

Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 941/2014

Date Heard: 2-7/02/17

Date Delivered: 25/04/17

In the matter between:

MSIMELELO BOLTINA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MALUSI J

[1] The plaintiff claims damages from the defendant for injuries sustained arising out of a motor vehicle collision on 11 April 2009 in Settlers Way Freeway, Deal Party, Port Elizabeth. The plaintiff was a driver of a motor vehicle which collided with an unidentified motor vehicle insured by the defendant driven by an unknown driver. Subsequently, the plaintiff instituted an action for damages.

[2] It is common cause that the plaintiff sustained the following serious injuries:

- (a) A fracture of the fifth cervical vertebra;
- (b) A spinal cord injury.

- (c) A traumatic brain injury with long term mental and behavioural disturbance;

[3] Prior to and during the course of the trial the following issues were settled between the parties:

- 3.1 Liability for causing the collision was conceded by the defendant on an 80/20 basis in favour of the plaintiff;
- 3.2 The plaintiff's general damages were settled in the sum of R1, 920,000.00;
- 3.3 The defendant tendered an undertaking in terms of section 17(4) of the Road accident Fund Act 56 of 1996 in respect of 80% of the plaintiff's future medical expenses;
- 3.4 The plaintiff's hospital or medical expenses paid by his medical aid were settled in the sum of R587, 623.89;
- 3.5 The plaintiff's past caregiver and driver's expenses were settled in the sum of R441,200.00;
- 3.6 The defendant agreed to pay the costs of two Counsel employed by the plaintiff.

All the amounts reflected above are after the application of the apportionment in paragraph 3.1.

[4] The trial proceeded on the following limited claims:

- 4.1 The plaintiff's past hospital and medical expenses paid by him; and
- 4.2 The plaintiff's past loss of income and future loss of earning capacity.

[5] Medico-legal reports from various experts were admitted by the defendant. The report by Dr Olivier discloses that immediately after the collision the plaintiff was admitted at Life St Georges Hospital. He was unconscious and his Glasgow Coma Scale was 9/15 on ambulance report and 10/15 on hospital notes. He presented with a tender cervical spine. His reflexes in the upper and lower limbs were flaccid and he was not able to move his legs. Although able to flex his arms, he was unable to extend them. He was referred for X- rays and a CT scan which revealed a fracture of the fifth cervical vertebra associated with a spinal cord injury. An anterior cervical fusion which extends from the fourth to the sixth cervical vertebra was performed. The fusion was augmented with anteriorly situated plate and screws. Thereafter, he was ventilated in the Intensive Care Unit for a prolonged period of time. During this period a

tracheotomy was also performed. After sufficient recovery he was transferred to the Aurora Rehabilitation Centre for a spinal cord rehabilitative program.

[6] It is not in dispute that the plaintiff has reached maximum medical improvement and his present condition is permanent for the rest of his life. He has suffered severe and pervasive loss of amenities of life due to assessed 86% impairment as a whole person. He is an incomplete quadriplegic confined to a motorised wheelchair. He uses controls to move with the wheelchair. He has complete paralysis of both lower limbs. He experiences severe pain in the lower back and between the shoulder blades. Pain in cervical area is still a prominent symptom.

[7] The plaintiff is total bladder and bowel incontinent. As a result of this condition he has to use diapers. He is on a bowel regulation program using suppositories with mishaps reported to occur intermittently. He has developed multiple urinary tract infections which were treated. He uses a urinary catheter which is replaced every month. He also uses multi-vitamins, ecotrin (aspirin), pain tablets and sleeping tablets on a regular basis.

[8] The plaintiff is unable to perform the normal and basic tasks of daily living such as dressing, eating and performing his own hygienic activities. He is assisted by his wife and two caregivers with his activities of daily living.

[9] The psychiatrist diagnosed the plaintiff as suffering from post-traumatic stress disorder (PTSD) and a generalised anxiety disorder. The PTSD leads to excessively severe anger following trivial incidents. These emotional episodes occur frequently. The generalised anxiety disorder is not major and has not caused occupational impairment of consequence. He suffers from sleep apnoea which results in him having fatigue in the afternoons. He experiences a severe headache for a very brief period on average once a week. This causes him to be dysfunctional during that period and the condition is permanent.

Past hospital and medical expenses paid by plaintiff

[10] The plaintiff gave evidence that at the time of the collision he was a member of a medical aid insurance scheme. He incurred substantial medical expenses as a result of injuries sustained which were paid by his medical aid insurance. During the years 2009-2012 his medical aid did not pay for chronic medication and supplies. This was due to him not having been approved for chronic medication by the medical aid. Consequently, he purchased by way of cash payments from various

retailers items like urine leg bags and straps, dulcolax suppositories, depuran capsules, cranberry tablets, boxes of medical gloves, linen savers and adult diapers. These were purchased once every month from September 2009 until December 2012. Other items like mattress overlays and wheelchair spares were bought infrequently. The plaintiff also had to pay for some lab tests and hospital consultations.

[11] Later, the plaintiff's medical doctor facilitated approval by the medical aid of chronic medication from January 2013. Even during this period up to the present there were medical items the plaintiff paid for in cash as they were excluded from cover by the medical aid.

[12] The plaintiff submitted a schedule detailing all the purchases and payments he made. It is clear therefrom that the purchases were in the sum of R105,531.13. The plaintiff has proof of payment or vouchers for expenses amounting to R31,404.13. Expenses in the sum of R74,127.00 neither have proof of payment nor vouchers. The plaintiff testified that his modus operandi was to provide cash amounts to his caregivers for the latter to purchase the items. He had lost the cash slips his caregivers had provided to him after the purchases.

[13] In cross examination, the plaintiff's claim was neither disputed nor challenged in any meaningful way. Counsel for defendant contented himself with asking six questions which sought clarification of certain aspects. The reason or justification for the defendant to refuse this claim is not clear to me. I will return to this aspect later.

[14] In my view the plaintiff proved his claim. A high percentage of his claim is for chronic items. There is no doubt he required these items on a daily basis, for example adult diapers are required daily. The plaintiff is entitled to payment of R84,424.90 in respect of this claim after application of the apportionment.

Loss of income and earning capacity

[15] The plaintiff gave evidence which clearly showed he grew up in disadvantaged circumstances at Motherwell Township, Port Elizabeth. His disadvantage was compounded by severe burn injuries he suffered as a six year old. These required multiple skin grafting procedures over the facial area as well as the dorsum of both hands. These burn injuries left him with compromised functionality of his hands and fingers and severe disfigurement of his head and face. His disability and appearance led to enduring taunting by his age mates as a child.

[16] Despite his circumstances, the plaintiff excelled academically. He matriculated in 1999 with three "A" symbols, two "B" symbols and an "E" symbol for the six subjects he studied. The achievement is all more remarkable for the fact that he was a pupil at a deprived township school.

[17] According to the plaintiff in 2000 he studied for a Bachelor of Commerce (accounting) degree at Nelson Mandela Metropolitan University. His eldest brother sponsored his studies in the first year. The subsequent years of his studies were completed as a part-time student due to lack of finances. He worked at Standard Bank as a teller during the day and in the evenings attended his classes. He obtained his degree in 2005 despite his employer not granting him any study leave.

[18] After the collision and despite his severe impairment, the plaintiff obtained even more outstanding academic achievements. He was awarded an Honours Bachelor of Commerce (Internal Auditing) degree by Unisa in 2011. He obtained the following certificates: a post-graduate certificate in Forensic and Investigative Auditing, Unisa (2012); a certificate in Forensic and Investigative Auditing, Unisa (7 march 2014); certificate as a fraud examiner with the Association of Fraud Examiners. He completed the following courses: Internal Auditing Course (2010); a short course on Prevention and Detection of Procurement and Contract Fraud (2013); Prince and Practitioner (APMP) course (an internationally

recognised process-based method for effective project management). After completing the necessary requirements, he was admitted for associate membership of the Association of Certified Fraud Examiners and also of the Institute of Internal Auditors.

[19] After completing his junior degree, the plaintiff was employed by KPMG as an MIDP advisor (Master Industry Development Programme) in 2006. According to him he was keen on a more challenging role. He was offered a position by Faurecia and also by VWSA. He opted for the latter in 2008 as he was interested in an auditing role.

[20] After commencing employment at VWSA an auditing position became available. The plaintiff was to transfer to this auditing position when he was involved in the collision. According to the plaintiff his career at VWSA would have progressed to a senior management position in the motor industry. This was possible as managerial and senior executive positions were available at VWSA. Alternatively, he would have been a director or partner in an accounting firm. During 2010 his employment at VWSA was terminated as he was considered disabled.

[21] During the years 2011-2013 the plaintiff was an intern at the Department of Roads and Public Works, Eastern Cape. He was also a

tutor for Unisa students at this time. He supervised the students allocated to him on-line. He was actively seeking employment from various companies. He was discriminated against due to his disability.

[22] The plaintiff testified that he sent correspondence to Chief Executive Officers of various organisations detailing his victimisation despite his qualifications. The CEO of Coega Development Corporation offered the plaintiff employment as a Forensic Auditor. His contract expires in July 2017.

[23] The industrial psychologists for both parties signed a joint minute wherein they agreed that pre-morbidly:

23.1 The plaintiff would have retired at the age of 65 years;

23.2 Robert Koch's 2017 salary figures should be utilised; and

23.3 The full package medians should be used in calculating the plaintiff's loss.

[24] Mr Martiny, the plaintiff's industrial psychologist, testified that with reference to the Paterson Grading System the plaintiff was employed at the lower end of the Paterson C1 level at the time of the accident. He gave an opinion with regard to the plaintiff's pre-morbid career scenario.

His opinion was based on extensive consultations with the plaintiff, his colleagues at both VWSA and Coega and consideration of substantial collateral information.

[25] Mr Martiny's opinion was that the plaintiff would have progressed from Paterson C1 level to a Paterson D3 managerial position by the time he reached approximately 45 years of age. He testified it was probable the plaintiff would have advanced to Paterson D4/D5 by the time he reached the age range of 55 to 60 years. In his view, with the right opportunity and in the right organisation, the plaintiff could well have progressed to a Paterson E band. Though it was difficult to predict far into the future, there was a good chance of plaintiff securing such a position. Mr Martiny adopted a conservative approach in advancing the plaintiff to a Paterson D4/D5 level due to the fact that there are limited E band positions.

[26] The reasons advanced by Mr Martiny for his opinion were impeccable and compelling. By all accounts the plaintiff is a highly intelligent person. His superiors at work reported that he had a good personality and was a hard worker with capability to be promoted. He had an ability to look beyond figures and has a broad mind. Mr Martiny had considered the fact that there was demand for people with the

plaintiff's qualifications and attributes. The plaintiff's chances of being promoted were optimal.

[27] The defendant's industrial psychologist had held a divergent opinion that the plaintiff career was limited to auditing/finance and his career would plateau when he was 43 years old. After hearing Mr Martiny he changed his opinion and agreed with the pre-morbid career scenario provided by Mr Martiny.

[28] I accept Mr Martiny's opinion for the reasons he provided. In my view the career scenario he sketched is the most probable. If anything, the scenario is conservative in light of all the evidence before me.

[29] Mr Paterson, who appeared for the defendant, criticised Mr Martiny's career scenario as being too imprecise and not supported by the evidence before Court. He submitted that E band was a mere possibility and not probable due to limited employment at that end of the market.

[30] I do not agree. It is unreasonable to expect the scenario to be more precise as there are many imponderables due to the long period of time into the future. Both industrial psychologists agreed the plaintiff would probably have retired at the age of 65 years. This means the

scenario accounts for a period of 33 years into the future. In my view, the evidence strongly supports the scenario by Martiny.

[31] I am satisfied that on the evidence before me, the plaintiff would probably have progressed to the E band for the reasons stated by Mr Martiny. Furthermore, the plaintiff has proved himself to be an exceptional individual with a very resilient character. He had to overcome adversity and monumental barriers to attain his academic and vocational achievements. It will be an injustice and unfair to limit the plaintiff's progress to D3/D4 as the defendant's submission seeks to do. Even with limited opportunities at the top end of the market, the plaintiff's achievements so far indicate he would probably have been one of the chosen few.

[32] The plaintiff was an exceptionally good witness if regard is had to his circumstances. He was well spoken and logical. His appearance exuded determination and fortitude. I accept his evidence in all respects. I am satisfied that his evidence was truthful and reliable. I agree with Mr Martiny in describing the plaintiff as "*a very impressive person to anyone who comes into contact with him*".

[33] Mr Martiny was a very good witness. The force of logic in his reasoning was irresistible. This is probably the reason the defendant's industrial psychologist changed his opinion after Mr Martiny testified. He maintained his objectivity as an expert throughout his evidence. I have no hesitation in accepting his reasons for the opinion he offered.

[34] The plaintiff's actuary Algorithm Consultants and Actuaries prepared two reports to assess the plaintiff's past and future loss of income. The first report was based on Mr Martiny's opinion as recorded in this judgment. The second report posited two scenarios. The first scenario was based on Mr Martiny's opinion with a slight adjustment. The second scenario was based on the opinion of the defendant's industrial psychologist. Nothing more need be said about the second scenario as the basis is no longer valid.

[35] The first scenario was calculated on the basis that the plaintiff's career would have plateaued on Paterson D4/D5 level at the age of 57½ years. The age and the level are at variance with Mr Martiny's evidence which I have accepted.

[36] I agree with Mr Frost, who together with Mr Williams appeared for the plaintiff, that the approach of the actuary is too conservative. Mr

Martiny was resolute about the plaintiff reaching the D5 level at the age of 55 years. I am also of the view that the plaintiff would probably have progressed to E level. It will be unfair and an injustice to accept the first scenario in these circumstances.

[37] The relevant portion of the first report dealing with loss of income reflects the following:

Losses before the application of the Amendment Act

Past Loss

Value of income uninjured:	R 2,234.271
Less contingency deduction: 5.00%	<u>R 111.714</u>
	R 2,122,557

Value of income injured:	R 1,627,073
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Net past loss:	<u>R 495.483</u>
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Future loss:

Value of income uninjured:	R 15.492,069
Less contingency deduction: 15.00%	<u>R 2,323.810</u>
	R 13 168,259

Value of income injured:	R 144.567
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Net future loss:	<u>R 13,023,693</u>
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<i>Total net loss:</i>	<u>R 13,519,176</u>
<i>Loss after 80% apportionment:</i>	<u>R 10,815,341</u>
<u><i>Losses after the application of the Amendment Act</i></u>	
<i>Net past loss:</i>	R 396,387
<i>Net future loss:</i>	<u>R 7,359,431</u>
<i>Total net loss:</i>	<u>R 7,755,818</u>

The above total net loss is after the agreed apportionment of 80%.

[38] The issue of costs requires particular consideration. In an oft quoted judgment per Howie JA it was said:

"The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed".

(Road Accident Fund v Klisiewicz, Case No 192/2001 (SCA), at paragraph 42 as quoted by Maya AJA (as she then was) in Madzunya and Another v Road Accident Fund 2007(1) SA 165 (SCA) at paragraph 17). The learned Maya JA went on to state that the intention of the Road Accident

Fund Act is to give the greatest possible protection to victims of negligent driving of motor vehicles.

[39] The defendant has unfortunately earned a reputation in this Division, if not nationally, of acting prejudicially to the interests of road accidents victims (*Bovungana v Road Accident Fund* 2009(4) SA 123 (E) at paragraph 7 amongst a plethora of other judgments). It has long been stated that the defendant is an organ of State. The *Mlatsheni* judgment went on to say:

"Organs of State are not free to litigate as they please. The Constitution has subordinated them to what has been called 'a new regimen of openness and fair dealing with the public'. The very purpose of their existence is to further the public interest and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust. It is expected of organs of State that they behave honourably-that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly".

(*Mlatsheni v Road Accident Fund* 2009(2) SA 401(E) at paragraph 16).

[40] The plaintiff claimed past medical and hospital expenses comprising amongst others caregiver and driver expenses he paid for. He had no

proof of payment for this particular expense. The defendant settled this particular claim on the morning of the trial. There was no tender of payment by the defendant of the claim for medical expenses as dealt with above in the judgment. This is strange as the plaintiff produced supporting vouchers for a portion of the claim.

[41] I invited Mr Paterson to explain the illogical and unreasonable approach of the defendant in settling the particular claims. Unsurprisingly, he was not able to do so as it was clearly not his decision.

[42] The consequence of the defendant's conduct was that the plaintiff was required to testify to prove the particular claim. His evidence was neither challenged nor disputed in cross-examination.

[43] It turned out that it was not necessary for plaintiff to have testified on this particular claim as the defendant could simply have admitted the claim. Almost all the expert reports indicate that the plaintiff is suffering from severe and chronic back pain. On the afternoon when he started testifying he requested a brief adjournment after about an hour. It later transpired that due to his existing physical condition as indicated in this judgment he was no longer able to continue.

[44] It must have been clear to the defendant that to require the plaintiff to testify would be a painful ordeal for him. The callous disregard to the suffering of the plaintiff is deprecated. The suffering he endured was unnecessary. A punitive costs order is warranted in these circumstances. It will be limited to only the first day of trial though I have reservations whether this matter should have been allowed by the defendant to proceed to trial. I will give the benefit of doubt to the defendant's industrial psychologist that his incorrect opinion was a *mala fide* error and not due to him having a single consultation with the plaintiff for only forty minutes.

[45] Mr Paterson prevailed on me to limit the punitive costs order to the afternoon of the first day of trial. I am persuaded by Mr Frost's submission that the defendant's misconduct predates the 1st February 2017. The defendant failed to resolve issues well before the trial date and only settled on the trial day. Even at that stage, the defendant's conduct was illogical, unreasonable and wasted Court time.

[46] In the circumstances and for the above reasons it is ordered:

1. The defendant is to pay the plaintiff the sum of R10 789 066.49 in full and final settlement of plaintiff's claim for damages, which is made up as follows:

- 1.1 The sum of R 1 920 000.00 in respect of general damages.
 - 1.2 The sum of R441 200.00 in respect of past caregiver and driver expenses.
 - 1.3 The sum of R587 623.59 in respect of past hospital and medical expenses paid for by plaintiff's medical aid.
 - 1.4 The sum of R84 424.90 in respect of past hospital and medical expenses paid for by plaintiff.
 - 1.5 The sum of R7 755 818.00 in respect of past loss of income and future loss of income and earning capacity.
2. Payment of the aforesaid amount in paragraph 1 above shall be made within 14 days from date of this Order directly to plaintiff's attorney of record, Roelofse Meyer Inc., trust account, details of which are as follows:
- Name: Roelofse Meyer Inc.
- Bank: Standard Bank
- Branch: Port Elizabeth
- Branch Code: 050017
- Account Number: [...]
3. Failing payment of the aforesaid amount in paragraph 1 above defendant is to pay interest on the aforesaid amount in paragraph 1 above at the rate of 10.5% per annum to date of payment.

4. Defendant shall furnish plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, for 80% of the costs of future accommodation of plaintiff in a hospital or nursing home, or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the collision on 12 April 2009, after such costs have been incurred and upon proof thereof.

5. Defendant is to pay plaintiff's costs of suit up to and including 7 February 2017, save that the trial costs of 1 February 2017 shall be on a punitive scale, as taxed or agreed, such costs are to include:

5.1 The costs of the reports and supplementary reports, if any, of:

Dr M Tait;

Dr PA Olivier;

Dr E Steenkamp;

Mr P Loots;

Mr B Rademeyer;

Mr R Knight;

Mrs A van Zyl;

Dr D van der Merwe;

Mr L Martiny;

Mr G Whittaker.

5.2 The reasonable qualifying fees, expenses and reservation fees, if any, of:

Dr M Tait;

Dr PA Olivier;

Dr E Steenkamp;

Mr P Loots;

Mr B Rademeyer;

Mr R Knight;

Mrs A van Zyl;

Dr D van der Merwe;

Mr L Martiny;

Mr G Whittaker.

5.3 The trial costs of 1 February 2017 shall be paid by defedant on attorney-client scale.

5.4 The trial costs of 2, 3, 6 and 7 February 2017.

5.5 The reasonable costs of consultations of plaintiff's counsel and plaintiff's attorney with plaintiff's experts and lay witnesses in the preparation for the trial.

5.6 The costs of the employment of two Counsel.

6. Defendant is to pay interest on plaintiff's said taxed or agreed costs at the rate of 10.5% per annum from a date 14 days after *allocatur* or agreement to date of payment.

T MALUSI
Judge of the High Court

Appearances

Counsel for plaintiff, Adv A Frost & Adv K William, instructed by Roelofse Meyer Inc.

Counsel for defendant, Adv N Paterson, instructed by Ketse Nonkwelo Inc.

Date Heard: 2-7 February 2017

Date Delivered: 25 April 2017