IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 5230/2008

In the matter between

WILCOCKS, OSMUND DONALD Plaintiff

and

BRIAN HLONGWA Defendant

JUDGMENT

EF Dippenaar AJ

[1] This is a damages action instituted by the Plaintiff against the Health Department of the Gauteng Provincial Government for damages suffered as a result of the negligence of staff at the Sebokeng Hospital which ultimately resulted in the amputation of Plaintiff's leg below the knee. The Plaintiff had fallen from a ladder and fractured his left ankle on 11 August 2005. Resulting

from complications due to septicemia, his left leg was amputated below the knee on 23 January 2007.

[2] This Court, on 11 May 2010 granted an Order that the Defendant is liable to pay the Plaintiff 100% of his proven damages.

[3] The issue to be determined in the current proceedings relate to the quantum of the Plaintiff's damages. The parties have agreed on the quantum of Plaintiff's claim in respect of past and future medical expenses in an amount of R1 000 000.00 and general damages in an amount of R400 000.00. The quantum of the Plaintiff's past loss of income and estimated future loss of income must be determined.

[4] Despite an interim payment Order having been granted on 23 November 2010 in terms of which the Defendant was obliged to pay the Plaintiff an amount of R250 000.00, by the time the trial commenced on 7 September 2001, this amount had not yet been paid. Pursuant to hearing oral evidence on the reasons why the payment had not yet been made, I granted an order on 8 September 2011 directing the Defendant to make payment of the said amount on or before 15 September 2011, together with interest on the said amount at the rate of 15.5% per annum from 25 March 2011, to date of payment.

[5] After the expiry of the said date and on 4 October 2011, I was notified by the Plaintiff's attorneys that the Defendant had regrettably still not made the payment directed, resulting in considerable hardship for the Plaintiff. The

approach adopted by the Defendant to their responsibilities in this matter is disturbing and smacks of a contemptuous attitude.

[6] The Plaintiff testified personally and called Ms May, an industrial psychologist as a witness. The Defendant called Mr Thabane, a psychologist and HR Practitioner. Both had prepared reports, which formed part of the record.

[7] Both parties had also filed expert actuarial reports, the Plaintiff by Mr Kramer and the Defendant by Mr Jacobson. The actuaries were not called as witnesses. The various actuarial reports contained calculations based on the various scenarios as sketched by Ms May and Mr Thabane respectively.

[8] Neither party contested the calculations of the other and were in agreement that, depending on which scenario was found to be probable, the appropriate actuarial calculations should be applied and adapted, if necessary by other contingencies. Absent oral evidence on such issues, the rationale behind the various contingencies used has not been debated, nor has any variation thereof been motivated.

[9] A large number of other medico-legal reports formed part of the record. The parties did not identify all the medico-legal experts in respect of whom reports were furnished. Much of the evidence, however, dealt with the extent of the injuries and their consequences in a manner which relates more pertinently to other issues, such as general damages, than necessarily to past employment or future employment prospects.

[10] Indeed the relevant experts, whose particular field of expertise relates to this issue, are only Ms May and Mr Thabane, who testified on behalf of the Plaintiff and the Defendant respectively. Mr Thabane is a psychologist and HR practitioner and not an Industrial Psychologist, as is Ms May. They met and discussed the Plaintiff's past and future employment. They recorded their areas of agreement and disagreement in a four page minute which formed part of the record and with which I shall deal extensively. Other than the actuaries, none of the reports of the other experts were referred to and I primarily lean on the evidence of the two psychologists to decide the remaining issues.

[11] Before doing so it is appropriate that detail is provided of the Plaintiff's employment history. I believe that most of what follows is common cause, but for ease of reference I add that I took it indiscriminately from the available medico-legal reports, and also from the evidence given by the Plaintiff himself which was not challenged in cross-examination. The nature of Plaintiff's employment is an issue which featured strongly in the trial.

[12] The Plaintiff testified that he was born on 17 February 1952 and is presently 59 years old. At the time of his accident he was 53 years old. He had fallen off a stepladder and broken his left ankle on 11 August 2005. Pursuant to complications consequent upon the treatment he received at the Sebokeng Hospital, his leg was amputated below the knee on 23 January 2007.

[13] The Plaintiff had completed Grade 10 during 1968 and obtained a N3 and N4 in Plating (Engineering Services) during 1982 to 1983. He commenced

employment during 1972 as apprentice boilermaker, qualified as boilermaker and was promoted to shop foreman at SA Fan & General Belting during the period 1972 to 1980. During the period 1980 to 1987, he was employed by Engineering Management Services (part of the Murray & Roberts Group) as trainee structural draughtsman. He had changed jobs for better prospects. For the same reason, he switched jobs to Gold Fields SA during 1987, where he was employed as CAD system supervisor until 1989 when he moved to Murray & Roberts Engineering Solutions in light of a probable restructuring and retrenchment program at Goldfields. He was employed as material controller on the Mossgas Project until the project terminated during September 1994. Plaintiff found alternative employment at Intertech Systems during September 1994, which was terminated during November 1995 when the company restructured.

[14] During the same month Plaintiff was able to secure contract employment at JCI Explorers as a training consultant up to October 2000 when the company closed down. From October 2000 to the end of 2004, Plaintiff again obtained contract employment with Murray and Roberts on its Mozel & Hillside projects which contract terminated at the end of 2004.

[15] During the aforesaid period, and specifically from 1980 onwards, the Plaintiff applied his trade as draughtsman uninterrupted, either as a staff member or contract worker, depending on how the employment was structured. He saw himself as a freelance draughtsman and testified that the industry mainly functioned on this basis. This was not refuted by the Defendant.

[16] Throughout his career the Plaintiff had done work over weekends as a handyman, taking on work from family, friends and neighbours. As he could not find any contract work after his previous contract terminated at the end of 2004, he resorted as necessity to doing handyman work again from January 2005. At the time of his accident he had been involved in a project with a value of some R60 000.00 to R80 000.00, installing, *inter alia,* ceilings and staircases. After the accident, the Plaintiff did not work again until February 2006 when he procured a contract from Murray & Roberts which lasted until February 2009, when he, together with other employees, were retrenched.

[17] Since February 2009 to the date of the trial, Plaintiff was unable to secure any work in the formal sector, despite leaving his CV with numerous employment agencies and labour brokers and going for multiple interviews. During this time he had only succeeded in generating an income of between R20 000.00 to R30 000.00 doing handyman work, but now limited mainly to a supervisory capacity.

[18] The parties were in agreement that after the amputation of the Plaintiff's leg during January 2007, he was only suitable for sedentary work.

[19] The issues to be determined centre around the very different approaches adopted by the parties' respective expert witnesses, Ms May and Mr Thabane to the nature of the Plaintiff's pre-accident and post-accident employment. Regarding the Plaintiff's pre-accident employment, the experts in the joint

minute filed on their behalf, agreed that at the time of the accident Plaintiff had been formally unemployed (i.e. unemployed in the formal sector) for two years.

[20] This agreement does not accord with the Plaintiff's undisputed evidence that at the time of the accident during August 2005, he had not had employment in the formal sector since January 2005, i.e. 8 months earlier, but had been self-employed.

[21] On behalf of the Plaintiff, Ms May contended that the Plaintiff was a self-employed handyman at the time of his accident (August 2005). The Plaintiff's main argument was that at the time of the accident, the Plaintiff was a self-employed handyman, a position adapted by him as result of necessity.

[22] The Defendant adopted the view that the Plaintiff had been unemployed. Mr Thabane contended that Plaintiff was not self-employed in a sustained manner, but was doing irregular odd jobs and that he was essentially unemployed.

[23] From there the views of the psychologists further diverged, especially regarding the Plaintiff's future employment prospects.

[24] Ms May postulated two scenarios in terms of what could have occurred but for the accident, after the Plaintiff's retrenchment during 2009.

[25] Her most likely scenario was that the Plaintiff would be self-employed and would probably have been able to continue working as a self-employed

handyman. This would have been born mainly of necessity having regard to various factors in the formal labour market which resulted in a shortage of contract work opportunities. He would have started the handyman business on a small scale and over a period would have built up clientele and grown his business. She was of the view that the Plaintiff would initially have generated a net income of around R5 000.00 per month.

[26] After about two years he probably would have steadily build up his earnings to around R15 000.00 per month at current rates. From about his fifth year of operation his profit would have in all likelihood have plateaued at around R20 000.00 per month at current rates. From about the age 65 the Plaintiff would have slowed down his business and reverted to a net income of about R15 000.00 per month at current rates. He would have retired at age 70.

[27] Mr Thabane was of the view that the Plaintiff was probably not entrepreneurial as he had never established himself as a self-employed person. He was usually looking out for employment and only engaged in handyman's work on a casual basis as and when his services were required. He did not concertedly market himself and had not shown any commitment to self-employment. He rejected the earnings indicated by Ms May. Mr Thabane was of the view that as a casual handyman, the Plaintiff would have earned irregularly and variably, at that.

[28] The least likely scenario postulated by Ms May was that the Plaintiff would have been able to secure work similar to what he had been doing prior to his retrenchment. I have already dealt with his employment history. Considering

his post-accident earnings in this regard, in her view the Plaintiff would probably have been able to earn at the D1 to D2 Paterson level at current rates (manufacturing and operations; guaranteed monthly package). At a small company his earnings would have dropped to the Paterson C4 / C5 level.

[29] Mr Thabane did not agree with this view. In his view the Plaintiff would have been intermittently unemployed and would have depended on contract work only if it became available. He would not have expected steady earnings. In his view it was also unacceptable to impose the Paterson system salary scales, which were normally afforded to permanent employees only.

[30] Regarding the Plaintiff's post-accident employment the aforesaid experts agreed that at the time of the amputation, the Plaintiff was employed on contract at Murray and Roberts Engineering Services as a material controller / ISO controller. From February 2006 to February 2009, he would in event have worked at Murray and Roberts Engineering Solutions. However, he would not had to take time off from work due to pain, suffering, consultations and medical treatments. He would accordingly not have lost income in this regard.

[31] They further agreed that following the accident, the Plaintiff remained unemployed, but still did a small amount of work as a handyman. The Plaintiff was retrenched along with other employees with effect from February 2009, for reasons entirely unrelated to the accident. From February 2009, the Plaintiff has been unemployed. At times he does small private handyman jobs, but mainly in a supervisory role. Ms May confirmed the Plaintiff's evidence that he

has earned a total of approximately R30 000.00 since February 2009. They further agreed that the Plaintiff is now only suited to sedentary work, such as resuming work as a draughtsman and that he would not be able to work as a handyman.

[32] From here the experts' views again diverged as reflected on the minutes. Ms May is of the view that the Plaintiff would probably have worked until the usual retirement age of 65, if he was employed in the formal labour market. Had he been self-employed, he would probably have worked beyond the usual retirement age to around the age of 70, health permitting. However, from around 65 he would probably have slowed his business down and would have worked fewer hours.

[33] Mr Thabane disagreed and was of the view that, although the Plaintiff may have worked until the age of 65, he may not have done so on a continuous basis and in a fixed job as he was primarily dependent on contract work. His work as handyman would have remained casual at best.

[34] Ms May recorded that from 11 February 2006 to February 2009 the Plaintiff worked at Murray and Roberts Engineering Solutions, moving around to wherever he was needed. During this period he had to take time off due to the sequelae of the accident resulting in a loss of income. Mr Thabane deferred to the Plaintiff's evidence, which I have detailed above.

[35] Ms May further recorded that the Plaintiff was again off work from the 19th of January 2007, just prior to the amputation until the first week of April 2007 and

confirmed the Plaintiff's evidence that he consequently lost R326 750.11 due to pain, consultations and hospitalisations, which amount was substantiated by documents in the record. Mr Thabane deferred to the Plaintiff's evidence.

[36] Ms May was of the view that given such factors as the Plaintiff's age, his absence from the formal labour market as well as affirmative action policies, it would be unlikely for him to be able to secure employment as a draughtsman. In her view, the Plaintiff is now probably unemployable in the formal labour market and will not be able to work in self-employment as a handyman, other than continuing with small private handyman jobs, earning a meagre income, estimated on average at around R1 000.00 per month. She perceived that he would not continue with such jobs beyond the age of 62.

[37] Mr Thabane's view was that the Plaintiff should still be able to find placings through placement agencies if work was available, as that is what had happened post-accident. His ability to find work should be seen in light of the scourge of unemployment in the country, a factor which is not related to the accident.

[38] Against this background the reports and the further evidence led at trial should be considered. The primary argument for the Plaintiff was that the Plaintiff had been working as a self-employed handyman at the time of the accident with intermittent contract work as a result of necessity and prevailing circumstances in the formal labour market. The Plaintiff's most likely scenario was that the Plaintiff would have continued work as a self-employed handyman. The

Plaintiff's secondary argument was that, being able bodied and given his previous years of experience and qualifications, the Plaintiff would probably have been able to secure contract work similar to what he had been doing prior to his retrenchment which would have resulted in an average earnings of R40 000.00 per month which fell within the D2 Paterson level for August 2009.

[39] As an alternative scenario, had the Plaintiff secured employment as a draughtsman and, given his years of experience, it was likely that the Plaintiff would have been placed in a senior position such as chief draughtsman in which event he would have been able to earn at the D1 Paterson level. At a small company his earnings would have dropped to around the C4/C5 level.

[40] Given the Plaintiff's age and the affirmative action policies, Ms May was of the opinion that that would be the least likely scenario and that the most likely scenario was that the Plaintiff would function as a self-employed handyman.

[41] Ms May' evaluation was in my view realistic, rationally based and well researched, although the Plaintiff sought to criticise her for using sources other than the Theoretical Quantum Yearbook tables to do her research. I do not think this criticism was justified.

[42] Mr Thabane testified that the Plaintiff's work history was inconsistent and indicative of vocational instability because of his various job changes. He did not agree with or appear to appreciate the Plaintiff's undisputed evidence that the work performed by the Plaintiff in the open labour market was, as a norm in

that industry, of a contract nature rather than in the form of permanent employment.

[43] This forms the basis for Mr Thabane's view that the Plaintiff was in any event an unstable employee with relatively poor employment prospects who would have relied on short term contractual employment with unavoidable intermittent spells of unemployment. In his report, he terms Plaintiff's pre-accident vocational situation as "*a troubled one*".

[44] Mr Thabane's views were clearly predicated upon his perception of the Plaintiff being vocationally unstable with limited prospects, irrespective of the accident. Mr Thabane's view was accordingly that the Plaintiff's pre-accident work capacity and employment abilities were limited. In his view the Plaintiff's loss of earnings should be determined on the basis of an artisan in accordance with Paterson job grade C1 to C3 scales. A basic salary level should be used having regard to the Plaintiff being a contract worker and one who would not have had the benefits normally enjoyed by permanent employees.

[45] Despite having no information to the contrary, Mr Thabane did not accept the undisputed evidence on earnings testified to by the Plaintiff or Ms May.

[46] Regarding the Plaintiff's post-accident employment prospects, Mr Thabane was of the view that the Plaintiff had residual work capacity, but that his employability would be restricted to office type work. He would be precluded from doing the work of a handyman and could only pursue a purely sedentary type occupation. The Plaintiff could however obtain retraining for purposes of

vocational rehabilitation to affect career changes or promotional changes, and as the Plaintiff was multi-skilled, he would be able to compete in the formal sector with the specialised skills he has acquired through experience. He concluded that the Plaintiff should be able to find a placement through the help of employment agencies. In his view the Plaintiff should be compensated only partially for his inability to perform the heavy work of an artisan.

[47] As opposed to considering actual factual evidence, Mr Thabane placed a dogged reliance on the figures provided in Koch's Quantum Yearbook, without considering the need to individualise an individual's circumstances. He resisted any concessions on this issue, despite rigorous cross-examination.

[48] Mr Thabane was an argumentative and defensive witness. His evidence was not helpful in determining the issues at hand and it appears that he misconceived the relevant facts. It further does not appear to me that the basis for Mr Thabane's opinions are rationally founded or motivated and he appears to have substantially disregarded undisputed evidence regarding the industry in which the Plaintiff functioned and the particular facts of this matter, without independent and proper investigation. I am of the view that the scenarios sketched by Mr Thabane, both in respect of the Plaintiff's past employment and future employment prospects are improbable and cannot be relied upon.

[49] Having regard to all the evidence presented and on the probabilities, I am of the view that the so-called most likely scenario as postulated by Ms May, must be accepted that the Plaintiff would, but for the accident, would have worked as a

self-employed handyman. I further find that on the probabilities, the Plaintiff was a self-employed handyman at the time of his accident.

[50] The general pessimism expressed at Plaintiff's prospects of obtaining future contract work in the formal labour market, does not render Ms May's secondary scenario as probable.

[51] In any event, if the Plaintiff is able to secure such contract employment in future, there can be no risk of over compensation in context of the award which I envisage, which is a conservative one.

[52] I now turn to deal with the contents of the actuarial reports.

[53] Neither Mr Jacobson, nor Mr Kramer testified and I was simply referred to the various scenarios sketched in the medico-legal reports and requested to make an appropriate determination.

[54] The report of Mr Kramer is based on the scenario sketched by Ms May that the Plaintiff would post accident have functioned as a self-employed handyman. None of his assumptions were criticized in argument, nor the contingencies accepted by him. Based on his calculations the loss of earnings of the Plaintiff is an amount of R408 841.00 in respect of past loss of earnings and R1,198 543.00 in respect of prospective loss of income.

[55] Mr Jacobson on the other hand has provided five main options based on retirement ages of 65 and 70 respectively and on the various scenarios sketched by the experts.

[56] The percentage of the claim allowed for contingencies and circumstances are dictated by the circumstances of each case. I have had regard to the principles enunciated in *AA Mutual Insurance v Maqula*[1]. All the relevant facts and circumstances must be taken into account, and I have sought to do so.

[57] The contingencies adopted by Mr Jacobson are substantially higher than those adopted by Mr Kramer. Absent a rational motivation for higher levels of contingency deductions, I consider the more conservative deductions adopted by Mr Kramer to be more appropriate.

[58] I am accordingly of the view that the following amounts should be awarded to the Plaintiff:

[58.1] Past and future medical expenses (as agreed)	R1 000 000.00
[58.2] General damages as agreed	R 400 000.00
[58.3] Past loss of earnings	R 408 841.00
[58.4] Future loss of earnings	R1 198 543.00

[1] 1978 (1) SA 805 A

[58.5] The total monetary amount which the Defendant is liable to pay Plaintiff, is accordingly the amount of R3 007 384.00.

[59] I accordingly grant judgment in favour of the Plaintiff against the Defendant for:-

[1] Payment of the sum of R3 007 384.00;

[2] The amount in [1] above shall be inclusive of any interim payment made in terms of the Order of 23 November 2010;

[3] Interest on the sum in [1] above at the rate of 15,5% per annum from 24 December 2011; being fourteen (14) days from date of this Order to date of payment;

[4] Costs of suit, including the costs relating to obtaining medico-legal reports and other expert reports and the qualifying, reservation and trial fees of the Plaintiff's expert witness, Ms May.

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E F DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	7 & 8 September 2011
Date of judgement	:	9 December 2011

For Plaintiff	:	Adv I Zidel, SC
	:	De Broglio Attorneys
For Defendant	:	Mr Lekabe
	:	State Attorney