

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

Case No.: 338/2010  
Date heard: 19 + 20 April 2012  
Date delivered: 13 November 2012

In the matter between:

**VALENCIA NOMAKHAYA ALLA**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

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**J U D G M E N T**

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**DAMBUZA, J:**

[1] The plaintiff claims damages suffered by her as a result of injuries she sustained in a motor vehicle collision on 21 November 2006, along Cape Road, near the St Albans Prison in Port Elizabeth.

[2] On that day the plaintiff was a passenger in a mini bus taxi when a collision occurred between the insured vehicle and another vehicle. The other vehicle then careered off course and collided with the mini bus taxi in which the plaintiff was a passenger. Having sustained certain injuries in that collision, the plaintiff received medical treatment at Greenacres Hospital, Port Elizabeth, and also consulted various other private medical practitioners.

[3] By the time the matter came before me the defendant had conceded liability for the full damages suffered by the plaintiff. Defendant had also specifically admitted liability for payment of the following amounts in the plaintiff's claim:

|      |                        |            |
|------|------------------------|------------|
| [i]  | Past hospital expenses | R14,019.09 |
| [ii] | Past medical expenses  | R7,123.54  |

[4] The defendant further undertook to furnish to the plaintiff an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996. It was agreed between the parties that the undertaking furnished would cover payment of the plaintiff's expenses for future accommodation in hospitals or nursing homes or treatment or rendering of a service including employment of a domestic employee, or supplying of goods to her arising out of the collision, after such costs have been incurred and upon proof thereof.

[5] The only issues before me for determination are the plaintiff's claims for: future loss of earnings and/or loss of earning capacity, past costs of a domestic employee and general damages.

[6] The injuries sustained by the plaintiff in the collision were a fracture of the left ankle resulting in displacement of the distal tibio/fibula joint and soft tissue injury. On the day of the accident the plaintiff was seen by Dr S Mentz and later by Dr Hendrik Juan De Jonge at the Out Patients Department in Greenacres Hospital. She could not be admitted to the hospital on that day because of bed shortage. She was only immobilised by means of a back slab. On being admitted to Hospital the following day an open reduction and internal fixation of the fracture was performed

and the medial malleolus was fixed by two 50 millimetre malleola screws with washers. The plaintiff's ankle was then immobilised by means of an ultra cast plaster which was removed after six weeks whereon the ankle was immobilised in an air-cast brace and the plaintiff was referred to a physiotherapist.

[7] The plaintiff remained in hospital until 25 November 2006 whereon she was discharged on a wheelchair. She was in a wheelchair for a period of six weeks after which she started walking with the aid of crutches. She resumed her duties on 15 January 2007 whilst still walking with the aid of crutches. The internal fixatives were removed in April 2008.

[8] At the time of the collision the plaintiff was employed as a correctional officer by the Department of Correctional Services at the St Albans Prison. Her duties in the Maximum Security Section entailed escorting prisoners all day, e.g. to their meals and when doing their exercises. This entailed a considerable amount of standing and long distance walking. Because she could not do the same work with ease after the accident she requested to be transferred to another department, whereupon she was transferred to the workshop, to do mainly clerical work. At some stage she was transferred to the Visitors Section where she again performed duties of escorting prison inmates which, again, entailed a considerable amount of walking. She continued to experience difficulty in performing these duties. In 2011 she was then placed in a sedentary position as a member of the case management committee.

[9] At the time of trial the 41 year old plaintiff lived at the St Albans Prison together with her 15 year old daughter. She explained in evidence that at the time of the collision she lived on the second floor of the same staff living quarters at the Prison, but had to relocate to a flat on the ground floor of the building due to her ankle injury.

[10] In her evidence the plaintiff testified that she still experiences pain on her ankle resulting in difficulty in walking long distances, standing for lengthy periods of time, ascending or descending flights of stairs, walking on uneven surfaces, carrying heavy objects and getting in and out of a motor vehicle. She is unable to run, walk fast or play active sports. Prior to the accident she used to play netball, she has not been able to participate in this sport since her injury.

[11] In his medico-legal report, Dr Basil Mackenzie, an orthopaedic surgeon, opines that in the future the unresolved ankle injury will continue to result in considerable pain associated with walking. Surgical options are, according to him, limited and generally unsatisfactory. The plaintiff stands the risk of suffering degenerative arthritis, the only remedy for which is an ankle fusion or a total ankle replacement. According to Dr Mackenzie, the plaintiff should do sedentary jobs and cannot do the work that she did prior to the collision. Prognosis of full restoration of function through surgery is, according to Dr Basil Mackenzie, unlikely to be successful. However, an arthrodesis of the distal tibio/fibula joint could be considered, although the results would be unpredictable and could even make the plaintiff's problems worse. An arthroscopic debridement may also bring about some pain relief.

#### Claim for domestic worker expenses

[12] No evidence was led on behalf of the defendant. The plaintiff's evidence was that, for a while after the collision her brother assisted her with household work. However in 2008 her brother secured employment and the plaintiff had to employ a part time domestic assistant for two days in a week to help with her household work. She had not required services of a domestic assistant prior to the accident. Initially, she paid the domestic assistant R120.00 per week. In 2011 she increased her payment to R160.00 per week; that was the amount she was paying the domestic assistant at the time of trial. The plaintiff claims R23,545.00 as the expense incurred by her in the past for employment of a domestic assistant. I am satisfied that, on the evidence, the plaintiff is entitled to payment of this expense.

#### Future loss of earnings and/or loss of earning capacity

[13] The plaintiff claims an amount of R750,000.00 in this regard. The basis for this claim is that the plaintiff struggles to cope with an entire day of performing the full spectrum of her pre-morbid duties as a correctional officer. Her complaint is that, taking up alternative duties will result in reduction in her earnings. The plaintiff's case is that her pre-morbid duties are based at the "*centre*" of the prison and in that capacity she is able to earn extra income, working overtime or additional working hours. A transfer to a more sedentary position, where she will perform pure administrative and/or clerical duties, will entail that she loses the additional working hours and therefore the additional earnings of approximately 5 hours per week.

[14] The plaintiff's further evidence was that she has, in any event, applied for "*non-centre-based*" positions that have been advertised from time to time, but has been unsuccessful.

[15] Dr Richard Holmes, a psychologist and Human Resources specialist consulted with the plaintiff and prepared a medico-legal report on her pre and post-morbid career potential and generally her adjustment to her current state. He considers the plaintiff to be a goal directed and a determined person of high average intellect whose career potential is affected by ongoing physical pains, anxiety, moods, depression and general adjustment disorder from which she now suffers. His opinion is that the injuries sustained by the plaintiff will result in 10 to 15% reduction in her pre-morbid earning capacity as she is not likely to progress to the same job level she would have attained in her pre-morbid state. His further evidence was that he had not been aware, when making this assessment, of the possible reduction in the plaintiff's earnings resulting from loss of the centre-based additional work hours. An additional assessment of 11.23% was then added to the assessed 10% -15% assessment, resulting in an estimated income reduction of between 21% and 26% in the injured state.

[16] I may state however that although the plaintiff anticipates loss of working hours and consequent reduction of income, the evidence was that, from the end of 2011 the plaintiff was placed on sedentary duties, as a member of the case management committee within the prison centre. Presently, her functions mainly entail sitting in the case management committee to assess newly sentenced inmates, allocating duties to them, and presenting prisoners to the parole board. These "*centre-based*" duties and have not resulted in reduction of income for the

plaintiff. This, in my view, mitigates possible reduction of income as a result of being allocated to sedentary duties.

[17] I am alive to the opinion by Dr Holmes that the plaintiff will experience difficulty in securing promotions in the future. And I accept that, the plaintiff is limited in the vacancies that she will now be able to apply for as she is precluded from doing physical work. However, it would seem that Dr Holmes did not take into account that the additional educational qualifications which the plaintiff has attained in the recent past will, in all probability enhance her stature in the job market; particularly viewed together with her experience as a correctional officer. The evidence was that in 2010 the plaintiff completed a National Diploma with the Nelson Mandela Bay Municipality in Human Resources Management. She is currently registered for a BTech Degree in the same discipline and anticipates that she will complete the degree next year (2013). Further, the plaintiff is described as a self-driven, motivated and resilient person. In his medico-legal report, Dr Holmes highlights the fact that she was the first lady to work in the maximum security section of the prison; a factor which, in my view, will count considerably in her favour when opportunity arises for her to be considered for promotion or other work opportunities.

[18] Although the plaintiff complains that her seniors at work are unsympathetic to her condition I cannot ignore the fact that since December 2011, she has now been allocated less strenuous duties. It therefore seems to me that an estimate of 10% in reduction of the plaintiff's future income earning capacity is more appropriate.

[19] An undisputed actuarial calculation of R3,659,942.00 as the plaintiff's total pre-morbid earnings is part of the record. I find no reason not to accept the correctness of this figure. *Mr Schubart* submitted, on behalf of the plaintiff, that a

normal contingency of 15% pre-morbid should be applied to this amount. The submission on behalf of the defendant was that a pre-morbid contingency of 25% would be more appropriate. I cannot find any reason why the normal/usual pre-morbid contingency of 15% should not apply in this case. It does not appear to me that there are any peculiar factors warranting a deduction for general contingencies at the higher scale suggested on behalf of the defendant. On application of a deduction of 15% pre-morbid contingency the plaintiff would have earned R3,110,950.70. The plaintiff's nett loss of income is therefore 10% of the sum of R3,110,950.70; i.e. R311,095.07.

#### General damages

[20] In addition to the description of the injuries sustained by the plaintiff and the *sequelae* thereof as set out above, I may also mention that medical evidence reveals that the plaintiff experienced severe pain immediately following the collision, particularly as she could not be admitted to hospital on the day of the collision. As I have stated she remained in hospital for four days following the collision and was again admitted to hospital for one day for removal of internal fixatives. She endured acute pain for about a week to ten days following the accident and the operation on her ankle. She again experienced pain of the same intensity following the removal of the internal fixatives. She was off work from the day of the accident to 15 January 2007 when she returned to work, still walking on crutches. She still experiences pain on her left ankle, especially when walking long distances and climbing or descending stairs. There is still dislocation in the ankle joint, accompanied by associated degenerative changes. Dr Mackenzie opines that this unresolved displaced joint is a difficult problem and will "undoubtedly" continue to cause considerable pain with

associated walking difficulties in the future which is not likely to be resolved through surgery. The plaintiff's problems are compounded by the fact that although it is imperative that she loses weight, she is currently inactive due to the pain she experiences when doing strenuous physical activity. Her ankle is partially unstable and requires support by special footwear. It is anticipated that she will have to use analgesics and anti-inflammatories on a regular basis for the rest of her life. Her enjoyment of physical activities has been curtailed.

[21] In assessing what would be fair and adequate compensation as general damages, I have taken into consideration, as guidance, the various comparable cases to which I was referred to by counsel.<sup>1</sup> I have also taken into consideration the general increase in awards made by courts in the recent past.<sup>2</sup>

[22] My view is that the injuries suffered by the plaintiff in *Coetzee v Union and National Insurance Company Limited (supra)* (which an award of R332,000.00 (present value) was made in 1969)) were more serious than the injuries sustained by the plaintiff in this case. The plaintiff in *Coetzee* had sustained a shoulder injury, over and above the ankle injury. Similarly in *Davidtz v Conradie N.O. (supra: Awarded R236,000.00 (present value) in 1959)* the plaintiff had sustained a fractured pelvis as well as a broken bone in the ankle. In *SA Eagle Insurance Co Ltd v Cillier (supra: Awarded R104,000.00 (present value) in 1987)* the plaintiff had sustained a comminuted fracture of the right foot near the ankle joint together with disruption of

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<sup>1</sup> *Coetzee v Union and National Insurance Company Limited*; The Quantum of Damages in bodily and fatal injury cases C & B (Vol II) at 55; *Davidtz v Conradie N.O.* C & B (Vol I) at 394; *Minister of Justice v Auxilliary Insurance Corporation Limited*; C & B (Vol I) at 509; *Lugodlo v Wolmarans*; C & B (Vol II) at 617; *SA Eagle Insurance Co Ltd v Cilliers*; C & B (Vol III) at 716 and *Rudge N.O. and Son v Rondalia Assurance Corporation of S.A. Ltd.*; C & B (Vol I) at 661.

<sup>2</sup> *RAF v Marunga* 2003 All SA (2) 148.

the talus bone. Like the plaintiff in this case, he was not immediately hospitalized; he walked with the aid of crutches for about six months. A triple fusion of certain bones was performed, but he was left permanently disabled with a “flat” or “block” foot and restricted range of movement and consequent reduced functional use. He had sustained a “most severe ankle injury”. He could no longer engage in hard physical work. He would have to wear special footwear and undergo a further minor operation for removal of a “spur” of bone. I consider the injuries sustained by the plaintiff in this case to be most comparable with the injuries sustained by the plaintiff in *SA Eagle Insurance Co.*

[23] My view is that an amount of R200,000.00 would be fair and reasonable compensation as general damages in respect of the injuries suffered by the plaintiff and the *sequelae* thereto.

[24] The total amount of damages I award to the plaintiff is calculated as follows:

|       |                                                               |                    |
|-------|---------------------------------------------------------------|--------------------|
| [i]   | Past hospital expenses                                        | R14,019.09         |
| [ii]  | Past medical expenses                                         | R7,123.54          |
| [iii] | Past hospital expenses                                        | R23,545.00         |
| [iv]  | Future loss of earnings<br>and/or loss of earning<br>capacity | R311,095.07        |
| [v]   | General Damages                                               | R200,000.00        |
|       | <b>TOTAL</b>                                                  | <b>R555,782.70</b> |

[25] Judgment is therefore granted in favour of the plaintiff as follows

- [i] Defendant is ordered to pay to plaintiff the sum of R555,782.70;
- [ii] Interest thereon at the legal rate with effect from 14 days of this order until payment thereof.
- [iii] Costs of suit, which costs shall include:
  - (a) Qualifying expenses, if any, of the following:
    - 1. Dr Mackenzie;
    - 2. Ansie van Zyl;
    - 3. Dr Holmes;
    - 4. Mr David Williams;
    - 5. Arch Actuarial Consulting.
  - (b) The costs of preparation of plaintiff's heads of argument.

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**N. DAMBUZA**  
**JUDGE OF THE HIGH COURT**

Appearances:

For plaintiff:

Adv L A Schubart (SC)

Instructed by Heine Ungerer of Port Elizabeth

For defendant:

Ms America

Instructed by Friedman Scheckter of Port Elizabeth