

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 391/2001

In the matter between:

NTOI MIKEA MAHOLELA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY:

EBRAHIM, J

HEARD ON:

7 NOVEMBER 2006

DELIVERED ON:

[1] On the 11th of February 1996 the plaintiff who was 40 years of age at the time was seriously injured when the taxi in which he was travelling as a passenger was involved in a collision. It is common cause that the insured driver was negligent and it has been accepted by the defendant that the plaintiff is entitled to 100% of such damages as he can prove. This judgement accordingly deals only with the question of quantum.

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[2] In his particulars of claim the plaintiff has claimed:

- 2.1 Estimated future medical and related expenses R2 180 247,00;
- 2.2 Pas loss of earnings R880 791,02;
- 2.3 Estimated future loss of earnings R919 859,00;
- 2.4 General damages in respect of pain and suffering R1 000 000,00.

The past hospital and medical expenses have been agreed on the sum of R7 020,22. In addition a certificate in respect of the future medical and related expenses has, in terms of section 43(a) of the MMA Act 1998, (Act 93 of 1998) being a statutory undertaking has been issued by the defendant.

[3] The certificate is dated the 9th of November 2006. At the outset it must be mentioned that no evidence whatsoever in contradiction to the evidence led by the plaintiff in regard to the collision and the injuries he sustained in the collision was proffered by the defendant during the trial and as such, the plaintiff having been an exemplary witness who steadfastly

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kept to the version which he gave of the collision and his condition immediately after the accident, no reason exists for me not to accept his version as being reliable in the circumstances.

[4] In terms of rule 36(9)(a) and (b) the plaintiff gave notice experts witness of its intention to call the following:

1. Dr. J J Fourie an orthopaedic surgeon;
2. Dr. P Repko a neurosurgeon;
3. Prof. E van Zyl an industrial psychologist;
4. Mrs. Elana Human an occupational therapist;
5. Mr. D Jacobson an actuary.

The defendants indicated that they would be relying on two witnesses namely Dr. I Lisssoos, a urologist and Prof. C Pottas an industrial psychologist. Prof Pottas was not called to give evidence on behalf of the defendant and the urologist's report was common cause between the parties. Although the defendants indicated that they deny the contents of the reports of Dr. Fourie, Dr. Repco, Mrs. Human and Mr. Jacobson the evidence of these witnesses were not challenged by way of any experts on behalf of the defendant

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and not disputed by way of any statements to these witnesses during cross-examination. Accordingly this court accepts the evidence of Dr. Fourie, Dr. Repco, Mrs. Human and Mr. Jacobson in its entirety.

[4] In the particulars of claim the plaintiff alleged that he sustained severe bodily injuries as a result of the collision more particularly a fracture-dislocation of the first lumbar vertebra which rendered him permanently a paraplegic with classic symptoms of paraplegia and multiple fractures of the ribs on the right hand side. Dr. Lissos mentioned in his report that the plaintiff is a paraplegic. In this view he is supported by Dr. Repco as well as Dr. Fourie.

[5] At the time of the collision the plaintiff was employed by Anglo Gold as a senior personnel assistant since the 2nd of December 1986 until the 7th November 1996. These dates are not disputed. The agreement of service with Vaal Reeves Mines was tendered in evidence as exhibit "C" and from this exhibit it was also clear that the plaintiff was also employed by the mine as a part-time teacher with an average income of R800,00 per month.

[6] A proper reading of the pleadings reveals that the real disputes of fact between the parties are:

1. Whether the plaintiff suffered the injuries referred to

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by the plaintiff's medico-legal experts as a result of the collision;

2. The reason for the plaintiff's retrenchment;
3. Whether the plaintiff would have continued to earn R800,00 per month as a teacher had it not been for the accident.

In this regard the only dispute is whether the R800,00 should be taken into account when calculating the plaintiffs prospective loss of income. The defendant does not dispute that the amount should be taken into account in the calculation of the plaintiff's accrued loss of income.

4. The percentage of the contingency deductions to be employed insofar as the calculation of the accrued loss and the prospective loss of earnings are concerned, and
5. The quantum of the general damages to be awarded to the plaintiff.

[7] A careful scrutiny of the defendant's plea reveals that the defendant does not seriously challenge or deny that the plaintiff sustained the injuries referred to by the medical

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experts but merely alleges that it bears no knowledge of such injuries. In light of the fact that there is no evidence to gainsay the evidence of the plaintiff and his experts I do not consider that there is a serious dispute of fact insofar as the nature of the injuries sustained by the plaintiff is concerned and I have already recorded _____ acceptance of the evidence that the plaintiff suffered a fracture to his lumbar spine and an injury to his ribs as a result of being involved in the collision on the 11th of February 1996.

[8] It is axiomatic that the plaintiff's employment at the mine was terminated as a result of the injuries which he sustained during the collision which rendered him unfit for work. The fact that he was offered the option of either taking a retrenchment package alternatively the option of a monthly wage is of no moment and does not detract from the fact that the only reason why the offer of a retrenchment package came his way in the first place was because he was not in a position to work any longer due to the injuries he sustained during the collision. The plaintiff's undisputed evidence was that he was not in a position after the collision to do the same work as he was able to do prior to the collision. He was not able to continue with his duties as senior personnel assistant after the collision and that it was for this reason that he was given an option of either being medically boarded that is being declared medically unfit for doing his job in which event he would receive a monthly payment as well as a possible lump sum amount alternatively if he elected to be retrenched he would receive an amount that he regarded as substantial. His undisputed evidence was that he preferred to take the retrenchment package. This

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however does not detract from the fact that he was unfit to perform his duties because of his paraplegic state. It is common cause between the parties that the plaintiff has not been able to earn an income since the date of the collision and in light of that I find that his employment with Vaal Reefs Mining Company was terminated for no reason other than that he was unfit for duty due to the injuries he sustained during the collision. I am fortified in this conclusion by the fact that the plaintiff's duties entailed walking around often and going underground which in light of his injuries would have been impossible for him to perform after the collision. The _____ psychologist called by the plaintiff, Prof. van Zyl, confirmed that the plaintiff was not fit for any work in the open labour market because of his disabilities. This was also the view of the occupational therapist, Mrs. Elana Human.

[9] I turn next to the issue whether the plaintiff did indeed earn R800,00 per month as a part-time teacher on the mines. Then again there is no evidence from the defendant to gainsay the evidence of the plaintiff which, moreover, is corroborated by a letter from his employer found in exhibit "C". The dispute in this regard centres around the question whether this court can find that the plaintiff would have continued to earn an income of R800,00 per month as a part-time teacher until his retirement age of 62 and a half years. I am of the view that in all probability the plaintiff would have continued earning this income because of the following circumstances:

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1. The plaintiff studied a course in Lesotho to become a qualified teacher. This is his undisputed evidence and as of the date of the collision the plaintiff had not only been teaching but had also been earning an income from such teaching for a period of approximately 9 years. In all probability mineworkers from the rural areas would have had to be taught basic communication skills and this would have continued each time mineworkers from the rural areas were employed by the mines. Consequently in all probability the teaching classes presented by the plaintiff would have continued as there would have been a continued need for them. The plaintiff on his undisputed evidence had not only been teaching English classes but had been promoted to the level of principal of the school. I find that these are factors which indicate that in all probability the plaintiff would have continued to earn an income of R800,00 per month until his retirement age of 62 and a half years.

[10] I deal now with the issue of contingencies. The basis for

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the calculation therefor was the actuarial calculation prepared for the plaintiff by its actuary Gerard Jacobson. The figures used by the actuary were obtained from the report of the industrial psychologist, Prof. Van Zyl, whose evidence was not seriously disputed by the defendant. In light of this it would appear that the basis for the calculations by the actuary are common cause in the following respects:

1. As far as the plaintiff's accrued loss is concerned the quantum thereof is R955 465,00 from which amount a contingency deduction has to be made and the amount of R27 359,00 which the plaintiff received in terms of his contract of employment must be deducted from the quantum of the plaintiff's accrued loss.
2. In view of my finding that the plaintiff would have earned an income of R800,00 per month as a teacher until his retirement age of 62 and a half, the quantum of his perspective income is given as R1 066 788,00 from which a contingency deduction should be made.

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In regard to this issue of contingency is I was referred by the plaintiff to the well-known dictum of Nicolas JA in **SOUTHERN INSURANCE ASSOCIATION LTD v BAILEY NO** 1984 (1) SA 98 (AD) at 113G:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.”

[11] As far as accrued loss is concerned the evidence of the actuary confirms that a normal deduction for contingencies is 5%. The defendant has however taken issue with this and argues that a normal deduction would be 10%. I have found that the fact that the plaintiff was employed continuously for a period of ten years by a multi national company and that no incidences occurred in his life save for the injuries sustained as a result of the collision which would have caused him not to continue earning an income which he was earning at the time militates against the possibility of him losing his employment to a large extent. In addition, the plaintiff was not a mine worker who was obliged to go under ground to earn a living, he was a senior personnel assistant and accordingly in a managerial position. He also had a standard 10 qualification and had undergone and completed a 3 year teaching course which qualified him as an educated employee rather than an illiterate employee of the mines. He has a stable working record and as such was a reliable employee and there is no reason to assume that this position would have changed and that he would

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have gone from one employment position to another. The plaintiff was also of great value to his employer in two senses. First as an employee in a managerial position and secondly in his capacity as a teacher of the illiterate mine workers. Moreover he received a promotion to the position of principal and was thus a valuable feature of the education centre on the mines. All these factors have moved me to make the finding that the plaintiff would in all probability have continued to earn his salary and his income as a teacher. The actuarial evidence of Mr. Jacobson was that in view of the dispute between the parties as far as the rate of the contingency deduction is concerned it would be better that a contingency deduction of 7½ % be made such that the figure which the plaintiff would then be awarded in respect of past accrued loss is R856 464,00 as appears from his calculation contained in his (exhibit "D").

[12] Insofar as the prospective loss of earnings is concerned there is a dispute once again in regard to the rate. The normal deduction would be between 10% and 15% as submitted by the plaintiff's counsel and confirmed by the evidence of Jacobson. I find that in view of the plaintiff's value as an employee to the mines and the fact that he has shown himself since the date of the collision to be positive despite his disabilities and has even attempted to obtain a further qualification by registering for a degree in journalism and that despite his obvious inability to use his legs his determined effort to convince the court as demonstrated in the court that he is able to walk up stairs shows that he is not one who would easily be discouraged once he had set his sights upon a particular goal. At this stage the plaintiff is 51 years of age and I have concluded, based on the report of Mr. Jacobson and having regard to all the circumstances of the plaintiff's case, that it would be fair and proper insofar as both the plaintiff and the defendant is concerned, for a contingency deduction of 12½% in respect of prospective loss should be made. Translated into figures this means that the plaintiff's prospective loss would be R933 439,50.

[13] I finally address the issue of general damages for pain and suffering, loss of amenities of life, shock and disfigurement. In this regard both counsel for the plaintiff

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and defendant referred to comparable cases and to awards made therein in respect of general damages. I was also referred to the case of **ROAD ACCIDENT FUND v MARUNGA** 2003 (5) SA 164 (SCA) where it was held that the court should take into account that there has been a tendency to make high awards in respect of general damages in the more recent past the court quoted with approval a passage from **WRIGHT v MULTILATERAL VEHICLE ACCIDENT FUND** as reported in Corbett & Honey, Volume 4 at E3-46.

“I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.”

13.1 In my view of the comparable cases quoted by counsel the one of significance is that of **NDABA v**

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ROAD ACCIDENT FUND 2002 (5), Corbett and Becannon A3-1 (a decision of the Transvaal Division) as bearing the closest resemblance in terms of factual content and circumstances to the facts and circumstances of the plaintiff's case. In **NDABA** the plaintiff was at the time of the trial 35 years of age, having been born in 1967. He was a boilermaker and sportsman of note, particularly a long distance runner. As an athlete he had won various silver and gold medals. As a result of the collision he was rendered a paraplegic and permanently confined to a wheelchair. On trial he was awarded R600 000,00 in general damages. In his judgment Roux J remarked as follows:

“The amount claimed for general damages is R600 000,00. In my view this is a modest claim. Certainly if more had been claimed I would have considered granting a larger award.”

In his heads of argument counsel for the plaintiff

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referred to this particular case and very helpfully made reference to the consumer price index to reflect the current equivalent value in 2006 to be an amount of R758 400,00.

- 13.2 Mr. Reinders who appears on behalf of the defendant has taken issue with this amount and has submitted that because of the marked difference in age between the respective claimants, (the plaintiff is at present 51 years old) and the fact that he could still walk with crutches and was not permanently confined to a wheelchair, the amount of general damages should be significantly reduced to that awarded in the **NDABA**-case. He submitted that this court should prefer the line of reasoning adopted in **NGUBANE v SOUTH AFRICAN TRANSPORT SERVICES** 1991 (1) SA 756 where once again the plaintiff suffered a spinal fracture resulting in permanent partial paralysis. He was left paraplegic with constant pain and suffering, spasms incontinence, sexual inability and a severe and permanent loss of amenities of life.

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He was awarded an amount of R85 000,00 in general damages which updated for purposes of inflation to the present day would amount to R394 000,00. Mr. Reinders has argued that this case is on all forms with the present matter and that, accordingly fair and reasonable award in the plaintiff's case would be an amount of R350 000,00 in general damages.

[14] The undisputed evidence of the plaintiff and his medical experts was that the plaintiff's injuries were permanent and according to Dr. Fourie there was:

“’n Fraktuur van die eerste lumbale werwel. Dit was ‘n verbrokkelde fraktuur. Daar was totale neurologiese uitval van die onderste ledemaat en blaas en rektum.

Ribfrakture aan die regterkant met gevolglike hemo-pneumotoraks.”

Dr. Repco stated the following in his report:

“Hierdie uitgesproke swakheid met verlamming van die onderste dele van die bene het gepaard gegaan met duidelike spieratrofie beide in die bo- en onderbene. Daar was geen spiertonus en die verlamming was van slap geaardheid.”

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In addition he went on to say the following:

“Aan albei kante vanaf L3 ondertoe, insluitende die sakrale gebied was daar ‘n anestesie, d.w.s. ‘n totale verlies van sensoriese waarneming.”

On this basis he came to the following conclusion:

“Die paraplegiese toestand gaan ook gepaard met totale funksie van beide die urinêre en dermkanaal sfinkters. Hierdie paraplegiese toestand met die verlamming en sensoriese verlies is van permanente aard.”

The plaintiff himself give evidence of a pressure sores which he had sustained as a result of him lying on his back in hospital for long periods of time, unitary trait infection, clinical depression and loss of sexuality bordering on impotence. Both medical experts, Drs. Repco and Fourie also testified to the degree of pain and suffering which the plaintiff experienced and Dr. Repco’s report in this regard deserves specific attention.

“Dit is prakties onmoontlik om die verlies van lewensgenot van paraplegiese toestand te beskryf. Hy het bewegingsvryheid ingeboet, kan alleen met groot moeite klein distansies onafhanklik beweeg en dit dan met hulp van twee arm krukke. Alle aktiwiteite waarby normale funksie van die bene benodig word, is permanent verlore. Die pasiënt het ook willikeurige kontrole van die sfinkter funksies verloor wat ‘n totaal

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onaanvaarbare toestand geskep het.”

Dr. Repco also went on to say that the motion which the plaintiff describes as walking as demonstrated to the court where he attempted to drag his feet using his crutches from one step to another, is rather a process during which the plaintiff drags his feet and uses his hips for momentum thereby moving forward but could hardly be described as walking in the normal sense of the word. Both doctors also testified that the plaintiff is not able to lift his legs against gravity and in light of the undisputed evidence that the plaintiff has no function whatsoever of his lower limbs there can be no debate about the fact that the plaintiff is simply unable to use his legs purposely and I make that finding.

[15] The plaintiff's evidence also disclosed that immediately after the collision, after he had been pulled out of the taxi he experienced terrible pain on his back. It felt like he was being pierced by a sharp instrument. He also testified that this pain was unbearable and that it only subsided marginally after three days when he was transferred to a hospital in Bloemfontein. He said that on being admitted to hospital, because of the terrible pain, he began to vomit. He also became incontinent and because of the loss of sensation in his lower limbs he was unable to detect the movement of his bowels and so would soil himself which caused him tremendous embarrassment and loss of dignity as he would have to be cleaned up by members of the nursing staff at the hospital. The plaintiff's complete disability in his lower limbs was pertinently clear to the court when he attempted to demonstrate in the courtroom that he was able to climb stairs. The plaintiff impressed me as a credible and honest witness who was not given to embellishment of his evidence nor to exaggeration of his physical condition and as one who was bent on showing the world that he was not a paraplegic confined to a wheelchair, hence his determined effort to show the court that he was able to climb steps.

[16] The plaintiff testified that at least several times a day he had to manually empty his bladder and every second day he had to empty his bowels. The exercise of having to perform these two

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functions is not only disturbing but also extremely degrading. From the description that the plaintiff gave of an incident in which he and his wife were mugged whilst on their way home after they had alighted from a taxi it was obvious that the plaintiff's inability as a result of his paraplegia to have assisted his wife against her attackers and prevented them from removing her handbag, cellphones and money gave him tremendous pain as he said, if he had not been disabled he would have been able to help his wife but he could not.

[17] I have found the **NDABA**-case particularly instructive and, conversely, the **NGUBANE**-case to be of little guidance.

This is so because, in live with the recent tendency of the courts to make higher awards in respect of General Damages I found the amount of R350 000 suggested by Mr. Reinders as a suitable award, to be wholly unrealistic, unfair and unreasonable in the circumstances of the plaintiff's case.

There are, however, distinct lines to be drawn between the circumstances of the plaintiff in the **NDABA**-case and that of the present plaintiff. The plaintiff in that case was much younger (at least 16 years younger) than Mr. Maholela who is at this time 51 years of age. Mr. Ndaba was a sportsman of note, who had won silver and gold medals as a long

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distance athlete. Mr. Maholela whilst not achieving distinction in any specific field, nevertheless has a proven track record of stability, reliability and has shown timeously to be of above average intelligence, having gained the recognition therefor by being promoted to school principal, at the mines. In addition he was employed in a managerial position at the mines. These factors have already been considered in quantifying his prospective loss of earnings but they are also, in my view, relevant to determining the quantum of his general damages, for the quality of his life is necessarily determined by the standard of living one enjoys and that, in truth, is determined by the position one holds in society and the level of one's earning capacity. Mr. Maholela was not an ordinary labourer engaged in manual labour. He occupied a position of leadership at the mine, which gave him some authority over other employees. That meant that he enjoyed a certain status in his work environment which came to an end when the collision occurred. He must be compensated for this loss together with the loss of all the other amenities in life which I have

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already referred to as also his pain and suffering. I have endeavoured to do my best to quantify the plaintiff's general damages so as to do justice between both parties and I have come to the conclusion that, in the exercise of the discretion vested in me, an amount of R600 000,00 would be fair and reasonable to both the plaintiff and the defendant in the circumstances of this case.

[18] I accordingly find that the plaintiff has succeeded in discharging the onus which he carries of proving the quantum of his damages on a balance of probabilities. There will accordingly be judgement for the plaintiff as follows:

1. The defendant is ordered to pay to the plaintiff:

1.1 An amount of R5 477,00 in respect of the claim for past hospital expenses;

1.2 An amount of R1 543,22 in respect of the claim for past medical expenses;

1.3 An amount of R2 180 274,00 in respect of the claim for future medical and related expenses;

1.4 An amount of R856 448,00 in respect of the claim of past loss of earnings;

1.5 An amount of R933 439,50 in respect of the claim for future loss of earnings;

1.6 An amount of R600 000,00 in respect of the claim for general damages.

2. The defendant is in addition ordered to pay the plaintiff's costs of the action which costs are to

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include the costs of the medical and supplementary reports of the following experts as well as their costs in respect of preparation, reservation and appearance in court:

2.1 Dr. Fourie, Dr. Repco, Mrs. E. Human
(including her actual travelling expenses from Cape Town to Bloemfontein per return on two occasions);

2.2 Prof. E. van Zyl;

2.3 Mr. G. Jacobson (including actual travelling expenses from Johannesburg to Bloemfontein per return on one occasion).

In passing, I wish to express my gratitude to both counsel in the matter for their very helpful written heads of argument.

S. EBRAHIM, J

On behalf of the plaintiff:

Adv. D. Coetzee
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the defendant:

Adv. S. J. Reinders
Instructed by:
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BLOEMFONTEIN

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