



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG NORTH PROVINCIAL DIVISION**

03/02/2015

DATE: ~~20 January 2015~~

CASE NO: 29836/09

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

29/1/2015
DATE


SIGNATURE

In the matter between:

MATSOBANE HENDRIK RAMOLOBENG

Plaintiff

and

LOWVELD BUS SERVICES (PTY) LTD

First Defendant

TA MABOTJA

Second Defendant

JUDGMENT

HASSIM AJ

- [1] On 5 October 2006 a bus driven by the second plaintiff in the course and within the scope of his employment with the first defendant, was involved in a motor vehicle collision. The plaintiff, a young man then aged 34, was a passenger thereon. The Road Accident Fund compensated the plaintiff to the extent of its statutory liability. The plaintiff now seeks from the defendants under the common law, compensation for injuries suffered by him in the collision.
- [2] The plaintiff's claim for loss of earnings as well as that for future medical expenses have been settled. The only outstanding issue is the quantum of general damages payable to the plaintiff.
- [3] The parties decided not to lead *viva voce* evidence but rather to present the case as what counsel referred to as an "informal stated case". The contents of the medical reports of the respective parties various expert witnesses were largely common cause. Counsel, assured me that the facts in those portions of the reports referred to in argument were indeed common cause. In addition to the facts and findings in numerous reports by expert witnesses the parties also relied on the hospital records of the plaintiff's hospitalisation (which I was informed were also common cause) as well as the joint minutes prepared by the respective parties various expert witnesses. I have had regard to all of these documents in determining the dispute.
- [4] The plaintiff was transported from the scene of the collision to Ellisras hospital by ambulance (he was later transferred to Polokwane Provincial Hospital). When admitted he was fully conscious. The plaintiff suffered injuries to the cervical and lumbar spine and a head injury with concussion.
- [5] The length of this first period of hospitalisation is not clear from the records. The parties agree though that the total length of hospitalisation for the treatment of his injuries was substantial. It was accepted as roughly six months in total.

- [6] After the first period of hospitalisation (i.e. that immediately following the collision) the plaintiff was admitted for a second time to the Ellisras hospital and was transferred from there to Polokwane Provincial Hospital on 6 July 2007. He complained that he had been unable to lift the left side of his body since 3 July 2007, was experiencing back pain and tenderness in lumbar area. He also complained of erectile dysfunction.
- [7] An MRI scan showed a L4/L5 inter-vertebral disc protrusion with compression of the left L4 nerve root, a L5/S1 intervertebral posterior disc bulge with impression on the left and right nerve roots of L5, a thoracic spine intervertebral disc bulge at T5/T6 with a thecal sac compression at that level and spinal cord impression.
- [8] On 2 August 2007 he was transferred from the Polokwane Provincial Hospital to the George Mukhari Hospital. At George Mukhari Hospital he underwent spinal surgery; an artificial disc was inserted at the levels L3 L4. Whether this was during September 2007 or September 2008 is not entirely clear from the records. After being discharged from hospital he was treated as an out-patient at Mokopani Hospital.
- [9] The plaintiff was initially treated conservatively- analgesics, physiotherapy and rest. Much later he underwent the disc replacement surgery. There exists a probability of future surgical interventions. These will require approximately five days hospitalisation.
- [10] As a consequence of his injuries the plaintiff suffered acute pain between one to two weeks following the collision. Post operatively he experienced severe acute pains for a period of fifteen days. He continues to experience chronic moderate to severe cervical spine pain as well as lumbar spine pain with associated paraspinal muscle spasm. The pain and discomfort is aggravated when travelling or walking long distances, sitting too long or bending forward. Acute pain is expected from any future surgical interventions. There also has been a loss of lumbar lordosis as well as normal cervical spine lordosis. The

posterior neck pain is aggravated by turning to the sides and other pain is aggravated by activity and inclement weather.

- [11] Then, there is the reduced power in the left lower limb as well as reduced sensation over it, monoparesis of the left lower limb. There are also signs and symptoms of spinal cord compression which are more pronounced on the left side.
- [12] The plaintiff wears a lumbar support brace (corset) since the collision and has an 18 cm surgical scar over the lumbar area. He suffers from severe erectile dysfunction, which seems to be a cause if not the major cause of his moderate depression, his low self-esteem and his reluctance to form a relationship with the opposite sex. The plaintiff had since the collision not been intimate with the opposite sex. Because of this condition the plaintiff has never attempted to establish a relationship.
- [13] The plaintiff completed grade 11. His two attempts to complete grade 12 were unsuccessful. He was always employed in an unskilled environment. At the time of the collision he was employed as a packer at a fruit and vegetable market. After the collision, he was unable to resume any type of employment on a permanent basis even though he attempted to do so on two occasions. There is consensus that his injuries (and the sequelae thereof) have rendered him unemployable.
- [14] The plaintiff is no longer able to play soccer and spends most of his time sleeping at home. He struggles with domestic chores such as gardening, household maintenance as well as with shopping and cooking. Because he is unable to sit too long he no longer watches television. Apart from all of this he can tie his shoes only if he is in a seated position. He is unable to sleep on his left side.
- [15] There is consensus that the plaintiff is unemployable in the open labour market.

- [16] This brings me to the present dispute. There is no magic formula for determining the quantum of general damages a plaintiff is entitled to. Courts have resisted doing so. The accepted approach to quantifying general damages is a flexible one.¹ The appellate division had this to say many, many decades ago:

*"The amount to be awarded as consequence can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case."*²

- [17] Claassen J in Reyneke v Mutual and Federal Insurance Co Ltd was acutely aware of the difficult task a court faces. General damages include items such as pain and suffering, loss of amenities of life, disfigurement. What are amenities of life? I find a useful description too in this case. Claassen J remarked:

"... 'loss of amenities of life' has been defined as 'a diminution in the full pleasure of living' see H West & Son Ltd and another v Shephard [1963] 2 All ER 625 (HL) at 636G-H. The amenities of life flow from the blessings of an unclouded mind, a healthy body, sound limbs and the ability to conduct unaided the basic functions of life such as running, eating, reading, dressing and controlling one's bladder and bowels."

- [18] In regard to the payment of general damages to an injured person Holmes JA found:

*"..., claims for bodily injury involving pain and suffering and the like have this in common with the action injuriarum-namely that both relate to non-pecuniary loss and the amount awarded is regarded in the nature of a solatium..."*³

- [19] In determining, the appropriate award for general damages resort may be had and is more often than not had to comparable cases for guidance. However, a

¹ Reyneke v Mutual and Federal Insurance Co Ltd 1991 (3) SA 412 (W)

² Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 @199.

³ Government of the Republic of South Africa v Ngubane 1972 (2) 601 (A) at 607B-C.

guide is all that they can be. Arriving at an appropriate award is not a perfect science. No two injuries have the same consequences for the injured person.

- [20] In Marine Trade Insurance Co Ltd v Goliath, 1968 (4) SA 329 (A) at 333H van Blerk JA stated:

"...in Capital Assurance Co. Ltd v Richter, 1963 (4) SA 901 (AD) at p. 908, it was stated that comparison can only be usefully undertaken where the circumstances are clearly shown to be broadly similar in all material respects. In Sigournay v Gillbanks, 1960 (2) SA 552 (AD) at p. 556B, the opinion was expressed that regard should be given to a general idea of the sort of figure which by experience is regarded as reasonable in the circumstances of a particular case. This suggests that a court need merely draw on its own experience and does not require to be reminded of earlier awards by the citation of an array of decisions.

...

In theory it may sound well that regard should be had to previous awards in comparable cases but in practice, as was pointed out by this Court in London Assurance v Cope, 1963 (1) P.H. J6, the difficulty is to find comparable cases...."

- [21] I have considered earlier awards. I do not intend to cite all of them. Both counsel referred to me to cases they considered to be comparable to this case. Plaintiff's counsel invited my attention to Wright v Road Accident Fund (3425/09) [2011] ZAECPHC 15 (15 May 2011) a decision by Eksteen J in the Eastern Cape. The plaintiff was awarded R750 000.00 for general damages. The injuries suffered were more severe.⁴ The sequelae of some of his injuries were comparable to those experienced by the plaintiff. Wright was however not unemployable. My attention was also drawn to Janse van Rensburg v Road Accident Fund (11522/2011) [2014] ZAGPJHC 71 (4 April 2014) a decision by Francis J in the South Gauteng High Court. Ms Janse van Rensburg was awarded R450 000.00 for general damages.

⁴ Among others a wedge compression fracture of Level T 12 of the vertebral body with a comminution, a vertical AP split fracture, stenosis of the spinal canal. He was a complete paraplegic in the early stages after the collision.

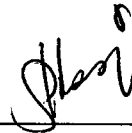
- [22] In my view, such an award is not fair in the present circumstances. The plaintiff suffers from severe erectile dysfunction. I can only imagine how this affects his self-esteem and worthiness. He was in a stable relationship at the time of the collision. The mother of his child accused him of infidelity because of his sexual limitations and left with the child. The plaintiff is unable to sit sufficiently long to watch television. He complained that the pain causes him to lie down and he spends most of his time sleeping. It is not entirely clear to me for how long the plaintiff was hospitalised. The parties accepted that since the collision he has been hospitalised for approximately six months. The plaintiff underwent surgery in September 2008 (a discectomy) as well as on 21 May 2011 (repeat lumbar surgery). He may require further surgery.
- [23] The defendant's counsel argued that in determining the award I should take into consideration the fact that the first defendant has undertaken to provide aids that will ameliorate the loss of amenities of life and ease the pain and suffering. In this case however I am not privy to what aids (para medical or otherwise) have been provided or may in the future be provided to the plaintiff. I am mindful that the first defendant has undertaken to compensate the plaintiff for future medical expenses. I accept that the provision of aids to ameliorate pain and suffering and other discomforts can be taken into account in assessing an award as to general damages. In addition to all of this he is unemployable. This in itself must be very discouraging. The plaintiff spends his days waiting for his life to pass.
- [24] I have cursorily looked at some of the aids which the occupational therapist has suggested⁵. While they may ease some of the burdens the plaintiff has to bear, they cannot alleviate most of the pain he has to endure. I am aware that

⁵ Industrial Psychologist Mrs Motake. E.g. long handled sock aid, shoehorn, nail clippers, sponge, brush and dustpan, mop, grab rail at the toilet, raised toilet seat, easi reach (I do not know what this is) trolley, shopping basket on wheels, raised swivel chair on castors, washing machine. A helper (domestic chores and the garden) two half days twice a week and access to indoor running hot and cold water to a drainage system with a bath or shower were also recommended.

medication has been prescribed for the severe erectile dysfunction. How effective this will be only time will tell.

[25] In all the circumstances of the case, in my view, an award of R 550 000.00 is reasonable. In the result I make the following order:

1. The defendants, jointly and severally, pay to the plaintiff, as general damages, the sum of R550 000.00;
2. Interest on the aforementioned sum at the rate of 8% p.a *a tempore mora*;
3. Costs.



S K HASSIM

Acting Judge: Gauteng North High Court

29 ~~20~~ January 2015

Date of Hearing: 4 September 2014

Date of Judgment: 20 January 2015

For applicant: Adv R Hawman.

For respondent: Adv JM Kilian