IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 2984/2009
Date Heard: 8 & 9 March 2012
Date Delivered: 15 March 2012

In the matter between:

JÉAN JOHAN NEPGEN N.O. Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

EKSTEEN J:

[1] This is an action for damages arising from personal injury sustained in a motor vehicle collision. The plaintiff sues in his representative capacity as *curator ad litem* for Thobile Enoch Nzayo (herein referred to as Nzayo).

[2] Nzayo was involved in a motor vehicle collision in Tyhinira Street, Motherwell, Port Elizabeth on 16 June 2005 when he, being a pedestrian, came into collision with a motor vehicle. The plaintiff contends that the collision was due solely to the negligence of the driver of the motor vehicle and accordingly action was instituted against the defendant herein. The issue relating to liability was separated from the

quantification of the claim and has previously been decided. An order was issued that the defendant is liable for 80% of such damages as the plaintiff is able to prove that he has suffered arising out of the collision in which Nzayo was involved on 16 June 2005.

[3] Nzayo, who was 48 years of age at the time of the collision, sustained very severe injuries in the collision. It is common cause that he sustained a severe brain injury, a fracture of the right tibia and fibula, a fracture of the left clavicle and extensive soft tissue injuries. As a result of the brain injury Nzayo experienced extensive cerebral oedema with bleeding involving areas of the brain causing blindness, for all practical purposes, in both eyes. In addition Nzayo has sustained a number of cognitive deficits as a result of the brain injury which together with his blindness, will probably require the appointment of a *curator bonis* in due course. I shall revert to these issues below.

[4] As a result of the collision Nzayo was hospitalised and incurred medical expenses. He has been rendered unemployable on the open labour market and will never again be employed. The parties have agreed on the quantum of the plaintiff's special damages as follows:

1. Past Provincial hospital expenses R135,00;
2. past private hospital expenses R419 361,93;
3. past medical expenses R28 411,30; and

4. past and future loss of earning capacity R858 416,50.

[5] These amounts fall to be reduced by 20% to give effect to the apportionment of damages to which I have referred above.

[6] There is agreement that the defendant will furnish the plaintiff with an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to the extent of 80% of Nzayo's costs of any future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the collision, after such costs have been incurred and upon proof thereof.

[7] What remains to be determined is the plaintiff's claim for general damages and the associated costs of a *curator bonis*. The plaintiff claims an amount of R1 500 000,00 for general damages in respect of shock, pain and suffering, disability, discomfort and the loss of the enjoyment of the amenities of life. The plaintiff has given notice of his intention to call as experts, Dr Keeley, a neurosurgeon, Dr Mackenzie, an orthopaedic surgeon, Dr Gardiner, an ophthalmic surgeon, Ms Ansie van Zyl, an occupational therapist, Dr Richard Holmes, an industrial psychologist, Dr Plunkett, a clinical psychologist and Dr van Dyk, a general surgeon. Summaries pursuant to rule 36(9)(b) of the Uniform Rules of Court were filed in respect of the evidence and opinions of each of these experts. At the hearing of the matter I was advised that the defendant admits the

correctness of the content of these reports (save for that of Dr van Dyk upon which reliance was not placed) and the factual basis for and the opinions expressed in each of these reports.

[8] By virtue of the agreements between the parties I do not intend to analyse in great detail each of these reports and I limit the discussion below to the salient features of these reports relevant to the assessment of general damages.

[9] It emerges from the report of Dr Keeley, which was prepared in June 2011, that immediately after the collision Nzayo was admitted to the Livingstone Hospital with a Glasgow Coma Scale reading of 9/15. He was admitted to the intensive care unit under the care of Dr Azhar, a neurosurgeon, Dr Gajjar, an orthopaedic surgeon and Dr Behari, a physician. Nzayo developed multiple complications and on 20 June 2005 he was transferred to the Greenacres Hospital where he was admitted to the intensive care unit. On 22 June 2005 Dr Gajjar performed an open reduction and internal fixation of the right tibia using an intramedullary nail. On 27 June arrangements were made for a tracheostomy.

[10] Nzayo remained heavily sedated throughout this period and it is recorded in the hospital notes on 20 July 2005, approximately a month later, that he was still being sedated every hour with morphine and Dormicum. He first started speaking on 23 July 2005, however, his

speech was confused. He was at that stage being fed by nasogastric tube. A catheter had also been inserted. On 4 August 2005 Nzayo was discharged from the Greenacres Hospital and hospitalised at the Aurora Hospital, still confused and disorientated. He was verbose and his speech was at times inappropriate. He remained in the Aurora Hospital until 25 August 2005.

[11] During his period of hospitalisation and on 22 June 2005 a CT brain scan was conducted which showed an extensive subarachnoid haemorrhage. X-rays of his lower leg revealed a comminuted fracture of the proximal end of the tibia and fibula. There was also a serious injury to the pelvic girdle with diastases and the ileus reflected bowel paralysis. A further CT scan was conducted on 6 July 2005 which revealed swelling of the left temporal occipital part of the parietal lobe.

[12] Dr Keeley recorded that during 1990 some 15 years prior to the collision, while Nzayo was working for the Port Elizabeth Municipality at the Waterworks he fell, fracturing the right radius and ulna. The fracture was enclosed in plaster of Paris cast which was removed after about six weeks. The fracture has never troubled him since and he resumed his work. He did, however, notice at that stage that there was a reduction in his vision and it was found that he an underactive thyroid and required thyroid supplements from then on. Nzayo was of the view that his vision was nevertheless adequate and spectacles were never suggested.

Nothing further is known of this event and I do not consider that it should be afforded any relevance to his current blindness.

[13] Dr Keeley summarised his overall impression as follows:

> "Thobile Enoch Nzayo involved in a road traffic accident, sustained a very severe closed brain injury from which he has made a remarkable recovery. He has been left with permanent cortical blindness.
> There must be an underlying degree of intellectual compromise which is not apparent in the circumstances in which he now finds himself.
> He is not invalided as a result of his posttraumatic dementia but as far as his wife Georgina is concerned, he is living a normal life subject to his blindness.
> It is unlikely that future medical expense will be considerable."

[14] I pause to mention that Dr Keeley records in his report the rehospitalisation of the plaintiff on 7 July 2008 when Nzayo had developed Fournier's Gangrene and he had undergone a colostomy. Dr Keeley does not suggest what the cause this condition was and Dr Mackenzie later pertinently records that it was not accident related. I shall accordingly not deal with this portion of Dr Keeley's report. In respect of the musculoskeletal injuries Dr Keeley records that Nzayo's right leg is shorter than his left and that he will always walk with a short limbed gait and will need the use of a crutch. This, Dr Keeley postulates, contributes

a significant degree of impairment.

[15] Dr Mackenzie, an orthopaedic surgeon, records as follows:

> "Mr Nzayo denied any musculoskeletal pain. I specifically asked him whether he had residual lower back, pelvic girdle, right lower limb or left shoulder regional pain. In each case he denied residual pain in these regions. He quite vigorously demonstrated the freedom of movement that he has in both his lower and upper limbs.
>
> He walked with one crutch which I suspect was used mainly to provide ambulatory stability and to orientate himself in what for him, as a blind person, were unfamiliar surroundings. He apparently is able to walk without the crutch when at home and in familiar surroundings. …"

[16] To this extent that these comments conflict with Dr Keeley's views in respect of the orthopaedic injuries I prefer the opinions of Dr Mackenzie.

[17] Nevertheless, from a musculoskeletal point of view Dr Mackenzie confirms that the plaintiff sustained fractures of his right tibia and fibula and bruising of the right side of his forehead. In addition, the plaintiff sustained a closed fracture of the left clavicle. He has marked swelling on his right leg. Dr Mackenzie recorded that the fractures were expertly

managed by means of reduction and internal stability using an intramedullary rod with two proximal and one distal locking screws. An examination of radiographs demonstrated solid union of the tibia and fibula fractures in adequate anatomical alignment. Although a synostosis has developed between the tibia and fibula Dr Mackenzie does not regard this as being of any significance and does not believe that any intervention is warranted. In respect of the leg length inequality to which Dr Keeley referred Dr Mackenzie notes that it is "functionally unimportant" and he does not believe that it justifies the provision of a compensatory shoe raise.

[18] The left clavicle fracture, Dr Mackenzie notes, was similarly expertly managed and the outcome of treatment was as good as one could realistically expect. Nzayo denied any left clavicular, acromio-clavicular or gleno-humeral discomfort. The plate and screws which were inserted are not prominently palpable through the skin and therefore there is no valid medical indication for their routine removal.

[19] Dr Gardiner has confirmed the cortical blindness in both eyes as a consequence of the brain injury. This blindness is permanent.

[20] Ms van Zyl, an occupational therapist has filed a lengthy report which, I think, is largely supportive of the view expressed by Dr Keeley that Nzayo "is living a normal life subject to his blindness". His very real

impairments flowing both from his head injury and his leg injury should however not be understated. Ms van Zyl records that Nzayo complains of pain in the leg which appears to be weather related and which bothers him when he has walked "longer distances" which, no doubt as a consequence of his blindness, does not occur often. He also complained to her of lower backache specifically when he has been sitting for a long time, however, this too, she records, did not seem to happen often. These reports of residual pain are of course in conflict with Nzayo's communication to Dr Mackenzie which I have recorded above. For purposes of this judgment I accept that Nzayo occasionally experiences pain in these regions.

[21] Nzayo complained to Ms van Zyl that he is not able to stand independently and holds onto a family member, furniture or the wall. This too, no doubt, is largely a consequence of his blindness. He is however independent in dressing, washing and grooming using adaptive methods, requiring extra time and with assistance from his family in some tasks. Naturally he requires assistance with the choice of clothing and with tasks such as cutting his food.

[22] His leisure activities are limited and he spends most of his time pottering in and around the house. He enjoys listening to Xhosa programmes on his portable radio and that seems to be the only contact with the outside world and his highlight of the day. He has a fair

understanding of the programmes and the timetable of the broadcasts. He knows the names of his favourite presenters and programmes. Notwithstanding all of this, his loss is clearly huge and he is not able at all to participate in the community. He is limited to his role in the family with limited involvement with the children.

[23] There is, undoubtedly, also a measure of impairment of his cognitive functioning which is dealt with in greater detail through the report of Dr Plunkett. Of significance, however, is the comment by Ms van Zyl that Nzayo understands his limitations with regard to his blindness and the leg length discrepancy but he did not express or display frustration with his situation. He seems to have adapted fairly well taking his limited education and his limited resources into account.

[24] Dr Holmes has set out Nzayo's educational development. He did not attend a pre-school facility and was enrolled at the Broadlands Farm School when he commenced his schooling at the age of approximately 7 years. He received only a very rudimentary education. To Ms van Zyl he indicated that he thought he had completed Std 1 and thereafter started working.

[25] Dr Holmes records that Nzayo was of normal intellect but severely compromised with regard to the effective use of his residual capabilities. He remains painfully mindful of his post-accident condition and limitations

and has suffered a significant loss of his self-confidence and self-esteem. He continues to mourn the loss of his pre-morbid circumstances. Dr Holmes is of the view that Nzayo expresses moods of despondency and depression and is easily frustrated having feelings of inadequacy and a sense of dependency on others.

[26] Dr Plunkett, a clinical psychologist, confirms the severity of the brain injury which was suffered and the residual cerebral blindness and neuro-psychological compromise. Dr Plunkett's psychometric testing showed gross visual defect, severe concentration and tracking problems, learning and memory problems, diminished verbal fluency and slowed mental processing. He notes that Nzayo is dependent for his daily living and quality of life, and indeed for his survival, on others. He continues to note, however, that it seems that Nzayo does not suffer from the actively unpleasant personality change which can occur after closed head injury. He in fact enjoys interacting, he still interacts with his friends and family although his tolerance is limited. The family do not enjoy as much outside social activity given his visual impairment and disability.

[27] Finally Nzayo's wife testified at the hearing. Her evidence does little more than to confirm that which emerges from the various reports which I have discussed above. Significantly, she does say that Nzayo suffers pain in his leg and lower back from time to time.

[28] On this basis I am called upon to assess the reasonable quantum of the plaintiff's general damages. In determining general damages the court is called upon to exercise a broad discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered by him, including their nature, permanence, severity and the impact on his lifestyle. (Compare ***Hurter v RAF and Another*** 2010 (6) QOD A4-12 (ECP) at paragraph [40].) The result will necessarily be a subjective assessment dependent upon the view which the court takes of what is fair in all the circumstances of the case. Thus, in ***Sandler v Wholesale Coal Supplies Limited*** 1941 AD 194 at 199 Watermeyer JA stated:

> "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[29] I have been referred during argument by counsel on both sides to numerous previous decisions relating to awards in matters concerning serious head injury, brain damage, blindness and orthopaedic injuries. These decisions are all useful in guiding a court to a reasonable assessment of the damages to be awarded in the case under

consideration, however, they would rarely be on all fours with the facts of the present case. Indeed each of them differs from the facts of this case. There is for that reason no hard and fast rule of general application requiring a trial court to consider previous awards (compare ***Road Accident Fund v Marunga*** 2003 (5) SA 165 (SCA) 169G-H).

[30] Furthermore, in considering previous awards it is right that a court should be alive to the effect of the ravages of inflation upon the value of money during the interceding years. Inflation rates, however, no matter how reliable, are like previous awards, merely guidelines as to what is an appropriate award in a particular case (compare ***AA Onderlinge Assuransie Assosiasie Beperk v Sodoms*** 1980 (3) SA 134 (A) at 141G-H; and ***Maloni v AA Mutual Insurance Association Ltd*** 1984 (3) QOD 480E).

[31] I take cognisance of the recent tendency to grant higher awards in current times than has been the trend in the past. (Compare ***Wright v Multilateral Motor Vehicle Accident Fund*** 1997 (4) QOD E3-31 (N); and ***Road Accident Fund v Marunga*** *supra* at 17F.) I have given consideration too to the well-established principle that I should take care to see that the award which I make is fair to both sides so as to give just compensation to the plaintiff, but not to "pour out largesse from the horn of plenty at the defendant's expense". (Compare ***Pitt v Economic Insurance Co. Ltd*** 1957 (3) SA 284 (N) at 287.)

[32] On a consideration of all these factors and in particular the injuries, and the sequelae thereof, sustained by the plaintiff as fully set out above I consider that an award of R900 000,00 would represent a fair compensation for general damages for shock, pain and suffering, discomfort, disability, disfigurement and loss of the enjoyment of the amenities of life which Nzayo has suffered. This figure, like the other agreed figures, falls to be reduced by 20% to give effect to the apportionment of damages as previously decided.

[33] At the time of the issue of summons Nzayo was cited as the plaintiff. What emerged, however from the medico-legal report of Dr Keeley and a subsequent letter from Dr Holmes was that they were not of the view that Nzayo was currently in a position to appreciate the nuances of litigation and the financial implications thereof nor did they believe that he was in a position to manage his own financial affairs. In these circumstances it was resolved to seek the appointment of a *curator ad litem* to conduct the litigation on behalf of Nzayo and to consider the appointment of a *curator bonis* to manage the affairs of Nzayo after the litigation. Whilst a *curator bonis* has not been appointed yet the parties were in agreement before me that it would be appropriate at this stage to order the defendant to pay the costs occasioned by the appointment of a *curator bonis* and the costs associated with the services of the *curator bonis* in the event of a *curator bonis* being appointed.

[34] In respect of the costs of the litigation the plaintiff has been successful. Mr ***Paterson***, on behalf of the defendant, argues nevertheless that the plaintiff should not be awarded all the costs of the trial. The foundation of this argument is to be found in the management of the application for the appointment of the plaintiff as *curator ad litem* and the impact which that has on the costs.

[35] Summons was issued in this matter on 21 October 2009. On 1 June 2011 the merits were settled between the parties and an order of this court issued. Dr Keeley provided his report on 30 June 2011. On 15 August 2011 Dr Richard Holmes wrote to the plaintiff's attorneys in which he recorded as follows:

> "Blind, neuropsychologically compromised and physically handicapped, Mr Nzayo has been rendered a complete invalid. It is not believed that he would have appreciation for the litigation process or the financial implications thereof. Under the circumstances the appointment of both the *curator ad litem* and a *curator bonis* would be recommended."

[36] On 17 August 2011 the plaintiff's attorneys filed a notice of set down advising that the matter has been enrolled for hearing on 8 March 2012. It was, however, only on 6 February 2012 that the plaintiff's attorneys launched an application for the appointment of a *curator ad*

litem to report to this court. Such an order was obtained on 21 February 2012 and Advocate Gajjar was appointed in order to report to this court, *inter alia*, on whether a *curator ad litem* ought to be appointed to assist Nzayo in the action instituted by him against the respondent for damages arising out of the motor vehicle collision in which he was involved on 16 June 2005. Advocate Gajjar reported on 6 March 2012. It was only on 8 March 2012, the day of trial, that the plaintiff moved an application for the appointment of the *curator ad litem* for this purpose. This necessitated the postponement of the trial to 9 March 2012 to enable the newly appointed *curator ad litem* to acquaint himself with the issues.

[37] In these circumstances Mr ***Paterson*** argues that the plaintiff should be awarded the costs of only one day of trial. It is readily apparent from the aforegoing that all the medico-legal reports which formed the evidential basis for the evaluation of the claim had been admitted. Mrs Nzayo testified very briefly merely confirming much of the content of the reports. The trial was completed in an hour and a half. It is therefore clear that had an application been timeously made for the appointment of a *curator ad litem* the trial would have been finalised on 8 March 2012. In these circumstances I think that there is merit in Mr Paterson's submission that the plaintiff should be awarded the costs of action, excluding the second day of trial.

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

1. The defendant is ordered to pay to the plaintiff the amount of R1 765 059,70 as and for damages.

2. The defendant is ordered to pay interest on the aforesaid amount calculated at the rate of 15,5% per annum from a date fourteen (14) days after the date of this order until the date of payment.

3. The defendant is ordered to furnish to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for payment of 80% of Mr Nzayo's costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the collision in which he was involved on 16 June 2005, after such costs have been incurred and upon proof thereof.

4. The defendant is ordered to pay the plaintiff's costs of suit excluding the second day of trial, as taxed or agreed, such costs to include:

   4.1. The qualifying expenses, if any, of the following:

      1.1 Dr Keeley;

      1.2 Dr Gardiner;

1.4 Dr Mackenzie;

1.5 Ms Ansie van Zyl;

1.6 Dr Holmes;

1.7 Mr Williams;

1.8 Dr Plunkett;

1.9 Dr van Dyk;

1.10 Mr Jacobson.

4.2 The costs occasioned by the appointment of and services rendered by a *curator bonis*, in the event that a *curator bonis* is appointed.

4.3 The costs of the *curators ad litem*.

5. The defendant is ordered to pay interest on the plaintiff's taxed or agreed costs calculated at the rate of 15,5% per annum from a date fourteen (14) days after taxation, alternatively the date of agreement, to the date of payment.

_____

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv L Schubart SC instructed by Gray Moodliar Attorneys, Port Elizabeth

For Defendant: Adv Paterson instructed by Boqwana Loon & Connellan, Port Elizabeth