



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

Case No. 7796/2010P

In the matter between:

AYANDA DLAMINI

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

ORDER

1. Judgment is granted in favour of the plaintiff in the sum of R1 398 567.12.
2. The draft order marked X and signed is made an order of court.

JUDGMENT

Delivered on:

Mngadi, J

[1] The plaintiff instituted an action against the defendant claiming damages for injuries sustained in a motor vehicle accident on 2 September 2004.

[2] The plaintiff is Ayanda Dlamini a male person born on 15 February 1990. The defendant is the Road Accident Fund a juristic person established in terms of s2 of the Road Accident Fund Act 56 of 1996 (the Act) which in terms of s17 of the Act is responsible to pay compensation for loss arising out of motor vehicle accidents.

[3] The parties as at the date of trial had settled all the issues except the issue of contingencies relating to the loss of earning capacity and the issue of general damages. The parties in addition, agreed not to lead any oral evidence and that reports confirmed on affidavit and filed by various experts and the joint minute filed by some of the experts shall constitute the evidence on which the parties would argue their respective cases.

[4] Reports were filed by the following experts, Dr R. Fraser, an orthopaedic surgeon; Jane Bainbridge, occupational therapist; David de Vlamingh, industrial psychologist; Ike Roliwe, occupational therapist; Angel Hargreaves, occupational therapist ; Shaida Bobat, industrial psychologist; and Ian Walsh Morris, an actuary. The occupational therapists Angela Hargreaves (Bainbridge and Associates) and Pragashnie Govender (Ike Roliwe Incorporated) provided a joint minute. The industrial psychologist David de Vlamingh and Shaida Bobat also filed a joint minute.

[5] Dr R Fraser in his report dated 12 February 2019 stated that the plaintiff was walking along the side of the road on 20 September 2004 when he was knocked over by a motor vehicle. He sustained a fracture of the right humerus at the junction of the middle and distal thirds. He was taken to hospital. His arm was immobilised with a U-slab and transferred to another hospital on 4 October 2004. It was noted that he had an isolated injury to his right humerus with no distal neurovascular deficit. The position of the fracture was deemed unsatisfactory and he was taken to theatre on 14 October 2004. The fracture was reduced and internally fixed with medial and lateral Tens nail. Post-operatively his arm was immobilised with collar and cuff. He was noted to have a right radial nerve palsy post-operatively and was fitted with a cock-up splint. He was discharged on 18 October 2004.

[6] Dr Fraser reported that the plaintiff wore the splint for approximately three (3) weeks. He returned to school after three (3) months. He was promoted to grade 9 the following year based on his June results. On 13 December 2006 he was re-admitted in hospital. It was noted that he had a stiff right elbow. His radial nerve palsy had recovered completely. There was evidence of infection with purulent discharge from the previous wounds. The pins were removed and he was discharged on 14 December 2006.

[7] Dr Fraser noted the socio economic situation of the plaintiff as follows. He achieved grade 12. He worked as a general worker building houses for 4 months. He got employment as a security guard for three years. He then started work as a general worker for Sappi in 2016 and he has remained so employed.

[8] Dr Fraser reported that the medical examination of the plaintiff showed the following. He had a 6cm post-surgical scar over the medial aspect of the right upper arm and a 4cm post-surgical scar over the lateral aspect of the right upper arm. There is a 2 cm post-surgical scar over the anterior aspect of the right upper arm. The circumference of the right upper arm measures 27 cm a hand's breath above the elbow compared to 30 cm on the left side. The circumference of the right forearm measures 26 cm a hand's breath below the elbow compared to 27 cm on the left side. The alignment of both forearms is in slight varus. The range movement in the right elbow is from 10 to 90 degrees of flexion compared to zero to 150 degrees on the left side.

Pronation is 0 degrees compared to 90 degrees on the left and supination is zero to 90 degrees bilaterally. All joints of the right wrist and hand have a full range of active movement. There is no neurovascular deficit in the lower limbs. The radiological examination of the right humerus confirm a previous fracture of the distal humerus which has united in good position. There is some irregularity of the articular surface of the elbow joint compatible with post- traumatic osteoarthritis in the elbow. Dr Fraser in conclusion states that the plaintiff has early post-traumatic osteoarthritis of the right elbow which if it does not respond to anti-inflammatories he would require a right elbow arthrodesis. The plaintiff's permanent disability, states Dr Fraser, are as follows. Pain in the right elbow with strenuous physical activity; stiffness in the elbow, which precludes him from doing certain physical activities; permanent loss of range of movement in the right elbow joint.

[9] The occupational therapists in the joint minute agreed on the following physical limitations: right elbow pain; stiffness of the right elbow joint; mild to moderate reduction in muscle strength in the elbow flexors and extensors; wasting of the right arm and forearm; and impaired manual dexterity, handwriting ability, motor coordination, finger dexterity and aiming. Further, the therapists regarding functional difficulty agreed on the following; impaired grip strength in the dominant right hand; strength and lifting capacity limited to tasks of sedentary to light nature.

[10] The industrial psychologists, David de Vlamingh and Shaida Bobat agreed as follows. The plaintiff uninjured would have more competitive to progress to semi-skilled work on a pre-accident earnings peak at the lower quartile of the Paterson B1 level (Total package of R207 000.00 per annum in 2003 rand value as per Koch Corporate Survey Earnings). The plaintiff has early onset of post-traumatic osteoarthritis of the right elbow and the stiffness in his elbow precludes him from doing certain activities. His current employability and future employability as well as prospects of career advancement are compromised. He is at risk to retire 8 to 10 years earlier. He will no longer be able to reach his pre-accident earning potential remaining at a Paterson A2 level reaching an earnings peak of R155 000.00 per annum (lower quartile of Paterson A2 total package in 2023 rand value as per Koch

Corporate Survey Earnings) by the age of 45, with inflationary increases only until retirement. The post-accident retirement age being 56 years.

[11] It trite that the courts when making awards for potential or future losses, the practice is to make use of contingency deductions to provide for any future events or circumstances that cannot be predicted with any certainty but are possible. The determination of contingencies is a process of subjective impressions or estimation. The process is driven primarily by the courts consideration of the circumstances of the case and the impression they create in the mind of the court. The contingency deductions are a key in converting uncertainties to concrete calculations as well as in exercising trade-offs *intra* uncertainties. The determination of contingencies must be founded on relevant considerations and be within the range of acceptable realities of life. The determination is made in context that the future is uncertain and it is difficult to judge how a person's career prospects could be and would have been over a considerable period. It factors in what factors would have an impact and in what degree in the career of an individual. The deduction for contingencies is meant to take into account the vicissitudes of life. They include the possibility that the plaintiff may have passed on early in life, may have not qualified in her chosen career, may have lost employment, may have not progressed in her career, may have changed careers, may have fallen sick and unable to work etc. Importantly, contingencies factor in the fact that the claimant is compensated based on what she would have earned working although she has not worked.

[12] The rate of a discount is not be assessed on any precise logical basis; the assessment is largely arbitrary and depends on the Judge's impression of the case. See *Southern Insurance Association Ltd v Bailey* NO 1984(1) SA 98 (A) at 116H). The court to decide issue of contingencies relies on evidence by experts, but the court is not bound by the opinion of experts. It is the duty of experts to furnish the court with the basis of their opinion indicating the necessary criteria applies to the facts.

[13] The principles relevant to the assessment of damages are the following: what would constitute fair compensation in a particular matter taking into account, *inter alia*, the circumstances of the case, amounts previously awarded in broadly comparable cases and the decrease in the value of money since those previous cases were

decided. However, awards made in previous cases afford broad and general guidelines in view of the differences that inevitably arise in each case. See *Bonese v Road Accident Fund* 2014(7A3) QOD 1 (ECP) at p19.

[14] In *Alla v Road Accident Fund* 2013 (6EB) QOD 1 (ECP), a 41-year-old correctional services officer sustained fracture of the ankle resulting in displacement of the distal tibio-fibula joint and soft tissue injury. Surgery was in the form of an open reduction and internal fixation of the fracture. She was immobilised in a cast for six weeks and thereafter in an air cast brace. Plaintiff still experienced pain in the ankle resulting in the difficulty in walking long distances. She was awarded general damages in the sum of R200 000-00. In *Mahlangu v Road Accident Fund* (2013/46374)[2013] GNP (9 June 2015) a 30 year old general assistant sustained a bimalleolar fracture dislocation resulting in a fixed plantar flexion deformity of the ankle and foot, a manumitted displaced fractured medial malleolus and a laterally sub fluxed ankle and foot off the tibia. The ankle left permanently misaligned and lost flexibility accompanied by chronic pain. The court awarded the plaintiff the sum of R300 000-00 general damages.

[15] The court in *Msiza v Road Accident Fund* 2010 (7E2) QOD 1 (GNP) p5 stated that the plaintiff must be sufficiently and properly compensated, but the defendant should not unnecessarily be burdened with an inordinately high award despite the recent tendency by the courts to pitch the awards higher than in the past. In *De Jongh v Du Pisane* NO 2004 2 All SA 565(SCA) at para [56] the court held that the claimant is entitled to a fair compensation. The amount of such compensation must also be fair towards the defendant. The court must warn itself against what is in the human nature to over-compensate. In *NK v MEC for Health, Gauteng* 2018 (4) SA 454 (SCA) at p461e it was held: 'It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another, across the land. Consistency, predictability and reliability are intrinsic to the rule of law. Apart from other considerations, the principles facilitate the settlement of disputes as to quantum.' In *Mahlangu* the court noted the following:

(a). The award for general damages remains compensation, it ameliorates the damage (pain and suffering) resulting from the injuries sustained in an accident. It is not

intended to be full compensation (if that is possible) and it is not intended to wipe out (if that is possible) the damage.

(b). The statutory compensation scheme is in essence compensation by the public at large through the state. Therefore, it cannot have a punitive element in it.

(c). The statutory compensation scheme is meant to benefit a broad spectrum of the public. Money in a country like South Africa remains a scarce resource with huge demands for it made to the fiscus. Compensation awards must be considered carefully in a responsible manner.

[16] The following are, in my view, the main consideration in determining the amount to be awarded to the plaintiff as general damages:

1. The plaintiff got injured at the age of fourteen (14) years. He was a teenager. It means he shall experience most of his life in an injured state.
2. The plaintiff sustained injury at a crucial stage of his life to demonstrate his intellectual ability that would determine his life career
3. The plaintiff sustained the injury in the formative state of his development robbing him of showing his potential.
4. The plaintiff was injured when he had not obtained any skills and left unable to compete for any physical work.

[17] The plaintiff showed resilience and fortitude. He continued with his schooling. He based on his previous results was promoted. He completed matric on time. He despite his physical challenges secured employment. In my view, the plaintiff with his qualities, and the availability of state funded education, would probably have enrolled for and obtain a tertiary qualification. It is unfortunate that his uninjured state is worked at unskilled to semi-skilled level.

[18] The accident has compromised the plaintiff's competitiveness on the open labour market and in his current employment. It has compromised his ability to find employment, his ability to keep employment, his ability to advance in his career. It has also reduced the lifespan of his employment. The plaintiff faces the early onset of traumatic osteoarthritis, which shall progressively affect negatively on the quality of his life.

[19] The defendant has offered the plaintiff an amount of R400 000-00 for general damages. The defendant referred to the case of *Ngomane v Road Accident Fund* (53010/12)[2017] ZAGPPHC 401 (26 May 2017) as a comparable case. Counsel for the defendant stated the following referring to *Ngomane* 'plaintiff was 24 years old at the time of the accident, had a severe fracture of the right humerus and radius and ulna. Since the accident, he has been left with dysfunctional right arm and scarring. He has weak grip on the right side and he cannot lift and carry heavy things. He says he also has headaches at times. Frane du Toit, occupational therapist reported that after the accident, the plaintiff has a dysfunctional right arm with limited grip strength due to the radial nerve injury, his active wrist extension and active MP extension is impaired. He has limited extension and flexion of his right elbow and no forearm pronation. Mr Ngomane has major loss of amenities due to his dysfunctional right arm. He will need to make adjustments for the rest of his life to accommodate these limitations. The court awarded R450 000 for life. and the current valuation amounts to approximately R600 000.00'. I agree that the case of *Ngomane* is comparable to the plaintiff's situation. In *Ngomane* the plaintiff had some injuries on the radius and ulna but it appears that those injuries on their own had no significance. The effect of the injuries on the right arm is similar to that of the plaintiff. In addition, the plaintiff was only fourteen (14) years old when he was injured, and he has to face early onset of posttraumatic osteoarthritis, which together with the disability will endure for the rest of his life. In my view, the award to the plaintiff for general damages in the sum of R550 000.00 is conservative and is fully justified by the injuries sustained by the plaintiff and the *sequelae* thereof.

[20] The parties differ on the contingencies to be applied. The defendant submits the normal premorbid contingency is 0.5% per annum totalling 16% in the case of the plaintiff. However, contends the defendant, in the case of the plaintiff more than normal contingency should be applied. A reasonable and fair contingency premorbid future is 20%, submits the defendant. The defendant submits that the reasonable more than normal post morbid future contingency is 30%. The plaintiff submits in the case of plaintiff a fair and reasonable contingency premorbid is 11% and post morbid is 40%.

[21] The contingencies help the court to factor in the uncertainties accompanying calculation of future loss. The uncertainties include possible errors in calculating the injured party's life expectancy; the injured party's future quality of life; future economic

situation; etc. The parties agreed that the plaintiff did not suffer past loss of earnings. The normal contingency for future loss is around 15%. The plaintiff in an injured state is exposed to uncertainties at a greater degree. In his case, in my view, a realistic contingency is 35%. The plaintiff in an uninjured state a realistic contingency is 15%. Based on the actuarial calculations dated 21 February 2013, the future loss of income, but for the accident would amount to R2 927 783.00 less 15% is R2 488 615.55. The future loss of income in an injured state is R1 985 241.00 less 35% is R1 290 406.65. The difference between R2 488 615.55 and R1 290 406.65 is R1 198 208.90. The defendant settled for liability at 80%. The amount of general damages of R550 000.00 added to R1 198 208.90 less 20% results in R1 398 567.12.

[22] It is ordered as follows:

1. Judgment is granted in favour of the plaintiff in the sum of R1 398 567.12.
2. The draft order marked X and signed is made an order of court.

Mngadi, J

APPEARANCES

Case Number : 7796/2010

Plaintiff represented by : Ms Rasool

Instructed by : AC De Sousa Attorneys.
: DURBAN

Defendant represented by : Ms Govender

Instructed by : Road Accident Fund
DURBAN

Date of Hearing : 27 February 2023

Date of Judgment