

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 10/39907

In the matter between:

DLAMINI: DUNSTON

and

ROAD ACCIDENT FUND

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES <input checked="" type="radio"/> NO <input type="radio"/>	
(2) OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO <input type="radio"/>	
(3) REVISED.	
21/02/2012	<i>A</i>
DATE	SIGNATURE

Plaintiff

Defendant

JUDGMENT

FRANCIS J

Introduction

1. The plaintiff was involved in a motor collision accident on 23 May 2007 as a result of which he sustained severe injuries. He instituted an action for damages against the Road Accident Fund (the defendant), for the following:

- | | | |
|-------|--|---------------|
| 1.1 | General damages for pain and suffering, discomfort, loss of amenities of life, disfigurement and emotional shock and trauma. | R2 000 000.00 |
| 1.2 | Special damages for R9 447 984.52 made up as follows: | |
| 1.2.1 | Past medical expenses | R 123 184.52 |
| 1.2.2 | Future medical expenses | R 574 800.00 |
| 1.2.3 | Past of loss of earnings | R 250 000.00 |
| 1.2.4 | Future loss of earnings | R8 500 000.00 |

2. The defendant has conceded the merits. The defendant is therefore 100% liable for any proven damages by the plaintiff. It did not dispute the injuries sustained by the plaintiff.
3. The plaintiff has abandoned his claim for past loss of earnings since he has not incurred such losses. The defendant has in terms of section 17(4)(a) of the Road Accident Fund (the Act) given an undertaking for future medical expenses that the plaintiff might have to incur. The parties have agreed that the plaintiff has incurred past medical expenses amounting to R123 184.52. The defendant has admitted that the plaintiff is entitled to be compensated for general damages but the amount is in dispute. The defendant disputes the plaintiff's entitlement to future loss of earnings and interference with earning capacity. The defendant avers that the plaintiff's earning capacity may be affected but does not render him unemployable.
4. A *curator ad litem* was appointed for the plaintiff.

The evidence led

5. The plaintiff did not testify. He was examined by a number of experts who provided reports about his condition. Some information was provided to them by his mother. The plaintiff is married with three children but is separated from his wife because of the accident. It appears from the reports that were not opposed or contested by the defendant that he was born on 17 January 1970. He was a premature baby. He did his Sub A in 1976 which he passed but had to repeat it again in 1977 after he had changed schools. In 1986 he passed

standard 8. In 1987 he passed his N1 but could not complete the N2 in 1988 due to financial constraints. In 1989 he joined MK (the ANC military wing) until 1994 but was not trained. He was integrated into the South African National Defence Force (SANDF) in 1994. He received his basic training from January 1995 to June 1995 and was based at the 3 SA1 Military Base in Kimberley. After the basic training, he was placed at the Lenz military base where he was appointed a private and was trained as a carpenter. From July 1995 to 2002 he was a private soldier at the SANDF Lenz military base. During the training, he would attend roll call, and spend the day working in the carpentry workshop. All types of tradesmen worked at the technical maintenance centre. He specialised in carpentry - at the maintenance centre everything made of wood was fixed in the carpentry workshop, including the handles of rifles, tables, door frames, ceilings etc. The SANDF sent him to three colleges in Centurion, Durban and Atteridgeville where he completed 26 modules. The courses were both theory and practically orientated with a focus on more practical matters. He received full training in carpentry whilst employed in the SANDF. He has done some short courses in computers and first aid. In terms of his ideal career aspirations, he would have liked to have become an architect. In 2002 he was promoted to corporal in the technical department of the SANDF. He completed a course for non commissioned officers and then was transferred to Heidelberg in 2006. His duties there were receiving and releasing military vehicles that required servicing. He was also responsible for guard duties and carried a firearm.

6. On 23 May 2007, he was involved in a motor accident collision which resulted in him being

admitted to the Union Hospital for a week and because he is an employee of the SANDF was transferred to One Military Hospital in Pretoria where he remained for approximately three months. He recuperated at home and in November 2007 he returned to the Lenz military base which was closer to his home and was in the technical department. In August 2009 there was a planned march to the Union Buildings by soldiers about salaries. The plaintiff did not participate in the march, but did not go to work. As a result he was suspended for not reporting to work. He was put on special leave. He is still on special leave from the SANDF. A trade union in the military won a court case against the Minister of Defence which she has taken on appeal. The plaintiff was hoping that he would return to work by the end of January 2012. He is earning a gross salary of R12 490.00 per month (basic plus housing allowance). Whilst he was reporting for duties from 2007 to May 2009, he did no work at all. He would attend parade and after parade was given no tasks to complete. At some stage he would be given instructions but could not understand those instructions and was unable to carry them out. His immediate superior had initially threatened to take disciplinary action against him but after the matter was referred to a colonel Mbatha, a decision was taken not to take any disciplinary action against him on the basis that he was sick. Some of his colleagues mocked him and he felt isolated.

7. The plaintiff was examined on 28 July 2009 by Dr Wiebo van der Meulen who confirmed that he had sustained a head injury. He reported that the plaintiff has made good recovery but was still symptomatic with neuropsychological sequela consistent with a head injury of that nature. The psychometric testing confirmed that his neuro-cognitive function has been

seriously impaired by the accident. According to the American Medical Association guides to the evaluation of permanent impairment a whole person's impairment of 31% is calculated. No meaningful improvement can reasonably be expected of the plaintiff. A joint minute was compiled by Dr L F Segwapa and Dr W A van der Meulen. They are neurosurgeons. They agreed that the plaintiff was involved in an accident in which he sustained a severe head injury and a fracture of the maxilla and teeth. He is left with neuropsychological sequelae because of his head injury. They agreed that although the plaintiff has not developed post-traumatic seizures, he now has an increased risk of developing seizures. He is symptomatic with post-traumatic headaches, and there is a 20% chance that he will remain symptomatically lifelong. They agreed that the plaintiff has lost some teeth because of the injuries received in the accident and that this should be evaluated by a maxillofacial surgeon with a view of dental implants. They recommended that his work capacity should be evaluated by an occupational therapist and an industrial psychologist.

8. The plaintiff was examined twice by Nellie Prinsloo, a clinical psychologist, who issued a medico legal report. She testified about the psychometric test that she used. It is not necessary to deal with her report in any great detail since her evidence was largely uncontested. It suffices to deal only with her summary. She said that the plaintiff's tests results showed that his neuro-cognitive functioning has been seriously impaired by the accident. Although he experienced some problems at school, he obtained his N1 and only stopped his studies due to financial reasons. He also obtained a qualification as a carpenter. His neuro-cognitive functioning is currently so impaired that he would have been unable to

obtain that. The various tests results show a person with signs of brain injury and a lack of differentiating between obvious facts presented by his environment. He is experiencing much inner stress and finds it difficult to control his impulses especially aggression and irritation. He was not aware of where he was and could not sign to undergo an operation. He isolates himself to be emotionally independent and this is in stark contrast to someone that participated in competitive sports, opposed his mother and could fend for his family. His personality has changed from a team-player to an irritable loner and this will make him virtually unemployable. He is unable to cope well with stressful situations and the manner in which he deals with it, will increase his stress. He believes in abilities that he no longer has because he despises being so reliant on others. He still relies very much on his mother. He focusses on the negative and not on positives. He has difficulty in expressing himself and finding the right words. He is slow in completing tasks and is unable to grasp the different parts of his experiences. Test results show signs of brain injury and defective functioning. Although there is evidence that he was intellectually not very strong before the accident, she said that she thought that his intellectually and emotional functioning is much worse after the accident. He could previously attend different courses but he will now be unable to learn new material. The tests result and her clinical impressions show that the plaintiff will be unable to function independently in a work environment and is actually permanently disabled to function in a work environment. He can function in a sheltered environment with much structure and guidance but an industrial psychologist should determine the area of placing if indeed he will ever be able to work again. He will need some occupational therapy to help him with his organizing of free-time and to look into a sheltered work-environment. She said

that there was no doubt in her mind that the plaintiff should be compensated for his loss of emotional well-being and cognitive abilities, independence and probably permanent inability to work and be financial independent. He must receive some psychological therapy to help him adapt to his new realities. The cost of psychological therapy is currently anything between R560.00 and R900.00 per session. He will need supportive therapy for an undetermined amount of time. He cannot manage his money and is not capable of planning and signing contracts.

9. The plaintiff was also examined by Susan Badenhorst, an occupational therapist who has filed her report. Her colleague Aadilah Hassim an occupational therapist filed a report and testified. Again it is not necessary to set out her report in any great detail. Her conclusions would suffice. Hassim confirmed that by reading the medical reports of the plaintiff and the occupational therapy assessment shows that he has areas of injury to his brain. The indication that the medial structures of the brain moved over to the right side shows the severe oedema the plaintiff's brain developed. Multiple bleeding areas were identified over the frontal, temporal and parietal lobes of the left cerebral hemisphere. The injuries to those three lobes mentioned were severe and the impact of the injuries was noted within the functional and formal assessment situations. He has lost interpersonal relationship with his wife because of the changes in his personality and uncontrollable behavioural outbursts. His personality has undergone changes and becomes agitated, frustrated and angry very quickly. Those emotions are typical of a frontal lobe injury. He will not be able to continue working in his current environment in the future. His prognosis for the injury to the lumbar and

cervical spine is poor. He is left with neuropsychological sequela consistent with a head injury and that it has been more than two years since the accident, any further meaningful improvement is not expected. His intellectual and emotional functioning is much worse after the accident. Thus, his learning abilities are compromised. Hassim said that she believed that the plaintiff cannot continue with his current employment. He is not a candidate to work in the open labour market; however he may be able to find employment in a sheltered employment facility doing work that he is familiar with, i.e. carpentry, with increased structure and supervision to assist him. However it is very unlikely that he would be able to find employment in this type of structure which will cater to his needs. She said that allowances should be made for loss of earnings in the future. Deference to an industrial psychologist regarding this matter was required. She said that it was highly recommended that he attend a 'Return-to-Work' programme. Within this programme he will receive therapy that focuses on skills and abilities influenced by the injuries he sustained. He could also learn new skills within a structured environment.

10. A report was also compiled by Henry van Blerk an industrial psychologist after he had examined the plaintiff. It is not necessary to set out the report in any great detail. In his view he said that had the accident not occurred, it is likely and possible that the plaintiff could have seen further increases in earnings at his workplace. At the time of the accident, he held the rank of corporal and it is possible that had the accident not happened that he might have seen a promotion by the age of about 38 to Sergeant and by the age of about 43/44 to Staff Sergeant which is seen as a possible career ceiling for the plaintiff where it is possible that

he might have stayed until reaching retirement age. The 2012 earnings for a Sergeant are R161 139 per annum and for a Staff Sergeant R181 470 per annum. The outcome of the psychometric tests reveals that his intellectual capacity is in the slightly below average range, but that he works extremely slowly and tires rather quickly. As a result he is not likely to cope with even relatively easy practical tasks which is not familiar to him and where he needs to act swiftly and complete work according to strict time lines and deadlines. Workplace collateral information was obtained from his supervisor, the section commander captain Fortunate Selelo. She said that after the accident they had serious difficulties in placing him somewhere where he could be productive. He was not even able to do simple administrative tasks and even when shown precisely what to do, he would often do the precise opposite. In addition to that, he tended always to forget what he was supposed to do, and when he did not follow instructions he said that could not remember receiving such instructions or directions. He is currently on special leave after being absent from work on the day certain army personnel marched unto the Union Buildings regarding their dissatisfaction about their salaries (which was widely reported in the media - press and television) and he was subsequently placed on special leave. Captain Selelo agreed that it was quite likely that the plaintiff did not realise that he had to report for duty (at work) on that day due to his impairments, and did not voluntarily take part in the strike action. When he asked her when his special leave was likely to end and whether he could see a discharge from the army, she said that such a decision laid in higher authority such as with the Minister of Defence, and she therefore did not know the answer to the question.

11. Van Blerk said that from an orthopaedic and neurological perspective, due to the injuries from the accident it was clear that the plaintiff's cognitive function has been impaired. Both experts concurred that his head injury has negatively affected his employability levels, and that the brain injury was permanent and there was little if any room for improvement. The neurosurgeon calculated his whole person's impairment at 31%. Occupationally, it was also concluded that the brain injury has negatively affected his daily activities. It takes precedence in his area of work. From a psychologist's point of view, the trauma of the accident and injuries sustained has left him intellectually and emotionally weaker than he was before the accident had occurred. He finds it difficult coping with stressful situations and his learning and thinking abilities have been hugely negatively affected. Psychological expert opinion also agrees with the other three perspectives which conclude that he is not able to function independently in a working environment. It was reported that he was not able to cope with his work and being sympathetically employed. He was 37 years at the time of the accident and he was 42 years old when he examined him. Based on the available information, expert opinion and collateral information, it appears that the accident and its sequelae had a major and significant negative impact on his career and earning potential. Before the accident it was reported that the plaintiff completed carpentry courses in the military service and managed quite well with carpentry work and later with other duties assigned to him relating to booking of military vehicles requiring technical service, repairs and maintenance. After the accident he was no longer able to manage with his work tasks, and he could not write properly so that his superiors decided that somebody else, a sergeant, should take over his work, leaving him nothing meaningful to do in a workday. Due to this

and his neuro-cognitive impairment, he no longer seemed suitable for employment in the open labour market. Although he is still employed by the military, it is not clear how long he would be so employed. He is currently on special leave and he showed that he did not know when this situation was likely to end, but after this, his continued employment seemed likely to be highly doubtful. After his discharge from the military, he would not likely be able to find work in the open labour market again and could then be seen as unemployable. Finding employment in a sheltered environment was not likely to happen in view of such facilities being highly scarce in South Africa, and taking his relative advanced age and background into account.

12. Van Blerk said that it could therefore be concluded that the plaintiff's post accident career and earning potential was considerably lower than what was the case before the accident. He is sympathetically employed and is likely to eventually see a discharge from the SANDF which would result in him not finding any other work in the open South African labour market suggesting him retiring earlier than expected. Whilst the plaintiff was employed, it seemed that he had the work capacity and motivation to continue with his duties with possible expansion with promotional possibilities until retirement age. After the accident, his employability levels are highly affected. The conclusion is that his brain injury is permanent and that he may not be able to work again after the end of his current special leave in the army, also mainly due to his loss of coping skills and logical reasoning abilities. He also seemed to have retained psychological scars (mood, temper) which was likely to seriously interfere with his day to day interactions. A loss of reasoning ability may have

influenced the plaintiff not to report to work on the day of the planned march to the Union Buildings. Due to this, he was placed on special leave and may lose his job as a result, but mostly due to him not being capable of doing any productive work any more as indicated by expert opinion and collateral information. Upon discharge from the army he was not likely to find work again in the South African open labour market, and could as such be viewed as unemployable which is viewed directly as a result of the accident and its sequelae. He is a subject for future loss of earnings. As he does not seem able to function in any work situation any more due to the accident and its sequelae, after his discharge from the army he would be considered unemployable. Van Blerk recommended that he be compensated with his total loss of earnings.

13. The defendant called sergeant major Baloyi as its witness. He said that the status of the officials who were suspended was unclear since the Minister of Defence had appealed a court ruling. The officials including the plaintiff are still receiving a salary and are on special leave. He was not sure whether the plaintiff was medically assessed since he arrived at the base in March 2011. He testified about the process that will be followed before a person is medically boarded off and said that there was no such an application for the plaintiff. A letter would be written by a doctor to the officer commander for a full report of his work and this would be taken back to the hospital. A panel of three would decide if the person could be boarded off. He said that he did not know the plaintiff. Once a person gets boarded off, the person concerned would receive a lump sum payment and half his salary.

14. Warrant officer Theophilis Mtshali. He is based at the Lenz military base. His duties are both military and administrative. He is a motor mechanic in the workshop and is in charge of it. He knows the plaintiff for about 15 years before the accident. He was told by captain Selelo to come and testify on her behalf. He did not see the personnel file. In May 2007, he was working with the plaintiff in Heidelberg who was under his supervision. He used to receive and dispatch cars. He did administrative work. The plaintiff was responsible and did his work well. The plaintiff was employed as a carpenter but did not do carpentry at the workshop after the carpentry department was closed down. He was put under technical services. He was a good worker and played sports. He also did many courses and was known and liked. He heard about the plaintiff's accident and later met him at the Lenz military base after he was transferred from Heidelberg to Lenz. He saw the plaintiff there but he was always going to the One Military Hospital. The plaintiff was causing trouble at the army. When he gave him an order, he would refuse to take it and the matter was reported to colonel Mbatha. He knew that the plaintiff was good and he tried to calm him down. He was a different person after the accident. He was not working but was sitting doing nothing. When something was sent to him, he did not do it. He would go home without telling anyone. The other soldiers understood him and left him. They would sometimes mock him and say that he was mad and he should be left alone. The plaintiff did not visit him in the workshop. The plaintiff did not go with them to the shooting range and he became isolated. He was not laughing like he used to do before the accident and did not take part in sports on Wednesdays. He did not do any work. The colonel knew that he was involved in an accident and once when the warrant officer had given him work, he told him that the plaintiff was sick

and should be left alone. He never reported the plaintiff to captain Selelo and they knew that he was struggling. He said that there is a medical boarding off procedure. They would have to take a decision and they could not just dismiss him.

Analysis of the evidence and arguments raised

15. It is common cause that the plaintiff was involved in a motor collision accident. He was admitted to the Union Hospital and was later transferred to the One Military Hospital in Pretoria. After he had spent some time in hospital, he was discharged and returned to work in November 2007. He used to report for work but did not do any work at all. This went on until 2009 when he was suspended on full pay with a group of soldiers who had marched to the Union Buildings in Pretoria. He is still suspended on full pay and no decision has been taken yet about the outcome of his suspension. It is clear from the evidence led before this Court that the plaintiff did not take part in the march to the Union Building and had remained at home on the day in question. This was also confirmed by captain Selelo who told van Blerk that it was possible that he did not understand the instruction that he had to report to work. It is also clear from the evidence led that the plaintiff would not have taken part in the march due to the nature of his injuries. He is in any event not able to walk long distances. Why he was suspended is beyond me.

16. After the accident, the plaintiff was left with a brain injury. The defendant admitted that the accident occurred and did not dispute the injuries sustained by him. It disputed his entitlement to future loss of earnings and interference with earning capacity. It admitted that

he is entitled to medical expenses with an undertaking in terms of section 17(4)(a) of the Act and general damages regarding pain and suffering and other sequelae because of the accident. It averred that the plaintiff's earning capacity may be affected but did not render him unemployable. In support of this contention it relied on page 19 of the occupational therapist report of Susan Badenhorst where she said the following:

"It is highly recommended that Mr Dlamini attends a 'Return-to-Work' Programme. Within this programme he will receive therapy that focuses on skills and abilities that have been influenced by the injuries he sustained. He can also learn new skills with a structured environment".

The defendant contended further that it was of the view that the plaintiff still has opportunities and means to remain employable. Considering that he is passionate about his work, it believes that with the necessary interventions and assistant programmes, he will be able to remain employed.

17. The first issue to be determined is the amount of compensation to be awarded to the plaintiff for general damages. The second issue that needs to be determined is whether despite the plaintiff's brain injuries and despite what all of the experts have agreed upon, he is still employable in the open market.
18. It is common cause that the plaintiff has suffered the following injuries as stated in various medical reports: poly trauma; head injury - facial abrasions and lacerations; chipped teeth frontal lower jaw, fractured to a mandible; four missing teeth in central anterior maxillary

area as well as three anterior mandibular region; intercerebral bleeding/nasal bleeding; soft tissue injury to cervical spine; soft tissue injury to lumbar spine and lacerations to the right hand. The medico legal report of Susan Badenhorst an occupational therapist, records the injuries as follows: cervical spine disturbance in alignment; right hand soft swelling; fracture of both nasal bones; fractured maxilla; loose teeth; brain bleeds on the left temporal and parietal lobes; subarachnoidal bleeding in the brain; oedematous changes on the left cerebral hemisphere; and the middle structures of the brain are displaced towards the right.

19. All the experts agree that the predominant injuries sustained by the plaintiff is a head injury and lumbar spine and cervical injuries and that there is serious sequelae to the injuries. The damage to the brain, lumbar and cervical spines is permanent.

20. The plaintiff is claiming R2 000 000.00 for general damages in respect of pain and suffering, discomfort, loss of amenities of life, disfigurement and emotional shock and trauma. The defendant contended that the plaintiff should be awarded R600 000.00. I was referred to cases dealing with similar injuries and amounts for damages awarded. For example in *Matthysen vs POF* 1999 (4) C & B B4 - 23, the plaintiff had suffered a head injury: moderate concussive head injury and focal right parietal cerebral contusion. The plaintiff was awarded R90 000 which in 2012 is R188 000. In *Adlem vs RAF* 2003 (5) C & B J2 -41, the plaintiff suffered a head injury causing focal and diffuse brain damage to temporal and frontal lobes. The original award was R400 000 which in 2012 would have been R649 000.00. The plaintiff has besides the brain injury also suffered other injuries which are set out in

paragraph 18 above. If those injuries are taken into account with the brain injury an appropriate amount for damages under this head should be R850 000.00.

21. This brings me to the second issue about whether the plaintiff is still employable. It must be pointed out from the onset that the defendant did not lead any expert evidence to contradict the reports filed on behalf of the plaintiff. It relied on paragraph 19 of Susan Badenhorst's report which deals with "the Return to Work" programme but tended to disregard the expert's views that the plaintiff was no longer employable in the open market. It has also disregarded the direct evidence led by the plaintiff's colleague about what he was doing when he returned to work after the accident. It is the plaintiff's case that he is no longer employable and this is supported by all of the experts who consulted him and testified on his behalf. A joint report was filed by the neurosurgeons which confirmed that he has suffered a severe brain injury. The brain disability was caused by trauma. They recommended that his work capacity should be evaluated by an occupational therapist and an industrial psychologist. The plaintiff was evaluated by a clinical psychologist namely Nellie Prinsloo and her report is uncontested. The report by Susan Badenhorst an occupational therapist is not opposed. She has updated her report which was done by Hassim. The occupational therapist and clinical psychologist are both of the view that the plaintiff cannot return to work and indicated that an industrial psychologist's report should be obtained. Van Blerk an industrial psychologist produced a report which is also uncontested.

22. The evidence led by the plaintiff shows that the plaintiff once he is discharged from the

SANDEF he will no longer be employed in an open employment environment. The SANDEF when he returned to work after the accident, did not know what to do with him. He was left alone. All that he would be able to do in the future, is to work in a sheltered environment which from the evidence led before this court is non existing. The defendant conceded that the plaintiff will not be able to work in an open work environment but contended that if he attends the "Return to Work" programme he would be able to work. Hassim testified about the "Return to Work" programme. She said that this would entail much commitment and buy in from a prospective employer. He can probably work in a sheltered environment but not in the open market. She said that sheltered employment is structured better but there are very few and far between and employees there do not get paid. In her report she recommended that the plaintiff attend a "Return to Work" programme. Within this programme he will receive therapy that focusses on skills and abilities that have been influenced by the injuries sustained. He can also learn new skills within a structured environment and the costs of this would be about R30 000.00. She said that the "Return to Work" programme is run by an occupational therapist on vocational rehabilitation. Either work in a sheltered or open environment but constant therapy would have to be given to help him. A specialist would do an assessment on this and place him in a place and assess and assist him in that structure. She said that there are therapists who could assist him if that programme was applicable to him and to run with him. This would take constant therapy with support from his work, family and the therapist and they would have to be patient with him. If all the factors were in place, the programme would be beneficial to him. She said that it was better if he participated in it. She said that he was unable to work in the open

labour market and his cognitive difficulties would be a hindering factor to learning a new skill as his learning abilities are poor. With all the interventions he will be functioning in a sheltered environment with structure and supervision for some work. He will have to be evaluated in a “Return to Work” programme.

23. It would appear that the plaintiff’s claim for future of loss of income was opposed on the basis that because the plaintiff is still employed by the SANDF and he is receiving a salary, his claim for damages should be dismissed. Whilst it is true that the plaintiff is still employed by the SANDF because he was placed on suspension on the basis that he had taken part in a march to the Union Buildings, he had for a period from November 2007 until his suspension in 2009 been reporting for work but was unable to do any of the work. The senior officials of the SANDF knew about his plight and it would appear that he was not medically boarded off due to his suspension. I got the distinct impression from warrant officer Mtshali that it was only going to be a question of time that he was going to be boarded off.
24. It is clear from the evidence led that the plaintiff is not a candidate for a “Return to Work” programme. The defendant did not lead any evidence to prove that he will be a successful candidate for this. All of the experts agree that he is not. It is clear from the evidence that his current employer does not provide for sheltered employment. He is unable to learn any new skills. He was unable to carry out instructions and where he attempted to do work did not do what he was told to do. The neurosurgeons recommended that an industrial

psychologist should consider the question of his capacity to work. The industrial psychologist assessed him and found that he is unable to work in the open market. Despite what was said about the “Return to Work” programme, the plaintiff is not a candidate for that programme. He is unable to manage his affairs and this is one of the reasons why a *curator* was appointed for him.

25. All that needs to be determined is what amount should be awarded for future loss of income. The plaintiff was born prematurely at seven months. He was initially a slow learner who later managed to pass standard eight. He completed an N1 course but did not complete an N2 due to financial constraints. He joined the SANDF in 1994. In addition to that he did some 26 courses in the army. Unfortunately for him the carpentry department was closed down and he was transferred to Heidelberg in the maintenance department. He was then involved in a motor car accident collision. He was assessed by various experts. It is clear from van Blerk’s testimony and expert report that the plaintiff would have proceeded to the rank of a staff sergeant. He considered the plaintiff’s family background, the fact that he was a premature baby, the fact that he had a drive and had done 26 courses and that he would have progressed despite all of his initial setbacks. I do not believe that he would have become a warrant officer if one considers the evidence that was led about his background. Allowance should be made for his slow progress. But for the accident he would have become a staff sergeant.

26. I have no doubt that the SANDF will fail to dismiss the plaintiff for having taken part in the

march to the Union Buildings. He was not part of the march and was incapable to do so. I have no doubt that once this judgement is placed before the relevant authorities that he will be boarded off medically. Since the plaintiff is still employed by the SANDF and no steps have been taken to board him off medically, he is receiving a salary and an assumption should be made that he will be boarded off in a year's time.

27. Mr Jacobson, an actuary, has set out what the plaintiff's claim for future loss of income should have been but for the accident. He has taken into account the necessary contingencies. His calculations are based on an assumption that he will be discharged on 1 March 2012. It is clear that his discharge will not take place on 29 February 2012. The plaintiff and other officials were suspended in 2009 and one can safely assumed that it might take another year before the plaintiff is discharged. His salary as at 1 March 2012 for a staff sergeant would have been R146 400 per annum. His claim for future loss of income should therefore be R1 696 927.00. The amount is arrived at by deducting R146 400 from the amount that Jacobson gave in his actuarial report. The defendant filed an actuarial report but did not take into account any contingencies. I am not prepared to accept that report since no provisions have been made for any contingencies.
28. The plaintiff's claim for past medical expenses which is R123 184.52 was not disputed by the defendant. The plaintiff had initially claimed R574 800.00 for future medical expenses. The defendant has given an undertaking for future medical expenses so no damages can be given under this head. The plaintiff has abandoned his claim for past loss of earnings since

he has incurred no such losses.

29. There is no reason why costs should not follow the result.

30. In the circumstances I make the following order:

30.1 The defendant is to pay to the plaintiff the sum of R2 670 111.52 and interest a *tempore morae* on the above sum at 15,5% per annum, within fourteen days of date of this order.

30.2 The amount referred to in paragraph 30.1 above, shall be paid into the plaintiff's attorneys trust account, details of which are as follows:

McMillan Attorneys

ABSA

OAKDENE

Trust Account

30.3 The plaintiff's attorneys of record, McMillan Attorneys Inc, shall retain the aforesaid amount in an interest bearing trust account pending the creation of a Trust for the benefit of the plaintiff.

30.4 The defendant shall furnish the plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ("the Undertaking") for the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of, or rendering of a service, or supplying of goods to the plaintiff arising out of the

injuries sustained by the plaintiff in the motor vehicle collision that occurred on 23 May 2007, after such costs have been incurred and upon proof thereof.

30.5 The defendant is to pay the plaintiff's taxed or agreed party and party High Court costs including the following:

- (a) the costs of Senior/Junior Counsel;
- (b) the costs of obtaining medico-legal reports in terms of Rule 36(9)(a) & (b);
- (c) the costs of attending to the preparation of joint Minutes, if any;
- (d) the preparation fees to the preparation of the plaintiff's experts, being:
 - 1. Dr Schnaid (Orthopaedic Surgeon);
 - 2. Dr Van Der Meulen (Neurosurgeon);
 - 3. Ms Prinsloo (Clinical Psychologist);
 - 4. Ms Badenhorst (Occupational Therapist);
 - 5. Ms Hassim (Occupational Therapist);
 - 6. Mr Van Blerk (Industrial Psychologist); and
 - 7. Mr Jacobson (Actuary).

30.6 The plaintiff's attorneys, McMillan Attorneys Inc. is ordered to:

- (a) cause a trust ("the Trust") to be established in accordance with the Trust and Property Control Act 57 of 1998 to administer the funds awarded to the plaintiff; and
- (b) to pay monies held in Trust by the said attorney for the benefit of the plaintiff to the Trust (and as and when approved by a *Curator*).

30.7 The Trust instrument contemplated above shall make provision for the following:

- (a) that the plaintiff shall be the sole beneficiary of the Trust;
- (b) the powers of the Trustee(s) shall specially include the power to make payment from the capital and income for the reasonable maintenance of the plaintiff, or for any other purpose which the Trustee(s) may decide to be in the plaintiff's interest;
- (c) if the income is not sufficient for the aforesaid purpose, the Trustee(s) may utilize capital for such purpose;
- (d) that the Trustee(s) are to provide security to the satisfaction of the Master;
- (e) that the cost to obtain such Trustee are to be covered by the Undertaking;
- (f) that the ownership of the Trust Property vest in the Trustee(s) of the Trust in their capacity as Trustees.
- (g) that the procedures to resolve any potential disputes are subject to the review of any decision made in accordance therewith by this Court.
- (h) that the Trustee(s) be authorised to recover the remuneration of, and costs incurred, by the Trustee(s) in administering the Undertaking, in accordance with the certificate of Undertaking to be provided by the defendant;
- (i) that the suspension of the plaintiff's contingent rights in the event of cession, attachment or insolvency prior to the distribution or payment thereof by the Trustee(s) to the plaintiff;
- (j) that the amendment of the Trust instrument be subject to the leave of this Court;
- (k) that the determination of the Trust upon the death of the plaintiff, in which

event the Trust assets shall pass to the Estate of the plaintiff; and

- (l) that the Trust Property and administration thereof be subject to an annual audit.

30.7 The costs of the establishment of the Trust and the administration of the Trust Property be paid by the defendant.


FRANCIS J

JUDGE OF THE SOUTH GAUTENG HIGH COURT

FOR PLAINTIFF : D A LOUW INSTRUCTED BY MCMILLAN ATTORNEYS

FOR DEFENDANT : FF OPPERMAN INSTRUCTED BY MOHLALA ATTORNEYS

DATE OF HEARING : 8, 9, 10 and 13 FEBRUARY 2012

DATE OF JUDGMENT : 21 FEBRUARY 2012