

**IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE No. 39254/2008



DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES:
YES / NO
- (3) REVISED.

Reportable in the electronic law reports only

In the matter between:

ELBON ASHLEY NOBLE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WILLIS J:

- [1] The plaintiff claims from the defendant in terms of the provisions of the Road Accident Fund Act, No.56 of 1996. The claim arises from a motor vehicle collision which occurred on 18 September 2005. The plaintiff was the driver of a motor cycle having registration letters and number HSJ 030 GP. The collision occurred between that motor cycle and a truck having registration letters and number PDC 800 GP. The truck was driven at the time by Mr Tolotolo Nzimeni (“the insured driver”). The parties settled the merits of the plaintiff’s claim on the basis that the defendant would pay the plaintiff 100% of his proven damages. The plaintiff sustained serious multiple injuries which included including a large number of fractures which necessitating complex surgery. The plaintiff also suffered a brain injury with neuropsychological and neuropsychiatric *sequelae*.
- [2] The parties have settled the merits of the case such that the defendant would be liable to pay the plaintiff 100% of his proven damages. In order to resolve the *quantum* of damages, the parties

have prepared a stated case for determination by the court in terms of Rule 33. The main issue for determination in the stated case relates to whether or not insurance benefits and more particularly disability benefit paid to the plaintiff falls to be deducted from the plaintiff's otherwise agreed damages. The other issues relating to damages have largely been settled although I have been left with a discretion to determine the quantum of general damages.

[3] The parties have agreed to the following facts in terms of the stated case:

(i) The plaintiff, Elbon Ashley Noble, is an adult male born on 30 April 1974.

(ii) The plaintiff was seriously injured on 18 September 2005 whilst he, as the rider of a motorcycle was involved in a collision with a truck on the old Meyerton Kliprivier Road.

(iii) As a result of the collision, the plaintiff inter alia sustained the following injuries:

- a) A head and brain injury resulting in the plaintiff suffering from a reduced cognitive ability, an altered personality and resultant mood disorders;
- b) A fracture of his right femur complicated by a 2.9cm shortening of his right leg, along with a 20 to 25° rotational deformity;
- c) A fractured right tibia rendering ongoing pain and difficulties with his right ankle and right foot with significant scarring;
- d) A fracture of his right fibula similarly resulting in extensive scarring and deformity;
- e) A fractured right foot with scarring including a malunion of some of the metatarsal bones of the foot;
- f) A fractured right patella with extensive scarring of which the Kirchner and Cerclage wires broke some time following the corrective surgery which the plaintiff underwent;
- g) A fractured left patella with associated scarring and knee pain and similarly requiring future corrective surgery which would likely result in a total knee replacement;
- h) Fractures of his right hand for which he similarly received an operation and requires further surgery;

- i) Scarring of his right thigh as a result of skin grafts taken from that area to his right lower leg;
- j) A soft tissue spinal injury rendering chronic neck pain and cervicogenic headaches;
- k) Lower back pain which is associated with the shortening of the plaintiff's right leg.

[4] The plaintiff's claim in respect of past medical expenses and past hospital expenses have been paid.

[5] In respect of the plaintiff's future medical and related expenses, the defendant has agreed to furnish the plaintiff with an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of his future accommodation in a hospital or nursing home, or for the treatment of or rendering of a service or the supplying of goods to him, arising from the injuries sustained by him in the aforesaid motor vehicle, after such costs have been incurred and upon proof thereof.

[6] At the time of the accident, the plaintiff was contracted to Ntuli Noble Incorporated Attorneys and earned an amount of R15 000.00 per month. (R180 000.00 per annum as at the time of the accident).

- [7] But for the accident and its consequences the parties have agreed that the plaintiff's income would have increased from the time of the accident uniformly to a total package of R382 825.00 per annum as at 1 March 2011 which is equivalent to the average of the Paterson C4 and C5 levels increased with inflation from 1 April 2009 to the present time. The parties are agreed that the plaintiff would have retired at the age of 65.
- [8] The parties are agreed that the plaintiff has not been working since the accident and will not be capable of working in future.
- [9] The parties have agreed that plaintiff would have earned an income from the time of the accident to the present time of R1 239 025.00 from which the parties have agreed to deduct a 5% contingency deduction, rendering a past/accrued loss of R1 177 074.00.
- [10] The parties have agreed that the plaintiff will in future suffer a loss of earnings (a prospective loss) of R4 866 566.00 to which the parties have agreed that a 15% contingency deduction should be applied, rendering a net future income in the sum of R4 136 581.00.
- [11] The plaintiff had taken out a Liberty Life insurance policy which inter alia entitled him to monthly disability payments in the event of his becoming disabled.

[12] In terms of the Liberty Life insurance policy, the plaintiff received monthly insurance payments in the sum of R667 437.00 during the period calculated from the date of the accident to the present time.

[13] The plaintiff will, in the event of the insurance payments continuing into the future, receive monthly insurance payments totalling a capitalised value of R2 715 923.00 (having applied an agreed contingency deduction).

[14] The plaintiff contends that the Liberty insurance benefits received by the plaintiff and those insurance benefits which the plaintiff may in future receive from the Liberty insurance policy ought not be deducted from the damages to which he is entitled following his injuries sustained in the accident.

[15] The plaintiff accordingly contends that he should be awarded an award in respect of his past loss of earnings in the sum of R1 177 074.00 and R4 136 581.00 in respect of his future loss of earnings.

[16] The defendant contends that the insurance payments received by the plaintiff and the insurance payments which the plaintiff may receive in future (referred to in paragraph 13 above) ought to be deducted from the plaintiff's past and future loss of earnings.

[17] The plaintiff's total loss of earnings as a result of the accident, its aftermath and his resultant inability to work amounts to the capitalised sum of R5 313 655.00, calculated on the basis that the plaintiff's past/accrued loss of earnings after making an agreed 5% contingency deduction would be R1 177 074.00 and the plaintiff's future/prospective loss with an agreed 15% contingency deduction would be R4 136 581.00.

[18] From this amount of R4 136 581.00, the defendant contends that the insurance benefits received and to which the plaintiff may in future become entitled and which it contends ought be deducted from the plaintiff's aforesaid loss amounts to a sum of R3 383 361.00 calculated by deducting the amount of R667 437.00 which the plaintiff has received as payments in terms of the Liberty Life policy and R 2 715 924.00 which the plaintiff will potentially receive in future in terms of this policy.

[19] The plaintiff accordingly contends that the award in respect of his loss of income ought to be R5 313 655.00. The defendant, on the other hand, contends that the plaintiff's loss of income, having deducted his insurance benefits should amount to R1 930 294.00.

[20] The plaintiff relies on the principle that a defendant cannot rely in mitigation of his own liability on the fact that the plaintiff has

and will be entitled to recover wholly or in part from his insurer in terms of a contract of insurance. It is clear to me, having read the cases of *Santam Versekeringsmaatskappy Bpk v Byleveld*¹ and *Standard General Insurance Company Limited v Dugmore N.O.*² Corbett's *Quantum of Damages*, edited by Gauntlett,³ that the plaintiff must succeed. The policy considerations of fairness favour the plaintiff rather than the defendant benefiting from the "good fortune" of there having been another *bona fide* insurance policy in terms of which the plaintiff was insured.

[21] Consequently, the plaintiff is awarded damages in respect of his past and future loss of earnings in the sum of R5 313 655.00. There was some disagreement among the parties as to the appropriate award for general damages. In the end, the parties agreed to leave the matter in my discretion. I am satisfied that R600 000,00 would be a fair award under this head, in the circumstances.

[22] Judgment is given in favour of the plaintiff against the defendant as follows:

1. The defendant shall pay the plaintiff the sum of R5 913 655.00;

¹ (1973) 2 SA 146A at 152A-D

² 1997 (1) SA 33 (A) at 42A-B

³ See Corbett *The Quantum of Damages* Volume 1, 4th Edition, page 12

2. The defendant shall pay the plaintiff interest on the aforesaid sum at the rate of 15,5% per annum calculated from a date 14 days from the date of this order;
3. The defendant shall furnish the plaintiff with an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996 to compensate him for his future accommodation in a hospital or nursing home, or for the treatment of or rendering of a service or the supplying of goods to him, arising from the injuries sustained by the plaintiff ("the patient") in a motor vehicle collision which occurred on 18 September 2005, after such costs have been incurred and upon proof thereof, which costs shall include the costs of the formation and administration of a trust for the benefit of the plaintiff;
4. The defendant shall pay the plaintiff's costs of suit on the party and party High Court scale as taxed or agreed, which costs shall include the qualifying, reservation and preparation fees, if any, of the following expert witnesses:
 - 4.1 Dr L Marais (orthopaedic surgeon);
 - 4.2 Dr C Angus (clinical psychologist);
 - 4.3 Ms H du Preez (occupational therapist);
 - 4.4 Dr H J Edeling (neurosurgeon);

4.5 Mr L Marais (industrial psychologist);

4.6 Dr B Braude (psychiatrist);

4.7 Mr G Whittaker (actuary).

5. It is declared that the insurance payments received and receivable by the plaintiff do not fall to be deducted from the plaintiff's loss of earnings.

**DATED AT JOHANNESBURG THIS 24TH DAY OF
FEBRUARY, 2011**

N.P.WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: *E. Van Vuuren*
Counsel for the Defendant: *Q.H. Mabena*

Attorneys for the Plaintiff: Erasmus De Klerk Inc.
Attorneys for the Defendant: Kekana Hlatswayo Radebe Inc.

Date of hearing: 24 February, 2011
Date of judgment: 24 February, 2011