

**IN THE HIGH COURT OF SOUTH AFRICA**

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 2056/2008  
Date heard: 2 February 2010  
Date delivered: 11 May 2010

In the matter between:

**JACOBUS FREDERICK DE BRUIN**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

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**J U D G M E N T   O N   Q U A N T U M**

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**DAMBUZA, J:**

[1] On 2 May 2005 the plaintiff was the driver of the insured vehicle when the insured vehicle, whilst stationary, was struck from behind by another vehicle in Uitenhage. As a result of that collision the plaintiff sustained neck and back injuries. He now claims damages from the Road Accident Fund (“the Fund”), in terms of the Road Accident Fund Act, Act 56 of 1996 (“the Act”) for the injuries he sustained in the collision. The matter comes before me only for determination of quantum, the defendant having conceded liability for the damages sustained by the plaintiff in the collision. At the start of the proceedings

counsel brought to my attention that the parties had agreed on the quantum for the plaintiff's past medical expenses and that the Fund has undertaken to furnish to the plaintiff a certificate, in terms of section 17(4) of the Act, in respect of future expenses relating to the injuries sustained by the him in the collision. The issues before me therefore are the plaintiff's loss of earnings (past and future) and general damages suffered by the plaintiff as a result of the accident.

[2] The record reveals that on the day following that of the collision, the plaintiff visited his General Practitioner, Dr Steenkamp who compiled a statutory medical report relating to the injuries sustained by the plaintiff as required by the Act. According to Dr Steenkamp, the plaintiff had sustained "minor" neck and back injuries, more particularly, a "whiplash injury to cervical spine with no nerve involvement and soft tissue injury to his back and lumbar region". The plaintiff received "conservative" medical management. A radiographic examination of the cervical spine was "unremarkable". He was referred for physiotherapy which he attended for three to four months.

[3] Dr Basil Mackenzie, an Orthopaedic Surgeon consulted with the plaintiff on 18 April 2008 (almost three years after the accident) and prepared a medico-legal report on the injuries sustained by him in the accident. Both parties consented to this report being handed to me. In the medico-legal report Dr Mackenzie states that as a result of the accident the plaintiff sustained moderately severe lower back and neck soft tissue injuries. He opines that the plaintiff probably did not sustain any direct trauma to his cervical and lumbar discs, facet joints or vertebrae and that he will not develop degenerative changes in his cervical and/or lumbo-sacral discs any more rapidly than he would have, had he not met with the accident. Therefore the likelihood that the plaintiff will require surgery as treatment for the accident related injuries is remote (less than 3%).

[4] Because the pain had persisted beyond two years at the time of the consultation, Dr Mackenzie deemed it unlikely that the symptoms experienced by the plaintiff will resolve spontaneously. On the other hand they are not likely to become significantly more intrusive. The result is that the plaintiff will require long term, predominantly non-operative treatment, including

analgesics, physiotherapy and counselling on self care of his neck and lower back.

[5] Dr Mackenzie confirms Dr Steenkamp's diagnosis of the neck injury as a "whiplash" and remarks that the association of the cervical soft tissue injury with lower back pain is typical. He notes however, that the plaintiff's complaints and clinical signs at the time of the consultation were entirely subjective and that no measurable clinical abnormalities (e.g. limitation of movement or deformities) were found on examination.

[6] When the plaintiff consulted with Dr Mackenzie he was working for Bowman Cranes having left Continental Tyre where he had worked as a tyre builder at the time of the accident. Dr Mackenzie views as reasonable, that the plaintiff sought an alternative job involving less physically demanding activity. He concludes that the plaintiff is 5% impaired; that being the extent to which his capacity to manage common activities of daily living have been compromised. According to Dr Mackenzie, generally people with 5% impairment due to a spinal problem are capable of "medium work" (according to the guidelines proposed by the United States Department

of Labour) which he compared to exerting 9kg to 22kg of force occasionally or 4.5kg to 11kg more frequently or greater than negligible forces up to 4.5kg constantly (two thirds or more of time on duty) to move objects. Dr Mackenzie is of the view that the plaintiff's duties at Bowman Cranes entailed "medium work" which he could do to normal retirement age. It would not be in the plaintiff's interests, however, according to Dr Mackenzie, to resume "heavy work" (which he compared to exerting 22kg to 45kg of force **occasionally** or 9kg to 22kg of force frequently or 4.5 to 9kg of force **constantly**). The plaintiff is further precluded from taking part in heavy weight leisure activities and impact sports such as rugby.

[7] The 26 year old plaintiff testified that at the time of the accident he was employed as a tyre builder at Continental Tyre. His specific duties involved assembling of tyre components onto a tyre manufacturing machine and removal of a complete or whole tyre from the machine and placing thereof on a skid. The weight of the tyres ranged from 19 to 21kg each. He would repeat the process about 200 or 300 times a day.

[8] The plaintiff testified that he went up to matric at school. Prior to the accident he was healthy and fit. He played rugby and cricket at club level. He would train during the week and play matches over week-ends. After the accident he never resumed his sporting activities.

[9] Following the accident the plaintiff was off from work for a week. Thereafter he returned to work and continued with his duties as before. His evidence was that because of problems resulting from his back injuries he had difficulties in coping with his job and ultimately resigned from Continental Tyre in February 2008. A schedule of instances of sick leave taken by the plaintiff whilst still in the employ of Continental Tyre is part of the record. The schedule reveals that on 3 May 2005, 4 April 2006, 24 April 2007, 31 May 2007, 1 June 2007, 27, September 2007, 30 to 31 January 2008 and 1 February 2008 on 3 May 2005, 4 April 2006, 24 April 2007, 31 May 2007, 1 June 2007, 27, September 2007, 30 to 31 January 2008 and 1 February 2008 the plaintiff was absent from work as a result of "backache and/or MVA-back injury".

[10] After leaving Continental Tyre the plaintiff secured employment as a sales representative with Bowman Cranes, a company selling truck mounted cranes. His duties at Bowman Cranes were less demanding on him physically than the work he did at Continental Tyre, but entailed relatively long hours of driving. His evidence was that his back continued to give him problems as he would experience pain and stiffness of his lower back after long hours of driving.

#### *Loss of Income*

[11] During the trial it is common cause that the salary which the plaintiff earned at Bowman Cranes (a basic salary of R5,500.00 *per month* plus cell phone allowance) was lower than what he received at Continental Tyre (R1,684.00 *per week*, annual bonus, contributions to a provident fund and medical aid). It was also not in dispute that had the plaintiff remained at Continental Tyre, his salary would have, on 1 July 2008, increased by 8%.

[12] *Mr Dala* who appeared on behalf of the fund submitted that the plaintiff had failed to prove that he had suffered loss of income as a result of the injuries

sustained by him in the accident. This submission is based on the comment by Dr Mackenzie that “no objectively measurable clinical abnormalities were noted, for example, limitation of movements, deformities, etc.”. The plaintiff had complained to Dr Mackenzie of lower back pain which was most intrusive when he rose from bed in the early mornings and when he was obliged to sit for long periods. These were still the plaintiff’s main complaints at the time of the trial.

[13] I do not think that objectively measurable clinical abnormalities are the only **proof** that the plaintiff sustained injuries which resulted in loss of income. Nothing in Dr Mackenzie’s report suggests that he doubted the veracity of the plaintiff’s complaints. On the contrary, and as I have stated Dr Mackenzie’s view is that the plaintiff should not revert to doing heavy work. I am satisfied that as a result of the injuries sustained in the accident the plaintiff had to downscale the strength of physical activities that he engaged in. The issue then becomes whether he should have done something or more than he says he did to persuade his employer to place him on other duties.

[14] Brian Brokenshaw who was a Product Manager in charge of the department in which the plaintiff worked at Continental Tyre at the time of the accident testified on behalf of the Fund. His description of the plaintiff's duties was that they involved repeated moving and/or lifting weights of, at least 12kg at a time for two thirds of the plaintiff's working time. He testified further that he had explained to his team at Continental Tyre that if anyone had difficulties in coping with his duties, arrangements could be made that his duties be altered in line with his or her capabilities. Consequently, had the plaintiff reported that he was experiencing difficulties as a result of the injuries he had sustained in the accident, arrangements would probably have been made for him to be placed on different duties. He would therefore not have lost any income. Further, according to Brokenshaw when the plaintiff resigned from Continental Tyre, he (Brokenshaw) inquired from him as to the reason for his resignation and the plaintiff told him that he sought employment where, unlike Continental Tyre, he would only work day shift. This point is also alluded to by Erica Pretorius, a managing member at Bowman Cranes, who also testified that when the plaintiff

applied for employment at Bowman Cranes, he gave, as his reason for leaving Continental Tyre, the fact that he only wanted to work day shift.

[15] But I do not think the fact that the plaintiff told Brokenshaw and Pretorius that he wanted to avoid working night shift negates the fact that he had sustained injuries which rendered it undesirable for him to do heavy work. The plaintiff admitted that he never told Brokenshaw the true reason for his resignation as he did not want to “burn his bridges”. As to whether the plaintiff would have been placed on alternative duties at Continental Tyre, it was the plaintiff's undisputed evidence that he had alerted his immediate supervisor to his plight and the response was that because the injuries were not sustained in the course of his duties with Continental Tyre, no assistance could be afforded to him. It is evident that the plaintiff never hid the fact that he had been involved in an accident and that he was suffering from recurrent backache as a result thereof. It was common cause during the trial that the schedule which I referred to earlier as setting out instances of his absence from work was part of records at Continental Tyre pertaining to the plaintiff. It seems to

me that his immediate supervisors must have had access thereto as they would have had to inquire as to why he was not at work on a particular day. Incidentally, on his own evidence, until shortly before giving evidence, Brokenshaw had not even been aware that the plaintiff had been involved in the accident under consideration. At the time of trial he was also not aware that the plaintiff had had to take time off from work as a result of the injuries relating to the collision.

[16] It is, in my view improbable that the plaintiff would have chosen to work for Bowman Crane where he earned less than he did at Continental Tyre, if he could have stayed on at Continental Tyre. Further, Brokenshaw was evasive on the issue of whether the plaintiff's income would have remained the same if his duties at Continental Tyre had changed. In response to a question on this issue he explained at length the procedure that an employee has to go through after the exhaustion of the 10 day annual sick leave which includes a counselling session and an incapacity inquiry to determine whether an employee is temporarily or permanently disabled. And he could only support his assertions by quoting an example of

an employee who was injured on duty and was still employed at Continental Tyre in a different capacity.

[17] I am satisfied that it was not unreasonable for the plaintiff to seek alternative employment in the circumstances.

[18] At the time of the trial the plaintiff had left Bowman Cranes, had worked for Planet Fitness for three months, and thereafter took up employment with Security Management Solutions as a sales representative. The evidence was that he was dismissed at Bowman Cranes following a disciplinary enquiry in which he had pleaded guilty to the charges. I agree that he was the cause of his own misfortune of not earning an income during January and February 2009. Even if, but for the accident, he would not have left Continental Tyre and therefore would not have been the subject of a disciplinary inquiry, as submitted on his behalf, the cause for his loss of income during these months was a fact which was not linked to the accident. I am not persuaded that the Fund is liable in this regard.

[19] Further evidence was that although the plaintiff still earned less at Security Management Solutions than he would have earned at Continental Tyre, there were good prospects of promotion and it was anticipated that in about three years his salary would catch up with what it would have been at Continental Tyre. At the time of the trial the plaintiff earned a basic salary of R5,700.00 at Risk Management Solutions, that being about R3,100.00 per month less than he would have earned at Continental Tyre.

[20] In summary, the plaintiff's claim for loss of income relates to the period from when he left Continental Tyre up to 2013 (three years from the time of the trial). The claim is calculated as follows:

|                                                                                                                                  |                  |
|----------------------------------------------------------------------------------------------------------------------------------|------------------|
| During the period that the plaintiff was employed at Bowman Cranes (calculated as a portion of his annual package of R25 000,00) | R20,833.00       |
| January – February 2009 (unemployed)                                                                                             | R17,636.00       |
| March – December 2009 (Planet Fitness)                                                                                           | R40,000.00       |
| January – March 2010<br>(Security Management Solutions)                                                                          | <u>R9,300.00</u> |
| Past loss of earnings                                                                                                            | R87,769.00       |

[21] On my finding that the Fund is not liable to compensate the plaintiff for the period of January and February 2009, the amount of R17,636.00 falls to be

deducted from the plaintiff's claim, bringing the total to R70,133.00. Both parties were in agreement that a contingency factor of 5% be applied to the plaintiff's past loss of income, thus bringing the plaintiff's claim to R66,626.35.

[22] The plaintiff's claim for future loss of income (April 2010 – March 2013 with Security Management Solutions) is R111,600.00. Although no evidence was led as to the rate or stages at which this deficit in the plaintiff's salary will decrease in the next three years to ultimately match what it would have been at Continental Tyre, the amount claimed by the plaintiff as future loss of earnings was not disputed. *Mr Schubart* submitted that a 10% contingency deduction be applied to this amount. I can find no reason why the usual contingency factor of 15% should not apply to the so called 'normal contingencies'.<sup>1</sup> This brings the plaintiff's claim for future loss of earnings to R94,860.00.

### *General Damages*

[23] I have already referred to the injuries sustained by the plaintiff and the *sequelae* thereto. Counsel referred

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<sup>1</sup> *The Qantum Yearbook 2010*; Robert Koch; at 102

me to a number of decisions wherein awards were made for general damages relating to whiplash injuries.<sup>2</sup> I have considered these cases and do not deem it necessary to set out the details of each matter. In comparison with some of them (see for example; **Smit v Road Accident Fund** 2006 (4) SA 590 SCA; C&H at C3-193) the plaintiff in this matter does not experience constant or recurrent headaches, neck or backaches.<sup>3</sup> As I have already stated, he only experiences pain after long hours of maintaining the same position (e.g. driving). On the other hand he, at 22 years old at the time of the accident, was younger than the plaintiffs in the cases to which I have been referred. His participation in sports was curtailed at an early age. My view is that an award of R70,000.00 as general damages is reasonable.

### *Medical Expenses*

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<sup>2</sup> **Norman v Santam Insurance Limited** reported in Volume 4 of **Corbett and Honey**, The Quantum of Damages in Bodily And Fatal Injury Cases, C3-74; **Griffiths v Mutual and Federal Insurance Company Limited**; **Corbett and Honey** Vol 4 at C3-33; **Jacobs v Padongellukefonds**; **Corbett and Honey** Vol 5 at C3-131; **Road Accident Fund v Tooley**, **Corbett and Honey**; Vol 5 at C3-164.

<sup>3</sup> See also **Barton v Road Accident Fund** 2002 (5) C&H; at C4-19C;

[24] The plaintiff claims an amount of R1,619.35 as past medical expenses. I did not understand this amount to be disputed by the Fund.

[25] In view of the undertaking made by the Fund in terms of section 17 of the Act, the plaintiff's claim of R239,500.00 for future medical expenses falls away.

[26] Damages to be awarded to the plaintiff are therefore calculated as follows:

|                                            |                   |
|--------------------------------------------|-------------------|
| Past Medical expenses                      | R1,619.35         |
| Loss of earnings (R66,626.35 + R94,860.00) | R161,486.35       |
| General Damages                            | <u>R70,000.00</u> |
|                                            | R233,105.70       |

Consequently the defendant is ordered to :

- (a) Pay to the plaintiff an amount of R233,105.70 as and for damages;
- (b) Pay interest on the said amount at the legal rate as from 14 days from the date of this judgment until the date of payment;
- (c) Furnish the plaintiff with an Undertaking in terms of Section 17 of the Road Accident Fund Act, Act 56 of 1996;

- (d) Pay the plaintiff's costs of suit with interest thereon at the legal rate as from 14 days from the date of taxation; such costs shall include the qualifying costs of Dr Basil Mackenzie.

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**N DAMBUZA**  
**JUDGE OF THE HIGH COURT**

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Heard on: 2 February 2010

Delivered on: 11 May 2010