

SOUTH AFRICA / JUDGMENT

Mtshali v Road Accident Fund (23918/2013) [2017] ZAGPPHC 868 (22 March 2017) [2017] ZAGPPHC 868

COURT

North Gauteng High Court, Pretoria

BEFORE

T Brenner

CASE / FILE NUMBER

23918/2013

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

Date

of hearing: 14 and 17 March 2017

Date

of judgment: 28 March 2017

Case

number 23918/2013

Not

reportable

Not

of interest to other judges

Revised.

22/3/2017

In

the matter between: SANDILE
 WONDERBOY
 MTSHALI Plaintiff
 and
 ROAD
 ACCIDENT
 FUND Defendant

JUDGMENT

BRENNER, AJ:

1. In this personal injury case, quantum is in dispute, after the RAF had conceded 100% liability on the merits.
2. On 28 June 2009, the plaintiff, Sandile Wonderboy Mtshali ("Mtshali"), (born on 28 January 1987, and therefore 22 at the date of accident), was a passenger in a motor vehicle which collided with a vehicle insured by the defendant, the RAF.
3. The claim for past and future medical expenses was abandoned. Mtshali's claim comprised four components, namely, payment of:
 - a. general damages;
 - b. past loss of income;
 - c. future loss of income;
 - d. future medical and hospital expenses, by way of a section 17(4)(a) undertaking: this undertaking was tendered by the RAF.
4. The parties agreed to the introduction into evidence of all of their expert reports, and the joint minutes of experts. The qualifications and expertise of the experts who adduced vive voce evidence was not placed in dispute.
5. The following injuries were sustained by Mtshali:
 - a. A head injury with frontal and parietal cranial impacts, accompanied by a moderate to severe brain injury;
 - b. A soft tissue injury of the right shoulder;
 - c. Widespread abrasions and soft tissue injuries.
6. The focal issues in dispute were whether Mtshali had indeed suffered a severe head and brain injury, and if so, the sequelae and the nature and extent of his claims for past and future loss of income.

7. To this end, Mtshali's legal team adduced the vive voce evidence of clinical psychologist Dr Catherine Angus ("Angus"), educational psychologist Brigitte Purchase ("Purchase"), industrial psychologist Jeannie van Zyl ("van Zyl"), and neurosurgeon Dr Herman Edeling ("Edeling"). The RAF closed its case without calling witnesses. In addition, at the hearing, Mtshali's Counsel handed up an updated report by actuary GA Whittaker ("Whittaker"), which took into account two scenarios: one, that Mtshali would have obtained an N4 certificate and diploma in civil engineering but for the accident, and two, that he would have obtained a degree in civil engineering.
8. The RAF handed in an actuarial report from Ndumiso Mavimbela ("Mavimbela").
9. During the hearing, certain additional documents were handed in by Counsel for Mtshali. They were: Mtshali's UNISA records from October 2010 to 2017, which came to light on 14 March 2017, an undated Netcare 911 Patient report form, Addington hospital records dated 28 June 2009, and a supplementary report from Purchase dated 16 March 2017 commenting on the UNISA records.
10. It was common cause that Mtshali had secured a matric certificate with exemption in December 2006. He received an F mark for physical science at the standard grade, and a D for mathematics at the standard grade. It was undisputed that, in 2007, Mtshali worked as a volunteer teacher at a local primary school.
11. Mtshali attended the Ntuzuma Academy in 2009, the year of the accident, with the aim of securing an NT4 diploma. His year marks for four subjects reveal three passes and one failure. His final marks, which encompassed practical exams (for which he received zero in all four subjects) represented a failure of all subjects: 33% for quantity surveying, 35% for building administration, 22% for building and structural construction, and 15% for building and structural surveying. No evidence was led on Mtshali's behalf to explain his zero marks for the practical exams.
12. The UNISA records reveal the following. Mtshali commenced to study for a Bachelor in Education (Intermediate and Senior Phase) in October 2010. He passed the subjects "Child Education" at 53% and "The Learning Child" at 51% in October 2010. In June 2014, he passed "African Language and Culture in Practice" at 50%. In all, he failed two exams and was absent from two. In 2017, he enrolled for five subjects. The UNISA records were produced after Messrs Angus and Purchase had testified.
13. Angus gave evidence that she is a qualified neuropsychologist who is able to assist in the diagnosis and treatment of brain related problems, as also emotional problems due to brain dysfunction. She has been in private practice for 21 years. Angus testified that, according to her information, Mtshali was discharged on the same day of admission at Addington hospital, at about 08h30. The accident apparently happened at about 18h00 on 28 June 2009 and Mtshali was admitted to hospital at about 02h10 the following morning. His Glasgow Coma Scale was 15/15. Loss of memories for 2 to 8 hours, combined with a normal GCS as

indicated by Netcare's paramedics, would suggest "the possibility of a mild to moderate head injury."

14. The hospital records reflect that he was given a Voltaren injection and a prescription for Panado and Brufen. Angus indicated that to her recollection, there was a strike at the hospital at the time. The Netcare report indicates that he was bleeding from the right upper eyebrow and had a laceration in the same area. Her interview with Mtshali on 27 January 2014 included his girlfriend, Simangele Gumede.
15. Angus was aware of Mtshali's matric results and his results at Ntuzuma Academy. She notes that after matric, Mtshali was accepted at Zululand University for a B.Ed degree but had no money to study. He then attended "Elangeni" College (which we assume is Ntuzuma Academy), where he studied for one semester "but was not really interested in this course so he dropped out.....He

then applied to do a B.Ed at UNISA and was accepted."

16. In her report, dated 4 January 2015, she concludes that Mtshali had cognitive deficits typical of a brain injury which were mild to moderate in nature. The mild to moderate deficits were consistent with a mild to moderate brain injury. In the same report, concerning future loss of income, she notes she was informed that Mtshali was studying towards a degree in Education before the accident. She notes: "His poor marks in his Civil Engineering subjects were reportedly due to a lack of interest in the course." She goes on to say: "His current profile would suggest that he is not going to cope with a degree at this stage and he should move to studying a diploma or certificate or more practical types of training."
17. In cross-examination, Angus expressed the view that she did not think that Mtshali would have obtained a diploma in civil engineering, pre- accident.
18. Purchase testified that the purpose of her report, dated 23 May 2016, was to determine Mtshali's then cognitive and educational potential, establish his academic progression and ability to cope with future learning or training and to establish his pre-accident levels of educational potential. She was cognisant of his matric results and the marks obtained at Ntuzuma Academy. Her report notes on pre-accident learning potential, Mtshali was "at least within the average range."
19. In her view, he would have completed a tertiary qualification, either by way of a diploma or degree and depending on his level of interest. She testified that, but for the accident, Mtshali would have been able to complete his N4 diploma. However, financial means would have also played a role in choice of institution and area of study.
20. Post accident, according to his assessment, he was no longer eligible for tertiary education but may be able to complete a three to six month certificate course. Post accident, she noted that Mtshali "still wants to realise his pre-accident aspiration of being a teacher or lecturer." "The writer is of the view that (Mtshali) is no longer suited to this occupation as he will struggle with the inherent requirements of the job." Purchase deferred to the industrial

psychologists with regard to his expected employment prospects. She doubted whether Mtshali could work without supervision.

21. In her supplementary report, Purchase has regard to the UNISA results which were forthcoming on 14 March 2017. In her view, the B.Ed degree at UNISA was overwhelming and it was unlikely that he would complete it within 10 years. Mtshali was better suited to short vocational certificates which may equip him as a teacher's aide or assistant, such as listening to reading groups or supervising

homework. He will require a "supportive and sympathetic environment where he is supervised and directed at all times."

He remains a "vulnerable individual by this accident and is no longer competitive in the open labour market."

22. Van Zyl stood by the opinions articulated in her report dated 20 February 2017, and was not seriously challenged in cross-examination. When shown the UNISA results, she did not change her opinion. The fact of enrolment post accident did not indicate Mtshali's cognitive ability but rather his motivation.
23. She accepts that it is unknown which profession of the two options, education or civil engineering, Mr Mtshali would have pursued. She posed two scenarios, the first being the attaining of a diploma and the second being a degree. Van Zyl's evidence is best summarized by the conclusion drawn in her report, and repeated in her evidence:

"Mr Mtshali was a full time student, studying towards a N4 Certificate when the accident occurred. But for the accident, Mr Mtshali would probably have completed a diploma or degree. He would probably have been gainfully employed at the Paterson C4 or 01/ 2 level. Mr Mtshali was probably motivated to work until retirement. On 28 June 2009, Mr Mtshali was involved in a motor vehicle accident in which he sustained a brain injury. Mr Mtshali's educational potential, as well as his work capacity has probably been significantly and permanently curtailed by the sequelae of his brain injury. Mr Mtshali's employment opportunities have probably been restricted to unskilled work. Mr Mtshali is presented with a high risk that he will probably become permanently unemployed in future, as set out in the report. "

24. In evidence, Edeling was taken through his report dated 16 February 2017 arising from an assessment of Mtshali on 23 April 2015, this time in the company of his cousin, Sifiso Gumede ("Gumede"). Gumede provided important collateral information. The fact that Mtshali remembered nothing of the accident and only about waking up in hospital was evidence of post-traumatic amnesia. The bleeding from his right upper eyebrow was consistent with a possible brain injury. At hospital, there should have been four-hourly neurological observations for a period of at least 24 hours.
25. The anecdotal evidence from a relative, Gumede, confirmed that when he saw Mtshali a few days after the accident, Mtshali was unable to walk straight or look after himself. He spent most of his time sleeping. He failed to recognize family members. His memory and

concentration have deteriorated. He had difficulty in reading. He had continued to take Panado and Grandpa headache powders weekly. Mtshali was a healthy and ambitious young man before the accident. The accident marked a watershed in Mtshali's life with persistence since then of headaches, mental impairment, fatigue and alterations in personality, moods and behaviour.

26. Edeling testified that the fact that he had to prompt Mtshali to share the sequelae with him, a form of under-reporting, was another indication of incomplete recovery from trauma. Edeling observed scars on his head in the right upper parietal region, and at the left flank, as also musculoskeletal impairment to the right shoulder. Impairments of mental function were evident in poor attention, memory difficulties, sluggish thought processes, paucity of speech, comprehension difficulties, lack of drive and mental fatigue.
27. In his view, the head injury involved "acceleration-deceleration forces as well as direct cranial impact, resulting in a primary diffuse (concussive) brain injury with loss of consciousness and amnesia". It was what he termed was probably a moderate "coup-contracoup" contusional brain injury. The contents of the ambulance and casualty records white note GCS levels of 15/15 were consistent with a mild primary diffuse (concussive) brain injury.
28. In conclusion, Edeling states that the organic neurological sequelae of the brain injury had become permanent. Provision should be made for specialist treatment for possible epilepsy and for psychotropic medication. The sequelae have resulted in permanent serious disability with loss of earning capacity. He was to be considered a "vulnerable individual". And finally, he states: "On neurological grounds it is considered that any residual work capacity will be limited by the needs of simplicity, structure, supervision and sympathy." When asked what work might suit Mtshali, Edeling indicated that simple manual labour under supervision might be appropriate, and the construction industry was cited.
29. This concluded the case for Mtshali. The RAF closed its case without calling evidence.
30. I have had regard to the actuarial reports of Whittaker and Mavimbela. Whittaker's calculations are premised on Mtshali having attained an N4 certificate and diploma in civil engineering (scenario 1), or a degree in civil engineering, (scenario 2), pre-accident.
31. Post accident, Whittaker assumes entry at Paterson level A1 and A2 earning R102 370,00 per annum as at February
2016. The net loss for scenario 1, with contingency deductions, translates to R5 747 163,00. The net loss for scenario 2, with contingency deductions, translates to R6 337 897,00.

32. Mavimbela assumes that, pre-accident, Mtshali would have studied for a teaching diploma in December 2011, entering the labour market in 2016 at a basic salary of R173 130,00 per annum, in 2016 money terms. Allowance is made for a basic salary, thirteenth cheque, housing allowance, medical aid and pension benefit. Pre-accident, he poses this one scenario.
33. Post-accident, he poses two scenarios. The first being that Mtshali is restricted to unskilled work, earning R20 600,00 per annum, equating to the median quartile for unskilled workers. The second scenario assumes that he would have been an educator by August 2022, with added benefits.
34. In my view, the assumption of Mtshali's obtaining a teaching diploma pre- accident is far more consonant with the proven facts as adumbrated above.
35. Mtshali had originally enrolled for an education degree at Zululand University. He spent 2007 teaching at his local school. He expressed a lack of interest in civil engineering in 2009 and he failed his first semester in any event. Post accident, he enrolled for a B.Ed at UNISA, and passed three subjects. Post-accident, he maintained the ambition to become an educator, albeit that the experts opined that this was an unrealistic aspiration. All of these indiciae are consistent with the inherent probability that he would have become an educator but for the accident.
36. Concerning post accident loss, scenario 1 as posed by Mavimbela is the more probable, namely that of work in the unskilled sector where, on a starting salary of R20 600,00 per annum, supervision would be competent and conducive to the amount of the income. This is consistent with the consensus of opinion amongst Mtshali's own experts. A post accident contingency deduction of 30% is fair. This being the case, Mtshali's claim would amount to R5 788 663,00.
37. His past loss, after a contingency of 5% would be R795 331,00 and future loss, after a contingency of 30% would be R5 095 333,00. After deduction for the RAF cap of R102 001,00, the total claim amounts to R5 788 663,00.
38. The determination of general damages is an inexact science and requires consideration of various factors. I have taken note of the relative youth, health and enthusiasm of Mtshali before the accident turned his life around, the severity of his brain injury and its sequelae, the unabated headaches, pain, mental health issues, and his compromised employability.
39. In casu, taking cognizance of the severe consequences of his brain injury, the sum of R850 000,00 is a justifiable award for general damages.
40. In the result, an order is made in terms of the draft attached hereto marked "X".

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

22 March 2017

Appearances

Counsel for the Plaintiff: Advocate N Makopo

Instructed by:

Edeling van NiekerkInc Attorneys

Counsel for the Defendant: Advocate M Pienaar

Instructed by:

T M Chauke Attorneys

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

Case No: 23918/2013

HELD AT PRETORIA ON THIS 22nd DAY OF MARCH 2017 BEFORE THE HONOURABLE JUDGE
BRENNER AJ.

In the matter between:

MTSHALI: SANDILE WONDERBOY Plaintiff

THE ROAD ACCIDENT FUND

RAF REF NO. 509/1938365/06/0: LINK 3188334 Defendant

ORDER

By agreement between the parties, it is ordered that:

1. The Defendant pay damages to SANDILE WONDERBOY MTSHALI (hereinafter referred to as "the Plaintiff"), in a total amount of R6 638 663,00, comprising R795 331,00 for past loss of income, R4 993 332,00 for future loss of income + R850 000,00 for general damages ("the capital amount"). Payment of the capital amount shall be paid within 60 (sixty) days of the date of this order.
2. The Defendant is to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996, for 100% of the Plaintiff's future accommodation in a hospital or nursing home, or treatment or rendering of a service, or supplying of goods or related expenses as inter alia set out in the Plaintiff's medico legal reports, in respect of injuries sustained by the Plaintiff in a motor vehicle collision which occurred on or about 28 JUNE 2009, which undertaking shall further include the following:-

2.1 The reasonable costs incurred in the creation and establishment of the Trust and the appointment of trustees(s) as contemplated in paragraph 6 and 7 below;

2.2 The costs of the trustee(s) in respect of the future administration of the Trust and;

2.3 The costs incurred in providing security to the satisfaction of the Master of the High Court of South Africa for the administration of the award and the annual retention of such security to meet the requirements of the Master;

3. Payment of the capital amount is to be made into the following account:-

Account Name Edeling Van Niekerk Incorporated

Bank

Nedbank

Branch

Business Westrand

Account number [...]

Branch code

128605

4. Should the defendant fail to effect payment of the capital amount within 60 (sixty) days of the date of this order, the Defendant shall become liable for interest a tempore morae on the capital amount at a rate of 10.5% per annum from 14 (fourteen) days from date of this order to date of final payment;

5. The payments by the Defendant referred to in this order shall be made into a trust account as contemplated in Section 78(2A) of the Attorney Act 53 of 1979, of the Plaintiff's Attorney, EDELING VAN NIEKERK INCORPORATED, for the sole benefit of the Plaintiff pending establishment of the TRUST contemplated in paragraph 6 hereunder.

6. In order to ensure that the monies awarded to the Plaintiff are suitably protected, as contemplated by the relevant experts, the attorneys for the Plaintiff, EDELING VAN NIEKERK INCORPORATED of Block A, Clearview Office Park, Wilhelmina Avenue, Constantia Kloof, ROODEPOORT are ordered:

6.1 to cause a trust ("the TRUST") to be established in accordance with the Trust Property Control Act No. 57 of 1988, such Trust to be a "special trust" as defined in Section 1 of the Income Tax Act, No. 58 of 1962 (as amended). Such trust shall be registered with Uberrima Phoenix Trust (Pty) Ltd as per the trustee consent annexed to this order marked "A";

6.2 to pay all monies held in trust by them for the benefit of the Plaintiff, to the TRUST;

7. The trust instrument contemplated in paragraph 6 above shall make provision for the following:

7.1 That the Plaintiff shall at all times be the sole beneficiary of the TRUST;

7.2 That the trustee(s) and their successors are to provide security to the satisfaction of the Master;

7.3 That the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of the beneficiary, or for any other purpose which the trustee(s) may decide to be in the beneficiary's interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilise capital;

7.4 That the trustee(s) be authorized to recover the remuneration of and costs incurred by the trustee(s):-

7.4.1. In the establishment of the Trust;

7.4.2. The future administration of the Trust which will include accounting and auditing fees;

7.4.3. In administering the undertaking;

7.4.4. In the annual retention of security to the Master.

7.5 That the ownership of the trust property vest in the trustee(s) of the TRUST in their capacity as trustees;

7.6 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court;

7.7 The exclusion of any and all benefits (income and/or capital) accruing to the Plaintiff as beneficiary of the TRUST from any community of property and/or accrual system in any marital regime;

7.8 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;

7.9 That the amendment and cancellation of the trust instrument be subject to the leave of this Honourable Court;

7.10 The termination of the TRUST upon the death of the Plaintiff, in which event the trust assets shall pass to the estate of the Plaintiff;

7.11 That the trust property and the administration thereof be subject to an annual audit.

8. The Plaintiff's attorney shall be entitled to make payment of expenses incurred in respect of accounts rendered by:

8.1 experts witnesses namely:-

8.1.1. Dr D Irsigler, General Medical Practitioner

- 8.1.2. Dr C Angus, Clinical Psychologist
- 8.1.3. Ida-Marie Hattingh , Speech/ Language Pathologist & Audiologist
- 8.1.4. Dr L Grinker, Psychiatrist
- 8.1.5. Alison Crosbie, Occupational Therapist
- 8.1.6. Rookaya Vahed, Audiologist
- 8.1.7. Brigitte-Leigh Purchase, Educational Psychologist
- 8.1.8. Mr G Whittaker (Algorithm), Actuary
- 8.1.9. Jeannie Van Zyl, Industrial Psychologist
- 8.1.10. Dr H J Edeling, Neurosurgeon
- 8.1.11. Ravine Yachad, Orthopaedic Surgeon

from the aforesaid funds held by them for benefit of the Plaintiff.

- 9. The Plaintiff s attorneys shall be entitled to payment, from the aforesaid funds held by them for the benefit of the Plaintiff, of their fees in accordance with their written fee agreement. There is no valid contingency fee agreement.
- 10. The trustee(s) will ensure that the payment in terms of such agreement will be fair and reasonable and the Master of the High Court and/or the trustee(s) may insist on the taxation of an attorney-and-own-client bill of costs;
- 11. The Defendant pays the Plaintiff s taxed or agreed party and party costs on the High Court Scale which costs inter alia will include the following:

11.1 The Costs of Senior-Junior Counsel;

11.2 All costs in obtaining all medico-legal/addendum-reports, joint minutes and an actuarial report as well as the Plaintiff s travelling and lodging costs in attending the Plaintiff's and Defendant's Experts. The Plaintiff filed the following expert reports:

- 11.2.1. Dr D Irsigler, General Medical Practitioner
- 11.2.2. Dr C Angus, Clinical Psychologist
- 11.2.3. Ida-Marie Hattingh , Speech/ Language Pathologist & Audiologist
- 11.2.4. Dr L Grinker, Psychiatrist
- 11.2.5. Alison Crosbie, Occupational Therapist Rookaya Vahed, Audiologist
- 11.2.6. Brigitte-Leigh Purchase, Educational Psychologist
- 11.2.7. Mr G Whittaker (Algorithm), Actuary

11.2.8. Jeannie Van Zyl, Industrial Psychologist

11.2.9. Dr H J Edeling, Neurosurgeon

11.2.10. Ravine Yachad, Orthopaedic Surgeon

12. Reservation fees of Ms I Hattingh, Dr C Angus, Dr HJ Edeling, Ms BL Purchase and Ms J van Zyl.

BY ORDER OF COURT

REGISTRAR

COUNSEL FOR PLAINTIFF: COUNSEL FOR DEFENDANT:

ADV N MAKOPO

083 258 0435

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

MTSHALI,SANDILE WONDERBOY

(ID [...])

Plaintiff

ROAD ACCIDENT FUND

Defendant

CONSENT TO BE APPOINTED AS TRUSTEE

I, the undersigned,

PENELOPE JANICE DU PLESSIS

as duly authorised nominee of Uberrima Phoenix Trust (Pty) Ltd of Property Business Park, 389C Ontdekkers Road, Roodepoort, hereby

declare that if appointed, I would be willing and able to act as Trustee of the Trust created for the benefit of SANDILE WONDERBOY MTSHALI.

SIGNED at Roodepoort on this 17th day of March 2017.

PJ DU PLESSIS

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