

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN
JUDGMENT

ECJ:

PARTIES: **NOSANGO MQUTWA**
 AND
 THE ROAD ACCIDENT FUND

1 Registrar: **3178/2006**
2 Magistrate:
3 High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **19/03/10**

DATE DELIVERED: **07/05/10**

JUDGE(S): **JONES J**

LEGAL REPRESENTATIVES –

Appearances:

for the Plaintiff(s): **ADV: Schoeman**
for the Respondent(s): **ADV: D De La Harpe**

Instructing attorneys:

1. for the Plaintiff(s): **NN DULLABH & CO ATTORNEYS**
for the Respondent(s): **WHELDON RUSHMERE & COLE ATTORNEYS**

CASE INFORMATION -

1. *Nature of proceedings* : **DAMAGES**

Reportable on the quantum of damages

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Grahamstown

Case No 3178/2006

In the matter between

NOSANGO MQUTWA

Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT

Summary: Damages – motor vehicle accident – bodily injury – loss of portion of left hand by an 11 year old child – disability resulting in a reduction of 50% of earning capacity as a general labourer – quantum of general damages fixed at R250 000-00.

JONES J:

[1] On 5 August 2002 a motor vehicle in which the plaintiff and her 11 year old son, Malizo, were passengers was driven into a bus which had been left stationary in the roadway. They both sustained bodily injuries. In due course, and, in terms of the provisions of the road Accident Fund Act No 56 of 1996, the plaintiff claimed compensation for both of them arising out of their injuries. In respect of Malizo's claim, she acted in her capacity as his mother and natural guardian. In a hearing in which the issues had been separated in terms of rule 33(4), this court (Paterson AJ) determined that they were both entitled to compensation from the Fund for the full amount of their damages. The parties now come to trial before me solely on the quantum of Malizo's damages. He is presently 17 years old.

[2] The particulars of claim allege that Malizo sustained a compound fracture of the left hand with loss of soft tissue and skin and loss of the 4th and 5th left fingers. Particulars of the quantum of the damages he is alleged to have suffered, R1 633 000-00 in all, are R100 000-00 for future medical expenses; R600 000-00 for general damages; R926 900-00 for future loss of income; and R3100-00 for past loss of income. There is no indication in the papers that a *curator bonis* has been appointed to receive payment should the plaintiff be successful.

[3] The Fund has tendered an undertaking in terms of section 17(4)(a) of the Act in respect of its liability for future medical expenses, and agreed that this be incorporated in the order of court. As a result, this item of the quantum of damages falls away.

[4] On trial, the issues between the parties were the quantum of general damages and damages of loss of income. There is considerable agreement on the factual basis of these two claims. The medical reports of Dr Olivier, orthopaedic surgeon, and Dr Van Oudenhove, plastic surgeon, are admitted as evidence. So, also, is the report of the occupational therapist Mrs Fourie. Next, the parties have agreed to hand in a document headed Joint Minute of the Parties' Appointed Industrial Psychologists (Mr Malherbe and Mr Swart) attached to a notice dated 8 March 2010. This sets out an agreement on which the basis of much of the claim for loss of income is to be assessed and calculated, and it isolates points of disagreement between the parties. Finally, a report containing actuarial calculations based on various scenarios was handed in as the agreed basis for the calculation of the quantum of the loss of earning capacity. They have as their factual basis the psychologists' minute and the evidence of Mr Malherbe.

[5] This evidential background sets the stage for the *viva voce* evidence. The only witnesses to testify on behalf of the plaintiff were the psychologist Mr Malherbe and the occupational therapist Mrs Fourie. The defendant led no evidence.

[6] The only injury alleged in the pleadings is the damage to the left hand. Malizo was 11 years old and in grade 3 at school when he sustained it. It was medically assessed for the purposes of this litigation by Dr Olivier in January 2009 and by Mrs Fourie and Dr Van Oudenhove during March 2009. At that time, he was 17 years old and in grade 9. The injury was a serious orthopaedic and degloving injury involving loss of bone, soft tissue and skin. There was a traumatic amputation of the 4th and 5th fingers, followed by a surgical amputation of the 4th and 5th metacarpal bones through the level of the joint where the metacarpal bones of the hand meet the carpal bones of the wrist. In effect, Malizo lost two fingers and half of the

palm of his hand. This resulted in shock and considerable pain, and also in discomfort which still persists and which is likely to continue. Further, it results in what Dr Olivier described as a cosmetic defect which is significant and permanent. The various reports are at one that the concomitant emotional distress from the deformity and disfigurement should not be underestimated. Even more important, the injury has resulted in serious permanent functional disability, not only in respect of normal daily living activities which involve bilateral activity of the hands, where the disability is described as slight to moderate, but also in respect of his enjoyment of the amenities of life and his capacity to earn a living. When viewed in its totality, the combined effect of the cosmetic disability and the disability in relation to daily living, in relation to loss of the enjoyment of the amenities of life, and in relation to loss of earning capacity, the disability must be categorized as serious.

[7] The initial pain caused by the traumatic amputation was severe, and so was the treatment, which lasted for about sixteen weeks. He will suffer a further moderate degree of pain for about 12 weeks following the surgical revisions of the stump, which he is expected to undergo on two occasions. He still experiences discomfort in cold and rainy weather or when he works hard with his hands. This has been the case since 2002 and is therefore likely to persist for the rest of his life.

[8] Malizo is naturally right handed. There are limitations to the use to which he can put his left hand. He is able to make a fist with the remaining thumb and two fingers. He can grip with the left hand, though with significantly compromised strength. He can pinch with the thumb and each of his fingers, and perform a 'tripod' steadying action when holding small things between finger and thumb. He can perform some coordinated actions such as doing up buttons, but he cannot perform others, particularly where fine coordinated action is involved using both hands such as operating a computer or musical keyboard. He cannot cup his hand, which makes it difficult to hold things, especially small things. He cannot grasp or grip large or heavy objects, or keep large or heavy objects steady. In-hand manipulation is not possible with his left hand, but he can perform some supportive or stabilizing functions which do not require

manual dexterity. He lacks the endurance necessary for the use of the left hand in a sustained or repetitive manner, and is restricted in the performance of bilateral hand actions or functions which require strength of hand or dexterity. The accuracy and speed with which he can do things with both hands is also reduced.

[9] Malizo was only 11 years when he was injured. He has a normal lifespan. He must endure the disability of not having two good hands and with it the resultant loss of the amenities of life, for almost an entire lifetime. He must also put up with a significant degree of disfigurement. The permanent nature, extent and duration of the disability should not be underestimated. His past pain and suffering has been considerable, and his sporadic discomfort for the rest of his life is significant. In my view a proper award for general damages for pain and suffering and loss of the enjoyment of the amenities of life is R250 000-00. In arriving at this amount I have been referred to a number of cases by counsel. In having regard to them I bear in mind the remarks and *caveat* in *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) (paras 23-25) relating to the pros and cons of relying on other cases in measuring the quantum of general damages. The cases in question are *Robinson v Roseman* 1964 (1) SA 710 (T), *Mbobo v Royal Exchange Assurance of SA LTD* 1971 (3) SA 783 (E) and *Newhouse v Road Accident Fund*, Corbett and Honey, *The Quantum of Damages in Bodily and Fatal Injury Cases* vol 5 D5-1 (para 45). The awards in those cases, which translate to R230 000-00, R200 000-00 and R270 000-00 in today's monetary value, have given me a measure of assistance. Despite the fact that they are not on all fours with this case, they are concerned with serious hand injuries and I am satisfied not only that they provide acceptable parameters, but that are a useful guide to an appropriate award in this case.

[10] I turn now to compensation for loss of earning capacity, past and future. In *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE)¹ at 410 Chetty J cited two of the leading cases, *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 150B-D and

¹ *Prinsloo's* case was approved by the full bench of the Eastern Cape Division (Case No CA 139/2009) in a judgment dated 14 February 2010.

Dippenaar v Shield Insurance Co Ltd 1979 (2) (SA) 904 (A) 917B-D and then, in para 5, restated the principle they set out:

A person's all-round capacity to earn money consists, *inter alia*, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control. . . . A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. *In casu*, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss.

[11] Counsel for both parties are agreed that Malizo's loss of earning capacity is the difference between the total present monetary value of all that he would have brought into his patrimony had he not been injured, and the total he will be able to bring into his patrimony in his handicapped condition. There is no dispute between them about what he would have earned had he not been injured. Counsel are agreed that he would have left school at the age of 18 or 19 years without proceeding to grade 12 and hence without a 'matriculation' certificate. He would then have entered the open labour market in either the formal or the informal sector as an unskilled general labourer at the minimum entrance wage which is laid down by statute; that he would have continued in employment and, as the years go by, would probably have developed skills in his chosen field to progress towards a semi-skilled workman, and that his wages would have increased in accordance with the readily predictable schedule outlined in the reports of the industrial psychologists until he reaches retirement age at between 60 and 65 years. As I understand it, counsel for the parties accept that I may use schedules of calculations prepared by the plaintiff's counsel based on the psychologists' minute and the actuarial report as correctly reflecting the amount which Malizo would have earned during his entire working life if he had not been injured. This is an amount of R1 799 600-00. It The calculations reduce it by a factor of 25% to make an allowance for adverse contingencies, such as retrenchment, which are to be expected to occur during the course of the working lifespan of a labourer.

[12] The disagreement between counsel is about how to measure the nature and extent of Malizo's handicap on the open labour market. They are agreed on the nature of the injury, on its handicapping effect on his capacity to produce an income, and on the resultant disability on the open labour market. They both accept the same underlying facts, which are, indeed, the basis for the calculations for the first and second model. They also agree that the most satisfactory way of assessing the extent of his handicap is to regard it as a contingency – that is, to express it as a percentage deduction which is to be made from what he would have earned had he not been injured. The dispute is determining the degree of his handicap and the corresponding extent of the deduction. The argument by Malizo's counsel is that his ordinary earnings must be reduced by an additional 50% because of his disability. The Fund's argument is that although Malizo will earn less than he would have earned, he will be able to earn more than 50% of that amount, and its liability is likely to be confined to no more than 25% or 33.3%.

[13] One of the Fund's arguments advanced in favour of less than 50% is the contention, based on expert opinion, that once Malizo receives his award he will be in a financial position to improve his academic qualifications. If he has the means to do so, he may, so it is suggested, complete his matriculation, and even get a qualification on a tertiary level, which will mean that he will not have to compete at a physical level on the labour market. In my opinion, this argument is effectively countered by the evidence of Mr Malherbe. He testified that, as a matter of probability, Malizo has already reached the extent of his academic capability. None of his family has gone beyond primary level at school, let alone passed the matriculation examination. His parents and siblings are indeed barely literate. At 17 years in grade 9, with 3 years to go, he is already years behind his age group. His performance levels at school hold no prospect of his getting any further. Mr Malherbe's opinion is that no matter how much he spends on education, he does not have the academic capacity to progress further. I am of the view that Mr Malherbe's opinion is realistic, and his reasoning in support of it is convincing. I can properly accept that Malizo will never be more

than a labourer. He may, at best for him, develop some skills in a particular employment field that do not require dexterity and that may enable him to earn the wage of a semi-skilled workman. But that is as far as he can reasonably hope to go.

[14] Mrs Fourie's opinion was that Mr Malherbe's assessment of a 50% disability is conservative. That is also Mr Malherbe's own view. It is clear to me from an evaluation of the reasons for their opinion that although Malizo is not as disabled as a one-armed workman he is in many ways in much the same position. They work from Dr Olivier's conclusion on medical grounds that

From a functional point of view, the patient's ability to pick and carry heavy objects will be significantly compromised. Due to the fact that he has only three digits, his grip strength is significantly weakened and he will be able to carry objects of light weight only.

He will be able to perform an administrative type of job, but it should be kept in mind that his ability to work on a key board will be significantly compromised on a permanent basis. He will be able to drive a light vehicle, provided it is an automatic vehicle.

Mrs Fourie and Mr Malherbe emphasized the large range of employment areas in which he cannot compete at all as a manual labourer because the disability described by Dr Oliver disables him from doing medium to heavy physical labour. An obvious example of an employment field beyond his capacity is the building and construction industry, which is one of the largest employers of manual labourers. There, labourers are expected to do heavy work like digging trenches, pushing barrows of cement and rubble, or moving large volumes of bricks about a site, which is quite beyond Malizo's capabilities. Mrs Fourie said that his ability is confined to doing light manual work. Opportunities for light manual work are limited for unskilled persons, especially where the disabled job-seeker will have difficulty in performing work which is on the limits of his capability and especially where he has to compete with able-bodied candidates for the work. He will always be less productive than his able-bodied counterpart. Mr Malherbe and Mrs Fourie are both of the view that more than 50% of the available range of employment is out of his reach. What is left, light manual work, is much less readily available. This places him at an additional disadvantage. I should explain, in conclusion, that their opinion is not that he should be classified as being 50%

disabled on some arbitrary scale. It is that he will earn 50% less because, in his disabled condition, (a) more than 50% of labouring jobs will be denied him and (b) he remains at a disadvantage in those jobs that remain because even then he must still compete with able-bodied people.

[15] In Mr Malherbe's view, therefore, a 50% deduction from what he would have earned produces a realistic and considered assessment of what he will probably now be able to earn. That view was not contradicted in evidence, it remained unshaken by a vigorous cross-examination, it is fully supported by the expert opinion of Mrs Fourie, and the reasons for expressing it make sense. In my judgment, it can safely be accepted.

[16] As I have said, counsel for the plaintiff prepared schedules of calculations specifying what Malizo would have earned had he not been injured, and what he is likely to earn in his injured condition. In the schedules, plaintiff's counsel makes provision for a contingency deduction of 25% for adverse contingencies, which is higher than the 15% frequently deducted but which is justified in this case because of the greater degree of uncertainty. Counsel for the Fund accepted that that deduction is appropriate in this case. He also accepted the correctness of the figures and calculations in the schedules which, as I have said, are based on those in the actuarial report which in turn were based on the information in the psychologists' reports and Mr Malherbe's evidence. I have accepted the plaintiff's evidence that the appropriate further deduction in this case should be 50%. That is the scenario for which the counsel's first schedule of calculations makes provision. I accordingly make a finding of fact that the quantum of Malizo's future loss of earning capacity is R918 150-00.

[17] The plaintiff's counsel submitted that, in addition, I should make an award of R3100-00 for actual loss of earnings. There is no evidence, however, that Malizo has indeed suffered loss of earnings, and, if so, in what amount. The plaintiff has not discharged the

onus in this regard. The proved damages are, therefore, R250 000-00 for general damages and R918 150-00 for future loss of earnings;

[18] In the result there will be the following order:

- 3.1 The defendant is ordered to pay the plaintiff the sum of R1 168 150-00 as and for damages on behalf of her minor child Malizo Mqutwa, which sum is to be paid into and invested in the Guardians' Fund on his behalf until such time as the Court orders otherwise;
- 3.2 The defendant is ordered to pay interest on the sum of R1 168 150-00 as prescribed by law from a date 14 days from the date of this judgment to the date of payment;
- 4 The defendant is directed to give an undertaking in terms of section 17(4)(a) of Act No 56 of 1996 for the costs of future accommodation of Malizo Mqutwa in a hospital or nursing home or for treatment of or the rendition of a service to him or for supplying goods to him arising out of the injury sustained by him in the motor vehicle collision of 5 August 2002, after such costs have been incurred and on proof thereof.
- 5 The defendant is ordered to pay the plaintiff's taxed party and party costs of suit, which shall include the qualifying costs, if any, of Dr Olivier, Dr Van Oudenhove, Ms Fourie, Mr Malherbe and Ms Cartwright, with interest thereon as prescribed by law from a date 14 days from the date of taxation to the date of payment.

RJW JONES
Judge of the High Court
2 May 2010