

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



Case number: 29755/2011

Heard on: 11 March 2021

Date of judgment: 15 March 2021

DELETE WHICHEVER IS NOT APPLICABLE

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

15/3/21

DATE

SIGNATURE

In the matter between:

EDWIN MONATSE MAPHOSA

Plaintiff

and

MEC FOR HEALTH, LIMPOPO

Defendant

JUDGMENT

SWANEPOEL AJ:

[1] On 16 March 2010, whilst he was a passenger in a truck, the plaintiff was unceremoniously hauled from the vehicle by members of the South African Police Service. In the process he broke his right ankle. He was taken to the Musina Hospital where he was admitted for treatment. He was later transferred to the Tshilindzini Hospital where he was treated for some weeks before an open reduction and internal fixation was attempted.

[2] Plaintiff's experts say that the failure to immediately operate on the ankle was extremely negligent, as it should have been attended to immediately. The ankle has been left severely compromised, and requires an arthrodesis, essentially a fusion which would leave the joint without movement. It is safe to say that plaintiff was ill served by the authorities.

[3] In a merits hearing, the defendant was held to be 100% liable for the plaintiff's damages resulting from the negligent treatment by the hospital staff. This hearing is to determine the quantum of the damages. A number of heads of damages have been agreed between the parties:

[3.1] Future medical expenses: R 266 900.00;

[3.2] Past loss of income: R 1 650 000.00;

[3.3] General damages: R 250 000.00.

[4] The remaining head of damages is that of future loss of earning capacity.

[5] Plaintiff resides in Beitbridge, on the Zimbabwean side of the border. He is married, and his wife is a vendor. He has five children. From the age of approximately 9 years (Grade 3) assisted his father, a welder, in his business, and so he learnt his trade. He does not have a formal welding qualification. At the time of the accident plaintiff had taken over the welding business, was employing his brothers, and had a steady income. He is obviously proud of the fact that he could afford two vehicles, a car and a delivery vehicle. The parties have agreed that his income averaged R 12 500.00 per month. He was able to provide a good life for his family.

[6] After the incident plaintiff was unable to return to work. He had to resort to using crutches to walk, and because he physically compensated for the injury, other joints were affected. He has suffered pain ever since. Plaintiff's brother took over the business after he was injured, and eventually plaintiff was able to secure some income by doing deliveries for another one of his brothers. He cannot drive far, or for long, and is limited in his ability to generate an income. The employment opportunity created by his brother seems to have been born more out of sympathy than anything else.

[7] Plaintiff's expert, Ms. Bonnie Huang, is an occupational therapist. She testified that she had prepared a report on the plaintiff. He currently struggles to stand and walk for extended periods of time. He requires regular breaks and stretching, and his pain is a distraction when he is working. He aspires to start a construction company. Ms. Huang testifies that the arthrodesis would leave plaintiff with a stiff ankle with no movement. At present she regards him as unsafe for employment as a driver, and even after the arthrodesis he would still

be unsafe. There was emphasis placed by defendant on plaintiff's ability to earn an income as a driver, probably because there had been a misconception that he was previously a truck driver. Pre-accident he was a welder and businessman, not a driver, and he has been moonlighting as a driver since the incident, in order to secure some income.

[8] Ms. Sagwati Sebapu is defendant's occupational therapist. She did not testify. Her report opines that plaintiff is unsuited for heavy work, which would seem to exclude welding jobs. Following the arthrodesis plaintiff would, in her view, be able to cope with his pre-incident occupation with better comfort. In her view, the arthrodesis would have little impact on his functioning.

[9] The difference between Ms. Huang's view, and that of Ms. Sebapu is stark. However, the evidence of Ms. Huang, which was not seriously contested, was that plaintiff would continue to suffer severe difficulties in whatever occupation he pursued. Plaintiff's evidence supports Ms. Huang's contention that he will not be able to function as a welder. As a driver he has little scope of finding employment that is not sympathetic, simply because he cannot drive far or for long distances. His options are also limited given the small village in which he resides.

[10] The joint minute by the industrial psychologists, Ms. Kotzé and Dr. Malaka dated 13 January 2021 records that they agree that pre-accident plaintiff was earning R 12 500.00 per month as a welder in his own business. But for the accident he would have continued to function as an unqualified welder with inflation related earnings until retirement at age 65. Post-accident

plaintiff earned R 2000.00 per month working for his brother, until he was retrenched in March 2020.

[11] It did, however, emerge from Ms. Kotzé's evidence that the plaintiff is a resourceful and motivated person. She believes that he has entrepreneurial skills that can be put to good use, especially if he has some capital to start a business.

[13] Both parties produced actuarial reports. There was no evidence led in respect of either report, and plaintiff accepted that defendant's report should be used as the basis for the calculation of the plaintiff's future loss of income. Defendant's actuary calculated plaintiff's loss of future income at R 3 783 713.00. To that amount a contingency deduction should be applied to make provision for the probability that plaintiff will generate an income having undergone the arthrodesis, and having some capital to start a business.

[14] Plaintiff contended for a 20% contingency deduction, whilst defendant argued for 50%. Plaintiff's submission is, in my view too low, given the probability that plaintiff will generate an income in future. On the other hand, defendant's proposal is high, given the fact that plaintiff will still be left with a serious disablement, which will no doubt affect his ability to operate on a normal level. In my view, a contingency deduction of 30% is appropriate. That would reduce plaintiff's future loss of income by R 1 135 113.00. His loss of future income is therefore R 2 648 600.00.

[15] I have been told that there is no contingency fee agreement in place. The proposed order makes provision for matters which are within the purview of the taxing Master, and I will therefore make the customary order.

[16] I make the following order:

[16.1] Defendant shall pay to plaintiff the sum of R 4 815 500.00 which is made up as follows:

- | | | |
|-----------------|---------------------------------|------------------------|
| [16.1.1] | Future medical expenses: | R 266 900.00; |
| [16.1.2] | Past loss of income: | R 1 650 000.00; |
| [16.1.3] | General damages: | R 250 000.00; |
| [16.1.4] | Future loss of income: | R 2 648 600.00. |

[16.2] Defendant shall pay plaintiff's costs on the High Court party/party scale. The costs shall include the reasonable reservation and qualification and other fees of the following experts:


- | | |
|-----------------|---|
| [16.2.1] | Dr L Berkowitz (Plastic and reconstructive surgeon); |
| [16.2.2] | Ms. A Rossouw (Occupational therapist); |
| [16.2.3] | Ms. K Kotzé (Industrial psychologist); |

[16.2.4] Munro Forensic Actuaries.

[16.3] The following provisions will apply to the determination of the aforementioned taxed or agreed costs:

[16.3.1] Plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on defendant's attorney of record; and

[16.3.2] Plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs, whereafter interest shall commence running at the applicable *mora* rate.



JJC SWANEPOEL

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

COUNSEL FOR PLAINTIFF:

Adv. J Swart

ATTORNEY FOR PLAINTIFF:

Dyason Inc (Ms. L Horn)

COUNSEL FOR DEFENDANT:

Adv. L Mfazi

ATTORNEY FOR THE DEFENDANT:

**The State Attorney (Mr.
Rabambi)**

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