

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL, PIETERMARITZBURG

CASE NO: 441/2003

In the matter between:

CASSIM MAHOMED SARDIWALLA NO PLAINTIFF
(In his capacity as Administrator/ Executor
of Estate of Late Ntethelelo Goodman Vilakazi)

Vs

THE ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

MOLEKO J

[1] The plaintiff a 39 year old male instituted an action against the Road Accident Fund (the defendant) for payment of damages arising from injuries sustained in a motor vehicle collision which occurred on 2 September 1998.

[2] Plaintiff's claim, as set out in his Particulars of Claim to the summons, is in the sum of R570,000.00 made up as follows:

- 2.1. Estimated future medical expenses R50,000.00;
- 2.2. Past loss of earnings and estimated future loss of earnings
R400,000.00;

- 2.3. General damages inclusive of pain, shock and suffering, loss of amenities of life disfigurement and permanent disability R120,000.00.

[3] I was advised by counsel that the issue of liability had been resolved, in that the Court granted an order in favour of the plaintiff on the issue of liability and directed that the defendant compensate plaintiff for damages arising out of the injuries sustained by him in the motor vehicle collision.

[4] The only issue I was required to determine was the quantum of damages to be paid by the defendant to the plaintiff.

BACKGROUND

[5] The trial commenced on 19 June 2006 and evidence was completed on 3 November 2007. Because the available time was not enough to hear oral argument, counsel agreed to file their written Heads of Argument within fourteen days of the receipt of the transcript of the proceedings. After hearing a debate as to who would obtain the transcript I made the following direction:

1. That the case is adjourned sine die;
2. That the defendant forthwith applies for the transcript from the previous trial until to date;
3. That counsel file their Heads of Argument within fourteen days of receipt of the transcript.

[6] It was not until March 2008, when I had retired that I received some documents from the Court Registrar with a letter from the plaintiff's attorney, addressed to the Registrar to request me to proceed with judgment. I could not proceed with preparing judgment on those documents and I sent them back to the Registrar.

[7] Sometime during September 2008 I received three lever arch files, two containing transcript of the proceedings save that during reading the papers when I wanted to refer to plaintiff's evidence-in-chief it was not there. I then notified the Registrar accordingly. The third lever arch file contained *inter alia*, a letter dated 11 April 2008 written by plaintiff's attorney addressed to defendant's attorney stating, *inter alia*, that notwithstanding their (plaintiff's attorney's) various letters to defendant's attorneys they had not filed Heads of Argument. This file also contained Pleadings, Notices, Rule 37 Conference Minutes and plaintiff's counsel's Heads of Argument.

[8] In the last lever arch file referred to above there was a death certificate showing that plaintiff died on 24 May 2007. In terms of 'Letters of Authority' issued by the Master of the High Court Durban, in terms of Section 18 (3) of the Administration of Estates Act 1965 as amended, Cassim Mohammed Sardiwalla, (who is the plaintiff's attorney), was authorized to take control of the assets of the deceased.

[9] Plaintiff's attorneys then filed a Notice of Substitution in terms of Rule 15 of the Uniform Rules of the High Court to the effect that Mr Cassim Mohammed Sardiwalla is substituted as Plaintiff in his capacity as Administrator / Executor of the Estate of the plaintiff.

[10] In August 2009 I received from the Registrar the original file and a complete transcript of the proceedings of the trial.

JUDGMENT

[11] I therefore proceed with the judgment on the basis that Cassim Mohammed Sardiwalla is plaintiff acting in a representative capacity referred to above, however reference to the plaintiff in this judgment will, unless stated, otherwise be reference to the plaintiff as cited in the pleadings.

[12] In so far as the claim as set out hereinabove counsel for the plaintiff in his Heads of Argument stated that in so far as the claims for future medical expenses and for hospital expenses, also the claim for future loss of earnings these claims are, by reason of the death of the plaintiff, are not persisted with by the Executor.

[13] As was submitted by counsel for the plaintiff I agree that at the death of the plaintiff, pleadings had been closed therefore *litis contestation* had been reached, therefore the representative of the plaintiff's estate is now entitled to proceed with the balance of the claims which I have set out above.

[14] My judgment will therefore be confined to the balance of the claim as set out by counsel for the plaintiff being:

- 14.1 General damages;
- 14.2 Loss of past loss of earnings;
- 14.3 Past medical expenses.

[15] I shall therefore deal with evidence only in so far as it deals with the above mentioned balance of claims.

[16] In dealing with the balance of the claims, I shall do so without the benefit of the defendant's counsel's Heads of Argument as they have not been furnished to me.

[17] The Plaintiff testified and called:-

- 17.1 Dr Reddy an orthopaedic surgeon;
- 17.2 M/s Brenda Bosch a clinical psychologist;
- 17.3 M/s Sahida Bobat;
- 17.4 Mr V Naidu of Greys Hospital;
- 17.5 Mr G M Gani.

[18] Defendant called:-

- 18.1 Professor Ganie an orthopaedic surgeon and M/s Colleen Kisten an occupational therapist;

[19] Dr Reddy's testimony briefly, he sets out the history of the plaintiff as extracted from Grey's Hospital records and his interview with him, is briefly as follows:-

- 19.1 Plaintiff sustained a compound fracture of the left leg. He was taken to Greys Hospital.
- 19.2 He had a deformity of the left leg with a three centimeter laceration over the medial aspect of the mid left leg where the compound fracture was diagnosed.
- 19.3 A plaster cast was applied to the wound that had been sutured and he subsequently underwent internal fixation of the fracture.
- 19.4 On 3 September under general anesthetic he underwent an insertion of a tibial nail. He was in hospital until 15 September 1998.
- 19.5 On 9 February 1999 he returned to hospital, having not been seen in October 1998 because, as he said, he was told that he could not be attended to because his file could not be located, on that day. On 9 February, 1999 he was found to have cellulitis (that is infection of the skin) resulting in a swelling and redness of the skin in the area of the fracture. On the left leg blood investigation done on him necessitated treatment with antibiotics and his painful leg was elevated on pillows.

- 19.6 On 12 February 1999 he was noted to have a collection of pus around the tibia, he was urgently taken to theatre for drainage of the pus collection. On 23 February the wound was sutured.
- 19.7 On 30 March 1999 he was re-admitted for removal of the tibial internal fixation device and further pus abscesses were drained, he was discharged on 23 April 1999.

[20] Dr Reddy explained that a compound fracture is distinguished from a closed fracture in that in the latter, although there is a broken bone it remains in tact, whereas with a compound fracture the fracture is exposed to the extent that the bone can be seen, which means that a compound fracture is more serious than a closed fracture. Dr Reddy further said a compound fracture is more serious because the bone is exposed and is open to infection.

[21] The history given by Dr Reddy, shows that plaintiff underwent no less than four operations that is:-

- 21.1 On 3 September 1998 when he underwent insertion of a tibial nail.
- 21.2 On 12 September 1999, when there was the incision and drainage of the puss collection.
- 21.3 On 23 February 1999, when his incision wounds were sutured by secondary suture.
- 21.4 On 30 March 1999, when he was taken to theatre for removal of the tibial fixation device and further abscesses were drained.

[22] From the history of plaintiff as gained from the hospital records Dr Reddy's evidence is that plaintiff was in hospital on the following dates:-

22.1 From 2 September 1998 to 15 September 1998;

22.2 From 9 February 1999 to some date after 23 February 1999.

22.3 Dr Reddy said on 30 March 1999 Plaintiff was re admitted but he was uncertain about the date of discharge as he had notes only up to 23 April 1999.

[23] He referred to an injured nerve on the left leg which formed a neuron, which he described as an injured nerve which formed a swelling which is painful which pain can be for life particularly if someone touches it.

[24] When Dr Reddy examined plaintiff in June 2006 he said he found the fractured bone had not remodeled to its original shape, the deformity was still palpable at the site of the fracture, when toughing he could feel a bony specule which was also tender on touching. On this examination he found the scar on the side of the left leg where the incision drainage was made that it was still tender.

[25] He said plaintiff in his opinion sustained a compound fracture grade two on the Gustello Anderson scale, this means the breaking of the skin as a result of the fracture was 10 centimeters which meant the chances of complication of the fracture were between 10 and 30 per cent, he said this explains why plaintiff's fracture had infection and that there is a risk of future infection.

[26] Dr Reddy said although there was no flare up of puss between June 2001 when he saw plaintiff for the first time and June 2006 when he saw plaintiff for the second time, in his assessment there are signs which suggest that plaintiff is in a chronic infection mode he can have a flare up of infection in his life in future. In this regard he referred to the chronic swelling and darkening of the skin in the distal leg, the pain symptoms plaintiff complains of in the area of the fracture and x-rays which indicate infection more periosteal reaction, periosteum he said is the covering of the bone. He explained that when there is periosteal reaction it means there is underlying inflammation. He said the last flare up was in February 1999.

[27] Dr Reddy went on to deal with shock suffered by the plaintiff as a result of the accident which he referred to as moderate cardiovascular shock which he said means that plaintiff suffered shock due to blood loss at the time of the accident.

[28] He said plaintiff also suffered emotional shock as a result of the accident.

[29] He further referred to pain and suffering which plaintiff suffered, he said he must have suffered tremendous severe pain resulting from breaking of the bone of the left leg as well as break of the neighboring skin. Such pain he said would be for at least a month after the accident.

[30] He further opined that plaintiff must have suffered as a result of septic complications he developed in February 1999 as well as pain as a result of surgical procedures connected to the complications resulting from removal and replacement of dressings of the surgical wounds as well as pain connected with the removal of the nail.

[31] The chronic pain in the leg he said would be long life, plaintiff will have to manage it with medication.

[32] The septic complication plaintiff developed in February 1999, Dr Reddy said, must have caused severe pain as well as pain which he suffered as a result of the surgical procedures. He said the removal and replacement of dressings. The surgical wounds must also have been painful as well as the removal of the nail which he said was a surgical procedure which would cause pain as well as the post operation pain following that procedure.

[33] He found that plaintiff's evidence that he had to stop road running and playing soccer was a reasonable result of the injuries he suffered in the accident.

[34] As far as plaintiff's continuing with his work he did prior to the accident, he said it was reasonable that due to his injuries plaintiff would be unable to continue his work duties involving normal labour and walking from door to door carrying heavy objects.

LOSS OF AMENITIES OF LIFE

[35] He opined that it was reasonable that plaintiff would not be able to walk long distances without experiencing pain.

[36] The plaintiff testified that he is 39 years and is unmarried, on 2 September 1998 he was run down by a motor vehicle at the intersection of Pietermaritz and Bourke Street. As a result of the collision he sustained a fracture of his left leg below the knee. He was taken to Greys hospital where he was treated and taken to theatre where a pin was inserted in his injured leg. Afterwards a plaster of Paris was applied to the left leg. He was discharged from hospital on 17 September 1998.

[37] He returned to hospital in February 1999 because he was experiencing severe pain. He was treated and was also taken to theatre. On this occasion he was in hospital for about a week.

[38] He again returned to hospital but he could not say when this was. On this occasion he was again taken to theatre where the left leg was operated on, he could not remember when he was discharged.

[39] As regards the pain he suffered when he was injured he said at the time of the collision he said he experienced such severe pain that he felt that no one should touch him.

[40] At the time of the collision he was self employed repairing pots and mending shoes, he had learnt this type of work at an early age from his father who was a handyman. He left school when he was in standard 7. In the early nineties his father stopped working, he then continued the work that his father had been doing. He operated on a pavement in Berg Street near a shop when there was a bus stop close by. He stored his goods and tools in a caravan which he owned which was parked behind the place where he operated. In the caravan he had a table which he used when he fixed up the pots, mended the shoes and other items. At the end of the day he carried the heavy tools and stored them in the caravan.

[41] At times he went out of town to repair items which could not be easily carried into town such as coal stoves.

[42] He went on to explain in detail how he carried out his work, some of it appeared to be involved, such as the cutting and replacing the bottom part of pots and replacing them with new ones in such a way that the pots would work properly after the repairs had been done.

[43] As regard his income at the time of the collision he said his income varied, at times it was R600,00 or R700,00 per week. He said he had books he kept regarding the business. The closed books which were no longer used to make entries were kept in his caravan while the current books he kept in his bag. He said in respect to small jobs where he did the repairs immediately he did not note

them in his books. With big jobs which he could not repair immediately he would write a number on the item, tell the customer what the cost of repair would be. If the customer does not have the full amount he or she would pay a small amount and pay the balance when he or she comes to fetch the repaired item.

[44] He was then shown a book in exhibit "C" in which he identified the first document, which showed a name and amount paid and an amount outstanding.

[45] In so far as his working days, he said he worked the whole week, from Monday to Sunday, his income at the time of the collision he said was R600,00 to R700,00 per week including the moneys earned for cash jobs and it was an amount after paying for material.

[46] In Court he identified exhibit "C" a bundle which had current invoices which he had kept in his bag. In the bundle he identified invoices dated from 24 July 1998 to 2 September 1998.

[47] He reiterated why he is not able to continue with his work, he said his work involved carrying heavy tools which he is now unable to do. He also said his work required a healthy and strong person. He added that for example when he has to combine and put together heavy sheets of metal which had to be used in repairing pots he had to stand because he could not do that while sitting down he has to stand and apply force in doing the repairs to the pot, all this he is now unable to do.

He tried to resume work but failed to start working because his foot was swollen and was very painful. He said the pain was from the knee to the ankle of the injured leg, and was extremely painful.

[48] After the first discharge from hospital he said he was given crutches which he used until towards the end of 2001, thereafter he then used only one crutch.

[49] Returning to the pain he suffers, he said that he was feeling pain as he was testifying, the pain is in the front of the lower left leg. He also feels the pain as he walks down the stairs.

He further mentioned that in cold weather he feels pains even if he wears heavy socks. At night he also feels pain and he has to put a pillow under the left leg and take pain tablets in order to be able to sleep. He also said he experienced pain if he carries heavy objects. Whereas prior to the collision, he was able to carry such objects and his tools.

[50] Asked about his general health he said in 2002 he was diagnosed to have T.B for which he is still taking treatment.

[51] Brenda Bosch a clinical psychologist consulted with and interviewed the plaintiff on 23 April 2006. She was present and listened to Dr Reddy's evidence under cross-examination.

[52] She conducted a number of psychometric tests on plaintiff and then compiled her report and her findings. In her report she summarized her findings basing them on the following psychopathology:-

(i) somato form, pain disorder;

This related to persistent complaint of pain consistent with a pain disorder with both psychological and medical features.

(ii) a self and body image disturbance;

(iii) an inability to continue with his pre morbid occupation;

(iv) difficulty to maintain his pre morbid lifestyle and physical activities;

(v) reduced post morbid social and structured leisure.

[53] In her evidence she referred to patients who have a pain disorder but because of their psychological make up are able to manage the pain so that it does not adversely affect their life style.

However in the case of the plaintiff she said that because of his psychological features he is not able to manage his pain, instead these factors exaggerate his feelings of pain. She said plaintiff's feeling of pain is because of the psychological factors, which he cannot control as he does not deliberately or consciously do this nor is he malingering.

[54] She said the psychological factors occur where there is a medical or physical basis as is the case with the plaintiff who has had a fracture, chronic infection and still has a swelling in his left leg.

[55] In so far as prognosis for treatment of the pain disorder she said it is poor.

[56] In regard to the prospects of plaintiff returning to his pre morbid occupation she was of the opinion that he cannot be able to return to his previous occupation. In support of her opinion she set out a number of physical problems such as the pain he is experiencing, he would also not be able to move from door to door servicing his customers as he used to do, that he would not be able to crouch as he said at times he is required to do in his job. This as earlier mentioned she said his physical problems are aggravated by the pain disorder arising from his psychological make up, which she said he told her that he regards himself as disabled. She said in assessing plaintiff's psychological aspects, she found that pain has become the central focus around which he functions. She however said this occurs when there is reason in his mind to have pain as his leg is still swollen.

[57] Dealing with the self and body image disturbance. She said this means a negative view of ones self, it could be ones intelligence, could be character, it could be ones worth. She said in the case of the plaintiff because of his experiences of pain and debilitation he sees himself as being less of a man,

inferior, to other men, he is financially dependant. These feelings contribute to his psychological make up.

[58] M/s Shaida Bobat is a clinical and industrial psychologist. She assessed plaintiff on 3 April 2006 and compiled a report.

[59] The purpose of her report was to give an opinion regarding plaintiff's functioning. She put plaintiff under various tests and sub-tests and had regard to reports of other experts. In regard to intelligence test she found that plaintiff fell within the below average range.

[60] She in the main agreed with Brenda Bosch's findings. Having regard to the evidence of Brenda Bosch and Colleen Kisten she was of the opinion that plaintiff is unemployable and prospects of finding work are bleak.

[61] Mr A Ganie a chartered accountant testified that he was requested by plaintiff's attorneys to compile a report to establish what plaintiff's earnings were. He compiled a report which was based firstly on information he obtained from an interview of the plaintiff. The second part of the report was based on invoices in a book in exhibit "C". The invoices were dated from 24 July 1998 to 2 September 1998.

[62] Mr Ganie said that during the interview plaintiff told him that the first three months, from February 1997 to April 1997 was a period when he was

establishing his business and he earned a daily average income of R70,00. From May 1997 to 23 July 1998 he earned an average income of R200,00 a day.

[63] Mr Ganie said he then made a calculation of an average daily income for the period February 1997 to 23 July 1998 which was based on these figures furnished by the plaintiff. The calculation showed an average daily income to be R178,00 amounting to a monthly average income of R5516,00.

[64] The second calculation was based on the actual figures for the period from 24 July 1998 to 2 September 1998. The average daily income for the short period from 24 July 1998 to 31 July was calculated to be R131,00. From 1 August 1998 to 31 August 1998 the average daily income was calculated to be R142,00. From September 1998 the average daily income for the two days was R198,00.

[65] For the purpose of calculating the average daily income for this period from 24 July 1998 to 2 September 1998 Mr Ganie ignored the income for September 1998 as it was only for two days. For the period 24 July 1998 to 31 August 1998 the average monthly income was calculated to be R4340,00. Because he did not have any actual written expenditure Mr Ganie calculated the monthly expenditure from information furnished by the plaintiff. He calculated the average monthly business expenditure to be R460,00.

[66] Mr Ganie opted to make further calculations based on the actual figures from the invoices which were the only figures based on written invoices as against the figures given in the interview with plaintiff.

[67] He calculated the net average monthly income of the plaintiff by deducting the average monthly expenditure of R460,00 from the 'actual' average monthly income of R4340,00 yielding the net average monthly income of R3880,00. On the basis of this average net monthly income he concluded that plaintiff's net annual income to be R46,500.00.

[68] Mr M.V. Naidoo testified that he is employed at Greys hospital in the Patient Administration Department. One of his duties was controller of files relating to Road Accident Fund. He had in his possession two files relating to the plaintiff.

He explained that for one of the files they had used a file which was for an awaiting trial prisoner and covered the particulars of that person with a sticker and then put the plaintiff particulars. The two files were marked exhibits "F1" and "F2". In so far as hospital expenses he said plaintiff would be charged R40,00 per outpatient visit. He said plaintiff had eight hospital visits.

[69] The charge for an in patient he said was R80,00 per calendar month or part thereof.

[70] Professor Goga is an orthopaedic surgeon who was called by the defendant. He consulted with plaintiff and drew a medico legal report on 23 June 2003.

His testimony relating to the plaintiff's injury as set out in hospital notes is broadly the same as that given by Dr Reddy and plaintiff himself. I do not propose to repeat that evidence save to say that he reiterated that plaintiff told him that he still suffers pain in his left leg. Professor Goga then describes in detail in medical terms what the plaintiff reported regarding his experiences of pain.

[71] Further Professor Goga in his evidence described in detail the treatment plaintiff received in hospital which is also broadly the same as that given by Dr Reddy. I also do not propose to repeat that evidence.

[72] He however commented regarding the removal of the tibial pin from the plaintiff's left leg, he said one can surmise a number of reasons for the removal of the pin, such as:-

72.1 that those who removed the pin might have considered that the infection to the bone referred to as osteitis must be related to the presence of the pin in the injured leg.

72.2 that when removing a fixation from the fractured leg it is important to know whether fracture is united.

He said its not good practice to remove fixation from a fracture, if the fracture is not united. He said he would have expected a plaster of Paris would have been applied if the fracture bone had not united. He said there was no note that a plaster of paris was applied, he therefore presumed that when the fixation was removed the fracture had healed.

[73] In summary he said plaintiff had sustained a compound fracture of his left tibia. Which was stabilized with a tibial nail, that the fracture was complicated by chronic infection after approximately six months, that the fracture went onto full union, the nail was then removed and that the plaintiff has had no recurrence of infection as at April 1999. He said presently plaintiff's fracture is united and there is no evidence of active infection. He accepted that it is normal of a patient to complain of pain post fracture particularly post infection. He said the pain usually subsides with time if there is no recurrence of infection.

[74] In so far as pain is concerned, he said the plaintiff must have suffered severe pain at the time of the accident, the pain would have reduced once the fracture had been cleaned and immobilized and after the tibial nail was inserted. He said plaintiff would suffer a degree of pain when he developed abscess, he said that would have resolved over two to three weeks. He said when he saw plaintiff he complained of severe pain over the left leg, which pain he said comes on particularly at night he had to take pain tablets. He said he is however able to walk independently without crutches. He noted that the left leg was aedematous

and swollen, the fracture was clinically united. There were two scars measuring 6cm and 4cm over the fracture site.

[75] He referred to x rays that were obtained on 23 June 2003, he said the x rays confirmed a healed fracture of the left tibia. In good position, there was evidence of chronic infection.

[76] In so far as plaintiff's prospects of returning to work he was of the opinion that he would be able to return to work after 31 October 1999.

[77] In so far as plaintiff's general health he said he looked frail and was coughing, he was undergoing treatment for tuberculosis since 2002.

[78] M/s Colleen Kisten an occupational therapist who was called by the defendant in summary testified that :

78.1 She consulted with and assessed the plaintiff on 17 May 2006 and compiled a report dated 17 May 2006. She subsequently compiled an addendum report dated 12 June 2006. I shall refer to the latter report as a supplementary report.

[79] She said that when she consulted with the plaintiff he was not well, he coughed consistently.

[80] She then set out Plaintiff's complaints which in brief were the following:-

- 80.1 a severe pain to the left leg which was exacerbated by inclement weather conditions as well as daily activities. His pain came more during the night and he had to use Brufen pain tablets. He said his pain was from the knee to the ankle of the left leg;
- 80.2 he also reported that prolonged periods of walking induced tiredness;
- 80.3 he said the aggravating factors of the pain included prolonged walking;(i.e. approximately 2 kilometres and standing for approximately 10 minutes)
- 80.4 that he is unable to squat.

[81] She went on to set out various tests she performed and set out her conclusion in her report.

[82] As stated earlier she subsequently made a supplementary report in which she came to a conclusion which differed from her conclusion in her first report, I therefore do not intend to set out further details of the first report save to set out her conclusion in that report, as she herself said that the purpose of her assessment was basically to assess the extent of the injuries and how they have impacted on an individual in respect of their daily activities as well as vocational capacity.

[83] In her report of 17 May 2006 she said the following:

“Now that the accident has occurred, having regard to his vocational capacity and related earnings, the orthopaedic injury, i.e. fracture to the left tibia and fibula appears to have healed and it appears that the claimant could have returned to his pre-morbid occupation following the removal of the metal ware in 2001. Door to door canvassing of work may have initially proved problematic”

[84] In the supplementary report she said that in regard to the pain plaintiff suffers “it appears that despite radiological evidence of the fracture healing scar tissue which is adherent to the bone is noted.” She said this would account for the plaintiff’s persistent pain. She expressed reservations regarding plaintiff’s capacity to return to work which are set out in paragraph 110 herein under.

[85] She further stated that in her supplementary report she perused further documentation which contained transactions recorded by the plaintiff for the period July 1998, August 1998, and September 1998, which these documents were verifying plaintiff’s earnings, and the viability of his business. She further said that these documents provided verification which, she said, she required in her initial report that plaintiff repaired pots and shoes and what his earnings were. Asked whether she took the document at face value she said she looked at the invoices and compared them with a sample of plaintiff’s hand writing which she had and she was satisfied it was the same as in the documents. She further said it was an old invoice book, with pages rolled and were discoloured.

ASSESSMENT OF GENERAL DAMAGES.

[86] In considering and assessing the quantum of the general damages for shock, pain and suffering, loss of amenities, disfigurement, and temporary and permanent disability and other aspects under this heading, I am guided by the approach set out in a number of cases stating that a Court in assessing quantum of general damages the Court has a wide discretion to award what is considered to be fair and adequate compensation.

[87] In regard to comparison with previous awards it had been said that the Court approach should not take the form of meticulous examination of such awards in order to fix the amount of compensation payable, but previous awards, if available, should be used to give some guidance, in a general way, in assisting the Court to make an award which is not substantially out of general accord with previous awards in a broad sense. See *Protea Assurance Co. Ltd vs Lama* 1971 (1) SA 530 (A).

[88] The present value of money is an important consideration in making an award. The value of money in recent times has depreciated.

[89] I have looked at some broadly comparable cases such as *Du Duma vs Road Accident Fund* reported in *Corbett and Honey The Quantum of Damages in Bodily Fatal Injures volume IV, E-51 a 1999 Judgment*. In that case plaintiff was a 38 year old male, a manual labourer. He sustained a segmented fracture of the left tibia and fibula. The leg was in plaster cast for two months. The fracture united in a bowed deformity. The left leg was 3cm shorter than the right

leg requiring permanent use of built up shoe. Even with the built up shoe plaintiff was unable to walk or stand for longer than about an hour. There was a likelihood that pressure on the ankle will cause arthritic condition which will lead to arthritis of the ankle. Plaintiff in that case also sustained a fracture of the right clavicle which would never unite as a result plaintiff would not be able to be employed in the heavy manual labour market where he operated before the accident. Plaintiff was awarded a sum of R35,000.00 in 1999 the present day value is R48,930.00.

[90] In *Mthembu vs Road Accident Fund (un-reportable case) NPD case no 3597/01 Judgment in 2005*, Plaintiff was 35 years married male. He was involved in a motor vehicle collision on 2 June 2000. In the collision he sustained a head injury with facial lacerations, a compound fracture of the right tibia and fibula which involved two fractures. He had a debridement of the leg which was placed in plaster cast, he had maxilla-facial surgery and extraction of teeth, he was an inpatient for 36 days. The fracture was to have healed after four months but was crooked and short. He was on crutches for 11 months. In 2005 he was awarded a sum of R90,000.00 general damages, the present values of which is the R93,060.00.

[91] The nature and extent of plaintiff's injuries and treatment is fully set out in Dr Reddy's evidence and they are common cause. There is no dispute that the compound fracture is more serious than a close fracture. The plaintiff was in hospital as an in-patient for a total period of 54 days. He underwent four surgical

procedures in hospital which involved plaintiff experiencing pain, pre-operation and or post operation.

[92] There is no dispute that plaintiff sustained a serious injury which was aggravated by the onset of infection which necessitating plaintiff undergoing two surgical operations. The injury left plaintiff with a swollen left leg which caused him pain lasting long after he had been discharged from hospital.

[93] There can be no doubt that plaintiff experienced shock in one form or other as a result of the collision. Plaintiff suffered severely at the time of the collision. I accept Dr Reddy's evidence that Plaintiff would have suffered such pain for up to a month after the collision. I also agree that when infection set in, in February 1999, plaintiff experienced severe pain necessitating that he returned to hospital where he had to under go the surgical procedure for the drainage of pus. It is also significant that all the experts who assessed him state that plaintiff complained of pain even after approximately eight years after the collision. Even in Court when he was testifying on 19 June 2006 he mentioned that he was experiencing pain.

[94] M/s Brenda Bosch who diagnosed that plaintiff's persistent complaints of pain arose from a pain disorder which had a medical and psychological basis. In her opinion she said that the prognosis for that condition was poor. Even on the day when plaintiff was testifying on the 19th June 2006 he was still experiencing

pain. To me this evidence of prolonged pain and M/s Bosch's opinion suggest that it is therefore probable that plaintiff suffered pain until his death.

[95] In so far as loss of amenities plaintiff's evidence is that when he was discharged from hospital he had to walk with the aid of two crutches until 2001, thereafter he used one crutch. Dr Reddy who assessed him on the first occasion in June 2001, said he walked with a painful limb gait. Both specialists said plaintiff's leg was thinner than the right leg and the muscle in that leg was wasted and this indicated that plaintiff used the right leg more than the left leg. I am satisfied that plaintiff could no longer engage in his pre-morbid sporting activities, playing soccer and jogging. The evidence also suggests that he could not walk freely in a normal manner.

[96] In regard to whether the plaintiff's fracture had healed there is a difference of opinion between Dr Reddy and Professor Goga. Dr Reddy's evidence is that when he saw the plaintiff a month before the commencement of the trial that is when again saw the plaintiff, he said he found the fracture was still palpable. He said after examining the fracture he concluded that the fractured bone had not remodeled to its original shape.

Professor Goga's evidence is that he assessed plaintiff on 23 June 2003, he examined plaintiff's left leg and was satisfied that the fracture was united. He also said he examined x-rays taken in June 2003, and these x-rays he said showed that the fractured leg was united.

[97] With the evidence before me I am not able to say which opinion is correct. Dr Reddy before he testified or when he testified was not furnished with the radiological report of the x-rays Professor Goga referred to.

[98] Although Professor Goga said there was no periosteal reaction in plaintiff he agreed that there was an inactive infection of the bone of the left leg which could flare up at anytime.

[99] Further, although Professor Goga said he did not find the neuroma which Dr Reddy said he found on the fracture site, he (Prof Goga) said he might have missed it. I accept Dr Reddy's evidence in this regard and that the neuroma can be a source of pain for the plaintiff.

[100] Having considered all the evidence and seen the plaintiff, I am satisfied that plaintiff is entitled to a substantial award for general damages. I therefore find that a sum of R85,000.00 for general damages is fair and adequate.

PAST LOSS OF EARNINGS

[101] At the commencement of the trial counsel for the parties agreed that an actuary would not be called to testify regarding calculation of plaintiff's loss of earnings, but I would be requested to make findings, assumptions including extent of contingencies.

I have been requested by counsel for the plaintiff in his Heads of Argument to make my finding, assumptions including contingencies.

[102] I have made a finding assumptions including extent of contingencies, these have been sent to the legal representatives of the parties to forward them to the actuary for the required calculations. My reasons for the findings follow herein under.

[103] In order to reach the determination of the quantum of loss of past earning I have to make a finding whether or not plaintiff, because of the injuries he sustained in the collision, he is unemployable and is therefore entitled to claim loss of earnings.

[104] The plaintiff's occupation before the collision was mainly repairing pots and mending shoes. He also repaired coal stoves and also made items such as containers for storing items such as mealie meal.

[105] There is no dispute that after the collision plaintiff was left with a swollen left leg, he also had pains in that leg.

[106] Plaintiff's evidence is that on two occasions he attempted to return to his pre-morbid work but because it involved heavy work and standing and required a person who had strength to do the work, he was no longer able to do the work and he failed to carry on with the work.

[107] He also said his tools which he kept in his caravan were stolen. His evidence was further that prior to the collision he used to visit his customers' homes, he also went out of the city to repair items such as stoves in rural areas, to do that he had to carry his tools.

[108] The plaintiff had a standard six education he said he was unable to do any other work as he was not trained to do anything else.

[109] Plaintiff's evidence that he is unable to go back to his work is supported by the experts, other than Professor Goga, who was of the opinion that plaintiff would be able to return to his kind of work after the 31 October 1999. Professor Goga reached his opinion in this regard without seeing or referred to reports of other experts including the occupational therapists, the psychologist and Dr Reddy.

[110] M/s Kisten who was called by the defendant said she was gravely concerned about plaintiff returning to his work. In view of plaintiff's work history and his job description she had reservations about plaintiff returning to his work as there might be recurrence of infection as he would be exposed to an environment where he might be exposed to a situation where it might be traumatic. She said she was concerned about plaintiff's persistent pain and swelling.

[111] Dr Reddy, whose evidence I have referred to assessed plaintiff in June 2001 and again examined him in 2006, was of the opinion that it was reasonable for plaintiff to discontinue work duties involving manual work and walking door to door and the carrying of heavy tools.

[112] I have summarised M/s Brenda Bosch's evidence. She said even if from a medical point of view plaintiff is considered fit to work she was of the view that he was probably not fit and unemployable for a combination of physical and psychological reasons.

[113] M/s Bobat carried out tests on plaintiff including, intelligence tests and technical aptitude tests she said having considered all the evidence she concluded that plaintiff was unemployable. She considered plaintiff's prospects of finding another employment such were bleak.

[114] I am satisfied that plaintiff has proved on a balance of probabilities that because of the injury he sustained, the collision and its after effects he could not and was unable to return to his work, prior to his death and that the prospects of doing or obtain other work were bleak.

[115] I therefore found that plaintiff is entitled to compensation for past loss of earnings for the period from the 2nd September 1998 to 24 May 2007.

PLAINTIFF'S INCOME

[116] There was no documentary evidence of plaintiff's income, save for the period 24 July 1998 to 2 September 1998. Mr Ganie, who was tasked with compiling a report of plaintiff's earnings made two calculations of plaintiff's average income.

[117] The first calculation was based on figures given by plaintiff for the period May 1997 to 23 July 1998. A calculation for that period showed an average monthly income of R5516.00.

[118] In the second calculation, Mr Ganie used actual figures obtained from plaintiff's invoice book for the period 24 July 1998 to 31 August 1998. (He ignored the income for the two days in September 1998.) This calculation showed a monthly average gross income of R4340.00.

[119] Because Mr Ganie did not have documentary evidence of plaintiff's business expenses he relied on information supplied by plaintiff regarding the expenditure which amounted to R460.00 per month.

[120] Using the average monthly income based on the invoices and using the amount of monthly expenditure based on figures furnished by the plaintiff he calculated plaintiff's average net monthly income to be R3880.00, which then amounted to an average annual net income of R46,500.00.

[121] Although Mr Ganie's average annual income was based on income from invoices for a limited period from 24 July 1998 to 31 August 1998, he justified this by saying that this income was based on actual evidence.

[122] I accept Mr Ganie's calculation even though it is based on information for a limited period. The information Mr Ganie used was the only actual evidence at his disposal. There is no dispute that plaintiff was self employed and he must have earned some income from his work. He has said his records were stolen.

[123] In so far as the expenditure is concerned Mr Ganie in cross examination agree that plaintiff did not give him any information as to how much he spent when travelling outside town to rural areas to service his customers. Mr Ganie agreed that there must have been an expense.

[124] I have considered it fair to make an allowance for these expenses even though there is no amount of what they would have been. I have decided to make a deduction of R500.00 from the average net annual income. I therefore found that the plaintiff's net average income was R4600.00

CONTINGENCIES

[125] In considering contingencies I was dealing with a short period from 2 September 1998 to 24 May 2007. I found that plaintiff's chances of finding alternative employment are bleak, there might have been a small chance of plaintiff finding some means of earning a living. I do not propose to speculate what such means would be. In the circumstance I have made an allowance for this. I accordingly found that an allowance of five percent is fair and appropriate.

[126] I have received from Messrs Human and Morris Consulting Actuaries and actuarial calculation of plaintiff's past loss of earnings which have been calculated to amount to the sum of R465.370,00. I annex to this judgment the actuarial calculation.

PAST HOSPITAL EXPENSES

[127] Mr Naidoo's of Greys Hospital, testified that plaintiff would be charged R80,00 per in-patient out-patient visit.

[128] According to Mr Naidoo plaintiff had eight out-patient visits at R40.00 per visit. On that basis the total amount for out-patient visits was R320.00. In so far as in-patient admissions, according to Dr Reddy's evidence plaintiff was admitted into hospital on three occasions which were:-

- (i) 2 September 1998;
- (ii) 9 February 1999;
- (iii) 30 March 1999.

The total amount payable by plaintiff to the hospital for in-patient would be R240.00.

[129] Therefore I find that the amount that is owed by the plaintiff to Greys Hospital is the sum of R560.00. As this amount is owed by plaintiff to Grey's Hospital the Administrator/ Executor of the plaintiff's estate is directed to pay the said sum of R560.00 to Greys Hospital.

ORDER

[130] I therefore grant judgment in favour of the plaintiff for payment by the defendant of:-

111.1 a sum of R85,000.00 for general damages;

111.2 past loss of earning in the sum of R465,375.00;

111.3 a sum of R560.00 in respect of past hospital expense;

111.4 interest at the rate of 15,5 per cent per annum on the aforesaid amounts from 14 days after date of judgment to date of payment;

111.5 costs of suit to include (but not limited to)

- (i) costs consequent upon the employment of senior counsel;

111.6 and travelling time and of other costs of the following expert witnesses:-

- (a) Dr Reddy;
- (b) M/s Brenda Bosch;
- (c) M/s Shaida Bobat;
- (d) G.M.A. Ganie

Date of last hearing:

Delivered on: 21 September 2009

Counsel for Plaintiff: Adv Moola SC

Instructed by: Messrs C.M. Sardiwalla & Company

Counsel for Respondent: Adv Chowdree SC

Instructed by: Messrs Naren Sangham & Associates