

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO.: 579/09

In the matter between:

ADVOCATE NEIL MUIR PATERSON N.O.

obo BAMBILE NZWANA

FIRST PLAINTIFF

FEDERATED EMPLOYER'S MUTUAL

ASSURANCE COMPANY LIMITED

SECOND

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

BESHE, J:

[1] All other heads under which damages are claimed having been resolved between the parties, what remains is the determination of the quantum of general damages that the first plaintiff, in his capacity as the *curator ad litem* of Mr Banbile Nzwana (the patient) should be awarded.

[2] First plaintiff's claim is for an award in the amount of R1 000-000-00 in

respect of general damages arising out of the injuries and sequelae suffered by Mr Nzwana as a result of a collision that occurred on the 27th of June 2006, near 6th Avenue, Walmer, Port Elizabeth.

[3] Mr Nzwana was on duty as a pipe layer working for Rand Pave EP (Pty) Ltd, Port Elizabeth. He was knocked down by the insured motor vehicle. He was then transported by ambulance to St Georges Hospital, Port Elizabeth.

[4] The nature and extent of the injuries sustained by Mr Nzwana does not seem to be in dispute and are those listed in the particulars of claim and confirmed in the various expert reports that were by and large handed in by agreement between the parties, as being;

Fracture of the left femur shaft, a plateau fracture of the knee and a closed brain injury with a left sided pontine haemorrhage.

His Glasgow scale rating was recorded as 8/15 on admission to St Georges Hospital.

[5] Mr Nzwana's femur fracture was managed and he underwent an open reduction and internal fixation with intra modularly interlocking nail. His plateau fracture of the left knee was treated conservatively and a hinged knee brace was used.

[6] He was treated for his head injury by Dr G P Greef a neurosurgeon.

[7] Mr Nzwana was also treated at Aurora Hospital where he was admitted on the 11th of July 2006 and discharged on the 25th of August 2006.

[8] The nature, extent and effect of his injuries are set out in the experts' reports to be as follows:

[9] According to Dr Basil Mackenzie, an orthopaedic surgeon, when he first examined Mr Nzwana in April of 2008, he was using a wheelchair. When he examined him again in August of 2009 he was independently ambulant using two elbow crutches and wearing a knee brace on the left side. This was still the case when Mr Nzwana presented himself to court in December 2010. Commenting on the effect of injuries on occupational and social activities, Dr Mackenzie remarked that Mr Nzwana has not resumed any form of work and remains independent in respect of dressing, eating, attention and to personal hygiene. And that as a result of his polytrauma he would have suffered very severe pain. There would have been a severe exacerbation of pain when he underwent open reduction and internal stabilization of his left femur fracture. That his pain has persisted due to the non-union of his femur fracture and the encroachment of the intramedullary rod into his knee joint.

[10] Dr Mackenzie's observations are also largely confirmed by Dr Swart, also an orthopaedic surgeon. Dr Swart also noted gross instability and shortening of the leg and swelling of Mr Nzwana's left knee.

[11] In his third report that he compiled after examining Mr Nzwana in December 2010, Dr Mackenzie remarked that Mr Nzwana's limb length

inequality has increased and his general and left lower limb condition has deteriorated and that his femur is yet to unite and there is a probability that within the next ten years Mr Nzwana will develop secondary osteo arthritis of his left knee severe enough to warrant a total knee joint replacement arthroplasty.

[12] It appears from neurologist Dr G P Greef's report that Mr Nzwana's prognosis is poor for any significant improvement in his cognitive abilities, social and occupational functioning. Dr Greef is also of the view that there is not likely to be any treatment that would improve his cognitive or social functioning. He concluded that Mr Nzwana's amenities of life have been severely impacted. His identity as a provider for the family and his children's education has been affected because of not being able to work after the accident. He also had to change living environments because of not being able to afford to live in the house he owned before the accident.

[13] According to Dr K P Swart's statutory medical report Mr Nzwana suffered a fairly severe head injury and severe lower limb injury.

[14] Mr Mark Eaton, a Clinical Psychologist also opined that Mr Nzwana sustained a traumatic brain injury of a severe degree. During consultation with Mr Eaton, Mr Nzwana reported that if he is given any new information, he forgets it within a few minutes whereas this was not the case prior to the accident. He does not do shopping anymore because he forgets the necessary items. His forgetfulness distresses him.

It is a feature of the case that as a result of the injuries sustained by the plaintiff he now requires curators to manage his affairs.

[15] It is on the basis of the above-mentioned injuries that the amount to be awarded to the first plaintiff in respect of general damages will be determined.

[16] *Mr Frost* for the first plaintiff submitted that first plaintiff was entitled to an award for R1 000-000-00 for general damages and referred me to a number of earlier cases which he contended were comparative to the present case.

[17] *Mr Dala* for the defendant contended that an award between R450 000-00 to R500 000-00 will be reasonable and drew the court's attention to various cases that were decided earlier for guidance.

[18] He argued that Mr Nzwana's injuries were not of a very serious nature than in some of the cases referred to by counsel and urged the court to decide the matter on the basis of its own peculiar facts. I will consider the awards that were made in these decisions in the light of the injuries sustained by Mr Nzwana, appreciating that differences will arise in each case.

[19] I will also be mindful of what *Watermeyer J* said in ***Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 199*** namely that:

“... .. it must be recognized that though the law attempt to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and

money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[20] I have considered the cases that I have been referred to by counsel as well as other cases. As could be expected the injuries suffered by plaintiffs and their consequences in those cases are either less severe in some or more severe in other. The personal circumstances of the plaintiffs in those cases were also different to those of Mr Nzwana.

[21] One such case is that of ***Hurter v Road Accident Fund and Another Case number 367/07 [2010] (2 February 2010)*** an unreported decision by *Plasket J.* The plaintiff in that case was 20 years old at the time of the accident. She sustained serious injuries, which rendered her unconscious for 10 days. Suffered from retrograde and post-traumatic amnesia. Had to undergo plastic surgery to reconstruct her nose and nasal septum. She also suffered from left sided visual field defect as a result of trauma to the brain. An amount of R500 000-00 was awarded for general damages.

[22] In ***Daniel André Jansen and Another v Road Accident Fund Case Number 1737/09*** (unreported) *Eksteen J* awarded R450 000-00 for general damages. In this case the plaintiff, a 24-year-old man sustained a severe closed head injury as well as certain orthopaedic injuries.

[23] I have also considered awards for general damages that were given in

the following cases: ***Mzendane v Road Accident Fund [2008] JOC 22081 Ck; Donough v Road Accident Fund [2010] JOC 26413 (GSJ); Tyrone Kapp v Road Accident Fund [Case Number 1432/ 08] ECPE.***

Having considered the awards made in those and other cases not mentioned in this judgment, and in the light of the injuries sustained by Mr Nzwana and their consequences, my view is that an award of R600 000-00 for general damages will be appropriate in the circumstances.

[24] Judgment is accordingly granted in favour of the first plaintiff against the defendant for:

- 1. Payment in the sum of R600 000-00 as and for general damages.**
- 2. Should the capital amount in paragraph 1 above not be paid within 14 days from the date of this order, defendant shall be liable for payment of interest on the said capital calculated at the legal rate of 15.5% per annum as from the due date until the date of payment.**
- 3. Defendant shall pay first plaintiff costs of suit, as taxed on a party and party scale together with interest thereon at the legal rate of 15.5% per annum as from the date of (14) fourteen days after taxation or agreement.**

Such costs to include:

Attending to a necessary inspection *in loco* at the scene of the collision with counsel.

Key and photographs.

Key and plan.

The qualifying expenses, if any, of the following expert witnesses:

- i) Dr S Basson
- ii) Dr H Kritzinger
- iii) Dr R D D Campbell
- iv) Dr G P Greef
- v) Dr K P Swart
- vi) Dr J Parsons
- vii) Dr B L Mackenzie
- viii) Dr P Pretorius
- ix) Mrs A van Zyl
- x) Dr P Swart
- xi) Mr M Eaton
- xii) Dr H J van Daalen
- xiii) Mr D Williams
- xiv) Dr A Ahmed
- xv) Mr P Stunden
- xvi) Mr Olivier

Reserved cost of 3 August 2010

Costs of the *curator ad litem*.

The costs of the *curator bonis* as prescribed in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

JUDGE OF THE HIGH COURT**APPEARANCES**

For Plaintiff(s)	ADV: A Frost
Instructed by	G P VAN RHYN MINNAAR INC & CO / ROELOFSE MEYER INC. 29 Bird Street Central PORT ELIZABETH Tel.: 041 – 585 3270 (Ref. Lunen Meyer/HN/N360) (C T A Minnaar - 041- 922 9124)
For Respondent	ADV: I Dala
Instructed by	BOQWANA LOON & CONNELLAN 4 Cape Road PORT ELIZABETH Tel.: 041 – 582 4361 (Ref.: Mr Armoed/JR/K45542)
Date Heard	9 to10 December 2010
Date Reserved	10 December 2010
Date Delivered	27 October 2011