

FORM A
FILING SHEET FOR TRANSKEI DIVISION JUDGMENT

PARTIES:

MADAYISE NENE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

- Case Number: **1021/2002**
- High Court: **EAST LONDON CIRCUIT LOCAL DIVISION**

DATE HEARD:

DATE DELIVERED: **20 October 2005**

JUDGE(S): **VAN ZYL J**

LEGAL REPRESENTATIVES –

Appearances:

- (a) For the Plaintiff(s): **Adv. SSW Louw**
- (b) for the Defendant(s): **Adv. S Rugunanan**

Instructing attorneys:

- Plaintiff(s): **Niehaus McMahon & Oosthuizen**
- Defendant(s): **Hart & Beyers**

CASE INFORMATION -

1. *Nature of proceedings:* **Civil Trial**
2. *Topic:* **Damages**
3. *Key Words:*

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: EL 352/02

ECD 1021/2002

In the matter between:

MADAYISE NENE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

VAN ZYL J:

- [1] The plaintiff has instituted action against the defendant in terms of the Road Accident Fund Act 56 of 1996 for damages in the sum of R993 798.59. The claim is for the costs of a personal attendant, future medical expenses, past and future loss of income and general damages arising from bodily injuries sustained by the plaintiff in a motor collision on 29 September 1997 on the East London / Mdantsane access road.
- [2] The defendant conceded liability to compensate the plaintiff for 80 percent of his damages. The only issue in dispute is the quantum of such damages. At the commencement of the trial the parties informed the Court that insofar as future medical expenses are concerned, the defendant will furnish plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act. The Court was further informed that the question of costs of a personal attendant is accepted by both parties to be an item of future medical expenses

which, if it is required and incurred by plaintiff, will be covered by the said certificate. It is accordingly not necessary to make any further finding in regard thereto.

[3] At the end of the trial the only outstanding issues were the following:

(c) The quantum of the plaintiff's damages for past loss of earnings and future loss of earning capacity. The parties were in agreement on the quantum of the unadjusted past and future loss of income of the plaintiff. They both accepted the figure of R563 737-00, calculated by Dr Robert Koch, the actuary engaged by plaintiff (Exhibit D). This figure is made up of R191 994-00 for loss of past income and R371 743-00 for loss of future income. It was left to me to decide to what extent allowance should be made for contingencies.

(d) The quantum of the plaintiff's damage claimed under the head of general damages.

[4] After the conclusion of the trial and before judgment the parties informed the Court that agreement was also reached in regard to plaintiff's claims for past and future loss of income. The effect thereof is that the plaintiff accepts the defendant's submission that a contingency deduction of 10 percent for past loss of income and 15 percent for future loss of income. The result is that the figure for past loss of income, namely R191 994-00 is to be reduced by 10 percent to R172 794-60 and the figure for future loss of income, R371 743-00, must be reduced by 15 percent to R315 981-55. This must in turn be reduced by 20 percent in accordance with the agreed apportionment to R138 235-68 and R252 785-24 respectively.

[5] The only issue that therefore remains is that of the quantum of the plaintiff's general damages. The nature and extent of the plaintiff injuries, the treatment received by him, the prognosis and sequelae thereof are largely undisputed. The evidence in respect thereof appears from the medico-legal reports of the two orthopaedic surgeons, Dr Olivier and Dr Berkowitz who were instructed

for the plaintiff and the defendant respectively. The report by a dental surgeon, Dr Uys tendered on behalf of the plaintiff in respect of the loss of certain teeth by the plaintiff, was admitted by the defendant. The plaintiff testified himself and in addition adduced the evidence of Dr Olivier, Dr Lourens, a clinical psychologist, and that of his elder brother. The report of Dr Berkowitz was also admitted into evidence. There is no material dispute insofar as the evidence relevant to the present enquiry is concerned and the effect of the medical evidence can broadly be summarised as follows:-

- [6] The plaintiff, aged 39 sustained a serious chest injury (diagnosed as a “**flail-chest**”) accompanied by fractured ribs on both sides of the chest, a large laceration of the lower right leg, a fracture of the right proximal femur (a sub-trochanteric fracture) and a laceration below the lower lip on the chin with the loss of several teeth in both the upper and lower jaws. He also sustained a severe head injury that rendered him deeply unconscious with a Glasgow coma scale of 3/15 upon admission to hospital. He was admitted to intensive care and was treated. This included **inter alia** the application of traction to his head and leg and the laceration was cleaned and saturated. The plaintiff remained unconscious for approximately one month. He was discharged from hospital nearly four months later. It must be accepted that the plaintiff after regaining his consciousness initially experienced severe and later moderate pain. During the time that he spent in hospital he was mostly lying on his back. This and the fact that he was, and still is, unable to walk without the assistance of crutches caused severe discomfort. The plaintiff further complains of pain and an inability to stand for long periods and walk long distances.
- [7] The plaintiff will require future medical treatment that will involve further pain and discomfort. This is as a result of mal-union of the fractured femur which requires to be surgically corrected. This involves a valgus osteotomy of the right femur in an effort to correct the mal-alignment of the femur that resulted in an external rotation deformity and a shortening of the leg. He will require a number of debridements of crepitus in the knee to relieve the discomfort and pain that will develop over time. He will also need a removal

of the internal fixation under general anaesthetic. Although the external rotation deformity will be corrected and the plaintiff will be able to walk more comfortably, the corrective surgery is not expected to remove the discrepancy in the length of the leg. For this purpose he will have to wear built-up shoes. The surgery is expected to cause the plaintiff further pain and discomfort. The plaintiff is also experiencing pain in his right shoulder which is attributed to muscular inflammation following the injuries sustained and which can be treated. The chest injuries have healed without complications.

[8] With regard to the consequences of the serious head injury which the plaintiff admittedly sustained, it was the opinion of Dr Berkowitz in his report that the plaintiff had made an excellent recovery therefrom. Dr Olivier, after a further consultation with the plaintiff shortly before the trial, agreed with this opinion in his oral testimony. Save for this, there is no exclusive scientific testimony of the extent of the brain damage suffered by the plaintiff or of further improvement and the effect of medication, if any. For reasons stated by Dr Lourens it was not possible to test the IQ level of the plaintiff and to assess his intellectual impairment caused by the head injury. From my own observation of the plaintiff when he gave evidence, the opinions expressed by the two orthopaedic surgeons would appear to be justified. The plaintiff was alert and able to understand the questions put to him and formulate answers thereto. He was able to remember events which took place years ago and his long term memory appears not to have been affected. Accepting that lay impressions can be misleading, the plaintiff did not show obvious signs of having sustained severe brain damage.

[9] It is however accepted that the plaintiff suffered some brain damage. I say this for the following reasons: The medical evidence reveals that he suffered a severe head injury. This rendered him deeply unconscious for a long period of time. He has no recollection of how the accident occurred. In addition there is the evidence that the plaintiff had undergone a personality change since the accident. This is manifested by symptoms of apathy and a lack of Drive. He is unable to do any physically demanding work and spends his days in and around the house. He is inactive and has grown to be somewhat

obese. Other symptoms include memory and concentration problems and difficulty in the ability to engage in discussion and social interaction and in having become more withdrawn.

[10] In assessing an award for general damages it has been accepted in a long line of cases that the Court, in assessing all the facts and circumstances of a particular case, has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. However, the Court ‘must take care to see that its award is fair to both sides-it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expense’. See **de Jongh v Du Pisanie NO Corbett and Honey Vol V at J2-105**. Although there is no hard and fast rule requiring a court to consider awards in previously decided cases, it is accepted that assistance may be derived from the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those under consideration in any particular case (See **Protea Assurance Co. Ltd v Lamb** 1971 (1) SA 530 (A) at 535A-536B (referred to with approval in **Road Accident Fund v Marunga** [2003] 2 All SA 148 (SCA) and **de Johngh v Du Pisanie (supra)**.)

[12] Mr Louw for the plaintiff submitted that the Court should be guided by the awards in the following cases reported in Corbett and Honey:- **Strydom v General Accident Assurance Company of SA Limited** Vol IV J2-16; **Nkadia v President Insurance Company Limited** Vol IV J2-29; **Mansos v Santam Insurance Limited** Vol IV J2-39; **Muller v Mutual & Federal Insurance Company Limited** Vol IV J2-56; **Begley v General Accident Insurance Company of SA Limited** Vol IV J2-97; **Buttgen v Santam Limited** Vol IV J2-125. Mr Louw also referred to the case of **Peter v Road Accident Fund** (Bisho High Court): Unreported case no 356/2002. He submitted that the plaintiff’s injuries and its sequelae justify an award for general damages in excess of R400 000-00.

[13] Mr Rugunanan for the defendant on the other hand, submitted that on the basis of comparable awards, in cases where the injuries were not dissimilar, an appropriate award would be between R210 000-00 and R230 000-00 in

present day terms. In this regard Mr Rugunanan referred the Court to the following cases in Corbett and Honey:- **Road Accident Fund v Marunga** Vol V at E3-1; **Scheuble v SAR & H** Vol II at 658; **Mansos v Santam** Vol IV at J2-39; **Begley v General Accident Insurance Co.** Vol IV at J2-97; **Nkadla v President Insurance Co.** Vol IV at J2-29; **Yeko v SA Eagle** Vol IV at E3-1; **Dladla v President Insurance Co.** Vol IV at J2-7; **Lawson v General Accident Insurance** Vol IV at J2-1 and **Ncunyana v President Insurance Co.** Vol IV at E3-7.

[14] In determining an appropriate amount for general damages I have taken account of the remarks of Navsa JA in **Road Accident Fund v Marunga (supra)**, as well as the supplementary comments of Brand JA in **De Jongh v Du Pisanie, (supra)**. Consequently, taking into account all the relevant factors, and after considering the awards made in previous comparable cases, I am of the view that a fair award for general damages is an amount of R280 000-00. In view of the agreement arrived at by the parties in regard to liability this amount falls to be reduced by 20 percent to R224 000-00.

[15] Since the plaintiff has been substantially successful there is no reason, and none has been advanced, why costs should not follow the result. The plaintiff is accordingly entitled to an order for costs in his favour.

[16] In the result I make the following order:

4. That the defendant will pay to plaintiff:
 - (a) the sum of R138 235-68 in respect of past loss of earnings;
 - (b) the sum of R252 785-24 in respect of future loss of income;
 - and
 - (c) the sum of R224 000-00 in respect of general damages, together with interest on these amounts at the rate of 15.5 percent per annum from the date of judgment to the date of payment.
5. That the defendant will further pay:

- (a) the qualifying expenses of the following expert witnesses who were instructed on plaintiff's behalf:
 - (aa) Dr PA Olivier – orthopaedic surgeon;
 - (bb) Dr J Lourens – clinical psychologist/personnel practitioner;
 - (cc) Dr R Koch – actuary; and
 - (dd) Dr D C Uys –dental surgeon
 - (b) the costs of plaintiff's photographs
 - (c) the plaintiff's costs of suit with interest thereon at the rate of 15.5 percent per annum from 14 days after taxation to date of payment.
6. The defendant will furnish the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 for the cost (limited to 80 percent thereof) of future accommodation of the Plaintiff in a hospital or nursing home for the treatment of or rendering of a service or supplying of goods to him arising from the injuries sustained by him in the collision of the 29 September 1999, after such costs have been incurred and on proof thereof.

JUDGE OF THE HIGH COURT

Delivered on : 20 October 2005

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