



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 60880/2011

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED:
6/7/2019.....	
DATE	SIGNATURE

In this matter between:

**MR MAMBO**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**NEUKIRCHER J:**

1. On 5 December 2009 the plaintiff was a pedestrian when he was knocked down by a motor vehicle. The merits were settled

between the parties some time ago and resulted in an apportionment of 30/70 in the plaintiff's favour.

2. What is now before Court is the dispute regarding quantum. At present, the parties have no agreement regarding past or future loss of earnings or the quantum of general damages to be awarded to the plaintiff.<sup>1</sup>

3. The plaintiff called several witnesses:

- 3.1. himself;
- 3.2. Mr Mphuthi, a neuropsychologist;
- 3.3. Mrs Ndzungu, an occupational therapist;
- 3.4. Mrs Sempene, an industrial psychologist; and
- 3.5. Dr Mazwi, a neurosurgeon.

4. The defendant called Mr Maturure, an industrial psychologist.

The plaintiff:

5. The plaintiff is presently 31 years old and was born on 2 March 1988. At the time of the accident he was 21 years old and worked as a supervisor at Mapanga Sole Trader, which is a

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<sup>1</sup> The defendant agreed to provide the plaintiff with a section 17(4)(a) certificate, which would cover 70% of his medical costs as per the apportionment agreement

brickmaking company. The plaintiff's evidence was that he did not do any physical work at his previous employment.

6. As already stated he was a pedestrian when he was knocked down. He testified that the last thing he remembers is a vehicle approaching, but he could not remember how he was knocked down or what occurred thereafter, and the next he knew, he woke up in hospital. He has also no memory of what occurred during his hospitalisation.

7. He sustained injuries to his right eye and as a result he cannot see properly, especially when it is very hot or cold. He also sustained an injury to his nose, his forehead and his upper back - his back pain sometimes wakes him up at night.

8. He worked for approximately three months during 2014 at Lebala Construction. His tasks included handing tools - for example wheelbarrows, spades and pickaxes - to the workers and ensuring that everyone wore their proper uniform when on duty. He testified that he was sick often, sometimes up to twice per week and he suffered from headaches because of the noise levels at work. As a result, he eventually left after three months and he has not worked since then.

9. Cross-examination was uneventful, save that -

attributed to his level of educational exposure and limited environmental stimulation.

11. He opined that:

*"... We conclude that his poor performance on the tests administered can be attributed to a combination of mild residual neurocognitive defects arising from lack of educational stimulation and attention deficits due to chronic pain and stress response interfering with the allocation of cortical resources, in an individual with limited formal education exposure. His mild traumatic brain injury (mTBI) may have contributed to mild residual neurocognitive deficits as it may be considered to be a complicated mTBI, given altered consciousness and time of accident and a period of post-traumatic amnesia."*

12. He states that, according to AMA Guidelines, the history provided with regards to response to treatment and vocational issues, the plaintiff has reached maximum medical improvement and that therefore, his condition is considered permanent.

13. Furthermore, given the injuries and sequelae, the plaintiff's prospects of securing and retaining gainful employment in the open labour market have diminished significantly, especially

given his limited educational exposure<sup>3</sup> and lack of sedentary skillset to compete in the open labour market.

14. In cross-examination he stated that post-traumatic stress disorder is latent in the plaintiff but the plaintiff does suffer from low self-esteem, which is a symptom of Post-Traumatic Stress Disorder (PTSD) as are his irritability and his high emotional levels. He stated that the plaintiff's PTSD symptoms are not fully blown and he opined that once the plaintiff receives pain medication, the PTSD symptoms would come to the fore. The diminishing of the plaintiff's pain levels would not however ameliorate the mild traumatic brain injury *sequelae*, i.e. the pain aggravates the situation, but once the pain is treated, the plaintiff's quality of life would improve but the residual issues would remain.

Mrs Ndungu:

15. She is the occupational therapist and assessed the plaintiff on 27 March 2019.
16. Joint minutes between her and the defendant's occupational therapist<sup>4</sup> were signed on 15 May 2019. These joint minutes state, *inter alia*:

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<sup>4</sup> His highest level of education is Grade 7  
Mrs Mathole

- 16.1. they agree that the plaintiff is unsuited to heavy jobs and has never held any job requiring heavy work;
- 16.2. Mrs Ndzungu was of the view that the plaintiff is ideally suited for occupations falling within the light to occasional medium physical demand levels due to his physical limitations;
- 16.3. Mrs Mathole stated that the plaintiff is suited for sedentary, light and medium occupations;<sup>5</sup>
- 16.4. Mrs Ndzungu is of the view that given the plaintiff's level of education, he will likely only qualify for unskilled work, which is generally medium to very heavy in nature;
- 16.5. Mrs Mathole opined that his pre-accident work is classified as light and he therefore remains suited to this type of work or any work in sedentary, light or medium range;
- 16.6. whilst Mrs Ndzungu is of the view that the plaintiff is left with physical and functional impairments compromising his work capacity, Mrs Mathole disagrees;

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It was noted during the evidence that Mrs Mathole did not have the neuropsychologist's report nor the neurologist's report when conducting her assessment of the plaintiff and no neurologist's report was obtained by the defendant - however, Mrs Mathole did not testify

16.7. they also disagree on whether the plaintiff would be able to secure employment in the open labour market with Mrs Ndzungu stating that he would not, but Mrs Mathole disagreeing.

17. Mrs Ndzungu testified that when one considers the chances of the plaintiff being re-employed he must be viewed wholistically, and one must also look at the psychological impact the accident had on him – he may on the surface look to be fully functional, but he has a right eye injury, suffers dizziness and from headaches and therefore his job prospects are slim.

Mrs Sempene:

18. She is the industrial psychologist who assessed the plaintiff. She and the defendant's industrial psychologist<sup>6</sup> produced joint minutes dated 20 May 2019. It appears from both that Mr Maturure did not have sight of the reports of either the plaintiff's ophthalmologist or the neurosurgeon or the neuropsychologist when finalising his assessment of the plaintiff.

19. The main points of disagreements are that:

19.1. Mr Sempene is of the view that the plaintiff would have

worked until he retired at the age of 65 and Mr Maturure stated that the retirement would have been at age 60;

19.2. Mrs Sempane's view is that given his educational level, the plaintiff is a candidate of low unskilled work and due to his condition he would struggle to find suitable employment and he would therefore experience long periods of unemployment;

19.3. Mr Maturure's view is that the plaintiff is likely to continue with his pre-accident employment prospects with some limitation and that the accident has not rendered the plaintiff unemployable, but simply reduced his competitiveness in the open labour market because of the pain from which he suffers.

20. Cross-examination revealed that regarding the retirement age, Mrs Sempane had contacted the plaintiff's previous employer and according to them, the retirement age at the company was the age of 65. She also stated that most unskilled labourers worked past the retirement age to augment their income as most do not have pensions and cannot afford to retire.



Dr. Mzawi:

21. He is a neurosurgeon who evaluated the plaintiff on 20 February 2019. He recorded that the plaintiff has disfiguring facial scars of 5cm and poor vision in his right eye with right eye ptosis.<sup>7</sup>
22. His neurological examination revealed that the plaintiff has difficulty with concentration, significant memory disturbances, poor attention span, poor mathematical ability, poor abstract thinking and poor general knowledge with poor recall.
23. According to Dr Mzawi, the plaintiff's whole person impairment according to AMA Guidelines is 30%.
24. He opines that the plaintiff's neurological problems are due to the head injury, which has also contributed to the pain and suffering with the plaintiff's experiencing persistent headaches post-injury. Dr Mzawi states that the plaintiff's memory disturbances are significant and his poor concentration is due to the head injury,<sup>8</sup> which has resulted in a "*significant loss of amenities of life*". He is also of the view that the plaintiff has reached his maximum medical improvement and his injuries are serious.

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<sup>7</sup> This is a drooping or falling of the upper eyelid but in the plaintiff's case there is no nerve or eyeball damage. It appears that he has damaged tear ducts.

<sup>8</sup> He states that this is a "*mild brain injury*"

25. In cross-examination Dr Mzawi explained that at best, one can try to manage the plaintiff's symptoms, for example the headaches and the teary eye with medication but that they are persistent and permanent as the natural recovery period has already been exceeded.<sup>9</sup> As to the plaintiff's scarring, that would have to be attended to by a plastic surgeon.

26. Plaintiff then closed his case.

Mr Maturure:

27. The defendant then called its industrial psychologist to give evidence. The important aspects of his evidence are the following:

27.1. that he regards "*normal retirement age*" as age 60, as he is of the view that in government and in practice in the labour market, this is the age for retirement;

27.2. that given the history of the plaintiff's employment and especially the fact that he worked for three months after his accident, the plaintiff is still employable albeit with some limitation.

28. In cross-examination he conceded that it is mostly people who

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<sup>9</sup> This is approximately a year after the accident

have pensions (for example government employees) that retire at the age of 60 and that it is likely that most people would work past the age of 60 because they cannot afford to retire. He conceded that the plaintiff would have struggled to accumulate sufficient funds to enable him to retire at the age of 60.

29. Furthermore, he only had the reports of the defendant's orthopaedic surgeon and occupational therapist for purposes of compiling his report. He did state that he had conducted an interview with the plaintiff but he did not have sight of the report of the neuropsychologist or neurologist and he was also not aware that the plaintiff had been diagnosed with a mild brain injury.

30. Despite this, Mr Maturure is of the view that the plaintiff's type of work does not require high cognitive functioning and he can therefore do some basic work and although he is not rendered unemployable, he will struggle to find work.

31. When it was put to him that he had had no regard to the plaintiff's mental abilities, his response was that he did mention in his report that the plaintiff had "*some limitations*".

32. The defendant then closed its case.

General damages:

33. The plaintiff was a 21 year old pedestrian when he was run over. He was employed at that time and earned R 3 900.00 per month. Although his level of education is Grade 7, the evidence provided is that he suffered a mild brain injury, which had left him with several *sequelae* – persistent headaches, poor memory and poor concentration in addition to an eye injury and disfiguring scarring. All of these *sequelae*, including ptosis of the plaintiff's right eye have, in Dr Mzawi's opinion, left the plaintiff with a "*significant loss of amenities of life*".

34. Both Mr Barnard and Mr Nonyane are agreed that the plaintiff's general damages award should be in the region of R 500 000.00 and, given this, the award of R 500 000.00 will be made, which must then be apportioned 30/70 in terms of the merits agreement between the parties.

Section 17(4)(a) Certificate:

35. The parties agreed that the certificate should be provided to the plaintiff with the proviso that the defendant is liable for 70% of the plaintiff's future medical expenses.

5.5.2 Earnings:

36. At the end of the trial it appeared that the only true dispute in respect of this was the contingencies to be applied to the calculation done by Munro Actuaries. It is noted that on the plaintiff's version, he is unemployable and on the defendant's version, he retains some residual employability because that he worked for three months in 2014.
37. In my view, the evidence of Mr Maturure was unsatisfactory given his failure to take into account the reports of the neuropsychologist and the neurologist and even more importantly, the fact that the plaintiff was diagnosed with a mild brain injury is an important aspect which he did not take into account.
38. Furthermore, his insistence that the plaintiff's age of retirement was 60 years old, was unconvincing given that Mrs Sempene had contacted the plaintiff's previous employer who had confirmed that the retirement age policy of the company was age 65.
39. Given these facts and the fact that there was no evidence that the plaintiff had built up a pension fund (or any form of savings), which would enable him to retire at the age of 60, I find that the likelihood is that the plaintiff's retirement would have been at the

age 65 (and possibly even later).

40. I also agree with the plaintiff's experts that the *sequelae* of the accident have left the plaintiff with significant injuries, all of which have contributed to the plaintiff being a candidate of low unskilled work, similar to that in which he was employed at the time of his accident. However, due to his condition as set out by the experts, I agree that the plaintiff would struggle to secure suitable employment and is therefore considered unemployable. The fact that he has not worked since 2014 simply confirms this.

41. Mr Barnard argues that 5%:15% contingencies must be applied to past and future loss of earnings respectively, which the actuary has calculated to be R674 500.00 and R1 950 600.00 respectively. Thus, applying the contingencies advocated by Mr Barnard, the plaintiff's loss of earnings would be the following:

41.1. Past loss of earnings	R 674 500.00
less 5% =	R 640 775.00
41.2. Future loss of earnings	R 1 950 600.00
less 15% =	R 1 658 010.00
<b>TOTAL:</b>	<b>R 2 298 785.00</b>

42. Mr Nonyane argues that given the evidence that the plaintiff did work post-accident, a higher contingency should be applied and he argues for a spread of 10%:25%.

43. Given that I am of the view that the plaintiff's experts are correct, I am also of the view that 5%:15% contingency spread is appropriate. Thus, the plaintiff has suffered a loss of income of R2 298 785.00.

Conclusion:

44. Thus, the loss of income plus the general damages put the plaintiff's loss at the following:

R 2 298 785.00 (loss of income)

+ R 500 000.00 (general damages)

= R 2 798 785.00

Less 30% apportionment = R 839 635.50

**Total damages to be awarded: R 1 959 149.50**

Order:

45. The parties have presented me with a draft which leaves the amount of the award blank. I am satisfied that the remainder of

Order:

46. Thus, the order I make is the following:

46.1. The draft "X", as amended, is made an order of Court.



NEUKIRCHER J

JUDGE OF THE HIGH COURT

**Date of hearing:** 23<sup>rd</sup> of May 2019 & 1 July 2019

**Date of judgment:** 6 July 2019

**For the plaintiff:** Adv Barnardt

**Instructed by:** Shabangu B Attorneys

**For the Defendants:** Adv Nonyane

**Instructed by:** Diale Mogashoa Inc