

/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 11/06/2007

CASE NO: 18932/2003

UNREPORTABLE

In the matter between:

LIPHIRI PETRUS PHATI

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SERITI, J

In this matter, plaintiff issued summons against the defendant claiming a certain amount of money as damages which he suffered when he was involved in a motor vehicle collision on 18 August 1999.

According to the particulars of claim on the date mentioned above the plaintiff was a driver of a certain motor vehicle which collided with another motor vehicle on a public road.

Pleadings were exchanged and the matter was set down for hearing.

Apparently, prior to the date of hearing merits and certain heads of damages were settled.

At the commencement of the hearing, the plaintiff's counsel

handed to the court the amended pages of his particulars of claim.

Paragraph 11 thereof reads as follows:

“As gevolg van die eiser se beserings soos vermeld, en die
sequelae daarvan, ly hy skade in die bedrag van
R3 045 382.54.

(i)	Mediese en hospitaal koste	R99 927.54
(ii)	Verlies aan inkomste	R359 829.00
(iii)	Toekomstige verlies aan inkomste	R2 260 626.00
(iv)	Toekomstige mediese uitgawes	R75 000.00
(v)	Algemene skade	<u>R250 000.00</u>
	Totaal	R3 045 382.54”

The plaintiff’s counsel further advised the court that the following issues have been settled: Liability, general damages, future medical expenses and past medical expenses.

He further advised the court that the court, at the end of the hearing, will be requested to make a determination on the following issues: Past loss of earnings, future loss of earnings or earning capacity and contingencies to be applied in the calculations of the loss of the plaintiff.

The court was further advised that the medico-legal reports of the following experts are not in dispute: Dr H J Albertse, an orthopaedic surgeon, whose reports are dated 19 October 1999 and 23 March 2003, Ms Haley Polley, an occupational therapist, whose report is dated 27 June 2000, Mr Enos Ramano, an occupational therapist whose report is dated 18 September 2002, Dr David Shevel, a psychiatrist whose report is dated 28 March 2007 and the “Minutes” of a joint meeting of Dr PP Kruger and Dr D A Birrell.

The first witness to testify is Mr Petrus Phati, the plaintiff.

He testified that he passed grade 12 at the age of 20. He got married in 1999, he has children with his wife, although from 28 November 2004 they have not been staying together as man and wife. After passing grade 12, he went to the then Vista University to study for a BA degree. He spent four years at Vista University, and he passed eight subjects during that period. He left the University prior to him completing his studies because of financial constraints.

After leaving University he worked as a hawker for a period of two years and thereafter he secured an employment at a pawn shop where he worked for one year. He stayed for some time without working, and later he secured employment at a security company. He underwent certain training and thereafter he started driving the security panel van which transports cash. During his employment at the said security company, and on 18 September 1998 he was shot on his left shoulder. After being shot, he was absent from work for a certain period and on his return, he was given light duties. Later he went back to driving the security panel van.

On 18 August 1999, whilst driving his employers motor vehicle he was involved in a motor vehicle accident and he sustained certain serious physical injuries which are documented in the various medical reports which forms part of the bundle of documents before this court. He was hospitalised from 18 August 1999 and discharged on 22 September 1999. After his discharge from hospital, he went back to his place of employment and he was informed that his documents were sent to their head quarters and he will receive a response from the head office. He was getting his full salary and later he received only 75% of his salary.

He attempted on various occasions to secure another employment and on 20 October 2006 he started at his current place of employment. He looked for another employment as the disability benefits he was receiving from Old Mutual were not enough to meet his financial needs.

At his current employment, he is driving a heavy duty truck on the mine premises. At the interview prior to his employment he was not asked about his injuries, although when he went for a fitness certificate medical examination he was asked about the said injuries. When at work, he at times feels tired and he has to stop working, do few exercises and thereafter resume his duties.

He works an eight hour shift per day and he drives the truck for about seven hours. His employment is contract based, as the mine has a contract with the owner of the land but he does not know when the contract expires. One day, his supervisor saw him resting and he (the supervisor) told him that he is wasting the employers' time.

At the time when he was employed by the security company, he thought the he will save enough money and thereafter go back to University to complete his studies, and thereafter go and look for a suitable employment particularly in the civil service. He has not attempted to complete his studies because of the effects of the accident under consideration.

Under cross-examination he said that after the accident, he started looking for employment in November 2000. He sent different applications to different companies including the government.

The next witness to testify is Ms Enid Kruger, an occupational therapist.

She confirmed the contents of her report, which formed part of the bundle of documents. She also confirmed the contents of the joint report prepared by her and Ms A Greef. She further testified that the plaintiff has decreased left wrist movement, which decreases his ability to work as a security guard. His left upper limb is not fully functional. His neck has limited movement. The upper limbs are not fully functional. Both limbs muscles power is decreased. To be employed as a driver is not a suitable work for him because of the history of his neck injury, as he requires

doing some exercises during his working hours. Driving on the industrial site is not good for him as, *inter alia*, he has decreased power in his upper limbs. In emergencies he might not react appropriately. She does not believe that he can produce eight hour work.

He is slow when he writes but his handwriting is legible.

Under cross-examination she testified that Mr Phati is not suitable for open labour market. Because of the history and *sequelae* of his injuries and his limitations he is not suitable for sedatory job.

His level of endurance is low and that will affect his productivity. At the moment, he has no suitable experience for a sedatory type of employment.

In her opinion Mr Phati cannot be regarded as 100% fit and thus suitable for the previous job he had as a security officer. He can be considered for an appointment in an administrative position, but he has no formal experience in that field, and that decreases the probability of such an appointment. She further testified that Mr Phati has reduced muscle power and that fact will decrease his endurance and productivity.

He is also not suitable to be employed as a driver.

The next witness to testify is Mrs B A Donaldson, an industrial and counselling psychologist.

She confirmed the contents of her report and the joint report she prepared with Dr Van der Walt.

She further testified that Mr Phati has the intellectual ability to have completed his BA degree but for the difficulties he experienced namely lack of financial resources and time.

After his accident, the chances of him completing his studies reduced to almost zero because, *inter alia* lack of financial resources and depression which caused him to suffer loss of concentration and constant fatigue.

Mr Phati stands no chance of securing another employment because of his lack of experience, his age and the *sequelae* of his injuries. She referred to the joint report and confirmed the contents of the following paragraph.

“We note that his career trajectory had been interrupted when Khulani Springbok Patrols was taken over by Fidelity Guards Holdings and Mr Phati was obliged to move from Box Room Assistant Controller to the position of driver, with effect from 1 April 1999. We agree that Mr Phati is likely to have worked his way up in the Fidelity Guards environment or an allied security environment, via first obtaining Grade A security grading. Thereafter, we agree that he is likely to have progressed through the typical ranks in the security environment, to an ultimate supervisory

position.”

She further testified that from a position of a security guard he would have progressed to the position of senior security guard, security officer and ultimately chief security officer. For purposes of quantification, she agreed with Dr Van der Walt, that the above positions will translate into the same figures which are contained on page 28 of her report. The said categorisation puts security guard, at Paterson Job Grade A2 level, senior security guard at Paterson Job Grade B3 level C ie an Agraded security guard, security officer at Paterson Job Grade B4 level and chief security officer at Paterson Job Grade C1 level.

She further testified that he would have retired at age 65.

Under cross-examination she testified that psychiatric treatment normally militates against a person gaining employment.

She further testified that she agreed with Dr Van der Walt that he is likely to find it significantly more difficult to secure an appropriate position than it would have been but for the accident.

Plaintiff closed his case.

The defendant called Dr R van der Walt an industrial psychologist to testify. He confirmed the contents of his report and the joint report he drew with Ms B Donaldson.

He further testified that if Mr Phati does not complete his degree within a certain period he is likely to forfeit credits that he accumulated towards the completion of his BA degree.

He confirmed the contents of his report where he stated “Had the motor vehicle accident not occurred it is probable Mr Phati could have obtained a grade “A” security grading and progress once again to the level of Box Room Assistant Controller, Base Security Officer and later Base Manager ...”.

He further testified that he has been unable to determine the retirement age in the security industry.

Under cross-examination, he testified that Mr Phati is a person of average intelligence and he would have been able to move to a supervisory position. He is not fit to be employed again as a driver of “Cash In Transit Van”, but he can probably be re-employed in an administrative capacity.

Post collision on paper he can be re-employed but in practice, the probabilities of him being re-employed are nil.

In re-examination he testified that he agrees with Ms Greef who stated in her report that Mr Phati will be able to do light duties. He was further informed what Mrs Greef suggested in her report and he said that he does not know if Mrs Greef considered the factors that might impact negatively on the possibility of Mr Phati doing an administrative work.

The next witness to testify is Ms Anneke Greef.

She confirmed the contents of her report and contents of her joint report with Ms Enid Kruger.

She testified about how she interviewed and examined Mr Phati.

She further testified that the work that Mr Phati performed shortly before the accident involved driving cash in transit vehicles in the PWV area. The vehicles were used for delivering of money to banks and the collection of money from shops. The motor vehicle he drove did not have power steering, and he drove on average 50km per day.

She further testified that the work Mr Phati performed falls within the parameters of mainly sedentary work but can include aspects of light work.

After the accident, Mr Phati, could have been able to go back to the same job as a driver of a “Cash in Transit Van”.

She further testified that during the physical assessment of Mr Phati, she found that the endurance of the neck muscles did seem to be somewhat restricted. She also found decreased muscle strength in the left elbow, forearm, wrist and hand, which is linked to the injuries he sustained in the shooting accident in 1998. His writing although neat and legible, was slow and did not meet the required standard required for the open labour market.

She further testified that Mr Phati is suited to perform work of a sedentary and light physical nature as well as driving a light duty vehicle.

Driving of a heavy duty truck is moderate work which is more heavier than light duty. The pathological condition of Mr Phati does not allow him to perform moderate work. She conceded that while performing moderate work., Mr Phati will get tired and experience discomfort.

Physically he does have the strength or ability for an administrative job.

Under cross-examination she testified that light duty driving does not include long distance driving nor involve delivering of small articles. Defendant closed its case

On 23 March 2002, Dr Albertse, an orthopaedic surgeon addressed a report to Old Mutual Employee Benefits. In the said report, he stated, *inter alia*, that “Except for the limited neck movements which will impair him as far as driving is concerned, I think he is fit for work in a more administrative environment”.

In his report, which was prepared in the year 2000, Mr Polley, an Occupational Therapist stated, *inter alia*:

“Work ability – Mr Phati is unable to work as a driver for

the following reasons:

- he is unable to rotate his neck sufficiently to the right to allow for environmental scanning in a normal driving situation, not to mention the high ... vigilance required when transporting cash;
- he has insufficient upper limbs strength on either side to be involved in a combat situation if the need arises;
- the prolonged periods of sitting required will result in increased neck pain ...”

Mr Ramano, an occupational therapist prepared a report on 30 August 2002. In his conclusion of the report, he stated “Reccomendations: Mr Phati cannot perform the essential functions of his job as a driver. His ability to perform the essential job functions is affected by restricted neck movement due to C4/5 fusion, poor eye, hand, foot coordination and reported muscle spasm in the right upper and lower limbs ...”

Dr Albert and Messrs Polley and Ramano prepared their reports on instructions of Old Mutual. The parties, correctly so, agreed that their reports should be admitted as evidence.

It should be remembered that on the basis of their reports, Old Mutual declared Mr Phati medically unfit to continue with his job.

Dr Van der Walt, the industrial psychologist who testified on behalf of the defendant, during cross-examination conceded that Mr Phati

is not fit to be employed again as a driver of a “Cash in Transit Van”. Ms Donaldson the Industrial psychologist who testified on behalf of the plaintiff and Ms Kruger an occupational therapist who also testified on behalf of the plaintiff are also of the view that Mr Phati should not go back to his pre-accident employment as a driver of a “Cash in Transit Van”.

In the light of the above evidence I find that Mr Phati could not be reemployed by Fidelity Guards in his pre-accident position. In fact, the factual position is that he was declared medically unfit to continue with his employment.

The orthopaedic surgeons, Drs Birrell and Kruger, in their joint report stated that Mr Phati would as a result of the accident and following his neck surgery, have been able to return to work with a loss of work capacity of 15% to 20% after a period of ten to twelve weeks sick leave following his neck surgery. The fact that he will be having 15% to 20% loss of work capacity does not mean that he would have been able to perform his duties at Fidelity Guards. The overwhelming evidence of other experts suggests otherwise.

There is evidence on record that Mr Phati started employment with Injula Mining Corporation (Pty) Ltd on 20 October 2006. In terms of his employment contract he is employed for the duration specified in the contract to mine coal that subsists between Anglo Coal, New Vaal Colliery and Injula Mining Operations (Pty) Ltd. The contract further stipulates that it will expire on date on which contract between company and Anglo Coal expires, or either of the parties can give notice of terminating the contract prior to the period mentioned earlier.

Dr Van der Walt, during cross-examination testified that Mr Phati is not fit to be employed again as driver of “Cash Transporting Van”. He further said that Mr Phati can probably be reemployed in an administrative capacity.

Ms Greef testified that the physical condition of Mr Phati does not allow him to do the work of a truck driver as he is doing at his current employment. It was pointed out to her that Mr Phati testified that at his present employer, he at times takes time of to rest as he gets tired, and she conceded that it is true he will get tired and experience discomfort.

Mr Phati testified that at the mine, when driving the truck, he at

times rests for some time when he feels tired. He further testified that his supervisor once warned him and told him that he is wasting the employers' time.

Ms Kruger testified that, industrial driving is not good for Mr Phati as he has, *inter alia*, decreased power in his upper limbs. In emergencies, he might not react appropriately.

It appears to me that the evidence of the experts clearly indicates that Mr Phati should not be driving a truck at the mine because of his physical condition.

The probabilities are that he will not maintain his current employment for a long time.

The employment contract of Mr Phati does not specify the exact duration of the contract and it is also not known what the duration of the contract between Injula Mining Corporation (Pty) Ltd and Anglo Coal New Vaal Colliery is.

For purposes of calculation of the future loss of earnings, I'm prepared to assume that Mr Phati will still be employed by his current employer for a maximum period of two years.

As stated earlier Dr Van der Walt testified that Mr Phati can probably be employed in an administrative capacity.

Ms Greef also testified that Mr Phati would be able to do light duties. She went further and said that his pre-accident work was a light duty work.

Ms Kruger testified that Mr Phati is not suitable to be employed in the capacity of a security officer. She further testified that he can be considered for appointment in an administrative position but unfortunately he has no previous formal experience in that field and that decreases the probability of such an appointment.

Ms Donaldson's report states that if he does not obtain his BA

degree he will find it difficult to secure an appropriate employment for himself.

My view is that taking into account his physical injuries, psychiatric treatment, his lack of experience in administrative functions and the fact that he only has matric qualification, he will find it difficult, if not impossible to find an administrative position. My opinion is that the chances of securing such a position, are not more than 20%.

The evidence in his case suggests that there are no prospects whatsoever that he will complete his BA degree. If he wants to study again, he might have to start from scratch as the probabilities are that he has lost all credits that he accumulated towards his BA degree.

If the accident had not happened the probabilities are that, as suggested by Ms Donaldson, he would have been capable of progressing with time and appropriate in-service training through the ranks of a B graded security guard to an "A" graded security guard and would then move to the position of security officer and eventually chief security officer.

The salary scales for the abovementioned positions are mentioned by Ms Donaldson on page 97 of her report, and my view is that the said salary scales should be utilised for purposes of calculating the future loss of earnings of Mr Phati.

The normal retirement age is 65 years. There is no reason why the calculations should not be made on the basis that Mr Phati would have retired at the age of 65 years at his pre-accident employer.

The court, at the beginning of the trial, was requested to make a determination on the basis upon which the past and future loss of earnings (if any) of the plaintiff should be calculated.

In this judgment, I have set out the basis on which the said headings of damages of the plaintiff should be calculated.

The parties can give their actuaries the basis of calculations as contained in this judgment and request said actuaries to do the necessary calculations.

The next question is the question of costs.

My view is that the plaintiff is entitled to his party and party costs, which costs will include the costs of all his experts as they were necessary witnesses.

This matter was set down for three to five days. After the first day of trial, the defendant's counsel advised the court that she is not available the following day as she has a matter in the magistrate's court and the magistrate insists that she must come to court. The behaviour of the defendant's counsel is not acceptable. She accepted a brief knowing very well that the trial will last more than three days and knowing very well that she will not be available on the second day of trial.

The court therefore makes the following order as far as costs are concerned:

1. The defendant is to pay the party and party costs of the plaintiff which costs will include costs of all the plaintiff experts who testified and/or prepared reports which were in the bundle of documents.
2. As far as Wednesday 23 May 2007 is concerned, the defendant is ordered to pay the costs of the plaintiff on attorney and client scale.

W L SERITI
JUDGE OF THE HIGH COURT

18932/2003

<u>Heard on:</u>	23/24 & 25 May 2007
<u>For the Appellant:</u>	Adv P G S Uys
<u>Instructed by:</u>	Messrs Jaco Hill and Piet Voges, Pretoria
<u>For the Respondent:</u>	Adv C Lindeque

/SG

Instructed by:

Messrs Mothle Jooma Sabdia Inc, Pretoria

Date of Judgment:

11 June 2007