchanged between the parties. In consequence of the contents of such reports the parties have reached agreement on the following issues, namely (i) that the defendant admits 100% liability for the plaintiff's proven damages;

(ii) the defendant will furnish the plaintiff with a certificate in terms of section 17(4)(a) of the Act for the plaintiff's future medical treatment and intervention; (iii) the reports of the experts exchanged by the parties are admitted and the contents thereof are further admitted as evidence; (iv) the only issues for determination by this court are the (a) general damages suffered by the plaintiff, and (b) the loss of future earnings by the plaintiff in consequence of early retirement which the plaintiff, according to the experts, will have to go on.

3. It is common cause that the plaintiff suffered two major injuries in the collision when the vehicle which he was driving collided with another vehicle. These injuries are (i) a soft tissue whiplash injury to the neck, and (ii) a soft tissue injury to the medial collateral ligament of the left knee.
4. The plaintiff attended a general practitioner for his injuries only after three weeks of the incident. He was given pain killers and referred to an orthopaedic surgeon: he, however, did not attend the said surgeon, as advised.
5. Prior to the collision the plaintiff participated in soccer, cricket and played pool. His leg still worries him and he is no longer as active in physical sport as he was before the collision. He experiences pain in the neck when he turns it and it is worse when he turns in the night.
6. His left knee is still painful on a daily basis. There is also pain in the right knee at night. This injury, however, is not relevant for the purposes of this claim as it was sustained in another collision which occurred prior to the one which forms the subject matter of this case.

7. There are two main medico-legal reports that were handed in by the parties. One of these was drawn up by Dr Capaert, whose report is dated 23 December 2006. He examined the plaintiff on the instruction of the attorneys representing the plaintiff. The second report is by Dr Steyn who examined the plaintiff on the instructions of the defendant; this report is dated 26 April 2010. It will be observed that the latter report was done three years and four months after the report by Dr Capaert and for that reason it is more updated than that of his counterpart. These doctors are agreed on the history of the matter and they are equally agreed on the sequelae of the injuries suffered by the plaintiff. Both concede that the plaintiff will continue to experience pain on a daily basis on the site of the soft tissue injuries. They also agree that with age various complications are likely to occur. The prognosis by Dr Steyn is that the plaintiff's knee will require intervention in the form of an arthroscopy and examination under anaesthesia and repair of the ligaments that are damaged; there is a possibility that the left knee will require replacement as the plaintiff gets older and that the cervical spine will need conservative treatment to relieve the discomfort and possibly may require surgery in the future.
8. According to the defendant's expert the probabilities of the aforesaid medical intervention is 50% in respect of the knee replacement and 20% in respect of the cervical surgery. The aforesaid treatment and the general degeneration in the plaintiff's health also have an effect on his possible early retirement. Two different scenarios have been depicted by the two specialists. The percentage of this occurrence according to the plaintiff's expert is 10% which translated into time, is approximately one to two years before the attainment of the age of 65. According to an actuarial report which was also handed in by the parties, the future loss of

income that is likely to be suffered by the plaintiff retiring at the age of 63 is the sum of R71 698. This is the figure that has been agreed upon by the parties as well. A contingency allowance has to be made in respect of the future loss of income as a consequence of the premature retirement by the plaintiff.

9. It was submitted by Mr. Marx, who appeared for the plaintiff, that based on the prognosis of a 50% probability of the knee replacement, the plaintiff would be entitled to half of R71 698. It was argued on behalf of the defendant that the plaintiff should be awarded 10% of that figure, the 10% having been the percentage which was the estimate of Dr Capaert, the plaintiff's expert. Be that as it may, the court heard further argument with regard to this point and that is that the plaintiff, in its particulars of claim, claimed R10 000 under this head and did not amend its claim on the basis of the actuarial report which plaintiff counsel referred and relied upon. I shall revert to this issue later in this judgment.
10. With regard to the general damages the plaintiff's expert has indicated that the plaintiff suffered acute pain directly after sustaining the injuries in the collision. In this regard he states "dit kan verklaar word in terme van die meganisme sowel as die behandeling wat die pasiënt ontvang het". He then goes on to say that that acute pain would have diminished after about six weeks of the occurrence and for the next six months the plaintiff would have suffered sub-acute pain as his injuries were healing. He then further states that the plaintiff is left with chronic pain which would have commenced about six months after sustaining the injuries. This is the pain that still persists to date hereof and will, in all probability, and in the court's view, continue into the future.

11. Dr Steyn deals with the present complaints of the plaintiff. He notes that under the heading "Pain and Suffering – This was moderate initially and then became slightly worse when he went to see his doctor for the check-up. It was not severe enough to stop him from driving or carrying on his activities." It is significant that Dr Steyn sets out the plaintiff's present complaints which include "pain to the neck when he turns it or when he goes to the right; that the left knee is painful on a daily basis and is worse when he has to climb stairs. There is also pain in the knee at night. He struggles to play soccer now. The knee is painful when he has to straighten it after it has been bent for any length of time." It is significant that the doctor accepts that the plaintiff uses different pain medication tablets and traditional healing methods and perhaps significantly does not in any way suggest that the plaintiff's present complaints, many years after the incident, are a form of malingering or that they are exaggerated or that they are not consistent with the injuries that the plaintiff suffered.
12. In address both counsel quoted copiously from the well-known works Corbett and Buchanan on "Quantum of Damages". It is not necessary that the various authorities that both counsel referred the court to be repeated. The court's approach is that the evidence of the plaintiff as well as the various experts has to be viewed in totality. It was argued that the plaintiff, by not keeping an appointment with an orthopaedic surgeon, that his injuries may have become exacerbated thereby and likewise that the further pain that he suffered and still complains of may be as a direct consequence of his failure to attend the orthopaedic surgeon that he was referred to. This, in my view, is a misplaced argument because the specialist that the plaintiff was referred to was an orthopaedic surgeon. Nowhere was it ever suggested that the injuries that the plaintiff suffered in consequence of the collision in

any way involved a fracture or injuries which would have necessitated curative treatment. It may very well be that the soft tissue injuries that the plaintiff sustained might have been diagnosed by the orthopaedic surgeon but whatever treatment would have been prescribed for the plaintiff's condition would most certainly not have been the conventional type of immobilization of appendages. There has been no suggestion from the defendant and none lends itself, in the court's view, to the conclusion that immobilizing any appendage or treatment by an orthopaedic surgeon, would have averted the residual pain of the soft tissue that the plaintiff suffers from. Indeed, the only injuries which required, in the court's view, intervention by an orthopaedic surgeon are those relating to the motor collision which the plaintiff had suffered years earlier and which are clearly distinct from those suffered in the collision which is the subject of the present case.

13. The plaintiff's injuries are, in the court's view, clearly serious and require, as has been set out by experts, surgical intervention in the near future. The plaintiff will still undergo pain in consequence of such intervention. Not only with that be the position, neither of the experts consulted ventured to suggest that pain, inconvenience and incapacitation that the plaintiff complains of will be eradicated and that the plaintiff will recover completely from the maladies he currently suffers from.
14. Having regard to all the circumstances in this matter, it is this court's considered view that the plaintiff suffered severe injuries and will continue to suffer from the effects thereof for some years to come and that there is no guarantee of the plaintiff reaching a stage in his life where he will not be subjected to pain arising from the injuries and any future intervention. It is this court's considered

view that the plaintiff is entitled to general damages in the amount of R175 000.

15. In the course of preparing the judgment it occurred to the court that plaintiff's counsel may have had some mental relapse during his reply regarding the limit of R10 000 to the plaintiff's future loss of income. It appeared quite strange that plaintiff's counsel would have failed to even attempt to seek an amendment of the plaintiff's particulars of claim in terms of Rule 28(10) of the Uniform Rules of Court. Reference had been made to an actuarial calculation of such damages in plaintiff's opening address to the court and Mr Marx had addressed the court specifically on the figure of R35 849.00 without the actual report being handed in. It appeared to the court that this could have resulted from some mental relapse on the part of both counsel. This issue was taken up in writing with both counsel who were invited to submit written argument on the matter.
16. On 2 June, 2010, Mr Marx approached the court in chambers with a notice in terms of Rule 28 amending paragraph 8 of the plaintiff's particulars of claim to read as follows:

"8.

In die vooropstelling het die Eiser skade gely in die bedrag van R590 849.00 welke bedrag soos volg saamgestel is:

8.1 GERAAMDE MEDIESE KOSTE	R5 000.00
8.2 GERAAMDE TOEKOMSTIGE MEDIESE KOSTE	R300 000.00
8.3 ALGEMENE SKADEVERGOEDING	R250 000.00
8.4 GERAAMDE TOEKOMSTIGE VERLIES AAN	
INKOMSTE	R35 849.00
TOTAAL	R590 849.00"

17. He assured the Court that he had discussed the amendment with Mr Uys who had indicated to him that he had no objection to the amendment being granted to reflect the plaintiff's future loss of income as R35 849.00, effectively abandoning his submission that the plaintiff's claim under this head was limited to R10 000.
18. Where parties to a matter expressly agree to an amendment of a pleading or where an application for such amendment is made before judgment is delivered the court will, unless prejudice would result from such amendment, grant such amendment. In this case the actuarial report had been available to the parties before the trial commenced and, from the court's understanding, was to have been handed in by consent. Based on the consensus of both counsel there is clearly no prejudice to the defendant. The amendment was accordingly granted.
19. The court is satisfied that the plaintiff's future loss of income amount to R35 849.00.
20. **Judgment is accordingly entered for the plaintiff in the sum of R210 849 (Two hundred and ten thousand eight hundred and forty-nine Rand) plus costs of the action which will include the costs of the experts.**



G. WEBSTER
JUDGE IN THE HIGH COURT