Case no: 390/95

In the matter between:

JOHN PHIKI SIBANYONI Appellant

and

MUTUAL & FEDERAL INSURANCE

COMPANY LIMITED Respondent

Coram: Mahomed CJ, Van Heerden DCJ, Vivier, F H Grosskopf et Harms JJA

Heard: 9 September 1997 Delivered: 14

November 1997

J U D G M E N T

F H GROSSKOPF JA:

On 19 June 1990 the appellant was a passenger in a taxi which collided with another vehicle at an intersection in Johannesburg. The appellant, who was 53 years old at the time, suffered certain bodily injuries as a result of the collision. He claimed damages from the respondent which was the appointed agent within the meaning of the provisions of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. The respondent conceded liability, but disputed the quantum of damages claimed by the appellant.

It is common cause that the appellant sustained a head injury in the collision. The main point in dispute was whether such head injury caused the disabilities which eventually led to the appellant being medically boarded in April 1992 by his employer, Sasol Oil ("Sasol"). The respondent does not dispute that the appellant also suffered certain other bodily injuries as a result of the collision, namely a dislocated left shoulder, compound fractures of the fourth and fifth metacarpals of the

left hand, as well as minor abrasions.

The collision occurred at approximately 18:30 and it would appear that the appellant only regained consciousness at about 20:00 in the Hillbrow Hospital. He was admitted for neurological observation and treatment of the other conditions. The appellant was discharged the following morning. He subsequently received treatment as an outpatient for the fractured metacarpals.

The matter was heard by BHeden J in the Witwatersrand Local Division.

Dr Zwonnikoff is a specialist neurosurgeon who testified for the appellant. He examined the appellant in November 1991 and found that he had a residual left-sided hemiparesis or weakness as a result of the head injury sustained in the collision. He examined the appellant again in September 1992 and concluded that the head injury was the most likely cause of the appellant's subsequent disabilities, which included one or more epileptic seizures during early October 1991.

Dr Du Plessis is a specialist neurologist who examined the appellant in August 1993 at the request of the respondent. Dr Du Plessis testified for the respondent at the trial. He was of the view that the appellant had probably suffered one or more strokes as a result of his pre-existing hypertension, and that the hypertension was the real cause of the appellant's problems. He agreed with Dr Zwonnikoff that the appellant probably suffered an epileptic seizure in October 1991 but said that it was not uncommon for a patient to have a seizure as the first sign of a stroke. He further concluded that at the time of his examination in August 1993 there was no evidence of a neurophysical abnormality.

Three other medical practitioners testified at the trial. Dr Grobler, who was the medical adviser to Sasol, agreed with Dr Zwonnikoffs conclusion of a left-sided hemiparesis. Dr Botha testified to an incident described as a mild stroke suffered by the appellant in 1985. The third medical practitioner was Dr Keikelame who gave evidence for the

other beverages to the senior managers of Sasol. Duursema and three other Sasol staff members told the court a quo that the appellant's work performance had deteriorated after the collision.

Having considered all the evidence the learned trial judge concluded that it was not possible for him to decide on a balance of probabilities which of the medical theories regarding the aetiology of the appellant's condition was the correct one. The court a quo further found that the appellant was not an honest witness, that Duursema's evidence was largely of a hearsay nature, and that the evidence of the three staff members at best was equivocal. The court a quo accordingly found that the appellant failed to prove that the disabilities which led to his early retirement had been caused by his head injury. This decision affected the extent of the appellant's claim for general damages and brought about the dismissal of his claim for future loss of earnings.

Judgment was granted in favour of the appellant in the sum of R3 097,00 (R3 000,00 in respect of general damages and R97,00 for the

agreed hospital fee) together with costs on the relevant magistrates' court scale. The parties were given ten days to make representations with regard to the costs order. It does not appear from the record that any such representations were made.

Leave to appeal to this court was granted by the court a quo.

The appellant started working for Sasol in February 1969. For many years he was responsible for making tea and serving it to the senior managers on the fourth floor at Sasol's head office in Rosebank. He also served tea at board meetings held in the boardroom on the fourth floor. He knew what each manager preferred to drink and when he had to serve it. The appellant was illiterate and therefore had to rely entirely on his memory in order to perform these duties properly. Duursema described the appellant as a "very -very reliable and diligent" worker who had no problem with his memory before the collision in June 1990.

It is common cause that the appellant suffered from chronic and

sometimes uncontrolled hypertension for some time prior to the collision.

There is evidence of an incident which occurred on 5 November 1985 for which the appellant received treatment at the Natalspruit Hospital. Dr Botha testified that when he examined the appellant on 18 November 1985 somebody (probably the appellant himself) told him that he had suffered a mild stroke. By that time the symptoms had cleared up, but the appellant was found to be hypertensive and he prescribed treatment for that condition. The record shows that during the period before the collision the appellant often suffered from hypertension and then usually stayed away from work for one or more days on the strength of a medical certificate. One should, however, distinguish between his absenteeism on the one hand and his fitness and ability to work on the other. There is no evidence to show that his hypertensive condition affected his performance or quality of work prior to the collision.

When comparing the appellant's work performance before and after the collision it can be accepted that prior to the collision he was a

competent worker who carried out his task to the satisfaction of his employer. This conclusion is borne out by the evidence of Duursema and that of Mrs Cornelius, a secretary who joined Sasol in 1982. The appellant often assisted her in serving tea at board meetings. Mrs Cornelius described the appellant as '"n puik werker en goeie werker" . She got to know him well and always found him to be friendly, polite and helpful. He told her that he was hypertensive but according to her this caused no problem as far as the quality of his work was concerned. Her evidence regarding the appellant's work performance prior to the collision was supported by the testimony of Mrs Taedi and Mr Mabuyangwe, two other co-employees of the appellant.

The appellant was involved in the collision on 19 June 1990 but he only returned to work on 8 August 1990. He consulted Dr Keikelame on three occasions during this interim period of seven weeks before he returned to work. It was Dr Keikelame's practice to record briefly what happened at each consultation and his notes form part of the

documentary evidence. The appellant's blood pressure was high when he consulted Dr Keikelame for the first time on 25 June 1990, six days after the collision. He was treated for hypertension and his blood pressure was normal when he was subsequently examined by Dr Keikelame on 28 June and 13 July 1990. Dr Keikelame accordingly

concluded that it was easy to control the appellant's blood pressure.

There is in any event no evidence to suggest that the appellant suffered a stroke or any other trauma unrelated to the collision during this interim period.

It is important to determine whether the appellant could effectively deal with the work situation after his return on 8 August 1990. Duursema testified that during the second serving of tea on the very first morning the appellant had to be relieved of his task because he was unable to cope with the work. Duursema received numerous complaints in connection with the appellant's poor performance that morning, and it is accordingly uncertain to what extent Duursema relied on hearsay.

He testified that the appellant's memory had failed him and that he was continuously making mistakes in serving the tea. Duursema further testified that the appellant complained that he had difficulty in carrying the tea trays because his arm was not strong enough. He was spilling tea over people and some of them even thought he was intoxicated. This too may be hearsay. What is clear however is that Duursema personally spoke to the appellant who complained that he was not feeling well since the accident and that his arm was not strong. It is highly unlikely that Duursema would not at the same time have discussed the appellant's poor performance with him.

Duursema came to the conclusion, be it partly on hearsay, that the appellant was not capable of serving the tea properly and he arranged for the appellant to go down to the second floor where the work was less demanding. Duursema must have regarded the appellant's performance that morning in a very serious light in order to have taken such drastic action against an otherwise competent old employee. The appellant's

task on the second floor was to fill the large water bottles and the vending machine with water and to put the powders of the various beverages into the vending machine.

Duursema intended to give the appellant time to recover, but his condition did not improve. The position actually got worse, but Duursema was unaware of it. It subsequently transpired that the appellant sometimes forgot to fill the vending machine and that he was incapable of lifting heavy objects such as the large water bottles. It was only in September 1991 at a disciplinary hearing that it came to light that the appellant's co-employees had in fact been covering for him all the time. That would explain why management was unaware of the appellant's inadequate performance and why he was employed for such a long time after the collision.

Certain aspects of Duursema's evidence are unsatisfactory and call for adverse comment. There is, for instance, the merit appraisal form of 27 April 1991 in which Duursema assessed the appellant's work

performance as "normal". The following comment appears in this form:

> "Mnr Sibanyoni se deeglikheid om take uit te voer asook sy positiewe houding laat hom in alle sleutel prestasie areas volgens vereiste presteer."

Duursema's explanation was that this report was correct, considering what had happened to the appellant, and based on his previous work record. Duursema did eventually concede that the report was not a true reflection of the appellant's ability or capability at the time.

The court a quo did not find Duursema to be a dishonest or unreliable witness and I have no reason to come to a different conclusion. The court a quo did, however, consider his evidence to be "largely of a hearsay nature". Duursema's evidence regarding the appellant's performance prior to the collision is clearly based on his own knowledge and observations. In describing the appellant's poor performance on his return to work after the collision Duursema did not

rely only on the complaints of others, but also on his personal observations, his knowledge of the appellant and his discussion with the appellant that morning. As far as Duursema was concerned

> "it was two different Johns. Prior to the accident very very little if any interference and/or supervision necessary. Subsequent to that completely unreliable."

Duursema's evidence that the appellant was not capable of performing his task as tea server when he returned to work after the collision was corroborated by Mrs Cornelius. As will appear from the evidence of Mrs Taedi and Mr Mabuyangwe they also concluded that the appellant was a changed person after the collision.

Counsel for the respondent submitted that the appellant's absence after the collision for seven weeks caused him to forget how to serve tea to the managers. I have difficulty in accepting that argument, particularly in view of Duursema's evidence that the appellant's memory

had never failed him before. I further cannot agree with counsel's submission that the appellant's physical inability to cope with the work on the fourth and later on the second floor can simply be attributed to his orthopaedic constraints after the accident. There is no evidence to justify the submission. The evidence in fact shows that the left-sided weakness got worse instead of better after his return to work.

I agree with the learned trial judge that no reliance can be placed on the appellant's testimony, but I respectfully disagree with his conclusion that the three co-employees "[did] not take the matter much further as their evidence at best [was] equivocal" and, with the possible exception of Mabuyangwe, "[did] not go anywhere to show that the [appellant] was a different person after the accident to what he was before".

When considering the evidence of the appellant's three co-

employees it should be borne in mind that they were lay witnesses who described the appellant's physical and mental condition and his work performance in lay terms.

I have already referred to the evidence of Mrs Cornelius insofar as it relates to the appellant's performance at work before he was involved in the collision. She gave the following further evidence regarding the difference in his performance after the collision as she observed it:

> "Na die ongeluk was daar definitief 'n verandering in John te bespeur.....
> Ek het opgemerk ... sy reaksies is baie stadiger en hy het gou moeg geword en heelwat gesit. Dit was nie vir my aanvaarbaar nie, veral nie in my werk nie."

In response to a question by the learned trial judge as to whether she had noticed any change she replied:

> "Ek dink in die verandering wat daar plaasgevind het na die

ongeluk was hy nie meer geskik vir die pos wat hy op die vierde vloer beklee het nie.
Nou hoekom se u so? — Omdat sy reaksies stadiger was en ons het spoed nodig daar waar ons werk. En ek dink net sy gesondheid het dit nie meer toegelaat nie."

Mrs Taedi was another staff member who used to work with the appellant at Sasol's head office. The appellant was the person who had taught her how to make and serve tea, and she regarded him to be "very good at his work". After he had been involved in the collision, and while he was still recuperating, she served tea to the managers on the fourth floor. On the day of the appellant's return she was asked to take over from him once again because he could not cope with the work.

The appellant was taken to the second floor to attend to the vending machine. When she saw him some time thereafter on the second floor he complained to her about his inability to lift the bucket in order to pour water into the coffee machine, and to pick up the big water bottles

to put them onto the stands.

Mabuyangwe, who was a clerk in Sasol's administrative department, knew the appellant well. He regarded the appellant as a competent worker before the accident. When asked to comment upon the appellant's performance and health after the accident Mabuyangwe responded as follows:

> "After the accident I saw John as a changed man. He did not perform like he used to perform before the accident. That is, if I may elaborate, he was slower and then he was weak again, so he could not really perform exactly the same way as he used to perform before the accident....
> In what way had he changed? — He was weak and slow. That is he did not perform his duties as before.
> Court: And was there any consequence, was there any result in that? — Yes, the results were that John was changed from his main job and given a lighter job but still he could not perform very well because he had to carry heavy stuff, that is water. Putting water in the coffee machines, because water is heavy he could not do it so someone was helping him."

Mabuyangwe's evidence was not challenged at all.

The evidence of the appellant's three co-employees shows that he was much slower after the accident than before, and always tired. He also displayed a distinct physical weakness after the accident. This weakness manifested itself not only on the day when he returned to work, but also subsequently when he was incapable of lifting heavy objects while working on the second floor.

The testimony of the appellant's wife provided further proof of his physical weakness and loss of memory after the accident. She described the appellant as a different person after the accident and said that he often complained about his health. One of the complaints which she specifically mentioned was that "his left-hand side [got] tired". She also said that his main complaint was that "his one side [was] not working". She further testified that whereas his memory had been good before the accident it failed him thereafter. To illustrate how poor his memory had

become she referred, to instances where he had attended township meetings but where he had forgotten what had been discussed or resolved at the meeting by the time he got home.

The appellant actually started complaining about weakness fairly soon after the accident. Dr Keikelame recorded complaints of weakness when the appellant consulted him on 22 September 1990 and again on 28 October 1990. According to Dr Keikelame he initially thought that there might be an element of hypochondria as far as the appellant's complaints of weakness were concerned, seeing that the appellant had been injured in the collision on the left side of his body. When he became aware in January 1992 that the appellant was definitely weak on the left side he realised that the appellant's earlier complaints of weakness might have been genuine all along, and that he might have misunderstood the appellant and therefore omitted to make notes of his

complaints of weakness at the time.

Dr Keikelame treated the appellant for hypertension. He usually recorded the appellant's blood pressure readings when he examined him and it is of some significance that those readings were as a rule within normal limits. The appellant consulted Dr Keikelame fairly regularly over the period June 1990 to January 1994 but Dr Keikelame's medical examinations of the appellant at no stage revealed any evidence of a stroke, notwithstanding the appellant's allegation in January 1992 that he was told (probably by somebody at work) "that he had a stroke".

The appellant's wife accompanied him to Dr Keikelame on 2 October 1991 and she then described an episode which indicated to Dr Keikelame that the appellant must have had an epileptic seizure the night before. When her description of the episode was later recounted to Dr Zwonnikoff he agreed that the appellant had suffered an epileptic

seizure. The appellant and his wife went to see Dr Keikelame again on 4 October 1991 and it then transpired that the appellant had probably suffered another epileptic fit since 2 October 1991. The appellant's blood pressure readings were nevertheless within normal limits on 30 September and again on 4 October 1991, ie immediately before and after the two suspected seizures.

Dr Keikelame did not record any complaints by the appellant on 2 and 4 October 1991 of a left-sided weakness as a result of the seizures, yet when Dr Grobler and Dr Zwonnikoff examined the appellant shortly thereafter they both found him to suffer from a left-sided hemiparesis. The fact that no complaints of weakness were recorded therefore does not necessarily mean that the appellant did not complain or did not have reason to complain of weakness.

The appellant went back to work for a short spell in October 1991.

He was again booked off work by Dr Keikelame from 22 October 1991 to January 1992, but he never resumed working again until he was finally boarded on 1 April 1992.

Dr Grobler gave evidence for the appellant. He was the medical adviser to Sasol at the time when he examined the appellant in October 1991 at the instance of Mrs Goedhals of Sasol's personnel services. In her letter dated 16 October 1991 to Dr Grobler Mrs Goedhals made no reference to the appellant's physical inability to perform his duties properly. She did however mention that he was suffering from high blood pressure. The problem, according to her letter, was that the appellant stayed away from work. She explained the situation as follows in her letter:

> "Die probleem egter is dat John die afgelope 2-3 jaar net van die werk af weg bly en altyd met 'n siekte sertifikaat later weer opdaag. Dit blyk ook altyd te wees net nadat daar 'n bietjie druk

> op hom geplaas is by die werk. Op Vrydag 27 Sept. was daar 'n dissiplinêre verhoor teen Hom a.g.v. ongemagtigde afwesigheid (sy vrou was siek) vir 4 dae. Daarna was hy nog nie weer terug by die werk nie - net aangehegte siekte sertifikaat gestuur."

Counsel for the respondent submitted that the problem as stated by Mrs Goedhals was unrelated to the appellant's performance in the workplace. He further pointed out that her letter to Dr Grobler made no mention of the appellant's alleged poor memory or physical inability to perform his duties properly. Mrs Goedhals did not testify at the trial and counsel for the respondent submitted that an adverse inference should be drawn against the appellant for not calling her as a witness. Duursama testified that he actually discussed the appellant's work performance with Mrs Goedhals at the time and he could not explain why she had omitted to mention it in her letter to Dr Grobler. It is indeed strange that Mrs Goedhals's letter made no reference to the

appellant's poor working performance, but I do not accept, as was suggested by counsel for the respondent, that the real reason for her failure to mention it was because Duursema never told her of the appellant's poor working performance simply because it was not true. Counsel's argument loses much of its force when regard is had to the contents of a subsequent letter which Mrs Goedhals wrote to Dr Grobler on 22 January 1992. That letter made the followings specific reference to Duursema's view that the appellant was incapable of doing the work:

> "Aangeheg 'n verslag en sertifikaat van dr. Keikelame wat daarop dui dat Sibanyoni nie medies ongeskik is vir sy pos as teebediener nie. Lynbestuur [ie Duursema] voel egter die teendeel - se die werknemer kan nie skinkborde met tee dra of die waterhouer hanteer nie."

It should further be borne in mind that there are a number of credible and reliable witnesses who support Duursema with regard to the appellant's poor working performance after the accident.

Mrs Goedhals informed Dr Grobler of the appellant's hypertension while the appellant himself told Dr Grobler of his head injury. Dr Grobler's examination of the appellant showed a left-sided hemiparesis. Although he was aware of the appellant's hypertension and his head injury he could not determine the exact cause of the appellant's hemiparesis and he accordingly referred the appellant to Dr Zwonnikoff for further examination. At the same time he advised Dr Zwonnikoff of the appellant's history of hypertension as well as his head injury.

Dr Zwonnikoff examined the appellant in November 1991 and confirmed Dr Grobler's diagnosis of a left-sided hemiparesis. He also found a mild but definite intellectual deficiency. It appears from Dr Zwonnikoff's report that the appellant himself told him that he "had a degree of weakness of the left side" since the time of the collision. Dr Zwonnikoff testified that the appellant told him "that his problem

stemmed from the accident". He concluded that the appellant had a residual left-sided hemiparesis, involving primarily the left leg, as a result of the head injury he had sustained in the collision on 19 June 1990. He thought the appellant would be fit only for employment in an environment which did not require anything more than basic intellectual and motor skills.

Reference has been made to the letter which Mrs Goedhals wrote to Dr Grobler on 22 January 1992. Annexed to that letter was Dr Keikelame's confidential medical report on the appellant in which he expressed the view that the appellant was not totally disabled from following his occupation. It appears from the letter, as pointed out above, that Sasol's management did not share Dr Keikelame's view. Management (Duursema) maintained that the appellant was incapable of carrying a tray with tea or handling the water bottles. In her letter of 22

January 1992 Mrs Goedhals asked Dr Grobler for his recommendation in the light of the available medical information. Dr Grobler replied on 30 January 1992 and recommended that a disability pension be paid to the appellant. Such a disability pension was granted by Sasol and the appellant was medically boarded on 1 April 1992 at the instance of Duursema and on the medical advice of Dr Grobler and Dr Zwonnikoff.

Dr Grobler and Dr Zwonnikoff examined the appellant once again in September 1992 and they both found that the appellant was still suffering from a left-sided hemiparesis. According to Dr Zwonnikoff the appellant's condition had deteriorated since he last saw him in November 1991. Dr Zwonnikoff also reaffirmed that there was some intellectual impairment. Both he and Dr Grobler found the appellant to be totally and permanently unfit for any form of gainful employment when they examined him in September 1992.

The medical experts agreed that the appellant suffered at least one epileptic seizure during the beginning of October 1991, but the cause thereof remained in dispute. Dr Zwonnikoff was quite confident on medical grounds that the appellant's epilepsy arose as a result of the head injury, while he could find no evidence of a stroke which might have been the cause of the appellant's weakness. Dr Du Plessis on the other hand could not confirm that the appellant had suffered a stroke, but he was convinced that the appellant's hypertension, and not his head injury, was the real source of all his problems.

The respondent contended that there was documentary evidence forming part of the record which showed that the appellant suffered "a collapse" and a "syncopal episode" in May 1991. Dr Lengane certified that he examined the appellant on 6 May 1991. The nature of his illness was described as "hypertension - led to collapse". Dr Lengane referred

the appellant to Dr Amanjee, a specialist physician, who recorded that he treated the appellant on 8 May 1991 for "hypertension" and a "syncopal episode". Both doctors mentioned hypertension as a problem, but since neither of them testified at the trial it remained uncertain what the true nature of the appellant's "collapse" or "syncopal episode" had been. Dr Du Plessis regarded the so-called collapse and syncopal episode as symptoms which were compatible with hypertension, but he did not describe either of them as a stroke.

The appellant underwent two brain scans, an ordinary Cat-scan and a Magnetic Resonance Imaging or MRI-scan. There was no evidence according to Dr Zwonnikoff of any form of stroke in either of the two scans done on the appellant. He was of the view that if the appellant had suffered a stroke severe enough to cause weakness the incidence of a positive scan was in excess of 90% on an MRI-scan. Dr Du Plessis

agreed that if one postulated multiple strokes they would more likely have shown on a scan than a concussive injury.

The respondent relied on the evidence of Mrs Painter in support of its contention that the appellant's brain damage was focal and that his disabilities were therefore probably a consequence of a stroke or strokes. There was much debate as to whether the appellant's brain damage was focal (which would be more consistent with a stroke) rather than diffuse (which would be more consistent with trauma). Both Dr Du Plessis and Dr Zwonnikoff expressed the view that the appellant's brain damage was more diffuse. Mr Mallinson's evidence was to the same effect. Neither of the two neuropsychologists could however indicate with any measure of certainty whether the appellant's problems were the result of one or more strokes or a traumatic head injury. The court a quo accordingly

found it impossible to decide on a balance of probabilities which of the neuropsychologists's theories was the correct one. I have the same difficulty in deciding this aspect of the case on the probabilities.

Dr Du Plessis gave the following evidence in chief:

> "It must be borne in mind that a stroke can give you cognitive impairment just as much as a head injury can. So I have got no problem that there is cognitive and/or neurophysical problems that led to his laying off. My problem is that looking through the records that were made available to me it was my understanding of those records that the problem did not arise as a consequence of the head injury but as a consequence of the incident in October 1991."

The learned trial judge then pointed out to him that there was evidence from the appellant's fellow workers that when he came back to work after the collision he was not able to function as before, and Dr Du Plessis thereupon acknowledged that he was not aware of such evidence.

In the course of cross-examination Dr Du Plessis made the

following significant concession in this connection:

> "....if the weakness was there before this whole thing [the October 1991 incident] started and it was there after the accident, then obviously the weakness is related to the accident and I have never denied that if there……is evidence, that there is a weakness from the day of the accident, that that must then be the cause. But the information that was available to me did not indicate that...."

Dr Du Plessis further conceded that if there was reliable evidence of a real change in performance by the appellant after the collision

> "then one must accept that something else - that the head injury must have been more severe than anticipated initially."

I have indicated above that there was indeed credible and reliable evidence of Dr Keikelame, the appellant's wife, Mr Duursema and other lay witnesses to the effect that the appellant not only complained of weakness shortly after the accident, but also displayed actual weakness and loss of memory.

Dr Du Plessis did not dispute that there were disabilities. He

accepted that the appellant's cognitive functions were impaired and that there was evidence of weakness when the appellant was examined by Dr Zwonnikoff and Dr Grobler in October and November 1991 and by Dr Keikelame in January 1992. Dr Du Plessis also accepted that there were reasons for Dr Grobler to board the appellant. He made these concessions despite the fact that he was not able to find a weakness when he examined the appellant in August and November 1993.

The evidence of the appellant's weakness and his inability to cope with his work shortly after the collision no doubt lends support to his case that his disability was caused by the head injury sustained in the collision. The respondent's expert, Dr Du Plessis, in effect conceded that such evidence would show that the weakness was related to the accident. I therefore agree with counsel's submission on behalf of the appellant that the temporal coincidence between the collision on the one hand and

the onset of the appellant's inability to cope with his work on the other hand created an inescapable probability of cause and effect.

In view of the aforegoing I am of the opinion that the appellant succeeded in proving that the head injury which he sustained in the collision was the most likely cause of his disabilities. It follows that the appellant has proved that the consequences of the head injury were a left-sided hemiparesis, epileptic seizures and cognitive and intellectual impairment. As a result thereof the appellant was unable to continue with his work at Sasol and he was consequently medically boarded. These findings obviously affect the quantum of damages.

The appellant claimed that he suffered the following damages as a result of the injuries sustained in the collision:

Agreed hospital fee	97,00
Future medical expenses	20 000,00
Past loss of earnings	1 884,82

Estimated future loss of earnings	270 010,00
General damages	40 000,00

The hospital fee of R97,00 is an agreed fee. There was no evidence to substantiate any claim for future medical expenses.

The claim for past loss of earnings was for the period of seven weeks from the date of the collision until the appellant returned to work on 8 August 1990. He had in fact been paid his salary for that period by Sasol, but the argument was that he had exhausted his contractual entitlement in respect of sick leave and that the payment was at the discretion of Sasol and therefore gratuitous. It appears from a memorandum dated 13 August 1990 that the appellant received payment for this period because additional sick leave was granted to him. There is, however, no acceptable evidence to show that this was not a benefit arising from his contract of employment.

After quoting a passage from the judgment of Rumpff CJ at 920C-G in the case of Dippenaar v Shield Insurance Co Ltd 1979(2) SA 904(A), Van Heerden JA remarked as follows in Mutual & Federal Insurance Co Ltd v Swanepoel 1988(2) SA 1(A) at 10C-D:

> "In my view this passage relates to the case in which a plaintiff assesses his loss of earnings on the basis that, but for his injuries, he would have continued to earn income in terms of an existing contract of employment. In such a case benefits due under or arising from that very contract fall to be deducted from the loss of earnings."

In my view the appellant is accordingly not entitled to any compensation in respect of past loss of income.

The parties have reached agreement on the actuarial calculations and figures in respect of the appellant's claim for future loss of earning capacity. If the pension benefit which the appellant is receiving is not deducted the calculated figure of his loss amounts to R163 245,00. If

on the other hand the pension benefit is deducted the amount is R99 517,00.

Counsel for the appellant submitted that the pension benefit paid to the appellant was res inter alios acta and should therefore be ignored in the assessment of the appellant's future loss of earning capacity. The evidence was that Sasol established a pension fund for a certain class of its employees in 1980. These employees were given the choice of joining the pension fund or not. The appellant chose to join the pension fund and monthly pension deductions were thereafter made from his salary. Counsel submitted that the appellant's participation in the pension fund scheme was voluntary and that the pension benefit received by him was not a benefit arising from his contract of employment.

I do not agree with the appellant's submissions in this regard. In

my view it matters not that he voluntarily joined the pension fund scheme. Once he agreed to join the scheme he was in principle in the same position as a new employee who was obliged to join the scheme. There is no evidence to support counsel's contention that the appellant entered into a separate pension contract which had no connection with his contract of employment. When the appellant joined Sasol's pension fund scheme as an employee of Sasol he was obliged to contribute to the pension fund and became entitled to receive a pension on his retirement as an employee of Sasol. This pension benefit was a benefit which in my view flowed from the appellant's employment. It was certainly not a collateral benefit such as a payment prompted by benevolence or a benefit received in terms of an insurance contract where no deduction of the benefit would have been required. It was a benefit which arose from the very contract of employment upon which the appellant relied

for the quantification of his claim for future loss of earnings. In those circumstances his pension benefit must be deducted from the amount claimed for future loss of earning capacity (Dippenaar's case supra at 920B-H; Swanepoel's case supra at 9F-10D; Standard General Insurance Co Ltd v Dugmore NO 1997(1) SA 33(A) at 41C-43A).

Counsel for the appellant sought to rely on the case of Burger v President Versekeringsmaatskappy Bpk 1994(3) SA 68(T), but in my view the facts in that case differ in material respects from those in the present case. The plaintiff in that matter was obliged by her employer to become a member of a group life insurance scheme, but she personally had to pay the premiums under the policy. As a result of injuries sustained in a motor vehicle collision the plaintiff became totally and permanently unfit for employment and consequently received

payment of a substantial amount of money from the insurance company under her group life assurance policy. The court there held that the money had been paid to her in terms of the contract of insurance which she had concluded with the insurance company, and not in terms of her contract of employment. The court in that matter accordingly held that the insurance benefit need not be deducted from her claim for future loss of earnings.

Counsel for the appellant further sought to rely on Dugmore's case supra. That case, however, is also distinguishable on the facts. In Dugmore's case this court held that the defendant (appellant) had failed to prove that a benefit which had been received by the plaintiff under an insurance policy had been paid in terms of the very contract of employment on which the plaintiff relied for his claim for future loss of

earnings.

Counsel for the respondent on the other hand asked us to make a further contingency deduction when calculating the appellant's future loss of earning capacity. He argued that this was necessary in view of the fact that the appellant, even if he had not been involved in the collision, would probably have retired at the age of 60 as a result of his poor health generally. This issue was raised for the first time during argument in this court. The respondent had in any event admitted in exhibit F that the actuary's assessment of compensation contained the correct calculations and figures. That assessment showed that the actuary had already made allowance for certain contingency deductions, and that his calculations and figures had in fact been based on the assumption that the appellant would only have retired at the age of 65.

In view of these considerations I am of the opinion that the question of

further contingency deductions should not be considered at this late stage.

After making allowance for pension and contingency deductions the actuary's figure for future loss of earnings amounts to R99 517,00.

The respondent claimed a further deduction. Counsel for the respondent submitted that the lump sum benefit which the appellant had received under his bond insurance policy upon his early retirement should also be deducted from the claim for future loss of earnings. In my view such an insurance benefit would ordinarily be regarded as res inter alios acta and therefore not subject to deduction. However, in the present matter the parties agreed in April 1994 in what circumstances this insurance benefit would have to be deducted. Their agreement is recorded as follows in exhibit F:

"Should the Court find that there was a loss of earnings and that the Defendant is liable to compensate the Plaintiff therefor, but that the contributions in respect of bond insurance were compulsory, then the lump sum benefit received ie an amount of R19 573,00 shall be deducted from the figures in 3.1 and 3.2, whichever the Court finds payable." (My emphasis).

It is not at all clear what the parties intended when they referred to "compulsory contributions in respect of bond insurance". The evidence of Mrs Quinnell, a senior personnel officer in the employ of Sasol, was that while the appellant's bond was subsidized his bond insurance was not. The appellant as the insured was therefore obliged to pay the insurance premiums under his bond insurance policy. But one would hardly refer to those premiums as "compulsory contributions in respect of bond insurance". It seems more likely that the parties intended to refer to the "contributions" which the appellant was, vis-a-vis

Sasol, obliged to make to the insurer.

Mrs Quinnell was asked in cross-examination whether it was compulsory to have bond insurance, and she replied as follows:

> "I am not sure in John's case. In later years they have made it compulsory. If you want .... subsidy on your bond you have to have bond insurance .... If you can prove as an employee that you have bond insurance sufficient, through the building society, you do not have to take it out through Sasol..."

In view of the evidence of Mrs Quinnell it is doubtful whether the appellant had ever been obliged to obtain bond insurance. In my opinion there is accordingly insufficient evidence to justify the deduction of the bond insurance benefit from the appellant's future loss of earnings.

In my judgment the appellant should therefore be awarded the said sum of R99 517,00 in respect of his future loss of earning capacity.

The appellant claimed R40 000,00 as general damages. The court a quo awarded an amount of only R3 000,00 on the basis that there were

no sequelae to the head injury, and that the appellant had to be compensated only for the actual injuries suffered by him in the accident. It has now been decided that there were indeed serious consequences of the head injury, and that the appellant was a changed person both physically and mentally after the collision. There are therefore proper grounds for this court to interfere with the award of general damages made by the court a quo (AA Mutual Insurance Association Ltd v Maqula 1978(1) SA 805(A) at 809B-C; Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980(3) SA 105(A) at 115D-G).

There was medical evidence to the effect that the appellant's left-sided hemiparesis was no longer evident during examination in 1993, but the medical opinions were unanimous that at the time of the trial in 1994

the appellant's condition was such that he was not able to work.

We were referred to several cases reported in Corbett and Honey The Quantum of Damages vol IV, which afforded some guidance in determining the quantum of general damages in the present case. Each case must of course be determined in the light of its own particular facts and circumstances. The serious consequences of the appellant's head injury need not be repeated. In my judgment an award of R15 000,00 should be made in respect of general damages for pain and suffering, loss of amenities of life and disability.

There remains the question of costs. The appellant submitted that the respondent's conduct of its defence was vexatious and that there should accordingly be an order against the respondent for costs on the attorney and client scale. The appellant relied in this regard on the respondent's attack on the correctness of the appellant's medical boarding

and on the integrity and bona fides of Sasol's management and the medical practitioners who recommended the boarding. The respondent's attack may not have been justified, but the appellant is faced with the problem that he never raised the question of a special costs order in the court a quo, and the court a quo accordingly made no finding in that regard. In my view such a special costs order should not be considered at this stage.

The respondent submitted that even if the appellant should succeed in this matter he should be ordered to pay the costs that were incurred when the matter stood down for two days during the trial at the appellant's request. The respondent did raise the question of the wasted costs when the matter was postponed on that occasion in the court a quo. When the court a quo gave judgment for the appellant and

awarded him costs it made no order in respect of those wasted costs. The court a quo gave the parties ten days to make written representations if they were not satisfied with the costs order. The respondent made no such representations and furthermore omitted to lodge a notice of cross-appeal in respect of this costs issue. In these circumstances the question of the wasted costs cannot be considered.

I am of the opinion that this matter justified the employment of two counsel on appeal in view of all the technical aspects which had to be considered in the light of the expert medical evidence.

The following order is made:

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and the following order

is substituted therefor:

"1. Judgment is entered for the plaintiff in the sum of R114 614,00 made up as follows:

3.	Agreed hospital fee	97,00
4.	Future loss of earning capacity 99 517,00	
5.	General damages	15 000,00
		R114 614,00

2. The defendant is ordered to pay the plaintiffs costs."

F H Grosskopf Judge of Appeal

MAHOMED CJ)
VAN HEERDEN DCJ)
VIVIER JA)
HARMS JA) CONCUR