

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO 12575/2007

In the matter between:

SIBONGISENI DERRICK GUMEDE

Plaintiff

and

MINISTER OF CORRECTIONAL SERVICES

Defendant

JUDGMENT

NTSHANGASE J

INTRODUCTION

[1] The plaintiff claims R722 677.00 as damages from the defendant on the grounds of negligence of the employees of the defendant who, as claimed, 'employed and was responsible for certain servants at the Durban Westville Prison, including prison warders, the head of Medium Prison and other senior management (the employees) who acted within their scope of employment.

[2] On 30 January 2006 the plaintiff as a prisoner was assigned a duty of 'petrol boy', a petrol attendant to fellow prisoners charged with the duty of cutting grass with brush-cutters. The plaintiff's claim arises from injuries he sustained from burns on that date in the performance of his assigned duty as a result of the alleged negligence of the defendant's employees. I shall not burden the record with detail of the alleged acts of negligence as

liability is no longer an issue as, by order of Ploos van Amstel J on 12 June 2013, the defendant was held 'liable to compensate the plaintiff for such damages as he will be able to prove as a result of the injuries sustained ...'

[3] The case proceeds before me on plaintiff's quantum of damages only in respect of future medical and ancillary expenses, future loss of earnings, general damages for past and future pain, shock, suffering and discomfort as well as general damages for permanent disability, permanent loss of amenities of life and disfigurement.

THE MERITS

[4] It is common cause that the plaintiff sustained 28% burns to his right axilla, chest, thorax, both forearms and hands. The reports of the experts engaged by the plaintiff which bear on the plaintiff's claim have been accepted by the defendant except the actuary's on an issue I shall later deal with.

[5] On the aspect of future medical and ancillary expenses **Dr LT Dumas** a specialist plastic and reconstructive surgeon opines that the plaintiff would 'substantially benefit from formal contracture release of the right axilla which will improve mobility of the right shoulder and would also benefit by contracture release of the bond of tissue of the central chest.' For future surgical interventions Dr Dumas approximates the cost of hospitalisation which includes theatre and anaesthesia at R50 000, the anaesthetist's fee at R15 000 and the surgical fee in total at R37 500. It translates to approximately R102 500.

[6] In her physiotherapy assessment report on the plaintiff **Ms G Hughes** a physiotherapist recommends various rehabilitative interventions and approximates the financial implications of physiotherapy in total as R49 015.

[7] **Ms R Stewart**, an occupational therapist recommends referral of the plaintiff to an occupational therapist experienced in rehabilitation of individuals with hand injury for 'provision of on-site employee support through regular work visits.' She recommends two strategically planned work visits at R3 750 per visit. Post-operatively the plaintiff will require scar remodelling interventions to prevent re-contraction of the axilla and central chest which would require pressure media and hydration media. Ms Stewart recommends an allowance of R4 000 for provision of necessary media and follow up with the occupational therapist. For provision of adaptive equipment to enhance ease of execution of physically strenuous activity, an allowance of R3 500 is recommended for adaptive equipment and a further R3 500 for replacements assumed in ten years' time. For psycho-supportive counselling and intermittent crisis management to address the emotional/psychological *sequelae* of his injury, she recommends an allowance of ten sessions of psycho-supporting counselling at R850 per session. Ms Stewart also recommends appointment of a case manager to monitor and co-ordinate the plaintiff's rehabilitative interventions, to act as liaison and to provide support to ensure that functional and treatment goals are met. An allowance of R2 750 per annum for five years is recommended.

[8] **Ms M Naude** a clinical psychologist conducted a psychological assessment of the plaintiff to determine his emotional status after injury. Ms Naude described the emotional and psychological *sequelae* on the plaintiff as including a depressed mood, anhedonia, diminished libido, impoverished sleep, fluctuating concentration, low energy, suicidal ideation, heart palpitations and flashbacks. He has withdrawn from social interactions. Ms Naude recommends supportive psychotherapy to treat his depression and help manage his anxiety, supportive psychotherapeutic and life skill sessions to support his recovery, for four months, bi-monthly appointments for six months, i.e monthly appointments for six months at approximately R850 per appointment.

[9] According to **Dr V Moodley**, a specialist psychiatrist, in order to monitor the plaintiff's response to treatment, to optimize medication and psychotherapy, he will need to be

followed up two weekly for the first three months and thereafter monthly for the rest of the year. According to this he will engage in fifteen consultations at R850 per consultation.

[10] **Mr Gregory Whittaker** performed an actuarial calculation of the capital value of the loss of income sustained by the plaintiff as a result of the incident which occurred on 30 January 2006 as well as to determine the capitalized value of the future medical and related expenses that may be incurred by the plaintiff as recommended by various medical and rehabilitation experts at 1 November 2014, (the calculation date).

[11] In his calculation of the capitalized value of future medical and related expenses that may be incurred by the plaintiff in terms of medical and rehabilitative interventions recommended by experts, Mr Whitaker arrived at a total of R245 298.00 as the calculation date. I turn now to deal with the estimated loss of income.

Estimated loss of income

[12] As is submitted on behalf of the plaintiff, before the incident of 30 January 2006 he relied on his physical well-being to generate income. Post-injury tests according to Ms Stewart suggest 'persistent physical, behavioural and functional compromise that cause the plaintiff to function in a diminished capacity in the work place.' The physical, emotional, behavioural, cognitive and functional *sequelae* of his injury prevent him from working at pre-morbid levels. Whereas the plaintiff would have continued to compete for unskilled employment, post-injury '(he) is no longer deemed suited to unskilled work of moderate to heavy strength demands'. Ms Stewart points to the negative social stigma attached to visible disfigurement, the high level of competition for unskilled work, the scarcity of work of unskilled employment of light strength demands and the plaintiff's past criminal record as factors which minimise his prospects of employment and which suggest his well-placement in his present enterprise of selling fruit, vegetable and other commodities from home, which, according to the plaintiff yields an income of approximately R80 to R100 per day.

[13] In the process of computation of the plaintiff's loss of income, Mr Whitaker's actuarial calculation applied a contingency deduction of 25% and 40% respectively on the pre-accident and the post-accident earnings in terms of Ms Stewart's recommendation for an application of a slightly higher than normal contingency. He arrived at a net loss of R77 379.

[14] Mr Whitaker's calculation in regard to loss of income was challenged on the grounds of variance between the testimony of the plaintiff in which he said his income was R2000 per month when, to Mr Whitaker he said his income at NMI ['Mercedes Benz'] was R30 000 per annum and caused Mr Whitaker to base his calculations on an unreliable figure of R30 000. In a plausible explanation, as I understood it, the plaintiff states that Mr Whitaker based his calculations on his gross income; R2 000 per month he referred to in his testimony was his net income after deductions. I pause here to state that this efficiently explains the apparent variance.

General damages for past and future pain, shock, suffering and discomfort

[15] In making the assessment I have had regard to the duration and intensity of the pain and the suffering experienced and to be undergone by the plaintiff. It includes both physical and mental pain and suffering of the past and future – as a direct consequence of the infliction of the injuries as well as the pain and suffering associated with surgical operations. (Ms Hughes recommends surgical release of scar contracture to enhance mobility).

[16] As at the time of infliction of the injuries by the fire, the intensity of the associate pain, the shock and discomfort are imaginable. According to the plaintiff his life of pain continued without assistance in the prison where he was kept until his wounds became septic. He states that he was subsequently hospitalised at King Edward VIII Hospital and at St Aiden's Hospital until March 2006. (According to Ms Hughes he was admitted to

Westville Hospital and then immediately transferred to King Edward VIII Hospital where he remained for one week.) The plaintiff states that he was subsequently referred to a clinic where he is provided with pain killers as the only treatment. (According to Ms Hughes the plaintiff told her that 'he attended the clinic in Umkomaas where they dressed and attended to his wounds until they were healed.') I refer to this as relevant in regard to the extent of assistance he received to relieve him of pain.

He still experiences pain in the right arm, shoulder and chest which worsens in cold weather or prolonged use of the arm. According to Dr Dumas the plaintiff now has a 'painful contracture of the central chest.' The plaintiff has been afflicted by pain from the initial injury, the repeated pain-inducing wound dressings and the protracted healing process.

[17] It is evident from the description, extent and location of the injuries that the fire caused extensive pain on his body. As confirmed in the report of Dr Dumas he 'presents with an extensive area of healed burn scars of the anterior aspect of the chest and the anterior aspect of the trunk overlying the abdominal wall. It would appear that the extent and depth of the burn wounds sustained was deeper on the right hand side of the chest wall with more scarring on the right axilla, right chest and central chest.' Dr Dumas also states that 'there is more scarring on the right axilla, right chest and central chest.'

[18] Cognizance must be taken of the future experiences of pain which will attend surgical operations and the discomfort from future prolonged contemplated medical and rehabilitative interventions.

[19] On the aspect of pain Ms Stewart states:

'Given the circumstances under which his injury occurred, the less than sympathetic environment in which he found himself during his recovery and the seemingly

lengthy burn wound healing thereafter (complicated by sepsis), it is quite possible that Mr Gumede has developed a pain disorder. His clinical presentation is certainly suggestive thereof, with the DPQ indicating that the plaintiff's pain experience requires psychosocial interventions in order to be comprehensively addressed.'

[20] The plaintiff's pain extends to the mental anguish he suffers. According to Dr Moodley, the plaintiff's 'mood appeared low as he described the difficulties and limitations he currently endures following his injuries.' According to Dr Moodley the plaintiff described 'features of anxiety following the incident. He has recurrent thoughts of the incident when alone ... He also reports experiencing nightmares resulting in disrupted sleep patterns ... He describes constant dreams of fire and somebody running after him. He avoids big fires in his yard ...'

General damages for permanent disability, permanent loss of amenities of life and disfigurement

[21] One of the plaintiff's problems as confirmed by Ms Hughes is that 'the right arm cannot move as it should' and it is weak. Ms Hughes describes the plaintiff's mobility, gait, balance and function as follows:

'His dynamic balance is compromised. He loses his balance when forced to turn quickly on uneven terrain or in a confined space and it is difficult for him to hop and turn to the right simultaneously. He does not effectively employ the right arm for balance and righting reactions.'

According to Ms Stewart '(n)otwithstanding further interventions, cognizance must be taken that the right upper limb will never be restored to its uninjured state ...' According to Ms Hughes '(the plaintiff's right arm and therefore also his bilateral upper limb functions is permanently curtailed, as is his ability to work as a manual labourer.'

[22] The incident left him with scars. As described by Ms Stewart '(a) large burn scar is evident over the anterior, chest and abdomen, extending into the right axilla ...' Considerable body image disturbance is evident as a result of this scarring, with the plaintiff referring to himself as "an animal." In regard to social *sequelae* Ms Naude states that '(the plaintiff) has withdrawn from social interactions and prefers to stay at home with his fiancé.' As summarised by Ms Stewart, bathing and dressing now present problems. The plaintiff has difficulty reaching overhead to wash his back. He has disturbed sleep patterns with scars itching in summer months. He now finds it difficult to perform physically strenuous household tasks of painting, raking sweeping the yard and slashing due to upper limb pain. His sporting activities are curtailed. On the emotional and psychological *sequelae* Ms Stewart as did Ms Naude notes that the plaintiff presents with a depressed mood, anhedonia, diminished libido, impoverished sleep, fluctuating concentration, low energy, suicidal ideation heart palpitations and flashbacks.

[23] Ms Stewart found the plaintiff apathetic, withdrawn and lacking in energy and conveying a sense of helplessness. She quotes him as saying:

"I am sick ... my right arm is finished ... the arm is useless and can't do anything."

Testing, according to Ms Stewart 'revealed a strained relationship between the plaintiff and his fiancé Mpumezile. While (the plaintiff) was passive, submissive and emasculated, Mpumezile appeared angry, frustrated, fatigued and "fed-up." The lack of sexual intimacy has also strained their relationship.

[24] The burns as earlier indicated have left extensive disfigurement in the form of scars over the plaintiff's right upper arm, axilla, chest and thorax as well as on the lower arms and hands. 'There is an extensive sear spanning the anterior right upper arm and extending across the chest and abdomen to past the midline on the left (measures approximately 9 x 26 x 30cm)' as per assessment report of Ms Hughes. Such scar would be visible unless

cautiously covered by clothing, as would be the scars on the lower arms and hands. Ms Stewart refers to 'negative social stigma attached to visible disfigurement'. The plaintiff's loss in this regard would be an aesthetic one.

[25] In order to establish his claim on the various heads the plaintiff testified as the only witness. There was no meaningful challenge to his testimony. No witness was called by the defendant.

[26] Plaintiff's counsel referred me to various cases with past awards for comparative purposes. I have taken account of past awards in comparable cases including those to which I was referred by counsel to serve as a guide in evaluating, and expressing, in terms of money, what would serve as a reasonable award under the various heads of the plaintiff's claim. The plaintiff has succeeded in proving claims for damages under the various heads to the extent which reflects in my order which follows.

THE ORDER

[29] Having taken all factors into account, the defendant is ordered to pay to the plaintiff the sum of R622 677 made up as follows:

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|----|---------------------------------------|-------------|
| 1. | Future medical and ancillary expenses | R245 298.00 |
| 2. | Future loss of earnings | R 77 379.00 |
| 3. | General damages | R300 000.00 |
| 4. | Costs of suit. | |

DATE OF HEARING:	11 February 2015
DATE OF JUDGMENT:	13 March 2015
FOR THE APPELLANTS:	Adv M Sibisi, instructed by Tomlinson Mnguni and James
FOR THE RESPONDENT:	Adv N Z Khuzwayo, instructed by The State Attorney: KwaZulu-Natal