IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 05/24197

In the matter between:

KAHLBERG, MUNROE RONNY Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MBHA, J:

[1] The plaintiff sued the defendant in terms of the Road Accident Fund Act No. 56 of 1996 for damages suffered as a result of injuries sustained in a motor accident which occurred on 26 August 2004.

[2] The defendant defended the matter and it proceeded to trial on 5 February 2007. On the first day of the trial, the defendant conceded the merits in favour of the plaintiff.

[3] The defendant also agreed to:

3.1 furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the plaintiff's future medical, hospital and associated medical expenses;

3.2 pay the plaintiff R510 574,08 in respect of the plaintiff's past medical and hospital expenses.

[4] The parties agreed that the plaintiff's general damages amount to R300 000,00.

[5] The only issue that this Court is called upon to determine is the quantum of the plaintiff's loss of earnings and earning capacity. In this regard there are two sub-issues to be decided namely:

5.1 Was what the plaintiff's employer paid to the plaintiff an act of charity and benevolence? If so, does this amount fall to be deducted when determining the plaintiff's past loss of earnings?

5.2 To what age would the plaintiff have worked had the accident not occurred?

[6] The plaintiff led the following witnesses:

6.1 Dr Herman Jacobus Edeling, a specialist neurosurgeon.

6.2 Mr Lance Philip Hirson, the financial and administrative manager of Westdene Printing Services CC, the employer of the plaintiff;

6.3 Ms Romy Marks, the occupational therapist; and

6.4 the plaintiff.

[7] The defendant did not lead any witnesses as most of the issues related to expert evidence. The joint minutes contained in Bundle B, being those of the parties' respective orthopaedic surgeons and occupational therapists, were admitted by the defendant at the outset of the matter.

[8] Dr. Edeling testified that the plaintiff sustained a permanent brain injury which has negatively affected his employability permanently. Dr. Edeling was not cross-examined and the defendant has accepted his findings.

[9]

9.1 Mr Hirson testified that at the time of the accident the plaintiff was 66 years old. Prior to the accident the plaintiff had been a

conscientious and hardworking employee who always and ably performed his tasks diligently. He was always an enthusiastic worker and keen to prove himself all the time. He got on well with all other employees.

9.2 All of this changed dramatically after the accident on 26 August 2004. The plaintiff's work performance deteriorated to the point where he could not cope at all with his ordinary work functions. He could not carry packages to his car nor write down simple orders. He became forgetful, and this caused many complaints. At some point he considered replacing him but he felt that as he had worked at the company for almost 10 years he had an obligation to look after him. Furthermore it became apparent that he had not made any savings and thus had no alternative source of income.

9.3 Mr Hirson testified that he only retained the plaintiff out of sympathy even though there was no real obligation to keep him employed.

9.4 Because of his age and *sequalae* of the injuries arising from the accident he was rendered unemployable.

9.5 Mr Hirson was adamant that the plaintiff would have worked for another 10 to 15 years at the company and that they were

prepared to keep him there for as long as he was prepared to work.

9.6 Under cross-examination Mr Hirson conceded that the company had a legal obligation to pay the plaintiff his normal salary, that tax was deducted from his salary in the normal manner and that he did not have to stay at home but had to come to work daily.

[10] Ms R Marks testified that in her opinion the plaintiff was only employed for sympathetic reasons and that he was only been retained for such sympathetic reasons.

10.1 Ms Marks testified that in her opinion and having regard to her examination, the plaintiff could have continued working to age 75 and beyond. She stated that having regard to the plaintiff's pre-accident activities which only a fit and healthy person could have accomplished, working until age 75 and beyond was a reasonable expectation.

10.2 Ms Marks was not cross-examined and her evidence was accepted by the defendant.

[11]

11.1 The plaintiff testified that prior to the accident he was a fit and healthy man of 66 years. He used to play tennis once or twice a

week. He would walk competitively for approximately 5 kilometers daily and then go for a swim afterwards. Although he had high blood pressure and raised cholesterol, this was well controlled with medication. In any event these conditions are not life-threatening.

11.2 The plaintiff testified that before the accident he coped excellently with his work without any problem. He had no other source of income and he would have worked until he was no longer able to. After the accident he was unable to perform his tasks and would as a result be reprimanded by his employer. He found this totally embarrassing. In his view he was kept at the company out of mere sympathy.

Past loss of earnings

[12] Plaintiff submits that all monies paid by his employer post-accident were an act of charity and benevolence and that these had to be deducted when calculating his past loss of earnings.

[13] On the other hand defendant submits that plaintiff has not suffered any past loss of earnings in that:

13.1 plaintiff was earning a salary up to the date of this hearing;

13.2 plaintiff has been employed with Westdene Printing Services CC since 1995;

13.3 plaintiff is still receiving the salary that he has been receiving throughout the years with the normal increments;

13.4 plaintiff goes to work at the same time and performs the same functions that he always performed for the employer;

13.5 plaintiff reports to the same management structure in the company;

13.6 plaintiff generates work for the company;

13.7 plaintiff is registered with the South African Revenue Services as an employee of Westdene Printing Services CC;

13.8 plaintiff pays PAYE to the South African Revenue Services as an employee of his employer, Westdene Printing Services CC;

13.9 plaintiff receives complaints from management in the same manner that other employees receive complaints from the manager i.e. his employer; and

13.10 the plaintiff does not stay at home and receive charity.

[18] In *Santam Insurance Company v Byleveldt* 1973 (2) SA 146 (AD) the court held that charitable benefits or payments prompted by the employer's charity or benevolence were not to be taken into account in assessing loss of earnings and that such payments were "*genade brood wat hom toegeval het vanwee die voorbeeldige barmhartigheid van sy voormalige werkgewer*" at 167.

[19] The same principle was confirmed in *Dippenaar v Shield Insurance* 1979 (2) SA 904 (AD) at 920C where the Appellate Division held that payment made on account of benevolence is to be disregarded in computing damages.

[20] For further elucidation I also refer to the English case of *Parry v Cleaver* 1970 (AC) 1 at 14 where the court pronounced itself as follows on benefits arising from generosity:

> "*it would be revolting to the ordinary man's sense of justice and therefore contrary to public policy that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relatives or of the public at large and that the only gainer would be the wrongdoer*".

See also *Standard General Insurance Co v Dugmore* 1997 (1) SA 33 (A) at 37 and *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A). In the latter case the court held that insofar as a pension accruing to the respondent served to compensate him for the intangible consequences of his disability, such pension should not be deducted for his non-pecuniary loss suffered as a result of injuries sustained by the respondent in a motor vehicle collision.

[14] In my view the evidence shows conclusively that the plaintiff was only employed for sympathetic reasons. Clearly he is only being kept at his employment purely for sympathetic reasons. Mr Hirson stated that at some point it did occur to management that plaintiff had to be replaced because of his inability to cope. However, because of his age and physical condition it was decided that he had to be kept there.

[15] Mr Hirson's testimony is corroborated by the uncontroverted testimony of Ms Marks. This is confirmed in the joint minute by the parties' respective occupational therapists. Paragraph 6.3 of the joint minute reads as follows:

> "*6.3 It is agreed that he* [plaintiff] *is currently only employed for sympathetic reasons only.*"

[16] In my view it makes no difference that the payment made to the plaintiff by the company was not registered as a donation and may have been paid as a salary. Neither does the fact that tax was deducted detract from the fact that the plaintiff was only employed for sympathetic reasons. It is clear that all payments by the company were and are made out of sympathy and based purely on charity.

[17] It is a well-established principle in our law that where the money is paid out of benevolence or sympathy, the defendant cannot benefit out of the goodwill or charity of the third party who is giving the charity.

[21] I am satisfied that the evidence of Mr Hirson and the plaintiff himself, taken together with the joint minute of the experts establishes, that whatever money the company paid to the plaintiff from the time of the accident, is not to be taken into account as this was clearly a payment out of sheer benevolence and charity.

[22] The plaintiff is accordingly entitled to payment of the sum of R335 845,00 as set out in the actuarial report of Mr D Rolland dated 6 February 2007.

Loss of earning capacity

[23] Having regard to the prospective loss of earnings, the parties have submitted the actuarial basis together with the various contingencies applicable to the future loss of earnings. These calculations based on the agreement are contained in Exhibit D.

[24] Defendant contends that the plaintiff's future loss of earnings should be calculated until the age of 70 or alternatively until the age of 72½ years old. Plaintiff's submits that his future loss of earnings should be calculated up to the age of 80 years old.

[25] The parties are agreed that the plaintiff has a life expectancy of 11 years.

[26] Ms Marks testified that in her opinion the plaintiff would have worked until the age of 75 and beyond. Mr Hirson was of the view that the plaintiff was fit and healthy before the accident and would have worked for another 10 to 15 years from the time of the accident. Ms Marks was of the view that having regard to the plaintiff's pre-accident activities which only a fit and healthy person could have accomplished, age 75 and beyond was a reasonable expectation. It should be borne in mind that Ms Marks was not cross-examined and her evidence was accepted by the defendant.

[27] It is difficult and almost impossible to predict precisely to what age the plaintiff would have continued working. However, given his pre-accident condition, as clearly established by the admitted evidence that he was fit and healthy and most importantly Ms Marks' opinion, I have decided to accept the age of 72½ as a basis. A figure of R521 156,00 was agreed between the parties as reflected in Exhibit D as the total amount the plaintiff would have earned if he had worked until the age of 72½ years old. A contingency deduction of 10% has already been made to arrive at this figure. I have taken into consideration the fact that the plaintiff is well past his retirement age and that it is rather unusual for ordinary people to work beyond the age of 70. I am accordingly, of the view that a 15% contingency deduction should be applicable meaning that an additional 5% contingency should be deducted further. The amount that plaintiff must be awarded which is the amount he would have earned but for the accident accordingly amounts to R495 098,20.

[28] Based on the aforegoing I have thus come to the conclusion that the plaintiff has suffered the following damages as a result of the injury that he suffered:

1.	Past medical and hospital expenses	R510 574,00
2.	General damages for pain and suffering loss of amenities of life and disability	R300 000,00
3.	Loss of earnings from the time of the collision to the date of trial	R335 845,00
4.	Loss of earning capacity	R495 098,20
		R1,641 517,20

[29] In the result, I make the following orders:

1. The defendant is to pay the plaintiff the sum of R1,641 517-20

2. The defendant shall provide the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the plaintiff's future medical, hospital and associated medical expenses.

3. The defendant is to pay the plaintiff's costs which costs are to include the costs of Senior Counsel, qualifying fees of Ms Marks, Dr Edeling, Prof Schepers and Mr Rolland.

B H MBHA
JUDGE OF THE HIGH COURT

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DATE OF HEARING	5 FEBRUARY 2007
DATE OF JUDGMENT	28 MARCH 2007