

**IN THE HIGH COURT OF SOUTH AFRICA**  
**BOPHUTHATSWANAPROVINCIAL DIVISION**

**CASE NO : 164/2001**

**In the matter between:-**

**JOSEPH MOGOROSI MENONG**

**PLAINTIFF**

**and**

**ROAD ACCIDENT FUND**

**DEFENDANT**

**MMABATHO**

**COUNSEL FOR PLAINTIFF : J F MULLINS SC**

**COUNSEL FOR DEFENDANT: J RAMAEPADI**

**DATE OF HEARING : 25 SEPTEMBER 2002**

**DATE OF JUDGMENT : 31 OCTOBER 2002**

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**J U D G M E N T**

**LEE U W J:**

1. The Plaintiff sued the Road Accident Fund (Defendant) for damages caused as a

result of injuries sustained in a collision which occurred on the 29 March 1996 between a certain Nissan Sentra motor vehicle registration numbers BCG 454 NW driven by one R I Motseoakhumo and the Plaintiff who was a pedestrian at Disaneng Road.

2.The Plaintiff was born on the 18<sup>th</sup> July 1979 and according to the Particulars of Claim, he sustained the following injuries as a result of the collision:

2.1.1 severe injury to his right lower leg;

2.1.2 injury on his mouth with upper four teeth being displaced and broken; and

2.1.3 laceration on the left temporal region.

2.2 As a result of the injuries sustained, he underwent the following treatment:

2.2.1 complete amputation of the lower leg;

2.2.2 skin graft done to the amputation stump; and

2.2.3 four upper teeth were extracted and oral treatment given.

3.The Defendant opposed the matter and after the close of pleadings, the matter was enrolled for hearing.

4.At the hearing of the matter, the following agreements between the parties were placed on record:

4.1 The Defendant conceded the merits and agreed and admitted liability to pay a hundred percent (100%) of the damages arising out of the injuries sustained by the Plaintiff in the collision of the 29 March 1996;

4.2 With regard to the claims for past hospital, medical and related expenses and general damages it was agreed as follows:

4.2.1 The claim for past hospital, medical and related expenditure was abandoned by the Plaintiff and is therefore agreed at nil;

4.2.2 The Defendant will furnish to the Plaintiff in respect of the Plaintiff's future hospital, medical and related expenditure an Undertaking in terms of the provisions of section 17 (4) of Act 56 of 1996 for the costs of the future accommodation of Plaintiff in hospital or nursing home for the treatment of or the rendering of a service or the supply of goods to the Plaintiff in respect of the injuries sustained by him in the collision of 29 March 1996;

4.2.3 General damages are agreed at R140, 000-00.

4.3 As far as the Plaintiff's loss of income and of earning capacity is concerned, the parties agreed that:

4.3.1 Had the collision not occurred, the parties compromised on scenario 2 (plateau at B1) as calculated by the actuary for the Defendant on p 4 of exhibit "B", to R1 029 863-00 before deduction for contingencies;

4.3.2 The parties agreed that a 20% contingency deduction is applicable to the uninjured scenario, reducing the aforesaid figure of R1 029 863-00 to R823 890-00;

4.3.3 The parties also agreed that the Plaintiff has been in receipt of a disability pension since January 2001, which pension will cease on the award being made, and that the value of that pension from January 2001 to the date of award is R12 420-00.

4.3.4 In the premises, the parties agreed on an uninjured income for the Plaintiff; i.e the value of the Plaintiff's income in the absence of the collision and after deduction of contingencies and of the disability pension which the Plaintiff has received, of R811 470-00 (R1 029 863-00 less 20% contingencies = R823 890-00 less disability pension of R12 420-00 = R811 470-00).

4.3.5 The parties also agreed that if Plaintiff is able to earn R1 500-00 per month with inflationary annual increases until age 65 out of repairing shoes, then the value of that income before contingencies is the R389 080-00 reflected under the heading "injured" on p 4 of exhibit "B".

5. The parties have agreed to base the Plaintiff's claim for loss of earning capacity on calculations by an actuary who calculated loss of earnings as the difference between the present value of the assumed future income which Plaintiff would have earned but for his disability and the present value of the Plaintiff's estimated future income having regard to his disability.

5.1 The figure arrived at in respect of the pre-morbid scenario, was adjusted in the light of all the relevant factors and contingencies as it appears in paragraphs 4.3.1 to 4.3.4 supra. (Total of R811 470-00).

5.2 The only issue which I am called upon to decide and which is in dispute is the extent of the value in percentage, of the contingency amount to be deducted from the post-morbid figure of R389 080-00 reflected in paragraph 4.3.5 supra.

5.3 The Plaintiff contends that in the light of the evidence of the Plaintiff and of Steyn and the agreed contents of the medico-legal reports, a Seventy Five Percent (75%) post-morbid contingency deduction would result in a fair reflection of the Plaintiff's injured earning capacity. That is reducing the figure R389 080-00 to R97 270-00 which would be deducted from the agreed uninjured earning capacity of R811 470-00 and which will result in a loss of income and of earning capacity figure of R714 200-00;

5.4 The Defendant contends that on the evidence led and the experts' reports, a 15% post-morbid contingency deduction would result in a fair reflection of the Plaintiff's injured earning capacity, which would reduce the figure of R389 080-00 to R330 718-00. Deducting that from the agreed uninjured earning capacity of R811 470-00 would result in a figure in respect of loss of income and of earning capacity of R480 752-00.

6. Mr Henk Steyn, who is a Psychologist and whose report was handed in as exhibit "A" by consent testified that the purpose of his examination on the Plaintiff was to assess, Plaintiff's:

- (i) career potential, abilities and interests;
- (ii) employability and
- (iii) earning potential and capacity

and that these potential and future career prospects were evaluated with regard to his pre-morbid and post-morbid factors.

6.2 With regard to the Plaintiff's post-morbid assessment, he stated that he relied on the report of the Clinical Psychologist Ms Gladys Maluleke, whose report formed part of the Medico-Legal-Reports handed in as exhibit "A". He referred, in his report to some of the recommendations contained in her report on p 13 that:

"Mr Menongs's career choices have been reduced largely due to his amputation. As an amputee, he is confined to sedentary work. His ability to function in the labour market, depends entirely on the academic qualification he will reach. If he does not acquire vocational or skills training, it will be difficult for him to market himself in the open labour market."

6.3 Mr Henk Steyn supports these findings and the recommendations of Ms Gladys Maluleke and states further in his report and in his evidence in court that, having interviewed the Plaintiff, he came to the conclusion that Plaintiff's aspirations were to repair shoes either as an individual entrepreneur or joining a shoe factory as an employee but that skills training would be essential.

6.4 He further stated that the Plaintiff and his father were of the view that if Plaintiff was to be trained as a "Shoemaker" and consequently practised as a private entrepreneur, he would be able to generate a basic salary of R1 500-00 per month;

6.5 That he made his own research with regard to this aspect,

and that although he did not gain enough relevant statistical information regarding the earning capacity of persons in this trade, from the limited information he gathered from entrepreneurs who have been adequately trained by institutions like RUTEC, MODE OPTIMA etc., it is possible to generate an average net income of R1 000-00 to R1 500-00 per month, and that this would pertain to a most successful entrepreneur.

7.Plaintiff testified that:

7.1 He went to formal school up to Standard 6 and he failed to pass Standard 7.

7.2 He embarked on a shoe repairing business from the year 1996 after the accident. This is a self-acquired skill which he learnt whilst recuperating at the Bophelong Hospital. He bought tools of trade and established his business at Disaneng Village, which is a rural village forty (40) kilometres from Mmabatho, which is the nearest town.

8.Mr Mullins on behalf of the Plaintiff submitted that it would not be correct to assume that the Plaintiff would generate a nett income of R1 500-00 taking his educational background and the area wherein he resides into consideration; that it can only be inferred from his circumstances that his average monthly income from the shoe repairing business can be estimated at R250-00 and therefore a 75% post-morbid contingency reduction would be a fair reflection of Plaintiff's injured earning capacity.

8.1 To the contrary Mr Ramaepadi submits that a 15% post-morbid contingency reduction would be reasonable and that it is possible for the Plaintiff to make an income of R1 500-00 per month from his business, having regard to the reports

of the actuary, Mr R J Koch and Mr Henk Steyn.

- 8.2 Mr Henk Steyn has testified that the amount of R1 500-00 for an entrepreneur in a trade of this nature may be earned by a successful entrepreneur who has been adequately trained in this field.
- 8.3 Ms Gladys Maluleka, states the following under prognosis: “Mr Menong’s learning ability cannot be optimal for as long as he continues to experience stress and mental preoccupations. His poor progress is justified under the circumstances.”
- 8.4 Mr Henk Steyn expressed reservation with regard to the ability of the Plaintiff to earn an income of R1 500-00 per month from his business unless he has been adequately trained to have the necessary business skills to run such a business.
- 8.5 I must here pause to state that under cross-examination of the Plaintiff, the extent of the various expenses incurred by him in the conduct of his business was canvassed and the details did not demonstrate that the Plaintiff’s estimate of his monthly expenses was reliable. It would be conservative to accept an estimate income of R1 500-00 per month especially taking the uncertainties surrounding the Plaintiff’s working life as a shoe repairer in our country presently beset with economic problems. It would be wrong, I think, to set a lower percentage for prospective loss of earning, as was submitted by Mr Ramaepadi.
- 8.6 On the other hand, a 75% contingency reduction, which puts the claimant’s income at approximately R250-00 per month does not seem to be a fair reflection of the Plaintiff’s income, especially taking into account that he was involved in this business from 1996 to date. It is improbable that he would continue with a business which is declining for such a lengthy period.



8.7 Taking into account the fact that Plaintiff is not marketable or employable in the labour market and also taking into account the fact that his income is just enough to make a living, the application of a contingency factor of 50% seems reasonable under the circumstances.

8.8 For the above reasons I believe that the Plaintiff is entitled to a loss of future income-earning capacity in the amount of R616 930-00 made up as follows:

Agreed uninjured earning capacity :	R811 470-00
50% post-morbid contingency	
deduction from R389 080-00 :	<u>194 540-00</u>
Total	<u>R616 930-00</u>

Added to this amount is the agreed general damages of R140 000-00 which makes it a total of R756 930-00.

9.I accordingly make the following order:

- (a) Defendant is ordered to pay Plaintiff the sum of R756 930-00;
- (b) The Defendant is ordered to pay interest on the above amount at the rate of 14.5% per annum 14 days after the date of judgment to the date of payment;
- (c) Defendant shall provide Plaintiff with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 in respect of Plaintiff's Claim for future accommodation in a hospital or nursing home, or for the treatment of or rendering of a service or supplying of goods to Plaintiff after the costs have been incurred and on proof

thereof, in respect of injuries sustained by him in the collision of 29 March 1996.

- (d) Defendant shall pay costs of suit herein such costs shall include the costs of Senior Counsel and the qualifying expenses of the following expert witnesses: Henk Steyn as well as the reasonable costs of the actuarial reports of Dr R J Koch and the medico-legal reports of Dr N P Louw, D G Maluleke, M S van der Spuy, P De Villiers and A Greef.

**M M LEEUW**  
**JUDGE OF THE HIGH COURT**

**PLAINTIFF'S ATTORNEYS**

**: LEPULE, MOKOKA  
& PARTN**

**DEFENDANT'S ATTORNEYS**

**: MOOKELETSI  
ATTORNEYS**