8/9/72

G.P.-S.43575—1969-70—2,000

J 219 29/9/72

29/9/72

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate ~~Division~~ Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

SOUTH AFRICAN MUTUAL FIRE & GENERAL INSURANCE CO. LTD *Appellant,*

versus

EDWARD MPUKU MKUTUNGU *Respondent*

Appellant's Attorney F.S.Webber & Son
Prokureur vir Appellant

Respondent's Attorney Israel S & S
Prokureur vir Respondent

Appellant's Advocate J. Broome S.C
Advokaat vir Appellant M. Chaitowitz

Respondent's Advocate J.W.I. Smallberger S.C
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 12-9-72

2. 4. 7. 8. 10

Coram: van Blerk, Botha, Potgieter, Jansen et Rabie JJ.A.

ECD 9.45 am ——— 10.30 am

C.A.V.

29.9.72 Rabie J.A.:— Appeal allowed with costs. Damages reduced from R5 112-68 to R4 042-68. Ito W.L.T.O. (enig)

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN MUTUAL FIRE AND GENERAL

INSURANCE COMPANY LIMITED.....Appellant

AND

EDWARD MPUKU MKUTUNGU.....Respondent

Coram: van Blerk, Botha, Potgieter, Jansen et Rabie, JJA.

Heard: 12 September 1972.

Delivered: 29 September 1972.

J U D G M E N T.

RABIE, JA.

In an action heard in the East London Circuit Local Division, the respondent (plaintiff in the action) was awarded R5 112-68 as compensation for injuries sustained by him on 2 June 1967, when he was crushed between a stationary trailer and a motor vehicle of which the appellant was the insurer

under...../2

under the Motor Vehicle Insurance Act, No. 29 of 1942. The appeal is against the quantum of the award only, appellant's contention being, in brief, that the award is excessive, and that it should be reduced by this Court.

The judgment of the Court a quo shows that the sum of R5 112-86 is made up as follows:

(a)	Loss of earnings	R 137-63
(b)	"General damages", being - I quote from the judgment - "future medical expenses, general damages for pain, suffering, disability, loss of amenities and loss of future earnings"	R5 070-00
		R5 207-63
Less:	Amount received by Respondent under the Workmen's Compensation Act, No. 30 of 1941	94-95
		R5 112-68

The amount mentioned in (a), R137-63, was an agreed figure, being the respondent's loss of earnings, calculated at R8-45 per week, during the period 3 June 1967 to 27 September...../3

tember 1967, when he was unable to work as a result of the injuries sustained by him. The respondent was, at the time, a labourer in the employ of Consolidated Textile Mills in East London. R94-95 was also an agreed figure, and it is not in issue in the appeal.

In addition to the aforementioned claim for loss of earnings, the respondent also claimed damages under the following heads, viz., estimated future medical expenses (R320); estimated future loss of earnings (R2 000); general damages for pain, suffering and disability (R5 000), and general damages for loss of amenities (R2 500). The learned trial Judge (Cloete, J.), however, as is stated in his judgment, decided not to "particularise" the amounts he proposed awarding, but awarded instead "a globular sum", viz. R5 070-00, in respect of all the claims, as specified in (b) above. Despite the absence of particularisation, it seems reasonably clear that the learned Judge thought

that...../4

that R370 would be a reasonable amount to allow for future medical expenses. This appears from the following passage in the judgment, which deals with the evidence of Mr. Berkowitz, an orthopaedic surgeon of East London, who testified on the respondent's behalf:

> "He was given certain figures in regard to medical expenses. He (respondent) will require about 50 physiotherapy treatments at R4-00 per treatment, making a total of R200. There would have to be manipulation of the spine. The cost of surgery and the anaesthetist's and theatre fees would be in excess of R50. He allows for analgesic medication in the sum of about R120".

The three amounts mentioned total R370, and this figure, if indeed used by the learned Judge, would explain the 70 in the figure R5 070. It is true that the judgment continues to say that the three amounts mentioned

> "can at best be but a rough index to the Court because of the ever changing nature of the costs involved, and the depreciation

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in the value of money.....",

and it is, therefore, not inconceivable that the Court may have had in mind a larger amount than R370 (but nevertheless one ending in 70), but this seems rather unlikely in view of Mr. Berkowitz's evidence. From all this it would seem that all but R370 of the sum of R5 070 was awarded in respect of "general damages for pain, suffering, disability, loss of amenities and loss of future earnings" (see (b) above).

I turn now to the injuries which the respondent sustained. The aforementioned Mr. Berkowitz, who examined the respondent on 15 September 1967 and again on 28 November 1969, describes the injuries as follows in the report which he drew up after the second examination:

> "1. Fracture of the transverse processes of the 1st, 2nd, 3rd and 4th lumbar vertebrae on the right.
> 2. Contusion of the right arm.
> 3. Contusion of the left arm".

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The respondent was admitted to hospital on the day he was injured and was there treated, according to Mr. Berkowitz's report, by "bed rest and analgesic medication". He was discharged from hospital on 10 July 1967, i.e., after about 5 weeks. Dr. Alexander, a general practitioner of East London, who treated the respondent while he was in hospital and who gave evidence on his behalf, stated that the respondent was in a shocked condition and suffering "extreme pain" when he was admitted to hospital, and that he was given pethidine, a powerful pain-killing drug, to relieve his condition. For the next 7 to 10 days, Dr. Alexander stated, the respondent would, but for the use of analgesics - including pethidine during the first few days - have experienced "severe pain". He agreed with cross-examining counsel's suggestion that the drugs "alleviated" the pain "to a substantial degree".

With regard to the arm injuries sustained by the

respondent...../7

respondent - i.e., "Contusion of the right arm", and "Contusion of the left arm" -the only evidence on record is that of Mr. Berkowitz, who stated:

> "There are no symptoms present pertaining to injuries to his arms. I would expect that by about a fortnight after the accident he would have been relatively symptom free as far as his upper limb injuries are concerned".

The injuries to the back were of a much more serious nature. According to Mr. Berkowitz, the fractures of the vertebrae - which would appear to have healed satisfactorily enough - were not significant in themselves, being "purely a manifestation of the injury to the back". What was of significance, he stated, was an injury to the "soft tissue" which was "associated with the fractured transverse processes", and which involved mainly the muscles of the back. It is this injury to the soft tissue, he said, which has had certain lasting effects, and which accounts for the respondent's

complaints...../8

complaints.

When Mr. Berkowitz examined the respondent on 15 September 1967, he found that he was tender "over the lumbar spine and over the paravertebral muscles on the right side of the lumbar spine", and "in the right renal angle and over the right buttock", and that movements of the lumbar spine were, generally, "to about half the normal range". He nevertheless recommended that the respondent should " attempt to return to light duty". The respondent returned to Consolidated Textile Mills on 27 September 1967, but left again on 17 October, i.e., after about 3 weeks. He said in evidence that he had to stand for long hours on end, "cutting towels", and that he found the work "too much" for him. At the time of the trial he was employed as a messenger by the Netherlands Bank in East London, and according to his evidence he was then in his "third year" with the Bank.

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If that is correct, it would mean that he must have been employed elsewhere for at least a year after leaving Consolidated Textile Mills. There is no evidence as to his having been so employed, and it may be that he erred when he said that he was in his "third year" with the Bank, and that he should have said in his "fifth year".

As stated before, Mr. Berkowitz examined the respondent for the second time on 28 November 1969. He then found that there had been "quite a lot of improvement" since his previous examination in September 1967, and, also, that the respondent's condition had "probably become stabilised by then" (i.e., November 1969). He saw the respondent again at the time of the trial (February 1972), and stated in regard thereto: "My examination was very brief, but I do not feel that any material alterations have occurred in the past two and a half years". The respondent's evidence, I should point out, was that his

condition...../10

condition had improved. He was asked: "...how does your condition now compare to when you saw him previously?", and his reply was: "It is much better. It is just when the sky turns and it is overcast". As will appear presently, the respondent's evidence was that he experienced pain, or discomfort, in cold or cloudy weather.

I turn now to the evidence relating to the respondent's condition at the time of Mr. Berkowitz's examination in November 1969, and at the time of the trial.

Mr. Berkowitz testified that the respondent's "general state of health would appear to be good", and that his life expectancy was, in his view, a period of 10 to 12 years as from the date of the trial. There is no suggestion in the evidence that the respondent's injuries might effect his life-span in any way.

Dealing with the after-effects of the injury to the respondent's back, Mr. Berkowitz stated that he

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found "some tenderness over the paravertebral muscles in the lumbar region", and some limitation of movement of the spine. This limitation of movement was "slight", or "not marked", and the spine movement was "not much less" than is usual in the case of a man of his age. It was, however, "accompanied by certain symptoms", and according to Mr. Berkowitz's report, the respondent complained of "constant back-ache" in November 1969. The report states:

> "This back-ache would not appear to be particularly severe unless he attempts to undertake certain activities. The details have been referred to under the heading 'Present Complaints'".

The words "This back-ache would not appear to be particularly severe" mean, Mr. Berkowitz said, that in the normal course of events there was no more than "discomfort".

Under the heading "Present Complaints" the following appears

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in the report:

> "Constant pain in the right buttock and the region of the right iliac crest. As a result of this pain he is unable to walk properly and also cannot sit properly. The pain is aggravated by walking a lot, getting up from the recumbent position and by bad weather. On being asked what he meant by bad weather, he said when it is cold or windy and just before rain.
>
> As a result of the pain, he is unable to plough, he is unable to walk fast or far. It is difficult to estimate how far he is able to walk, but it would appear that he can only manage about half a mile. If he attempts to walk any further, he experiences severe pain in the region of the right iliac crest and right leg and is unable to sleep that night. He stated that he is unable to chop wood because if he bends he experiences severe back-ache".

At the trial the respondent did not give evidence

about...../13

about the inability to "sit properly", or to sit "on his right buttock", of which he complained in November 1969. As to his inability to walk, he stated that he could not walk "fast" or for long distances. "I cannot walk, I get tired", he said in his evidence-in-chief. Later, however, he stated that he was sometimes sent on errands in the course of which he walked as much as 2 or 3 miles, and that, if he did not "rush", he felt "all right" when he returned to the Bank. His work as a messenger, he said, was "light". When he was asked whether his work brought on "any of (his) symptoms at all", he replied: "No". His inability to plough and chop wood is not disputed, so that I need not dwell on the evidence on these matters. I would point out, however, that these activities used to be limited to his annual 2 weeks' leave and to occasional long week-ends when he was able to go to his home in the Transkei.

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The respondent also testified that, as a result of the injury to his back, he could no longer run. In cross-examination he was asked how far he was able to run before he suffered his mishap, and he pointed out a distance of no more than 7 or 8 yards. Questioned about his inability to run, he complained of pain in his knees - saying, inter alia, "....it is difficult to bend my knees" - and there is little reason to doubt that his alleged inability to run is due to a condition unrelated to his back injury.

Speaking about the pain he suffers as a result of the injury to his back, the respondent said, that he feels pain "in the morning early" when he gets up, and also on "certain days" when it is "overcast" and "cold". With regard to pain experienced in the mornings, he said that he finds it "difficult" to "get out of bed", but that "later on I feel better again". Mr. Berkowitz said that he would describe the condition of the respondent's back

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in the morning as "discomfort and stiffness", which tended todisappear after a couple of hours. As to the respondent's evidence about feeling pain in cold and cloudy weather, Mr. Berkowitz said: "....his back-ache would appear to be definitely worse in inclement, cold, cloudy and rainy weather". During the summer months, he said, agreeing with a suggestion put to him by cross-examining counsel, the respondent would probably be "virtually asymptomatic" if he limited his activities to his "light work". He also said that in a "nice, warm month", like February, the respondent may well be "pain-free".

On the question of alleviation of the respondent's symptoms, Mr. Berkowitz says the following in his report: "This man may benefit from further physiotherapy and possibly manipulation of the spine. He would probably benefit considerably from simple analgesic medication". Dealing, in his evidence, with the question of analgesic medication,

Mr...../16

Mr. Berkowitz stated that such medication would, in future, be needed "intermittently". Simple analgesics (i.e., apparently, aspirin, disprin, and drugs of that nature), he said, would be sufficient to control the respondent's symptoms "at his present level of activity". One such pill, hestated, would be sufficient to relieve the stiffness and discomfort which the respondent experiences in the morning. In inclement weather, however, the respondent may find it necessary to use more than one such pill per day, and, perhaps, also "more potent drugs".

Expanding on his view that the respondent might "benefit from further physiotherapy and possibly manipulation of the spine", Mr. Berkowitz stated that if such treatment were given, he "would certainly anticipate a systematic improvement". The respondent, he said, "would feel better after physiotherapy", and "could have avoided some of the symptoms.... he had in the last two years by undergoing

treatment..../17

treatment". With regard to manipulation of the spine, Mr. Berkowitz stated that, because the respondent "has retained movement of his back", he would not need such treatment for 3 or 4 years; after that time, he said, he would probably benefit by manipulation.

I turn now to the question of ~~further~~ future loss of earnings, on which the following is said in the judgment of the Court a quo:

> "There is one other aspect which I should mention and that is the possible loss of future earnings. On his own showing this cannot be very great because he says that he will go into retirement in possibly four or five years' time. He is in steady employment. I must, however, take into account the contingency of his losing his present position for some reason or other, and the fact that he will then find it difficult with his disabilities to find employment in the labour market in this city.
>
> Evidence was given which I need not review in detail, of the difficulty which

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> unemployed Bantu, even able-bodied, experience in East London. The Plaintiff in his present condition, on Mr. Berkowitz's evidence, would certainly have difficulty in procuring other employment. I take this factor into account too in assessing the globular sum which I intend awarding".

With regard to what is said in this extract from the judgment, I would point out the following:

(i) The respondent did not actually say that he intended retiring in 4 or 5 years' time. He was asked whether he would "like to spend about 5 or 6 years" in retirement, and his reply was: "My wish is allt the last years I should spend there at my home". The learned Judge then asked him: "When are you thinking of retiring? Or haven't you thought about it?", whereupon he replied: "Any time". Counsel then asked him: "Would you like to do so as soon as you can?", and his answer was: "No". I do not quite understand

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what the respondent intended to say, save that it seems reasonably clear from his last answer that he did not contemplate retiring immediately. I get the impression that he intended to convey that he would retire when he felt like doing so, but that it would not be in the too distant future. In the circumstances it would perhaps be reasonable to suppose that he considered retiring in about 4 or 5 years' time - the period the learned Judge thought he had mentioned.

(ii) As I pointed out above, the evidence seems to show that the respondent took up employment with the Netherlands Bank in about October 1967, and that he was, therefore, in his fifth year with the Bank at the time of the trial, and not in his third year, as he testified. If he was indeed in his third year with the Bank, it would mean that he must have been in other employment for a year or more after he left Consolidated Textile Mills and before he went to the Bank.

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He never mentioned having been employed by anyone save the Bank after he left Consolidated Textile Mills, and in all the circumstances it would seem that, at the time of the trial, he had been employed by the Bank for a period of more than 4 years. He himself testified, as I have said, that his work was "light" and that it did not bring on any of his symptoms. There is, also, nothing on record which suggests that his employeers are not satisfied with his services, and in all the circumstances there is, I think, no reason to suppose that his employment is in any way insecure. If he should, for some reason, nevertheless lose that employment, he may well, as the learned Judge held, find it difficult to obtain other employment, but, on the other hand, such as eventuality may prompt him to retire, which he contemplates doing in any event.

(iii) There is nothing on record as to the respondent's earnings

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at the Bank. It may be inferred, however, that he has been earning not less than he earned at Consolidated Textile Mills, for otherwise he would, in all probability, have submitted a claim for loss suffered by him during the period of his employment at the Bank.

The learned Judge, as will appear from the above-quoted extract from his judgment, held that the responent's possible loss of earnings "cannot be very great", but there is, of course, no way of knowing what amount he had in mind when assessing his globular award. Mr. Browde, who appeared for the appellant, did not contend that the Court a quo should not have made an award in respect of future loss of earnings. He submitted, however that the learned Judge could not have had in mind a figure much in excess of R500, whereas Mr. Smalberger, who appeared for the respondent, argued that one could not speculate as to the amount the learned Judge had in mind. It is, as I have said, not

possible...../22

possible to know what amount the learned Judge had in mind, but it is nevertheless relevant to consider, in an appeal against a globular award as we have in this case, what amount it would be reasonable to allow for an item like loss of earnings, which is readily separable from items like pain and suffering, and loss of amenities. When I consider all that has been said above which has a bearing on this aspect of the case, I come to the conclusion that there would be no warrant for allowing an amount in excess of R500 in respect of future loss of earnings.

I said earlier on in this judgment that it would seem to be fairly clear that the learned Judge had in mind an award of R370 when considering the respondent's claim (which was for R320, according to the Particulars of Claim) for future medical expenses. If this is correct, it follows that the Court a quo awarded R4 700 in respect of (a) general damages for pain and suffering and loss of amenities, and (b) future loss of earnings, and the question

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which arises is whether this Court should interfere with with that award.

The circumstances in which a Court of appeal will interfere with an award of damages made by a trial Court are well known, and it will be sufficient if I refer merely to what was said in Parity Insurance Co. Ltd., v. Van den Bergh 1966 (4) S.A. 463 (A.), at p. 478/9:

> "The assessment of damage in cases such as this is notoriously beset with difficulty. It is well settled that the trial Judge has a large discretion to award what under the circumstances he considers right (Legal Insurance Co. Ltd. v. Botes 1963 (1) S.A. 608 (A.D.) at p. 614); and, further, that this Court will only interfere if there is a 'substantial" variation between what the trial Court awards and what this Court considers ought to have been award/(Sigournay v. Gillbanks, 1906 (2) S.A. 552 (A.D.) at p. 556), or if it considers that no sound basis exists for the award made as, for example,

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'where there is some unusual degree of certainty in its mind that the estimate of the trial Court is wrong' Sandler v. Wholesale Coal Suppliers Limited, 1941 A.D. 194 at p. 200".

It is not suggested by the appellant that the trial Court misdirected itself in any way, and the only question is whether its award is so high that it ought to be reduced by this Court. Mr. Smalberger conceded that the award was "on the high side", but he contended that a reduction thereof would nevertheless not be justified. I said earlier on that I would not have awarded the respondent more than R500 in respect of future loss of earnings. On this view, and on the assumption that the trial Court considered R370 to be a proper amount to award for future medical expenses, the question which remains for decision is whether an award of R4 200 (i.e., R5 070 less R370 and R500) for pain and suffering and loss of amenities is so high that it ought to be reduced. I have reviewed the evidence relating

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to the respondent's injuries and their after-effects, and also the evidence concerning the possible alleviation of pain and discomfort experienced by him, and I do not propose to discuss any details thereof. I have carefully considered all the evidence, and while I am fully conscious of the fact that the Court does not readily interfere with an award which a trial Judge has made in the exercise of the discretion which he has in matters of this kind, I find that I cannot persuade myself that I would have awarded the respondent an amount in excess of R3 000 as compensation for pain and suffering and loss of amenities. I would add, however - in view of Mr. Berkowitz's evidence that the cost of drugs and medical treatment will probably keep on increasing, and that manipulation of the respondent's back is something that lies in the future - that I consider that it would be fair to allow an amount of R500 for future medical expenses instead of the R370 which has been discussed above.

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It follows from all this that I would award respondent the sum of R4 042-68 (made up as follows: pain and suffering and loss of amenities, R3 000; future medical expenses, £500; future loss of earnings, R500; actual loss of earnings, R137-63; less the sum of R94-95). R4 042-68 is substantially less than the trial Court's award of R5 112-68, which accordingly falls to be reduced to the sum of R4 042-68.

In the result the following order is made:

1. The appeal is upheld with costs.

2. Paragraph (1) of the order of the Court a quo is altered by substituting for the amount of R5 112-68 the amount of R4 042-68.

P.J. RABIE
JUDGE OF APPEAL

van Blerk AR.
Botha AR.
Potgieter AR.
Jansen AR.