

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 6038/2016

In the matter between:

MZIKAYISE MICHAEL MATHABA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 5, 6, 8 FEBRUARY, 23 APRIL, 18 & 19 JUNE,
20 AUGUST 2019

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 10 OCTOBER 2019

- [1] The Plaintiff in this action is an adult male aged 38 years who sustained serious injuries in a head on motor vehicle accident on 18 November 2014 and the NS road near Smithfield. At the time of the collision, he was driving a truck bearing registration numbers [...]. He suffered multiple injuries to his lower limbs, namely a fracture of the right femur, compound fractures of the right and left tibia and fracture of the right tibia plafond. These injuries appear from a report by Dr. A. A Osman, a specialist orthopaedic surgeon, which report was handed in by agreement between the parties. In the report, it is stated that the Plaintiff is suffering from a serious long-term impairment as a result of stiffness of the right ankle and deformity of the forefoot and toes. His future earning

capacity will be seriously compromised. He is unable to drive a manual vehicle, to play sports, to run, to stand or walk for longer than 10 minutes or to sit for longer than an hour.

- [2] The Plaintiff now claims from the Defendant in terms of the provisions of the Road Accident Fund Act 56 of 1996 the amount of R 7 209 937-00, calculated as follows: R 678 676-00 for past loss of earnings, R 5 031 261-00 for future loss of earnings and R 1 500 000-00 for general damages. On 13 March 2018 this Court had already ordered, by agreement between the parties that the Defendant is liable for payment of 90% of the Plaintiff's proven or agreed damages. When the present proceeding commenced, the Court was informed that the parties had reached further agreement to the effect that Defendant would provide the Plaintiff with a certificate in terms of Section 17(4) of the Act (limited to 90% of the expenses) and that Defendant would pay to the Plaintiff the sum of R 800 000-00 for general damages (again limited to 90% thereof). The dispute concerning the past and future loss of earnings was the only dispute that remained unresolved between the parties, and is therefore the only issue this court has to decide.
- [3] The evidence concerning the past and future loss of earnings, as presented by the Plaintiff, became fiercely contested on behalf of the Defendant and the proceedings as a whole took up altogether seven court days to complete. The Plaintiff presented the evidence of five witnesses, but the Defendant closed its case without presenting any evidence at all. Notwithstanding, it soon transpired during the course of the proceedings that it is the case for the Defendant that the Plaintiff is not unemployable at all, and that the Plaintiff has failed to prove his damages as far as his alleged loss of income is concerned. In order to decide whether there is any merit in these contentions, it is necessary for this Court to consider the evidence presented in some detail.
- [4] The first witness called to testify, was the Plaintiff himself. He testified that, after the accident, he spent some two months in hospital. He underwent surgery during this period for a nail and plating with screws to be inserted into his legs, inter alia. As a result of all his injuries, he now has to use crutches to walk, and he therefore has become a disabled person for all practical purposes. He cannot sit, nor can he stand on his feet for long periods of time.

This became evident when he requested to be allowed to stand up after he had spent some time sitting in the witness stand.

- [5] The Plaintiff further testified that at the time of the accident, he was employed by a company named Civcon as a driver, and that he earned some R 8 000-00 plus some R 3 000-00 overtime per month in that capacity. During cross-examination this alleged income became disputed, but I will revert to this issue again later herein. It also appeared during the course of the proceedings that Civcon had closed its doors in January 2015, with the result that the Plaintiff would have become jobless in any event, had the accident not occurred. On the other hand, had Civcon not closed down, the Plaintiff would have been unable to return to his job because of his injuries. Fortunately for him, though, he managed to secure a job on 2 July 2015 through the intervention of a friend of his, who mentioned his plight to a Mr. Gonzales of a company named Hirecor.
- [6] Mr. Gonzales then employed him out of compassion, because he knew that the plaintiff could only drive short distances and that he was unable to load and to offload his truck, the Plaintiff testified. To this end, Mr. Gonzales purchased a light truck with automatic transmission to accommodate the Plaintiff. With this truck, the Plaintiff undertakes about two short trips per day, and on these trips he has to be assisted by other employees to do the loading and offloading. The rest of the day he spends doing odd jobs like passing spanners to a mechanic or updating the records of his employer. The plaintiff testified that his employer does not really need his services, but that he is employing him out of sympathy only until he gets paid his damages by the Defendant. He is earning about R 5 500-00 per month presently, but his employment would soon come to an end. Because of his disability, there is no prospects that he will ever be able to find a job again, he testified.
- [7] In cross-examination it was suggested to the Plaintiff that he is currently rendering a specific service to his employer which is needed by him, and that he is therefore not employed out of sympathy only. The Plaintiff was referred to a report by his occupational therapist, Mrs. Wendy Young, in which it is mentioned that his current employer is satisfied with him and that he will

remain in his employment even after payment by the Defendant. The plaintiff vehemently denied these suggestions, saying that it would be extremely difficult for him to continue with his employment because of his disabilities and the pain he suffers as a result thereof. He added that he cannot even lift a generator. In further cross-examination the income earned by the Plaintiff at both Civcon and Hirecor was disputed. It was put to him that the overtime recorded at Civcon was excessive, and that he would not have been able to continue with those excessive overtime hours until the age of 65. It was finally suggested to the Plaintiff that he is not unemployable because he is still able to drive short distances as a truck driver.

- [8] Mr. Gregory Paul Gonzales was the next witness called by the Plaintiff. He is a businessman and the current employer of the Plaintiff. He confirmed the evidence of the Plaintiff in all respects. He described the Plaintiff as a wonderful man with a good attitude, who is always trying to be helpful. He has such mental strength that it can only be regarded as a pity that he is now disabled. Mr. Gonzales even became emotional in the witness stand when he testified that it is a privilege for him to know the plaintiff. Notwithstanding, the Plaintiff is in actual fact only costing him money in circumstances where he does not really need him. Because of his disabilities, the Plaintiff always has to be accompanied by other workers when he does the short distance deliveries, because he cannot do the offloading himself. Due to financial constraints, he already had to lay off 18 employees in the recent past¹ and the Plaintiff will also have to leave once he is paid by the Defendant. According to this witness¹ the Plaintiff will become unemployable when his present employment is terminated.
- [9] In cross-examination Mr. Gonzales denied the proposition that the Plaintiff would still be able to work after he is compensated by the Fund. He testified that there is no market for disabled drivers over short distances. Therefore, he may perhaps only find limited employment with a sympathetic employer like himself. Referring to the report of Mrs. Young, the witness pointed out that his financial position has changed drastically since his consultations with Mrs. Young. He now cannot afford to employ the Plaintiff any longer, he testified.

- [10] Mrs. Young, the occupational therapist, also gave evidence. She testified that the Plaintiff is only able to do some light work. This, however, will only realize if he finds another sympathetic employer like Mr. Gonzales. Having examined the Plaintiff, she found that he could only walk with great difficulty if he is not using his crutches. She is of the opinion, though¹ that the Plaintiff could perhaps embark on training programs to improve his skills, but it must be kept in mind that he will nevertheless be unable to sit or stand for long periods of time. In cross-examination Mrs. Young confirmed that the plaintiff would be able to do some light work, but not all types of light work. This would only be possible if he finds a sympathetic employer. As for the training to improve his skills, the witness testified that such training happens very rarely, because normally the employer has to pay for such training.
- [11] Mr. Robert Julian Koch, an actuary, was called to testify next. He testified that he calculated the loss of income by comparing the income the Plaintiff would have earned but for the accident, with the income he earned or would earn after the accident. The only indication of what the Plaintiff earned before the accident, consisted in three monthly payslips for the year 2014. The pay slip for May 2014 showed the total number of hours worked as 408 hours, which is very high. He averaged the earnings indicated on the three payslips in making his calculations, and he regarded those three payslips as providing a sufficient level of confidence for the calculations he made. Mr. Koch further testified that the hours of overtime reflected in the May 2014 pay slip, were not repeated in the other two payslips. In his experience, long distance drivers do work considerable hours overtime from time to time. He further testified that, in any event, the Plaintiff was earning below the income of the industry in general at the time when he was employed by Civcon, that is, before the accident.
- [12] While Mr. Koch was still in the witness stand, he recalculated the Plaintiff's loss of income as at 8 February 2019, his initial calculations having been made as at March 2018. He came to the conclusion that the total loss for past and future income amounts to the sum of R 5 709 937-00. This conclusion is based on the assumption that the Plaintiff would not be able to find employment again in the future, he testified. He suggested that a contingency deduction of 5% be applied by the Court for the past loss of income, and a

150/o contingency deduction for the future loss of income in the present case.

- [13] In cross-examination Mr. Koch refrained from providing an opinion on whether the Plaintiff could do light work if he finds sympathetic employment. Based on the information he had, he assumed the likelihood of the Plaintiff finding employment in the future as being nil. Questioned about the number of overtime hours reflected in the May 2014 pay slip, he conceded that the number was high, but in order to cater for this, he averaged the overtime to industry acceptable limits.
- [14] Mrs. Goodness Busi Pepu, an industrial psychologist, was the last witness called to testify. She testified that the impression she gained from the Plaintiff was that he is hard-working despite his limitations, that he is driven to earn an income, that he is an honest person, and that he is not fabricating. Despite this favorable impression, she is of the opinion that it will be difficult for the Plaintiff to obtain any other employment. The occupational and safety risks pertaining to himself and his employer, should he indeed find other employment, are high, and it should therefore be concluded that the likelihood of finding employment again is low, if not non-existent. During cross-examination, it transpired that the witness had prepared an amended report in March 2019, which report was apparently not made available to the defence or to the Plaintiff's own legal representatives for some unknown reason. The proceedings therefore had to be postponed to another date for the report to be furnished.
- [15] When the proceedings resumed again, it transpired that the second report amended the first report in a number of respects, also in so far as the question of the plaintiffs earnings at Civcon were concerned. She explained that the three payslips she was initially provided with, were not clearly legible. She also explained that in the first report, she should have taken the overtime, the subsistence and the pension benefits into account, which she had not done. These deficiencies were corrected in her second report.
- [16] In cross-examination Mrs. Pepu was severely criticized for the deficiencies in her first report. She responded by explaining that at the time of the first report, she had gone through a personal tragedy which had distracted her. Under normal circumstances she should have called for clearer copies of the

payslips, she conceded. She could not tell whether her second report was made available to the actuary. Be it as it may, the evidence of Mrs. Pepu concluded the evidence presented by the Plaintiff. As mentioned before, the Defendant presented no evidence at all.

- [17] In presenting final submissions to the court at the end of the case, counsel appearing for the Defendant, Miss Ferreira, advanced mainly two grounds on which the Court should not allow the Plaintiffs claim. Firstly, she contended that it was not shown sufficiently and convincingly that the Plaintiff was totally unemployable. He has been rendering services to Mr. Gonzales for the past four years, and there is no reason why he could not continue in that fashion in sympathetic employment elsewhere, the argument went. He can at least be employed doing work of a sedentary nature, or other light work for that matter. Secondly Mrs. Ferreira submitted that the calculations of Mr. Koch were unreliable because they were based on figures of income provided in the first report of Mrs. Pepu, which figures were later proven to be wrong by her own admission. For this reason, the Plaintiff has failed to prove the quantum of his damages, and his claim for past and future loss of income should therefore be rejected, she submitted.
- [18] I cannot agree with these submissions. The totality of the evidence presented, leaves no doubt that, on a balance of probabilities, the Plaintiff will never find employment again in whatever capacity, that is unless a sympathetic employer comes to his rescue again somewhere in the future. The prospect of that happening, is to my mind so minimal that it may safely be disregarded. In the present economic circumstances where many thousands of able-bodied people are desperately seeking for employment mostly without any success, I deem the chances of a helping employer hand reaching out at a severely disabled man virtually non-existent.
- [19] However, on the other hand, Mrs. Pepu testified that the Plaintiff is a hard-working man despite his limitations, and that he is driven to earn an income for his family. In addition, it was the evidence of Mr. Gonzales that the Plaintiff has a positive attitude with great mental strength. In my view, the indications are that the Plaintiff is not the type of person who would be content to sit back and

do nothing once his present employment is terminated after he is compensated. He could, for instance, pay to be trained for sedentary or light work in a different field, although he cannot sit or stand for long. He may perhaps decide to purchase property which he could rent out for an income, however small that income may be. Or he may perhaps decide to purchase a light truck with automatic transmission to generate an income, although he will not be able to load and offload by himself. The point is that he may be able to generate some sort of income for himself, despite the fact that he must be regarded as unemployable in the open labour market. To allow for such probabilities, I will apply a 20% contingency deduction to his future loss of income, and not the 15% suggested by Mr. Koch.

[20] Secondly, it is not correct to say that the actuary has relied entirely on the first report of Mrs. Pepu as the basis for his calculations. He was placed in possession of the three salary slips at the time of his calculations. It is clear from his calculations that he took into account allowances and overtime, as well as a pension subsidy which the Plaintiff had received before the accident. This information came from the payslips. I therefore find no reasons to doubt the basis for the actuary's calculations. In any event, there is no evidence to controvert the evidence of the actuary.

[21] The further submission that the Plaintiff has, as a consequence, failed to prove the amount of his alleged damages and that his claim should be dismissed on that basis, is equally without any merit. It is obvious that the Plaintiff's earning capacity has been severely compromised by the accident. The three payslips gave an indication of his earnings prior to the accident, and although they do not provide an entirely satisfactory exposition in that respect, they must be regarded as the best evidence available to show the pre-accident income of the Plaintiff. That pre-accident income then has a direct bearing on the calculation of the future loss of income in the present case. Such calculation is not a matter of exact mathematical calculation, but is only speculative, and a court can therefore only make an estimate of the present value of the loss, which is often a very rough estimate. Without actuarial assistance, a Court has to rely on what would be fair and reasonable in a specific case, and the court's decision would therefore be no more than a blind guess. An actuary

computation, on the other hand, provides the Court with at least an informed guess, since it has the advantage of an attempt to ascertain the value of what was lost on a logical basis. (See **Southern Insurance Association Ltd v Bailey N.O.1984 (1) SA 98 (AD)**).

- [22] What then remains to be determined is the amount of compensation to be paid to the Plaintiff. The actuary testified that the past loss of income amounted to the sum of R 678 676-00. His evidence in this respect was undisputed. To this amount I **will** apply a 5% contingency deduction, as suggested by the actuary, and this equates to R 33 934-00. The net value of the past loss of income is therefore R 644 742-00 after the 5% deduction. As for the future loss of income, it is the evidence of the actuary that it amounts to the sum of R 5 031 261-00. As mentioned earlier, I will apply a contingency deduction of 20% to this amount, which equates to the sum of R 1 006 252-00. The loss of future income is therefore the amount of R 4 025 009-00 after the deduction. The result is that the total loss for the past and future income is the result is that the total loss for the past and future income is the sum of R 4 669 751-00. In terms of the agreement reached by the parties, the Defendant is liable for payment of 90% of this total, namely the sum of R 4 202 776-00.
- [23] As for costs, I can find no reason to deviate from the general rule that the successful party is entitled to his costs. The remainder of the orders will be in accordance with the agreement reached by the parties.
- [24] In the premises, the following orders are made:
1. The Defendant shall provide the Plaintiff with an undertaking terms of Section 17(4)(a) of the Road Accident Fund Act 1999, as amended, to pay 90% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on 18 November 2014 after such costs have been incurred and upon proof thereof as referred to in the medical reports filed by the Plaintiff in terms of Rule 36(9)(a) and(b).
 2. Judgment is granted in favour of the Plaintiff against the Defendant for payment of R 720 000-00 in respect of general damages.

3. Judgment is granted in favour of the Plaintiff against the Defendant for payment of R 4 202 776-00 in respect of past and future loss of income.
4. Payment of the amounts referred to in paragraphs 2 and 3 of this order shall be paid within 14 days of the date of this order.
5. In the event of the Defendant failing to make payment in terms of paragraph 4 hereof, the Defendant shall pay interest at 10, 25% per annum from such date to date of payment.
6. The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs which shall include the following:
 - 6.1 all the costs of consultations with the Plaintiff's expert witnesses, namely Dr. Osman, occupational therapist Wendy Young, industrial psychologist Goodness Pepu and actuary Koch, including the reasonable fees for preparation, qualifying, reservation, accommodation and traveling fees (including air travel where incurred), and fees for attendance at court where such witnesses actually attended court, and the costs of their expert reports;
 - 6.2 the reasonable traveling expenses (including air travel where incurred) and accommodation expenses of the Plaintiff, the Plaintiff's attorney, the Plaintiff's counsel and Mr. Gonzales; and
 - 6.3 the reasonable fees of Senior Counsel where so employed, such to include the reasonable fees for the drafting of all heads of argument.

P.J. LOUBSER, J

For the Plaintiff: Adv. H. A de Beer SC

Instructed by: Shireen Amod and Company

Verulam
c/o Honey Attorneys
Bloemfontein

For the Defendant: Adv. J. Ferreira

Instructed by: Maduba Attorneys
Bloemfontein