

IN THE HIGH COURT OF SOUTH AFRICA

[Northern Cape High Court, Kimberley]

Case no: 799/06
Dates heard: 2008.09.22;
2009-02-24,25,26
Date delivered: 2009-04-17

In the matter of:

ARTHUR RENS

PLAINTIFF

versus

**THE MEC FOR HEALTH: NORTHERN CAPE
PROVINCIAL DEPARTMENT OF HEALTH**

DEFENDANT

Coram: **MAJIEDT J**

JUDGMENT

MAJIEDT J:

[1]This is an action for damages arising out of negligent treatment administered to the Plaintiff at the Gordonia Hospital in Upington in February 1998. The Plaintiff was substituted in the course of the trial for the erstwhile Plaintiff, namely Mrs Desiree Sophia Dopp, who sued in her representative capacity as the Plaintiff's mother. The Plaintiff now has full legal capacity, having attained the age of majority prior to the trial. Mr. Corbett appeared for the Plaintiff and Mr. Nyangiwe for the Defendant.

[2]The Plaintiff was ten years old when he fractured his left arm while doing gymnastics at school. As a consequence of negligent treatment administered to him at the aforementioned hospital during February 1998, he underwent an above-elbow amputation of his left arm and subsequent thereto a re-amputation through the left shoulder.

[3]The Defendant has conceded that its employees, acting in the course and scope of their employment for the Defendant, had acted negligently and the Defendant has assumed full liability for the amount of damages which the Plaintiff was able to prove. The matter proceeded on the issue of the quantum of the Plaintiff's damages only.

[4]By agreement between the parties I had directed at the commencement of the hearing that no actuarial evidence would be adduced at this stage and that all that is required from this Court would be to make the necessary factual findings on matters which remain in dispute. These would then be furnished to the actuary for the calculation of the claims for future medical expenses and loss of earnings.

[5]The Plaintiff claims the amount of R13 105 400,00 which is made up as follows:

5.1	Past hospital and medical expenses:	R500.00
5.2	Future medical expenses:	R9 282 600.00
5.3	Past loss of earnings:	R15 700.00
5.4	Future loss of earnings:	I 007 100.00
5.5	General damages:	R800 000.00

[6]The Defendant has conceded that the assumptions made by the Plaintiff's actuary in the report dated 5 September 2008 are correct and that, for purposes of the said actuarial calculations, the assumptions which the actuary made and which relate to mortality, interest, inflation and earnings, inflation and costs, retirement age and taxation were correct and could be taken into account.

[7]The Plaintiff called a number of expert witnesses and he also testified in the matter. Quite disappointingly the Defendant did not adduce any evidence and closed its case. This is indicative of the manner in which the Defendant has conducted the litigation in this matter, something to which I shall allude again later herein. It is neither necessary, nor practicable, to set out in full the evidence of the various expert witnesses adduced at the hearing. Most of the evidence remained unchallenged and I shall therefore restrict myself to the germane portions of their testimony.

[8]The Plaintiff did not persist with his claim for past medical expenses. With regard to the rest of the claims I shall summarise the evidence as it relates to the different heads under which the damages had been claimed as set out above.

[9]Dr. Versfeld, an orthopaedic surgeon, had examined the Plaintiff and had also held a discussion with the Defendant's orthopaedic surgeon, Dr. Du Plessis, to isolate the issues on which they agreed and disagreed. In this regard they compiled a minute of their discussions which had been held on 20 February 2009 and which was handed in as Exhibit C. Both Dr. Versfeld and Dr. Du Plessis agreed that the Plaintiff requires an appropriate prosthesis for his physical needs. They also

agreed that the Plaintiff has scoliosis (curvature of the spine). According to Dr. Versfeld in his oral evidence, this scoliosis is as a consequence of the imbalance which the Plaintiff has due to the loss of the upper left limb. Both orthopaedic surgeons agreed that provisions should be made for conservative treatment of this scoliosis and the resultant lower back pain at a cost of R1800.00 per annum in the future.

[10]Dr. Versfeld testified further that, after having examined the Plaintiff, he found that the Plaintiff suffered from neck symptoms due to the imbalance created by the loss of the left upper limb. In his view an amount of R1200.00 per annum should be allowed for future treatment of these neck symptoms.

[11]Dr. Shevel, a psychiatrist, testified about the psychological sequelae of the Plaintiff's injury and amputation. According to him the Plaintiff has developed significant psychological adjustment difficulties as a consequence of the said amputation. He described the Plaintiff as being self-conscious, his self-confidence had decreased and he had tended to isolate himself on a social level. His school work suffered, since he had become depressed during the course of high school and he had struggled to concentrate, which ultimately led to him deciding to leave school. Dr. Shevel also indicated that the Plaintiff has not fully come to terms emotionally with the amputation. He testified that the Plaintiff requires anti-depressant medication for a period of 18 to 24 months at a cost of R250.00 per month and follow-up psychiatric consultations during this period at a cost of R800.00 per consultation as well as 30 sessions of psychotherapy at a cost of R1200.00 per session. It seems to me that the period of 18 to 24 months should be averaged out at a period of 21 months and that the costs alluded to hereinabove

should consequently be for a period of 21 months.

[12]Ms. Bester, an occupational therapist, testified that the Plaintiff will in future require occupational therapy comprising of one two-hour sessions per month for two years at a cost of R450.00 per hour and thereafter a one-hour session every four months. She also testified that provision should be made for the costs of travelling to and from these occupational therapy appointments at a cost of R450.00 per visit. She testified further that the Plaintiff will in future require a domestic assistant which would cost approximately R2500.00 per month. When questioned by me, she however conceded that this level of remuneration was based upon rates paid in the Cape Town area.

[13]The Defendant's occupational therapist, Ms Delport, stated in her report that the Plaintiff will need a domestic assistant in future at a cost of R1200.00 per month as well as the assistance of a gardener at the costs of R650.00 per month. Ms Delport is based in Bloemfontein and these rates are more reliable for smaller centres such as Upington. It seems to me that, although Ms Delport did not testify, the figures in her report appear to be accurate and therefore an amount of R2 000.00 should be awarded to Plaintiff to cover the costs of his care through a domestic assistant and a gardener in the future, as Mr. Corbett has submitted on behalf of the Plaintiff.

[14]Ms Bester also testified that the Plaintiff would in future require a specially adapted motor vehicle and that the costs of adaptation would amount to R10 000.00. She also pointed out that he would require a vehicle with an automatic, as opposed to a manual gearbox, given his disability. Her enquiries indicated that an automatic vehicle costs

R30 000.00 more, at the cheapest level available in the market.

[15]In her report, Ms Delport, the Defendant's occupational therapist, also recorded that the Plaintiff would require a specially adapted vehicle costing between R30 000.00 to R40 000.00 extra. I agree with Mr. Corbett that an amount of R40 000.00 should therefore be awarded to Plaintiff to cover these additional transport costs, which costs will be incurred every five years for a new vehicle.

[16]Mr. Kritzinger, an orthotist and prosthetist, testified that he had fitted a myo-electric prosthetic arm to the Plaintiff during the week of 17 to 21 November 2008. I interpose to point out that at the last adjournment, on 22 September 2008, I had ordered that the Defendant should make an interim payment in the sum of one million Rand into the Plaintiff's attorney's trust account by no later than 23 October 2008. This order was complied with and part of that sum of money was utilised for the fitting of this myo-electric prosthetic arm. During testing Mr. Kritzinger had found the Plaintiff to be a suitable candidate for such a prosthetic device. The reason why a myo-electric device was fitted, as opposed to a manual one, is because of the fact that the manual prosthesis causes unbearable discomfort to the extent that the prosthesis is usually later discarded by the patient.

[17]During the course of the hearing on the first day, while he was testifying, Mr. Kritzinger demonstrated on the Plaintiff the use of the prosthetic arm. Mr. Kritzinger was able to demonstrate to the Court how the Plaintiff was able to move individual fingers, wrist and elbow of this prosthetic arm. The elbow joint was manipulated through the use of a switch operated by the Plaintiff with his right hand. In this regard Mr.

Kritzinger testified that the Plaintiff requires a more advanced elbow joint, known in the market as an “*l-limb elbow*”, which has recently become available on the market. This new device would enable the Plaintiff to manipulate the elbow joint without the use of a switch, which would leave his right hand free when manipulating the elbow joint. Mr. Kritzinger testified further that he had made enquiries in order to establish whether a myo-electric prosthesis could be supplied and fitted by a government health institution. His enquiries confirmed that these institutions do not have the necessary expertise or specialized equipment to carry out this type of prosthetic procedure. This evidence of Mr Kritzinger relating to the non-availability of myo-electric prosthetic devices through the State health care system, was indeed confirmed by Mr. Knight who also testified for the Plaintiff. Mr. Knight is also an orthotist and prosthetist and he is also the chairperson of the South African Orthotic and Prosthetic Association. Furthermore Mr. Barkley, also an orthotist and prosthetist, testified on behalf of the Plaintiff and confirmed this particular aspect of Mr. Kritzinger’s and Mr. Knight’s evidence. Mr. Barkley is a successful tenderer for the supply of prosthetic devices for the government health care system in the Southern Cape. Mr. Knight confirmed that he had spoken to a Mr. Noordien who is the orthotist and prosthetist in charge of the Orthotic and Prosthetic Centre at Conradie Hospital, which is a State institution. Mr. Noordien, had confirmed to him that the State health care system does not have the required diagnostic equipment, training or ability to supply a myo-electric prosthesis. Mr. Barkley confirmed this particular evidence.

[18]Mr. Kritzinger also testified that in future Plaintiff would require a primary prosthesis to be replaced every five years and a secondary

prosthesis to be replaced every ten years. This secondary prosthesis is necessary to be used whilst the primary prosthesis undergoes re-fitting, maintenance and servicing. During such periods of maintenance, servicing and refitting, the prosthesis would have to be sent to Cape Town, since this requires specialised equipment and personnel. Plaintiff would also, according to Mr. Kritzinger, require a refit of the primary prosthesis every two and a half years. This refit is necessary as it has to be compatible with the body changes of the Plaintiff over the years from time to time. Plaintiff would also require further training on how to use the prosthesis and initially would require five two-hour sessions and thereafter ten in-patient intensive training sessions. He would also require a replacement glove every year, two replacement batteries every two and a half years during the period where a new prosthesis is not provided; maintenance of both prostheses for 8 hours per annum and servicing of both these prostheses every five years. In this regard it was pointed out that the first three years of the life span of a new prosthesis is covered by the warranty.

[19]Although initially I had doubts over whether a secondary prosthesis is really necessary, I was persuaded by Mr. Kritzinger's explanation during his evidence that it is indeed a necessary item. Furthermore, Mr. Nyangiwe for the Defendant conceded that the Plaintiff does indeed require both these prostheses as recommended by Mr. Kritzinger. I am also satisfied that it is reasonable to make provision for the immediate purchase of a prosthesis with the revolutionary new I-limb elbow which could be used as a primary prosthesis, while the existing one could be used as a secondary prosthesis until its replacement is required.

[20]I now turn to consider the question of loss of earnings. In this

regard, the Plaintiff led the evidence of Ms Pretorius, an industrial psychologist who had compiled a comprehensive report, which she had amplified and elucidated during the course of her oral testimony. Her modus operandi was to list the standard of academic achievements of Plaintiff's parents and their siblings and also to consider their work history. It appeared from her investigations that the majority of the Plaintiff's immediate family had completed grade 12 (the old standard ten) and two of the Plaintiff's uncles on his mother's side had achieved quite well, the one being employed at Eskom and at present undergoing tertiary training and the other employed at Checkers. The Plaintiff's father is a boilermaker by training. The Plaintiff informed Ms Pretorius that he regretted leaving school before completing grade 12 and that he has a desire to return to school to complete his education. In her opinion the Plaintiff has the intellect to complete grade 12, although it would be a major challenge for him, given his disability and his psychological disadvantage. She expressed the view that it would take the Plaintiff up to six years to complete his schooling up to grade 12. It appears that the Plaintiff left school in the course of grade 9, without completing same.

[21] In the course of predicting the Plaintiff's pre-morbid career path, Ms Pretorius took into account the educational and skills level of the families (on both his father's and mother's side), and it appeared that most family members had progressed to high school and many, as I have stated, had passed grade 12. She also considered the positive work ethic in the family, the presence of significant role models, such as Plaintiff's uncle Jeffrey who is employed at Eskom and who intends financing Plaintiff's younger brother's technical studies, as well as Plaintiff's level of intelligence which was at least in the average range.

She also took into account the trend of upward mobility of children as compared with their parents as a general proposition. On a conspectus of all these aforementioned factors, Ms Pretorius came to the conclusion that the Plaintiff could have reached a skilled position like that of his father, on a pre-morbid career path.

[22]Ms Pretorius further expressed the opinion that, had the Plaintiff not undergone the amputation of his arm he would have followed a career path as follows:

- 22.1 He would have completed grade 12 in 2007 (the date of 2006 in her report is obviously a mistake);
- 22.2 He would have entered the open labour market as an unskilled casual labourer working for approximately two years at R80 to R120 per day three to five days per week;
- 22.3 In 2009 he would have progressed to a level of remuneration equivalent to the well-known Paterson scale's job grade A1 to A3 for a period of three to five years;
- 22.4 Thereafter Ms Pretorius then predicted two scenarios. Scenario A assumes the Plaintiff would have received in-service training but remained at an unskilled level and progressed to a level of earnings equivalent to Paterson job grade B4/B5. I would refer to this scenario as the "*pessimistic*" scenario.
- 22.5 In terms of scenario B, referred to as the "*optimistic scenario*", Ms Pretorius testified that the Plaintiff would then

have progressed as follows:

22.5.1 He would have completed an in-service apprenticeship in a technical field and would have passed a trade test in three to five years, during which period he would receive at least the prescribed minimum wage, which for the four-year trade qualification amounts to R575.10 per week in the first year, R630.90 in the second year, R713.25 in the third year and R876.60 in the fourth year;

22.5.2 After having successfully passed his trade test in five years the Plaintiff would have qualified as an artisan and he would have earned an income equivalent to the Paterson job grade C1/C2.

[23]With regard to the applicable remuneration figures, Ms Pretorius made reference to the Quantum Year Book by Robert J Koch. The Quantum Year Book for 2009 is exhibit P before the Court. Utilising these tables, it is apparent that the average remuneration for Paterson level A1 per year amounts to R75 500.00 per annum. The average package for Paterson level A2 is R87 500.00 per annum. The average package for Paterson level A3 is R96 000.00 per annum. The remuneration representing the total package average per year for Paterson level C1 is R228 000.00 per annum and for level C2 is R272 000.00 per annum. The average between Paterson levels C1 and C2 is therefore R250 000.00 per annum.

[24]I think Mr. Corbett is correct in his submission that a 15%

contingency deduction is appropriate in this matter when one takes into account the uncertainties concerning the Plaintiff's pre-morbid career path and the normal vicissitudes of life. In my view the following factors should be taken into account in coming to this figure for a contingency deduction in this matter:

- 24.1 That most of the Plaintiff's family members had achieved a matriculation qualification.
- 24.2 That the Plaintiff's father had qualified as a boilermaker (artisan).
- 24.3 That two of Plaintiff's uncles had followed successful career paths (the one at Eskom and the other at Checkers).
- 24.4 That is generally accepted that children normally exceed the level of achievement of their parents, particularly those from previously disadvantaged backgrounds (given the historical inequalities in our country which are well documented).
- 24.5 That Plaintiff has the requisite cognitive and intellectual ability to obtain a tertiary qualification according to the relevant experts.
- 24.6 That it is always difficult to be precise when projecting a career path for a claimant who sustained injuries during childhood.
- 24.7 That the Plaintiff would have not have obtained formal qualification as an artisan and instead would have received

in-service training and would have progressed to the level of Paterson job grade B4/B5 instead of to the level of C1/C2.

24.8 That the Plaintiff's level of earnings would not have increased as quickly as that projected by Ms Pretorius.

24.9 That it is assumed for purposes of the career path that Plaintiff's earnings would not have progressed beyond Patterson job grade C1/C2, whereas it is quite possible that he could have progressed up to C4/C5.

[25]The next aspect that requires consideration is Ms Pretorius' testimony regarding Plaintiff's post-morbid career path. She testified that it would take at least six years for him to successfully complete his schooling up until grade 12 level. She also pointed out that he has no work experience and suffers from depression and adjustment problems. In the circumstances she expressed the view that Plaintiff would only obtain employment in a sheltered environment with a sympathetic employer. He would only be suited to sedentary work with minimal physical demands. Even in a clerical position he would be hampered by his disability. I am in agreement with these view expressed by Ms Pretorius.

[26]Ms Pretorius also expressed the opinion that should Plaintiff obtain employment in a clerical position, his earnings would be in the region of Paterson job grade B1/B2. According to the aforementioned exhibit P, the average package for level B1 is R106 500.00 per annum, while the average package for B2 is R122 000.00 per annum.

[27] Assuming that the Plaintiff does indeed complete his schooling, it would take some time for him to find suitable employment. On behalf of the Defendant Mr Nyangiwe conceded during argument that it could take up to ten years for Plaintiff to complete his schooling and to complete some form of post-schooling qualification whereafter he would enter the formal employment market in a clerical position.

[28] The next aspect for consideration is the appropriate contingency deduction to be made for post-morbid earnings. I am in agreement with Mr. Corbett for the Plaintiff that 50% would be appropriate in the present matter taking into consideration the following:

- 28.1 The strong possibility that Plaintiff may not complete his schooling;
- 28.2 The fact that Plaintiff may never obtain gainful employment;
- 28.3 That Plaintiff may take longer to complete his schooling and tertiary qualification and enter the formal job market;
- 28.4 Plaintiff's employment will always be insecure and he will be vulnerable to losing such employment should he not be able to cope with the requirements of his work. There may therefore be long periods of unemployment; and
- 28.5 Although Plaintiff may obtain employment he will not earn at the level of Paterson job grade B1/B2.

Mr. Nyangiwe has submitted that a contingency deduction of 25% would be more apposite in the circumstances. I disagree. While

the legislative protection afforded to disabled employees by the Constitution and by the Employment Equity Act, 55 of 1998, must be taken into account, in my view a 50% contingency deduction is far more realistic in the circumstances.

[29]I consider next the question of general damages. As a general rule, previous awards in comparable cases are helpful, but are not binding on me. See in this regard inter alia: **Protea Assurance Company Limited v Lamb** 1971(1) SA 530 (A) at 536 A-B. Potgieter JA put it thus:

“Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages.”

[30]With the aforementioned dictum in mind, it is correct as Mr. Corbett for the Plaintiff has submitted, that a tendency has developed in our Courts towards more generous awards for general damages. See: **Marunga v The Road Accident Fund** 2003(5) SA 164 (SCA) at I. 27, 170 F. There, Navsa JA referred to the following passage in **Wright v Multilateral Motor Vehicle Accidents Fund**, reported in **Corbett and Honey The Quantum of Damages in Bodily and Fatal Injury Cases**, Vol. IV at E3-31. Broome DJP stated that:

“I consider that when having regard to previous awards one must recognise that there is a tendency now for awards to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, in the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our

awards in the past have been significantly lower than those in most other countries.”

See also in this regard: **De Jongh v Du Pisanie and Another** 2005(5) SA 457 (SCA) at [65], 477 D-F. It is important to add the cautionary rider, however, that this tendency of increase in general damages, is but one of the factors to be considered. See **De Jongh v Du Pisanie N.O.** *supra* at [66], 477 I-J. See further generally in this regard the unreported judgment which I had written in **Arthur William Mark Harcourt NO v Road Accident Fund**, case number 1285/98 delivered on 2 August 2000 at pars. 15.2 and 15.3. And see: **Road Accident Fund v Van Rhyn** [2007] 3 All SA 659 (E) at par. [31].

[31]I will now consider comparable cases with regard to general damages. I was firstly referred by Mr. Corbett to the well-known case of **Blyth v Van den Heever** 1980(1) SA 191 (A) at 224C and following; also reported in **Corbett and Buchanan The Quantum of Damages in Bodily and Fatal Injury Cases**, Vol. III at page 38. In that matter the Plaintiff had sustained fractures of the radius and ulna of the right arm followed by sepsis and an undiagnosed ischemia. He had sustained these injuries after having fallen from a horse. Plaintiff had been left with an arm which was described by the trial judge as “*a shrunken clawlike appendage of extremely limited functional value*”. Apart from the initial operation in the form of an open reduction of fractures with the insertion of a metal plate, the Plaintiff had undergone two further operations to eliminate sepsis. There was a distinct possibility that he would have to undergo a further future operation to amputate the limb and to fit an artificial arm. The Plaintiff, who was 20 at the time of the

accident, was awarded R20 000.00 in respect of his claim for general damages during 1979. Converted to the present value by applying the consumer price index, that amount is worth R507 000.00 in today's monetary terms.

[32]I was also referred to **Cheney v Eagle Star Insurance Company Limited, Corbett and Buchanan**, *supra*, Vol. I at page 224 where the Plaintiff had undergone an amputation of his left arm just below the shoulder. He suffered from phantom pains and his body posture was distorted. The Plaintiff's hearing and sense of taste and smell has also been affected. He was a middle-aged man at the time of the accident and he was awarded £13 000.00 for general damages, which in today's monetary terms is worth R684 000.00.

[33]Finally Mr. Corbett referred me to **King v Geldenhuys, Corbett and Buchanan**, *supra*, Vol. II at 379 where the Plaintiff was attacked by two dogs as a result of which his right arm had to be amputated. His left arm was also bitten. The Court, referring to the decision in **Blyth v Van den Heever** *supra*, awarded the Plaintiff R45 000.00 in 1983, which is worth R538 000.00 in today's monetary terms.

[34]In **Pheko v Maine** (1995), **Corbett and Honey**, *supra*, Vol IV at D2-1, the Plaintiff had sustained multiple injuries, including an amputation of his left arm, some 12 cm below the shoulder joint. An amount of R50 000.00 was awarded for general damages, equivalent to R132 000.00 in today's monetary value.

[35]In **Smith v Road Accident Fund** (2003), **Corbett and Honey**,

supra, Vol V at D2-1, the Plaintiff's injuries comprised *inter alia* of a traumatic amputation of the left upper arm and a partial fracture of the right skull. He was five years old at the time. R250 000.00 was awarded for general damages, equivalent to R378 000.00 in today's monetary value.

[36]In the present matter the salient facts with regard to the amount to be determined in respect of general damages are the following:

36.1 The Plaintiff was only 10 years old when he sustained these injuries and had to undergo an amputation of his left arm.

36.2 The principal of the primary school which the Plaintiff had attended at that time in Upington, described the Plaintiff as follows in a letter dated 15 February 2008:

“Hy het sy skoolloopbaan by hierdie skool begin. Ek ken hom redelik goed, omdat hy een van my leerders was wat goed in sport en gimnastiek gevaar het. Ek was ook sy LO (liggaamsopleiding) opvoeder in die laerskool. Nadat hy sy linkerarm verloor het, het sy hele lewe verander en hy moes geweldige aanpassings maak waarvoor hy nie op daardie stadium gereed was nie. Dit het 'n groot impak gehad op sy toekoms. Hierdie impak was geweldig en dit het sy lewe negatief beïnvloed, omdat hy nie meer aan sy drome kon werk nie.”

36.3 Plaintiff himself gave evidence during the trial and he described the impact which this incident has had on his life. It can only be described as a devastating change of fortune for the worse in this young man's life. He was effectively

robbed of his childhood and had undergone an extremely traumatic experience at a very tender age. As is apparent from the letter of the principal, *supra*, he had been a budding sportsman and gymnast and he was one of the learners from whom much was expected.

36.4 The Plaintiff is self-conscious about his disability and has lost self-esteem. He has had to endure life and make the best of his circumstances without a prosthetic limb for a period in excess of 10 years (i.e. until the myo-electric prosthesis was fitted by Mr. Kritzinger as described above).

[37]Taking into account the facts and circumstances of this matter and having regard to the comparable cases referred to earlier, I am of the view that an amount of R600 000.00 would be fair and reasonable in respect of the Plaintiff's claim for general damages.

[38]With regard to costs it is clear that the Plaintiff has had to procure the services of expert witnesses who had to attend the trial and their reasonable and necessary and qualifying expenses should be paid by the Defendant. I disagree with Mr. Corbett in his submission that the Plaintiff was justified in obtaining the services of counsel and an attorney from Cape Town and that their costs of travel and accommodation should consequently be allowed on taxation. This is a luxury which I am not prepared to grant to the Plaintiff.

[39]One final matter that remains is the fact that I had broached with Mr. Corbett the possibility of the setting up of an *inter vivos* trust for the Plaintiff so that the substantial proceeds of the award could be paid into

such a trust to be administered for the benefit of the Plaintiff. The Plaintiff having attained the age of majority and being of sound mind, does not need a curator bonis. I am of the view however, that it would only be proper and in the Plaintiff's best interests that the proceeds of the award be paid into such an *inter vivos* trust. This proposal has found favour with Mr. Corbett and his attorney and had been explained fully by me at the end of the hearing to the Plaintiff and his mother who had attended the proceedings throughout. The proposal was also supported by the Defendant. Mr. Nyangiwe has contended that the parties should bear the costs of the administration of the trust in equal parts. I cannot uphold this contention. I see no reason why the Defendant, whose employees have caused Plaintiff's present predicament, should not bear all such costs.

[40]Mr. Corbett has furnished me with the Cape Law Society's guidelines in respect of non-litigious matters effective from September 2002. This has some bearing on the costs allowed for the administering of the trust by a firm of attorneys as proposed by Mr. Corbett. Having practised in Cape Town as an advocate for a number of years, I know the firm which is proposed very well and I am satisfied that they will properly administer the trust to be established and registered with the Master of this Court.

[41]I conclude by expressing by extreme displeasure at the manner in which the Defendant has conducted this litigation.

41.1 Having conceded the merits on 31/10/2007, the Defendant was not ready for trial on 22/9/2008 and the matter had to be postponed. I made a punitive order on the scale as between

attorney and own client against the Defendant for the costs occasioned by the postponement. I also made an order for interim payment of R1 000 000.00 (one million Rand) to be made to the Plaintiff to alleviate his suffering to some extent.

41.2 During the hearing from 24/2/2009 to 26/2/2009, the Defendant had no expert witnesses present, challenged the Plaintiff's experts' testimony only superficially and perfunctorily and then, to my utter astonishment, simply closed its case without adducing any evidence whatsoever. This type of conduct smacks of an uncaring and unsympathetic attitude towards the Plaintiff's plight which I can only deprecate in the strongest terms. In a constitutional dispensation founded on values such as human dignity and the advancement of human rights and freedom, one would expect better from a State department.

[42]I consequently issue the following order:

42.1 That Defendant pay to Plaintiff an amount of R600 000,00 in respect of general damages;

42.2 That the amount to be awarded to the Plaintiff in respect of future and medical and related expenses be calculated by the actuary based upon the following assumptions:

42.2.1 the effects of inflation will be 8 percent per annum as per par. 4.4 of the actuarial report of Plaintiff's actuary dated 5 September 2009 ("the actuarial report");

42.2.2 payment of anti-depressant medication costing R250,00 per month for 21 months;

42.2.3 psychiatric monitoring while on anti-depressant medication, costing R800,00 per session, one session every 3 months for 21 months;

42.2.4 psychotherapy, costing R1 200,00 per session, for 30 sessions;

42.2.5 conservative management of the lower back costing R1 800,00 per annum;

42.2.6 conservative management of the neck costing R1 200,00 per annum;

42.2.7 occupational therapy costing R450,00 per hour, one 2 hour session once per month for 2 years, thereafter one 1 hour session every 4 months;

42.2.8 occupational therapist's travel time assumed at 1 hour per visit costing R400,00 per hour;

42.2.9 occupational therapist's travel costs assumed to be R4,00 per kilometre at 60 kilometres per session;

42.2.10 care costing R2 000,00 per month calculated over 14 months per annum to allow for an annual bonus and replacement during annual leave;

42.2.11 transport costs including adaptation and purchase of automatic vehicle costing R40 000,00 required every 5 years;

42.2.12 a primary prosthesis costing R1 008 708,54 to be replaced every 5 years;

42.2.13 a secondary prosthesis, costing R1 008 708,54, to be purchased in 10 years time, and replaced every 10 years thereafter;

42.2.14 the refit of the primary prosthesis costing R98 671,59 required every 5 years, starting 2½ years from date hereof;

42.2.15 initial training costing R1 209,59 per hour, five sessions of 2 hours each;

42.2.16 occupational training, costing R1 710,00 per session, 10 sessions required;

42.2.17 glove replacement, costing R2 892,50 required every year, starting 1 year from date hereof;

42.2.18 replacement battery, costing R12 008,90, one set required every 5 years, starting 2½ years from date hereof;

42.2.19 maintenance, costing R1 345,18, 8 hours required per annum for each prosthesis;

42.2.20 servicing, costing R19 800,00, required every 5 years, starting 2½ years from date hereof;

42.2.21 that a contingency deduction of 5 percent be made against the cost of future medical expenses;

42.2.22 costs of the administration of the trust to be established (as described hereinbelow) calculated on the basis set out in clauses 2.3.1 and 2.3.2 of The Cape Law Society Fee Guidelines, Non-litigious Guideline, ie. at the rate of 1 percent of the capital amount paid over to the trust and 7 percent on income to be received by the trust.

42.3 That an amount be awarded to Plaintiff for loss of earnings to be calculated by the actuary subject to the following assumptions:

42.3.1 those set out in paragraph 4 of the actuarial report dated 5 September 2008 relating to mortality, interest, inflation and earnings, inflation and costs, retirement age and taxation;

42.3.2 that Plaintiff's pre-morbid career path would have been as follows:

42.3.2.1 completes grade 12 in 2006;

42.3.2.2 enters the open labour market in 2007 as an unskilled casual labourer working for 2 years at R80,00 to R120,00 per day, 3 to 5 days per week (2007-2008);

42.3.2.3 progresses to Paterson job grade A1 to A3 for 3 to 5 years at an average remuneration package of R85 000,00 per annum (2009 to 2011/2013);

42.3.2.4 completes in-service apprenticeship in a technical field in 5 years, earnings in the first year being R575,10 per week; the second year R630,90; the third year R713,25; the fourth year R876,60 and the fifth year R876,60;

42.3.2.5 qualifies as an artisan and earns at Paterson job grades C1/C2 at an average remuneration package of R250 000,00 per annum; and

42.3.2.6 income remains at this level for the remainder of his career until normal retirement age of 65 years.

42.3.3 From the value of pre-morbid earnings is to be deducted 15 percent to take account of contingencies.

42.3.4 The Plaintiff's post-morbid career path will be as follows:

42.3.4.1 completes schooling within 6 years, i.e. by the end of 2014;

42.3.4.2 undergoes further training and seeks employment for the following 4 years i.e. until the end of 2019;

42.3.4.3 enters employment at a level of Paterson job grade B1/B2 and earns an average remuneration package of R115 500,00 per annum ; and

42.3.4.4 remains at that level until retirement at the age of 65 years.

42.3.5 A contingency deduction of 50 percent is to be made against the value of post-morbid earnings.

42.4 From the capital amounts awarded to Plaintiff is to be deducted the interim payment of R1 000 000,00 (one million Rand) already received by Plaintiff from Defendant.

42.5 The amounts referred to in paragraphs 1, 2 and 3 above are to be paid into the trust account of Messrs Malcolm Lyons Brivik Inc. at First National Bank (branch: RNB Private bank) branch code: 202709, account number: 62006429949.

42.6 The Plaintiff's attorneys shall, after paying and recovering all costs and expenses for which the Plaintiff is liable, including their fees as between attorney and own client, pay the net balance of the sum awarded to them to attorneys Bernard Vukich Potash and Getz for the purposes set out hereinbelow, the sum so paid to be called "*the trust fund*".

42.7 Attorneys Bernard Vukish Potash and Getz shall cause to be executed and registered by the Master of the High Court in Kimberley, a deed of trust incorporating the

provisions normally appearing in an *inter vivos* trust deed prepared by them with the following specific provisions:

42.8 Attorneys Bernard Vukish Potash and Getz or their successors in practice shall be the trustees, with the power of assumption;

42.9 the trustees shall be exempt from furnishing security;

42.10 the trustees shall hold and administer the trust fund for the benefit of Arthur Rens;

42.11 the trustees shall apply the nett income of the trust fund and if that at any time it is not adequate for the purpose, the capital thereof, for the maintenance (including, without derogating from the meaning of the term, the medical, dental and similar treatments and advice, reasonable pleasures, entertainment, general upkeep, welfare benefits and education, the acquisition or provision of residential facilities or a residence and a motor vehicle for him. The income not used as aforesaid shall accumulate to the capital;

42.12 the trust shall terminate on the death of Arthur Rens;

42.13 on termination of the trust: if Arthur Rens leave a valid will, the trust fund shall be paid in accordance with the

provisions of the will as if they had formed part of his estate;

42.14 if Arthur Rens leaves no will and leaves a surviving spouse and/or descendants, the trust fund shall be paid to them. If any beneficiary is a minor, his or her share of the trust shall be paid in trust in accordance with the provisions of the trust deed;

42.15 if Arthur Rens leaves no will and also no surviving spouse or descendants, the trust fund shall be paid in accordance with the laws of intestate succession; and

42.16 the name of the trust shall be the “ARTHUR RENS TRUST”.

42.17 The Defendant is to pay the Plaintiff’s taxed or agreed party and party costs on the High Court scale, which costs shall include the costs of counsel, and the reasonable and qualifying expenses of the following expert witnesses:

42.17.1 Dr G A Versfeld;

42.17.2 Mr S Kritzinger;

42.17.3 Dr D Shevel;

42.17.4 Ms E Bester;

42.17.5 Ms M Pretorius;

42.17.6 Mary Cartwright Consultants CC; and

42.17.7 Mr R Knight.

It is noted that part of the amount of R1 000 000.00 (one million Rand) paid as an interim payment, has already been utilised for a portion of the aforementioned legal fees and medical experts' fees.

42.18 The expert witnesses referred to in paragraph 17 above are declared necessary witnesses, as are the Plaintiff and Mr Barkley.

42.19 A copy of this judgment is to be transmitted by the Registrar of this Court to the Defendant (the MEC for Health, Northern Cape) and to the Head of the Department of Health, Northern Cape.

**SA MAJIEDT
JUDGE**

<p>ADV PA CORBETT APPEARED FOR THE PLAINTIFF AS INSTRUCTED BY DUNCAN AND ROTHMAN ADV XS NYANGIWE APPEARED FOR THE DEFENDANT AS INSTRUCTED BY THE STATE ATTORNEY</p>
