

IN THE KWAZULU – NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Not reportable

CASE NO: 8846/2007

In the matter between

Malungisa Remember Nkosi

Plaintiff

and

Road Accident Fund

Defendant

Judgment

Lopes J

[1] The plaintiff in this matter is Malungisa Remember Nkosi, a 23 years old man who was involved in a motor collision during August of 2007 when a motor vehicle collided with him when he was a pedestrian. He received a number of superficial abrasive bodily injuries. In addition, however, he received what has been described, and what is accepted by all parties, as a very severe head injury.

[2] At the time of the collision the plaintiff was a talented and promising young rugby player

for whom the highest expectations were held.

[3] The parties are agreed that the defendant will pay to the plaintiff 70% of whatever damages he proves he has suffered as a result of the collision.

[4] The parties have also agreed upon the quantum of general damages which should be awarded to the plaintiff. I understand past medical expenses have been agreed, as have future medical expenses by way of an undertaking given by the defendant to the plaintiff. I am to determine his loss of earnings.

[5] At the end of the evidence led during the trial, Mr Marais SC who appeared together with Mr Combrinck for the plaintiff, handed me a schedule of the damages sought by the plaintiff. The parties agreed at that stage that I should merely indicate which of these figures I agreed with, and any amendments I thought were appropriate, and convey those to the parties. An actuarial report was then to be compiled and sent to me, whereupon I would finalise my judgment. I acted accordingly but was then advised by Counsel for the defendant that they wanted me to give my reasons prior to the actuarial report being compiled. I accordingly do so, with the agreement of the plaintiff.

[6] The first witness for the plaintiff was Dr Michael Denis du Trevou. He testified that he qualified as a neurosurgeon in 1987 and has been in private practice since 1993. In addition, he is a senior lecturer in neurosurgery at the University of KwaZulu-Natal. In his evidence he dealt with the injury suffered by the plaintiff together with the *sequelae* thereof. He described the

injury as a “*high velocity shaking injury of the brain, typical of a motor vehicle accident*”. On admission to hospital after the accident the plaintiff’s level of consciousness, measured on the Glasgow Coma Scale, was 6 out of 15. According to Dr du Trevou anything less than 8 out of 15 means that the person concerned is in a coma. The Glasgow Coma Scale is a universally accepted measure of the consciousness of a patient, measured by observation and easily applied.

[7] Although two CT scans had been performed on the plaintiff they did not reveal the extent of the damage. That was later found by Dr du Trevou when he did a more sensitive MRI scan which showed evidence of an underlying diffuse brain injury.

[8] Dr du Trevou was asked to decide whether the plaintiff would be fit to return to rugby, and because of the MRI scan, and a report by Dr Anne Watts who found significant cognitive dysfunction in the plaintiff, Dr du Trevou was of the view that the risk of a second brain injury which could be suffered whilst playing rugby was too dangerous for the plaintiff to undergo.

[9] In cross-examination Mr Maharaj for the defendant raised the issue that alcohol intake prior to the collision may have affected the plaintiff’s level of unconsciousness and rendered the Glasgow Coma Scale readings somewhat inaccurate insofar they were an indication only of brain damage. Dr du Trevou responded that only an excessive intake of alcohol would have had any effect. If the level of consciousness had been created by alcohol alone, the plaintiff would not have been able to walk across the road where he was knocked down. Dr du Trevou stated that a great deal of alcohol would be needed to influence the measurement on the Glasgow Coma Scale by more than a unit.

[10] The next witness for the plaintiff was Silomuzi Donald Ngwenya the manager of what is described as a development rugby football club in KwaZulu-Natal. There are 29 or 30 such clubs. These clubs are aimed at the development and promotion of rugby football. Mr Ngwenya is responsible for conducting coaching courses, administration courses and courses on financing these clubs. He has been doing that job since 2007, prior to which he worked at the Golden Lions in Gauteng doing a similar job. He was there for five years. He has been involved in rugby for approximately 18 years.

[11] Mr Ngwenya stated that he had first become aware of the plaintiff when he was 15 years old and playing rugby in the school system. He originally played for Soweto High School and had played in the schools team of the Golden Lions and in the under 16 Craven week.

[12] The Craven Week can basically be described as a gathering of the pride of South African schools' rugby players. Twenty-two candidates per province go to the Craven Week. There are 14 provinces which together with Namibia and Zimbabwe comprises 16 teams or approximately 352 players. The 22 players who are chosen in each province go through numerous selection processes and are selected from approximately 200 players. At the Craven Week two sides are chosen, a South African schools' team (the "A team") and a South African academy team ("the B team").

[13] In this regard :-

- a) in 2003 the plaintiff played for the Golden Lions under 16 Craven Week team and

- was chosen for the RSA Open “Green Squad”;
- b) in 2004 he was chosen for the Golden Lions under 18 Craven Week team, the South African Academy team, the South African Schools’ team, the South African under 19 squad, the South African under 19 Sevens team and he participated for South Africa in the under 19 team in the Commonwealth Games as well as playing at a junior level for the Lions provincial side;
 - c) in 2005 he played for the Golden Lions under 19 Craven Week team during which he was elected Craven Week player of the year. He also played for the South African Schools’ team;
 - d) in 2006 he enrolled at the Sharks Academy in Durban, played for the South African under 19 team, played in the under 19 World Cup in Dubai and was a member of the KwaZulu-Natal under 19 squad.

(I should mention that the parties agreed that the achievements of the plaintiff, as set out above, are common cause).

[14] Mr Ngwenya testified that he had watched the progress of the plaintiff because he had a close interest in him having coached him at the Soweto rugby club. He testified that the plaintiff had the attributes necessary to play the “sevens” version of rugby which is a very fast version of the normal game and usually played by backline players. The accent is on speed and mobility. The plaintiff, unusually, had been able to do this despite the fact that he was not a backline player but a forward.

[15] Mr Ngwenya said that the Craven Week was regarded as the hunting ground of rugby football talent scouts because that is where the best players are displayed. Provincial sides send representatives and coaches to Craven Week to find the best talent. Because Mr Ngwenya was so impressed with the plaintiff's ability he assisted him in organising a rugby bursary for him to attend St Stithians private school where he attended a post-matric year.

[16] In 2006 the plaintiff was invited to join the Sharks Academy which is a rugby development academy in Durban designed to bring talented players up through the system and provide a basis for players to fill the ranks of those leaving the Sharks' senior teams playing in the Currie Cup and the Super 14 (now 15) competitions.

[17] Personnel of the Sharks Academy had identified the plaintiff as a desirable player at the Craven Week and Mr Ngwenya was the link between him and the Sharks Academy. The plaintiff was offered what is referred to as a Sharks junior contract paying for schooling and his attendance at the Sharks Academy.

[18] Once a player has completed a junior contract at the Sharks Academy he is either offered a senior contract if he is considered a desirable player, or released to be able to play in one of the other provinces.

[19] Mr Ngwenya described the plaintiff's particular attributes as being not only his physical strength but his exceptional ball skills. He was a forward who was a kicker, usually a station reserved for backline players. He was very fast for a loose forward as well as versatile, as a

result of which Mr Ngwenya occasionally used him as a centre (a backline player) at club level when one of his centres was injured. In addition he testified that the plaintiff had an intense interest in rugby and worked very hard in his training. He was always willing to go to the gym and do extra work.

[20] Finally Mr Ngwenya believed that the plaintiff would have definitely played for the Sharks in the Currie Cup competition and the Super 14 competition as well as playing for the South African under 19 side in the under 19 championships in Dubai, with teams from all over the world.

[21] When asked about the number of players who dropped out after achieving a high level at a young age, Mr Ngwenya's views was that approximately 70% of the under 19 national level players would go "all the way".

[22] In cross-examination by Mr Maharaj Mr Ngwenya stated that he had coached the plaintiff during three years, from January to July at club level, and in representative teams in the Craven Week trials from March to May. One of those years had been with the Soweto rugby club. In addition Mr Ngwenya was part of the selection process in 2005 for the Golden Lions provincial team, where the plaintiff was chosen for the under 19 squad.

[23] With regard to the Craven Week, Mr Ngwenya said that to be selected as player of the year was an important achievement following which the player gets invited to the Springbok team's award ceremony to be presented with a trophy.

[24] Mr Ngwenya closely followed the career of the plaintiff again in 2007 when he joined the Sharks Academy.

[25] The functioning of the Sharks Academy is such that 500 applicants are screened per year, of which 90 are accepted. Of those 90 who are accepted, it is usually the ones who have been “scouted” (approximately 20 – 30 players) who are ultimately successful in remaining members of the Sharks’ team. Of those who were sponsored, as was the plaintiff, 90% would make it into the Sharks’ senior team. He stated that players became professional rugby players when they obtained their junior contracts, basically straight out of school. In reply to the suggestion that it was speculation that the plaintiff would make the Currie Cup and Sharks Super 14 team, Mr Ngwenya stated that he had seen the plaintiff play, coached him and the fact that he had come through the screening process at the Sharks Academy was a good indication that he would.

[26] Whilst training at the Sharks Academy Mr Ngwenya would conduct two training sessions per week and attend games with the squad size consisting of two senior teams, and he got to know the players personally. He conceded that the process was very competitive and stated that only a full-time commitment at an under 19 level would enable a player to succeed. The commitment was that of a total professional and a career in rugby could no longer be a part-time commitment as had previously been the case.

[27] Finally Mr Ngwenya stated the fact that the plaintiff was a black player would greatly have enhanced his prospects of succeeding because of the responsibility of the rugby

administration towards transformation of the game.

[28] The next witness for the plaintiff was Miss René Stewart an occupational therapist in private practice. Miss Stewart testified that she had been in private practice as an occupational therapist for 12 years, having obtained a Master's degree in occupational therapy. She compiled an occupational therapist's report in respect of the plaintiff and that report appears in Exhibit B from page 48 onwards. Her function was to assess the impact of the plaintiff's injuries on his functional abilities, particularly his quality of life and occupational performance. She conducted a series of tests including cognitive testing, which she acknowledged were not as sensitive as neuro-psychological testing. On the morning of the day on which she testified she had conducted a follow-up assessment with the plaintiff for approximately two hours. She had done this to see if there had been any changes. In her view the same deficits existed.

[29] She examined three areas finding that there were no real problems physically but problems existed with the behavioural presentation of the plaintiff and cognitive aspects which showed definite indicators of cognitive inefficiency. His higher level functions were compromised and would affect his judgment, decision-making, complex problem solving, memory and information processing capacities. She emphasized that it was not just the score in the cognitive testing which was important, but how fast the job was approached, the approach that was used, and the organisation of the work, all of which were poor in the case of the plaintiff. Aspects of his behaviour which were problematic were his loss of focus, he became bored and apathetic, depressed, withdrawn, agitated, aggressive and irritable. Miss Stewart described this behaviour as typical of a head trauma. She was of the view that whatever

deficiencies had not improved two years after the injury would experience little cognitive or behavioural improvement. As the deficits were organic in nature, they could not be remedied.

[30] She made various suggestions in her report in regard to rehabilitative recommendations, but stated that those were there to help manage the problem rather than cure it. She described his academic performance as being poorer in high school than it was in junior school and being uninspiring. She made reference to his employment history since the accident, including coaching the under 13 Mhlapane High School for R60 per practice, working in the Brown's Diamond Store for four months and coaching at the Linksfield High School.

[31] Miss Stewart viewed the plaintiff as having diminished work prospects and that he would only be able to work in coaching jobs at a very low level – perhaps an assistant coach in a high school. He had a higher probability of losing his jobs, and because of his behavioural problems he would only be able to compete for employment at an unskilled or semi-skilled level. She regarded the probability of his completing Matric as unlikely.

[32] Miss Stewart agreed with Mr Maharaj's statement that the plaintiff was passionate about rugby and not really interested in anything else. In addition if he did obtain a matriculation certificate, he would have better prospects in the semi-skilled employment field. She disagreed with the conclusion of Dr Plunkett that the plaintiff would still achieve Grade 12, given his deficits in memory, his inability to concentrate for long periods, his vulnerability to exam stress and lack of motivation to study further.

[33] It was pointed out that the conclusions reached by Miss Stewart and those of Dr Plunkett were different despite the fact that similar, although not the same, tests were conducted. Miss Stewart could not comment on why this should be. Miss Stewart expressed the view that the plaintiff could benefit from repetitive inhouse training such as that applied to a low level machine operation or assembly line worker. She felt the plaintiff could operate at one level above unskilled – i.e. very low semi-skilled worker.

[34] The next witness to testify was Roelof Kotzé the rugby manager of the Sharks Academy since 2000. He had a wide history of coaching rugby and had played for the Free State provincial side as inside centre.

[35] He explained that the Sharks Academy was developed for the purpose of training young rugby players to become professionals at both the provincial and national level. Although they come to the Academy after they have finished school in order to become professional rugby players, they are encouraged to further their education with tertiary studies.

[36] He referred to a brochure from the Sharks Academy which appears at Exhibit A from pages 38 ff which indicates that of the 195 players who entered the Academy between 2001 and 2009, 135 became provincial players. From his statement it is evident that 45 of those were Sharks players and 10 were Springboks. His view was that the Sharks academy introduced approximately 14 players on average per year into the provincial level of rugby. Forty to fifty percent of those players go on to make a career as professional rugby players.

[37] Those who qualified had the option of playing for the rugby union in South Africa or going overseas, basically anywhere in the world where rugby is played as a sport. He spoke of the popularity of rugby outside of South Africa and particularly in the Middle East. Countries such as Argentina, America, Canada, Ireland, France, Portugal, Austria, Italy as well as Hong Kong and Japan continually sought players. He said that in the rugby nations which are not at the forefront of the game players could earn a salary similar to the smaller unions in South Africa – i.e. R15 000 – R20 000 per month. In the Far East in Japan salaries were well in excess of the starting packages and in their top 14 competition players could expect to earn R 500 000 for six months.

[38] Mr Kotzé stated that once players had reached a high profile level in rugby they could expect to be able to market themselves for reward. Sponsorships include not only money, but cars, furniture and groceries. The lifestyle of professional rugby players, particularly at the top, was akin to that of a celebrity, particularly in Gauteng, although the level was more modest in Durban. He stated, however, that the best players lived in the best houses, drove the best cars, and wore the best clothes.

[39] Mr Kotzé stated that the plaintiff had joined the Sharks Academy during 2006 as part of a recruitment drive. The academy keeps a particular eye on schoolboy rugby from the age of approximately 17. The plaintiff was seen by Mr Kotzé at the St John's festival where he recognised his potential immediately. He also watched him whilst playing for the Golden Lions, where members of the Sharks Academy encouraged him to leave them and join the Sharks Academy.

[40] At the Sharks Academy only between 7 and 12 new players are contracted per year, and the plaintiff was one of them. The full contract includes money for studies, accommodation, meals, the Academy and pocket money (others must pay their own way). The plan of the Sharks Academy in recruiting these player is to produce new Sharks players. In this regard they look ahead at their need for specific positions to be filled because players in those positions were becoming older or in short supply and they would look out for new players and recruit them. The idea was to put them through the system and develop them into successful Sharks players. His view was that the Sharks Academy was very successful in achieving its goals.

[41] Throughout the Academy only approximately 36 contracts are given out per year and every player who has received a contract over the last seven years has played senior provincial rugby, either at the Sharks or elsewhere. It was significant that the plaintiff was contracted at a lower age than might otherwise have been the case.

[42] Mr Kotzè stated that the pool of talent which really makes it in rugby is very small and the market is extremely competitive between the five big unions. Contract negotiations usually take place between the union and the player's agent. The thinking in the Sharks Academy was that it was much cheaper to contract a player early and take him through the system rather to hire him when he was much older, not only because of the high salaries paid, but also because they might have to buy a player out of his contract if he has a long term contract with his current team.

[43] His view when they signed up the plaintiff was that they had obtained what he called “the real deal”. The plaintiff was one of the hardest workers both in the gym and on the field, and stood out in matches as a skilful player. His catching and passing was excellent and he had good strong running abilities with the ball. All these qualities were described by Mr Kotzè as being very useful for a loose forward. He explained how the game had moved to faster and bigger players and had become what he called “a collision sport” where size was extremely important. In this respect the plaintiff was always very big for his age.

[44] Other attributes sought by the Academy would include speed, agility, explosiveness (the ability to accelerate quickly) defending and anticipation, decision making abilities, etc. They looked for players which he described as having “the X factor” and he was convinced that the plaintiff “ticked all the boxes”. Another important aspect was that the plaintiff (apparently referred to at the Sharks Academy as “Giant”) demonstrated a willingness to work and improve his skills. In his evidence Mr Kotzè listed a number of players who were at the Sharks Academy at the same time as the plaintiff, and were now playing for other provincial sides as well as the Sharks.

[45] He said if he could have picked out two players at the Academy during 2006, one of them would have been the plaintiff.

[46] With regard to what would have happened to the plaintiff had he not been injured, Mr Kotzè was of the view that he have been in contention for the World Cup squad in 2011. He stated that World Cup availability dictates a player’s path of progress and if he had not qualified

for the 2011 World Cup he would have played for the Sharks for a further four years. Most players would try to attend two World Cups, and a loose forward would be able to play for approximately ten years, because they lost speed after the age of about 25.

[47] Thereafter, a player would usually go overseas to one of the smaller nations in the northern hemisphere countries which play rugby in vastly different conditions to those played in the southern hemisphere. The nature of the game and the weather conditions there dictate that players are stronger and this suits older players because their strength increases after the age of about 25. In the northern hemisphere the game is slower and there is closer contact, and a greater need to be stronger. This career move of the rugby player essentially gives them a second career of approximately five to six years. Mr Kotzè gave examples of player playing in Japan at the age of 35.

[48] Players who went to Japan or the Far East would typically play for a club owned by a big multi-national corporation. The players were essentially employees and the company would pay them approximately R500 000 for six months at the beginning of their employment.

[49] Although back line players would begin their careers earlier than front line players, their careers would be shorter and they would not last much past 26 or 27 years of age whereas the forwards would start later and last longer.

[50] With regards to the further progress of the plaintiff beyond the Sharks provincial team Mr Kotzè was of the view that the plaintiff would definitely have made it into the South African

national side – at least at the level where he would have been given a few games in order to prove himself. It was impossible to say with certainty whether he would have established himself there in the long term.

[51] With regard to salaries earned by players Mr Kotzè stated that a Sharks player playing in the under 21 team, would earn approximately R10 000 per month, players contracted in the senior side would earn R15 000 – R 20 000 per month for the first year going up to R30 000 per month for the first three years of their contract. Their next contract for a further period would progress between R30 000 – R50 000 per month. These amounts exclude match fees of R5 000 per game and win bonuses of R5 000 per game. These match and win bonuses would cover all games in the Super 14 competition and the Currie cup.

[52] In the last year the Sharks played between 25- 30 games winning eight or nine in the Super 14 competition and eleven in the Currie cup competition. Their expectation was that the Sharks would do even better in the coming years. Players who played for the Springboks would obtained a separate contract from the South African Rugby Board of approximately R1 000 000 (one million rand) per year with match fees of R85 000 per match. He did not know whether or not they got win bonuses.

[53] Mr Kotzè stated that the salary from the South African Rugby Board would be in addition to the salary earned by the player from his provincial union. A Springbok player might play between ten and twelve matches per year.

[54] Mr Kotzè also felt that the plaintiff's chances would have been greatly enhanced because of the need for transformation.

[55] With regard to the ability of the plaintiff to earn money as a coach or rugby trainer, he indicated that he himself had earned approximately R3 000 per month coaching at Harlequins for seven to eight months of the year. He indicated that senior schools did pay for experienced rugby coaches, but normal players who coach school boys might make only approximately R1 500 per month and then only during the rugby season. He was however, aware of two large government schools who paid their rugby coach approximately R14 000 per month and the other R5 000 per month.

[56] In cross examination by Mr Maharaj, Mr Kotzè stated that he had coached the plaintiff at the Sharks Academy approximately twice per week. He worked with the plaintiff in his role as a defensive coach. He reiterated that out of the 500 applicants who applied to come to the Sharks Academy only 90 are chosen. About six of those 90 would make it to the Sharks senior team eventually, and others go to other provincial teams. He agreed that it was extremely competitive to get into both the Sharks team and national team. Approximately a third of the players who made it to the senior side would be those of colour. In response to questions about his own career, he said he had played rugby for 27 years and had finished his Currie Cup career in 1995 when rugby became professional.

[57] The Sharks Academy has increased the percentage of Sharks players and Springboks it produces as it has progressed since 2001. Their approach to selection was highly scientific and

goes on from February to September once a month.

[58] In response to questions about what happened if a player did not perform, Mr Kotzè stated that those who evidenced problems would have the benefit of remedial and extra training, but if they continued to perform poorly would be released at the end of the period. Sometimes players who were under-performing were put out on loan in order to enable them to regain their confidence.

[59] His view was that most professional players would have a playing life of approximately ten years and that there were very few players who were put out of the game because of severe injuries. He could think of only three in the last year. Players occasionally left for other reasons such as the pressure of playing. Mr Kotzè stated that his only interaction with the plaintiff had been at the Sharks Academy and the plaintiff had been with him for eight to nine weeks when he went off to the Under 19 World Cup. Only three other players in that group went to the World Cup. Every player in the Academy was evaluated each week by a panel of the trainers who debate the player. These are the conditioning staff coaches and the rugby coaches.

[60] Mr Kotzè's knowledge of the salaries was as the result of discussions with the commercial manager of the Sharks Rugby union, and in addition salaries were often discussed with players in determining their career paths.

[61] Although serious injuries could hold up a player's career to some extent, a professional rugby team would not expect more than three out of 30 players to have injuries which will keep

them out for any substantial length of time.

[62] The next witness for the plaintiff was Izak Stephan De Villiers Swart who is also known as “Balie” Swart. His rugby career began in earnest at the Craven Week whilst at school and he had played for the Western Province team at that stage. He had played 25 tests for the Springboks in addition to other games for them and had competed over the period between 1989 and 1995. He had also been in five winning Currie Cup teams and had been a member of the South African World Cup winning team in 1995. From 1998 to 2008 he had become a professional rugby coach and had worked for two years with the Golden Lions under Lawrie Mains, a prominent former New Zealand player and now a coach. He had followed Mains to New Zealand to train the Highlanders for a further two years and then had worked under Robbie Deans with the Crusaders for two years. Both teams are in the Super 14 competition which is a competition of 14 teams from New Zealand, Australia and South Africa. It has now been expanded to be a Super 15 competition.

[63] After his return to South Africa Mr Swart joined the Sharks as an assistant coach for five years from approximately 2002 to 2007. He now consults with the Sharks Academy once a month as he operates as a consultant for his own account and for S A Rugby. His function is to set up training systems which are designed to ensure that South Africa is able to compete with systems available in New Zealand and elsewhere. This started with the Sharks Academy and has been extended to other provinces as well as an academy for the S A referees.

[64] Mr Swart saw the plaintiff play for SA Schools and during Craven week. He said that

when he first saw the plaintiff he knew he was an exceptional player, who was different and had to be looked after. His work with the plaintiff started when the plaintiff joined the Sharks Academy. Mr Swart's view was that the modern game needs big fast men who can handle big collisions. He conceded that the work intensity must have been something of a culture shock for the plaintiff. He said at that level players are required to step up the level of their performance, and discipline is an area which is important, particularly with regard to what they eat, etc. He said that the plaintiff exhibited a very good attitude and the academy was very happy with him. During his progress at the Sharks Academy they had wanted to match him with one of the Sharks players who is currently playing in the Springbok team (Mtwarira, a Springbok front row forward affectionately known to his fans as "the Beast"). The idea was that they would work together in the front row.

[65] Mr Swart was confident that the plaintiff had been earmarked to become a senior and established member of the Sharks. He was, however, unable to say whether or not the plaintiff would have made the Springbok team, although based on his work ethic the plaintiff's chances were better than even. He said it was often a case of how badly a player wanted to do so. He said the plaintiff had the work ethic and ambition of someone who could become a Springbok. With regard to the earnings of provincial players he was of the view that the entry level was about R350 000 per annum together with win bonuses, etc. Top players in the world could earn approximately R2 000 000 per year together with match fees and their provincial fees. He regarded the life expectancy of a player in the Springbok team as being two World Cup campaigns for a forward player and possibly more, and he cited examples of forwards who were going into their third World Cup.

[66] In cross-examination by Mr Maharaj Mr Swart stated that the plaintiff was in his mentor group. He had one-on-one sessions with him once a week and on field sessions between three and six times per week. He was a specialist coach for the loose forwards. Mr Swart was unsure whether he had first seen the plaintiff playing on videotape footage of the SA Schools and Craven week competitions or whether he had actually seen him there. He said that he had nonetheless recognised his talent. He described the plaintiff as a type of “Jonah Lomu individual”. This is a reference to the famous New Zealand wing. This was in terms of the fact that the plaintiff was big and had exceptional ball skills. He was earmarked for something special and Mr Swart described the fact that he was a different and special player, as well as a player of colour, meant he was the “crown jewels”.

[67] Because of the availability of witnesses, the evidence of Dr Rory Patrick Plunkett was then interposed as a witness for the defendant. He testified that he was a clinical psychologist and neuro-psychologist and had been doing reports and giving expert witness evidence throughout the country for 28 years. He had prepared a report on the plaintiff which appeared at Exhibit B22ff, was familiar with its contents and confirmed them. He was of the view that the deficits revealed by the plaintiff were mild and would have disabled him only to a minor or moderate degree. He had evaluated the plaintiff by means of psychometric testing, input from his mother and collateral information from his mother. He regarded the plaintiff as not being socially inappropriate.

[68] Dr Plunkett stated that the plaintiff would have problems with concentration and minor

problems with retention. His immediate recall was in the superior range but when required to recall after one day it was only in the average range. He was thus experiencing a loss of information or being forgetful. With regard to his visio-spatial ability the plaintiff had an ability to put elements together and was good at what he called “the block design test”. Dr Plunkett regarded this as an outlying result with no clear reason for it, but in his view was just an ability which the plaintiff had. It was at odds with the rest of the assessment of the plaintiff.

[69] Dr Plunkett was in agreement that the plaintiff’s rugby playing career was over, but regarded his coaching career as uncertain. He said that the plaintiff’s reduced academic achievement would reduce his level of employment. His minor deficits would also reduce his employment possibilities. He was of the view that there should be a minor increase in the unemployment contingencies to allow for this.

[70] Dr Plunkett agreed that the head injury which the plaintiff sustained was very severe and that his post-traumatic amnesia had similarly been severe. He felt that his findings were not consistent with those injuries and the outcome of the injuries were not well correlated with the injury itself. He did state that there was not a perfect correlation between the severity of an injury and its outcome. Sometimes severe injuries can result in good outcomes and vice versa.

[71] He was unable to explain the difference between his report and that of Miss Stewart save to say that they differed significantly in assessment outcomes. He said that reactive psychological events would play a role in the deterioration of the plaintiff’s condition resulting in reduced confidence, low self esteem, anxiety, depression and stress, and that knowledge of his

inability to achieve his potential would impact on his depression.

[72] It was pointed out to Dr Plunkett by Mr Marais SC in cross-examination, that his assessment had been performed two days after the assessment by Miss Stewart. Dr Plunkett was of the view that patients get what he referred to as “test-wise” which could explain the improvement in the plaintiff’s performance in his testing. He said he did not question the findings made by Miss Stewart and that the results of her recent findings would be reliable if they were the same as two years ago. He conceded that the plaintiff could not function at the level he had formerly done and would have to obtain a lesser job. He was of the view that the best the plaintiff could do was semi-skilled labour. In re-examination by Mr Maharaj Dr Plunkett was of the view that the plaintiff may simply have had a good day when he saw him. He viewed it as unlikely in reality that the plaintiff would re-do his matric. He had gained the impression that the plaintiff did not want to be there for the testing, but he had told him that his maximum performance was required in order for the tests to be meaningful.

[73] The plaintiff then called Clive David Couperthwaite a counselling and industrial psychologist practising in Durban. As with all the other experts Mr Maharaj placed on record that his qualifications and expertise were accepted. He had been engaged in numerous matters as an expert witness on employment opportunities for those who have suffered head injuries. He confirmed his report which appeared at Exhibit B page 86ff. With regard to the cognitive and behavioural difficulties experienced by the plaintiff, Mr Couperthwaite said he would always defer in this regard to the neuro-psychologists. He did tests on the plaintiff which showed abnormalities being :-

- a) an emotional score of 1 which is significantly different from the normal range of 4 to 6;
- b) with regard to pessimism plaintiff also registered an extreme score.

[74] He had no knowledge of the pre-morbid state of the plaintiff but strongly suspected that his emotional state had changed because of his injuries. Although the plaintiff's mother could not see much wrong with the plaintiff he regarded this as deceptive because it was an untutored view.

[75] Mr Couperthwaite went through the plaintiff's work history. He stated that he had ascertained that the plaintiff had been dismissed from the Brown's Diamond Store because of, *inter alia*, poor performance, sleeping on the job, etc. He had been given a fixed term contract for four months which had not been renewed. During that time he had earned a basic salary of R4 000 per month. In view of his experience at the Brown's Diamond Store Mr Couperthwaite was of the view that the plaintiff would have difficulty in holding down a normal job. He would have to decide whether coaching was a viable prospect because the long term option of being retained in a firm was unlikely. For this reason the application of scales such as the Peromnes scale was inappropriate. He stated that unskilled labourers would earn approximately R14 500 *per annum* up to R39 000 *per annum*.

[76] Mr Couperthwaite had contacted the Sharks Academy in order to ascertain salaries and confirmed that the information in his report was as conveyed to him by Gavin Melville who deals with contracts and finances of the Sharks franchise. Top players earn up to two million

rand (R2 000 000) and if they were not well paid other franchises would attract them away. He could not make no comment about the additional income a player might earn.

[77] With regard to the salary of Springbok players he obtained his information from Andy Marinos, the acting managing director of SA rugby.

[78] In cross examination by Mr Maharaj, Mr Couperthwaite said that he had found the plaintiff to be emotionally distressed as a result of an occupational personality profile test. On the basis of an aptitude test he was of the view that the plaintiff may be able to do semi-skilled work. In this regard mention had been made of a taxi driver or truck driver.

[79] As the Peromnes scale was based on blue chip companies (if that was applicable) he was of the view that the plaintiff would fit in somewhere between the 19th and 16th ranks. He viewed it unlikely given the plaintiff's employment background that he would be hired by any of the big companies. He regarded the prospect of the plaintiff being a truck driver or taxi driver as somewhat risky. He had also obtained information was regard to salaries in the Sharks team from Mr Kotzè, and they basically correlated to the evidence of Mr Kotzè. He was also of the view that it would be appropriate to increase the unemployment contingency to deal with the uncertainty retention that he had suffered.

[80] In re-examination by Mr Combrinck for the plaintiff, Mr Couperthwaite stated that the occupational personality profile was a vocational assessment tool used throughout his industry. He described it as a job grading system as was the Patterson grading system and the Task

grading system. They were designed for use in South Africa to apply to occupations in order to judge their complexity with a salary scale attached. These scales were generally employed by larger corporate employers in South Africa. He said it would have been speculative to use them and reduce the figures in scale to account for a smaller company.

[81] Mr Couperthwaite suggested (on his own admission tenuously) that the plaintiff could be a regular coach and that that salary could be used to determine his loss of income because it was a field of his interest, and a field in which he had expertise, and was of a seasonal nature which might suit his temperament.

[82] The parties then closed their respective cases. Mr Marais gave me a schedule of proposed findings regarding the uninsured progress (both past and future) of the plaintiff and his injured income, both past and future.

[83] Before I am able to decide on the actual figures it is necessary for me to decide how far the plaintiff would have progressed had he not been injured in the collision.

[84] It is necessary for me to assess the various witnesses who testified at the trial. I agree with Mr Marais that in this matter there has been no suggestion that the credibility of any of the witnesses is to be called into question. I am satisfied that they were all honest witnesses who did their best to assist the Court as far as they could.

[85] It was also agreed between the parties that :-

- a) the plaintiff could never again play rugby; and
- b) the plaintiff would have become an established Sharks team player;
- c) the plaintiff would initially have played under 19 and under 20 rugby at R10 000 per month and then signed a contract for between R15 000 and R20 000 per month going up to between R30 000 and R50 000 per month in his third year.

[86] I accept the evidence of Mr Cooperthwaite as to the loss of earnings in 2007 of R13 000. The figures of R120 000 to R140 000 and R360 000 for the plaintiff's Sharks contract during the 2008, 2009 and 2010 years are also therefore accepted. In this regard the figures quoted are at the bottom end of the range for years 1 and 3 and at the top end for year 2.

[87] With regard to match fees and win fees the calculations of Mr Marais are in accordance with the evidence (i.e. match fees of R5 000 for 25 games and win fees of R5 000 for 20 games). The total of past earnings which the plaintiff would have received had he not been injured, would therefore have been R1 395 000. However, a contingency must be applied. Mr Marais suggests that contingency at 12% whereas Mr Maharaj suggests it should be as high as 25%.

[88] Based on the evidence of Messrs Ngwenya, Kotzé and Swart it would seem clear that the plaintiff's history had marked him for great things by the time he came to the Sharks Academy in 2006. As agreed between the parties, I have no doubt that he would have progressed to become an established member of the Sharks senior team. Given the figures quoted by the above witnesses, the prospect of him having dropped out through injury, lack of interest, etc was a fairly low one put at 10% by Mr Ngwenya (who said that 90% of those who were sponsored

eventually make it to the senior side), and Mr Kotzè – three in the past years have suffered career-ending injuries. In my view it would be safer to be cautious on this aspect and I would put that contingency at 15%.

[89] For the years 2011 to 2018 the figures for the Sharks contract, match and win fees as proposed by Mr Marais seem probable and consistent with the evidence. (R600 000 for the Sharks contract, match fees of R5 000 for 25 games and win fees of R5 000 for 20 games). As that period is further down the line with the plaintiff getting older all the time, the contingency to be applied to those three items is 20%.

[90] With regard to the plaintiff becoming a Springbok, Mr Marais and Mr Maharaj again differed, with Mr Maharaj maintaining that the contingency to be applied to such wages, if applicable, should be of the order of 60%.

[91] The evidence of salaries paid to Springbok players was given by Mr Kotzè who said they earned a contract of a million rand per year in addition to the provincial contracts which they held. Mr Couperthwaite at page 99 of Exhibit B reflected this income for one player in 2009 as being R450 000 *per annum*, together with match fees of R30 000 per game and win fees of R80 000. Mr Kotzè stated that a Springbok player would earn R1 million per years in addition to which there would be match fees of R85 000 per game and win bonuses. Mr Swart stated that Springbok players could earn approximately R2m per year plus match and win bonuses in addition to their provincial contracts. According to Mr Couperthwaite's research the Springboks played 14 games in 2009, winning nine of them.

[92] Without any ability to determine the accuracy of these extremes, and in the absence of any evidence from the defendant to counteract them, it would in my view be wise to use a conservative figure for the plaintiff's Springbok earnings of somewhere between the two of R600 000 *per annum* and match fees of R80 000,00 per game and win fees of R80 000 per game. In my view the contingency which should be applied to the Springbok fees and match and win fees should be 45%

[93] With regard to the further earnings the plaintiff could have earned in foreign rugby clubs after the end of his South African playing career I think that the four years allowed in the calculation is a conservative figure and the amount allowed is in accordance with the evidence that players would not necessarily earn substantially more than they earned in their South African provincial clubs, but this would depend on where they went. In this regard I agree that a figure of R600 000 per year for the four years would be appropriate with a contingency of 40%. I have increased the contingency because the prospect of accurately seeing so far into the future is less certain.

[94] With regard to coaching income thereafter for a period of 11 years Mr Marais has submitted a figure of R60 000 *per annum*. I consider this to be conservative since it seems likely that whether or not he had been injured (as a player only) the plaintiff would at some stage at the end of his career have considered working as a coach, more particularly because that is a likely path for players who achieve national standards. It would be less well paid than other job possibilities at the end of a career such as commentating, public speaking, etc. I would apply a

contingency of 40% in this regard.

[95] With regard to the income which the plaintiff has accrued in his injured state, there is no evidence to contradict the figures for 2008, 2009 and 2010 and I accept them. With regard to his future income in his injured state it would appear that at best he would be able to earn R48 000 per year, but given the severe reservations held by Mr Cooperthwaite and Miss Stewart as to his ability to maintain steady employment, I would apply a 50% contingency.

[96] The costs of the action are to be paid by the defendant, such costs to include those consequent upon the employment of two counsel.

[97] I shall cause this judgment to be handed down and the parties are invited to provide me with an agreed actuarial report based on the above. Should they be unable to agree on an actuarial report based on these figures and taking into account the agreed apportionment against the plaintiff of 30%, they will have to approach me to present argument on that aspect.

[98] In the event that they are able to provide me with an agreed actuarial report I will make a final order with regard to the damages which the defendant is obliged to pay the plaintiff.

[99] In summary then, the figures to be applied by the actuary are :

Special Damages:

Past loss of earnings

1)	<u>2007</u> :	R 13 000
2)	<u>2008</u> :	
	(a) Sharks contract	R 120 000 (R 10 000 per month)
	(b) Match fees	R 125 000 (R 5 000 x 25)
	(c) Win fees	R 100 000 (R 5 000 x 20)
3)	<u>2009</u> :	
	(a) Sharks contract	R 240 000 (R 20 000 per month)
	(b) Match fees	R 125 000 (R 5 000 x 25)
	(c) Win fees	R 100 000 (R 5 000 x 20)
4)	<u>2010</u> :	
	(a) Sharks contract	R 360 000 (R 30 000 per month)
	(b) Match fees	R 125 000 (R 5 000 x 25)
	(c) Win fees	R 100 000 (R 5 000 x 20)
		R 1 395 000
		<u>Less</u> : contingency 15%
 <u>Future loss of earnings</u> :		
 <u>2011 – 2018</u>		
	(a) Sharks contract	R 600 000/yr (R 50 000 per month)
	(b) Match fees	R 125 000/yr (R 5 000 x 25)
	(c) Win fees	R 100 000/yr (R 5 000 x 20)
		<u>Less</u> : contingency 20%

- (d) Springbok contract R 600 000/yr
- (e) Match fees R 800 000/yr (R 80 000 x 10)
- (f) Win fees R 800 000/yr (R 80 000 x 10)

Less : contingency 45%

2019 – 2023

Foreign club rugby R 600 000/yr

Less : contingency 40%

2024 – 2035

Coaching income R 600 000/yr

Less : contingency 40%

Injured income :

Past

2008	R 12 000
2009	R 12 000
2010	R 3 135

Future

2011 – 2035 R 48 000/yr

Less contingency 50%

Note : An overall apportionment of 30% is to be applied against the plaintiff.

[100] In the interim I make the following order :-

1. the defendant is to pay to the plaintiff the agreed sum of R300 000,00 in respect of general damages;
2. The defendant is to provide the plaintiff with an undertaking for payment of the plaintiff's future hospital, medical and related expenses, in terms of s 17 of the Road Accident Fund Act, 1996;
3. the defendant is to pay the plaintiff's legal costs on the High Court scale (party and party) :
 - (a) including the costs of two counsel, including all consultations with and by senior and junior counsel, attorneys and experts;
 - (b) the reasonable qualifying fees and reservation costs and attendant fees (where applicable) of the following experts :
 - (i) Dr Mike du Treu;
 - (ii) Dr G M Pillay (report only);
 - (iii) Dr Rory Plunkett;
 - (iv) Mr Clive Couperthwaite;
 - (v) Dr Robert Fraser;
 - (vi) Dr Barry Isaacs (report only);
 - (vii) Ms René Stewart;
 - (viii) Mr Balie Swart;
 - (ix) Mr Ian Morris (report only).

Date of hearing : 19th November, 2010

Date of judgment : 4th January 2011

Counsel for the plaintiff : J Marais SC with P J Combrinck (instructed by Friedman & Associates)

Counsel for the Defendant : M Maharaj (instructed by Linda Mazibuko & Associates)