

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH)**

CASE NO. : 1418/2011

Heard on : 9 and 10 September 2015

Date delivered : 26 January 2016

In the matter between:

MZUKISI DOUGLAS DAMANA

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

MAJIKI J:

[1] The saying that “sometimes the chains that prevent us from being free are more mental than physical” cannot be more relevant than in the present case. The quote’s background emanates from a horse that is tied into a plastic chair, it remains still, because it believes, it cannot move.

The plaintiff is a 48 year old bachelor with three children. Four years ago he was assaulted by the members of the South African Police Services. He claimed damages against the defendant. The defendant was held liable for the assault on the plaintiff and was ordered to compensate the plaintiff for damages that the plaintiff proved. The matter served before this court for determination of general damages and loss of income. The claim for future medical expenses was settled between the parties in the sum of R32 000.00.

[2] The following issues were recorded as admitted in the parties' pre-trial minute:

- 2.1 The plaintiff was admitted to hospital, following the injury on 21 January 2011. He was placed in a cervical skeletal traction from 21 January to 3 February 2011, i.e. for 13 days.
- 2.2 On 3 February a C5/6 fusion was carried out on him under general anaesthesia. He was discharged on 8 February wearing a neck brace i.e. 5 days after the procedure.
- 2.3 In total he was hospitalised for 18 days.
- 2.4 The neck brace was removed after 6 weeks.
- 2.5 The C5/6 anterior fusion is now solid.
- 2.6 Since the brace was removed the plaintiff seldomly suffered pain and took analgesic medication therefore.

2.7 There is a 35% chance that within the next fifteen years he would have to have an extension of fusion to the C6/C7 level.

[3] Dr Keeley, a specialist neurosurgeon testified on behalf of the plaintiff. He had already prepared two reports which he confirmed in court. He testified that the plaintiff complained of weakness in his arms and legs which was probably indicative of an injury in the spinal cord. The X-ray examination found that the facet joints between C5 + C6 were dislocated. The fracture was unstable. As a result thereof he was put in traction and by July 2015 he had total stability. Solid fusion had taken place between C5/C6. He had no pain in his neck. Dr Keely agreed with Dr Mackenzie that the plaintiff received no further specific treatment for injuries sustained in the assault. Severe pain would have lasted for about two weeks after the injury. C6/C7 is deteriorating and may require fusion in future. The joints above and below take more strain because of the fused area. The plaintiff experiences unpleasant frightening cracking sensation in his neck when making certain movements.

[4] The plaintiff complained to him that he had difficulty with swallowing, this is associated with anterior cervical fusion. The complaint seemed like a vague description of pharyngeal inco-ordination. He has to take sloppy type of foods, not gulp too much, not even fluids, to avoid choking. This has been the situation since the surgery and is a permanent condition.

[5] The plaintiff never worked since the accident. The noted deterioration takes place without him being subjected to the stress of work. Heavy manual labour is a significant factor which would enhance deterioration of C6/C7. Lifting heavy objects braces shoulders in the neck. It is reasonable to assume hastened degeneration in the neck.

[6] Dr Keely disagreed with doctors Vlok and Mackenzies' reports that the plaintiff could be physically capable to return to work a year after the fusion. According to him, Dr Vlok had never examined the plaintiff and did not study the plaintiff's MRI scan.

[7] The plaintiff testified that he experiences pain when it is cold and when swallowing. He misses eating meat as he survives only on soft foods. He is shy to eat when there are people around, he can no longer attend traditional ceremonies where people mostly eat meat. He was in great pain on the day he was assaulted. He sat still on the sofa the whole night until he went to the hospital the next day. Upon his discharge he had to go and stay at his mother's house. He could not do anything for himself. His younger brother had to help him. He had a brace on, his hands were weak.

[8] He feels small when people look at him. He was humiliated by the assault in full view of onlookers. He has lost a lot of weight. He is stammering and speaks very softly.

[9] Before the incident he was working for about 7 to 8 months, in a period of 12 months, at a time, in Uitenhage. He was working on a contract basis, building walls, reconstructing windows, that involved having to break walls in order to put new windows. All the employees were paid in cash; a sum of R3 000.00 per month. They had no bank accounts. He obtained a matric and N1 motor mechanic certificates, whilst in jail. He did some practical work whilst he was in jail. When the jobs were scarce he would do gardening and was able to assist in work involving motor mechanic. He would make about R700-00 in a month. He would stand in a corner, called Maqokolweni and be picked by people who looked for casual labourers. After he was injured he could no longer be picked.

[10] After the injury he once got employment in a chicken farm. He was supposed to catch chicken and put them in boxes. He gave up the job after 3 days because of the pain he had at the back of his neck when bending and getting up catching the chicken.

[11] He burnt his book where he recorded his employment details. He had lost hope in ever getting employment again. It did not occur to him and he was also not advised that he must ask for a letter from one Mr Stuurman, he once worked for. He was concerned about telling the court about the injuries he sustained. It would be difficult to locate other of the people who picked him up from the corners.

[12] He disagreed with the doctors that he could still work. He stated that his spine becomes painful when he bends to pick up things or when he walks for a considerable distance. He said he did not remember telling Dr Mackenzie that he had no pain and did not feel weak. At the time of the injury he did not have full time employment, he was working as a casual labourer. This explains why he told Dr Mackenzie that he was unemployed.

[13] He admitted that he had history of incarceration, during his working life of 26 years. He started working at the age of 18 years. He spent 15 years in jail. At the time of the injury he had a pending case of possession of dagga. In some instances he was sentenced to lashes, reformatory school and cained for his brushes with the law.

[14] Dr Van Daalen, an Industrial Psychologist testified that when he did his report he was not aware of the plaintiff's criminal record. Nevertheless, that would not affect the plaintiff in the kind of industry he was working in, which only considers whether a person can do the job or not. He understood that when the plaintiff had indicated that he was unemployed it is because he had been a casual labourer. The plaintiff had said he knew some of his ex-employers but was not advised to look for them. Usually, such workers deal only with foremen who collect them, even though the workers would know the owner of the contract, the owners would not have their casual labourers' details. The workers are usually sourced from the localities where the work is being undertaken.

[15] He was of the view that the plaintiff could not compete in a labour market. The plaintiff told him that he has no strength. He is scared of injuring his neck or he is scared for his neck due to the injury he had had. He does not appear to be a person that can be picked by people who look for labourers. He cannot deliver expeditiously at work. The plaintiff's condition of the vertebrae had dramatically improved, but his neck had not. Doctors Mackenzie and Vloks' medical perspective is purely from a physical point of view, they did not consider the plaintiff's psychological state. He on the other hand, considered a range of factors, holistically, the injury, the fusion, the plaintiff's lack of strength, fear for his neck, his weight, speech difficulty, the type of work he would have to do and etc. Dr Mackenzie obtained answers to direct specific questions relating to whether the plaintiff was paralysed or not. The weakness in the plaintiff's arms did clear after sometime but his body in its entirety lacked strength. It would be difficult for him to find work.

[16] He could not agree with the suggestion that the plaintiff at the time of the injury was still continuing with his criminal activities. From 1998, he was out of prison for 10 years, up to 2008. He worked and lived a normal life. He had integrated successfully into the society. With regard to possession of dagga in 2008, Dr Van Daalen did not attach much significance to, he said there are huge cultural differences from society to society.

[17] He accepted what the plaintiff had told him about his employment information. He found no basis to suspect him of not being truthful and therefore saw no need for him to verify the information. The plaintiff's earning capacity to him did not appear to be a thumbsuck. The plaintiff explained it fully. He said he was building patios, fitting doors etc. He earned R3 000.00 per month. A month with 22 days gives a calculation of income of R150.00 per day, which is a normal rate in that industry. In bad months he earned R750.00 per month doing gardening.

[18] The method of the actuarial calculations by Munro Forensic Actuaries were not disputed. What is contentious is the factual basis for it.

[19] In order to assess the general damages for pain and suffering the court has to look at the nature and extent of the injuries and duration of the pain suffered by the plaintiff; amongst others. The injury and pain that was suffered by the plaintiff are common cause between the parties. What requires to be evaluated is the evidence regarding what he is suffering at the moment.

[20] The plaintiff did not appear as an untruthful witness to me. He easily conceded even less comfortable details of some parts of his history. I was able to observe his appearance, weight, difficulty in speaking. I find no basis not to believe his evidence that he has difficulty swallowing and the effects same has in his daily living. This is over and above the admitted evidence that he seldomly experiences pain. He specified that he feels pain when it is cold, when he bends and when he walks for a distance. I therefore accept his evidence in this regard.

[21] With regard to loss of earnings, I am of the view that Dr Van Daalen explained to the court that it is true from an orthopaedic and medical points of view that the plaintiff's condition had improved and stabilised. However, his difficulties entail a psychological aspect which the doctors did not enquire into. The plaintiff generally does experience loss of strength and fears for his neck.

[22] I must state that the issue as to whether the plaintiff would still be able to work is difficult to decipher in the manner in which his case has been presented. The evidence as supported by what the plaintiff told the doctors indicates that he experiences little pain. The evidence also establishes that, physically he fully recovered. He also demonstrated to Ms Ansie Van Zyl, the occupational therapist, that he was strong and does not have pain.

[23] Having said that, the plaintiff testified at length about his current circumstances. Over and above his health challenges, he tried to work in a chicken farm. He had to quit in three days because he was not coping. In my view, despite all the physical fitness that was recorded, same could not carry him through to sustain the work that required physical effort. In my view, it may be so that his case was mystified by the aspects relating to pain, however it became apparent during trial that the plaintiff still suffers. He cannot bend, walk for long, and has lost weight, amongst others.

[24] With regard to employment history I accept that for the times he was out of prison he did work, when work was available. As a contract worker his income was in the tune of R3 000.00 per month. When work was scarce, he would earn about R700.00 per month. I do not attach so much significance, as the respondents would want, to the fact that the plaintiff had said he was unemployed. My view is that, the plaintiff was not on any contractual work at the time he was injured. He was also not working on any particular person's garden at the time. However, he would avail himself and in all likelihood, he would be picked as it had always been the case and go and work for R150.00 a day. In addition to that, he had some competency in mechanical works. It is not unusual that, a person with circumstances like the plaintiff's, would spend such earnings without keeping a record or taking the money to the bank first.

[25] I have sought guidance from the case law. Both counsel assisted in this regard, for which I am grateful. In ***Ramolobeng v Lowveld Bus Services (Pty) Ltd and Another, Gauteng North Province, Case No. 29836/2009*** on 3 February 2015, a 34 year old male, employed as a packer at a vegetable market suffered injuries to cervical and lumber spine and had a head injury with concussion. He had a spinal surgery, he had an artificial disk inserted at levels L3/L4 and was hospitalised for 6 months. He suffered erectile dysfunction, moderate depression, low self esteem, struggled with domestic chores. He could not sit for long, sleep on one side, play soccer and was rendered unemployable in open labour market. An award of R550 000.00 was made for general damages.

[26] I agree with Mr Pretorius on behalf of the defendant that the injuries in the above matter were serious, the claimant was rendered unemployable by the injuries. He suffered total loss of amenities of life.

[27] In *Nhantumbo v Road Accident Fund South Gauteng Case Number 11385/2011* delivered on 16 August 2013. A 49 year old self employed panel beater and spray painter suffered soft tissue injury of the cervical and lumber spine. There was a suggestion by the doctor that the injuries were permanent, the x-ray findings on the other hand detected no abnormality. The plaintiff suffered severe pain for approximately two to three weeks subsequent to the collision. He would suffer pain throughout his life. He was awarded R200 000.00 in general damages.

[28] The plaintiff on the other hand did not suffer so much of prolonged pain, according to admitted facts. He also has not suffered total loss of amenities of life.

[29] The amount claimed for past and future loss of income in the amended particulars of claim is R100 000.00, during argument a sum of R119 610.00 and R299 440.00 in respect of past and future loss of income was suggested respectfully. The general damages claimed are in the sum of R500 000.00. During argument it was suggested that an amount in the range of R450 000.00 to R500 000.00 would be reasonable, a sum of R475 000.00 was suggested.

[30] In respect of loss of earnings, I have to consider whether it has been established that had the assault not occurred, the plaintiff would have earned and if so, how much. The date of the incident was 21 January 2011, at the time the plaintiff had a pending case of possession of dagga; he had a history of incarceration but had been out of prison for 13 years before the date of the incident; his earnings were irregular, i.e on contract basis and when there were no contracts as low as R700.00 per month;

[31] If I am to accept that the plaintiff would have worked until he was 65 years of age. He would have worked for 21 years from the date of incident. It is only in 15 years that there is a chance of 35% fusion. The plaintiff did not present a guaranteed structure of employment, his employment depended on availability of would be employers.

[32] The plaintiff was also prone to committing offences that could land him in jail again. At the time of the incident, he had a pending case. In my view, it is immaterial what he would have kept the dagga for, he would have kept an illegal substance, nevertheless. I also do not accept Dr Van Daalen's view that his criminal history would not affect his future employability. He is prone to re-offending, he said when it is tough he resorts to committing crime. If he did so, and was found guilty of a criminal offence, he would be sent to jail and would be unemployed. I have to take into account all these factors in my determination of quantum for loss earnings in this matter.

[33] In respect of past and future loss of earning, I am considering the net amounts of R132 900 00 and R374 300 00 calculated by the Munro Forensic actuaries. I would then apply 40% contingency deduction in the light of what I have raised above on each of the amounts.

[34] In the result, I consider the following amounts to be reasonable,

General damages	R275 000.00
Past loss of earnings and	
Future loss of earnings	R304 320.00
Future medical expenses (as settled)	R 32 000.00

B MAJIKI

JUDGE OF THE HIGH COURT

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