

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

Case No :1565/09

In the matter between :

Langalakhe Ncengokwakhe Njoko

Plaintiff

and

Minister of Safety and Security

1st Defendant

Sibusiso Muziwenkosi Ngema

2nd Defendant

Judgment

Lopes J

[1] The plaintiff is Langalakhe Mcengokwakhe Njoko. On the 1st April 2005 the plaintiff, who was then 24 years of age, was shot in the right upper arm and right upper chest by the second defendant, who was a police officer acting within the course and scope of his employment with the first defendant. As a result of being shot the plaintiff sustained severe injuries, and now claims for the medical expenses he will incur in the future, general damages and damages for past and future loss of income.

[2] The matter came before Gorven J on the 28th May 2008 and, after a very brief hearing, an order was granted by consent that :-

- a) the defendants are liable jointly and severally to compensate the plaintiff for all agreed or proved damages caused by his having been shot by the second defendant on the 1st April 2005; and
- b) the defendants are directed jointly and severally to pay the plaintiff's costs relating to proof of liability.

[3] The matter has now come before me for determination of the quantum of the plaintiff's damages. A number of expert reports were placed before me and they were contained in bundle A. The parties were agreed that I could have regard to the first seven expert reports in that bundle. They were also agreed that the reports are what they purport to be, and the defendant accepted the findings of the experts as contained in those reports.

[4] Two of those experts testified on behalf of the plaintiff. The first was Professor Willem Daniel Francois Venter, a specialist physician in the field of infectious diseases, with his focus being on the treatment of persons who are HIV positive.

[5] Professor Venter's evidence may be summarised as follows :

- a) he is an associate professor in the Department of Medical and Infectious Diseases at Johannesburg Hospital, and is the president of the Southern African HIV Clinicians Society;
- b) he has been involved in the treatment of HIV patients for

approximately 20 years and it has been his entire focus for the last 12 years;

- c) he has been involved in the aspects of public health intervention, access to HIV treatments, anti-retrovirals (“ARVs”) and infectious diseases treatment;
- d) he gave an outline of the history of the use of anti-retrovirals in South Africa. The disease was only discovered in approximately 1980, and for the next decade treatment revolved around the prevention of the HIV positive status, rather than the treatment of the disease itself. He described this treatment as basically being palliative. ARVs only started being used towards the end of the 1980s with triple therapy, or highly active anti-retroviral therapy, becoming established by the mid 1990s;
- e) whereas before that time treatment would buy patients a few months or a year or two, they were then suddenly able to return to work and play sport, etc;
- f) an example of this was a patient treated by Professor Venter who was very ill when the Professor first saw her in 2000 or 2001, she having been diagnosed as HIV positive during 1998. She was put onto ARV treatment and completed her eighth or ninth Comrades Marathon last weekend;
- g) he also referred to the case of Magic Johnson the famous professional basketball player in the United States of America, who returned to professional playing as a top athlete for a decade after receiving ARV treatment;

- h) over the last 15 years the medication used in the treatment of patients has improved dramatically, and includes an enormous reduction in the side-effects from which patients taking the medication formerly suffered. It has got to the point now where side-effects are an unusual occurrence;
- i) in addition, the first line therapy used in South Africa is the same as that used in Europe or the United States of America. Within a few weeks, patients placed on the medication feel better, they experience an increase in energy and their skin condition improves. Within three to six months patients who were formerly very ill will be back on their feet. As long as they continue to take the medication, and follow the medical advice, their recovery is rapid and prolonged;
- j) there is a striking difference between patients in South Africa and Botswana and those in America or Europe, particularly with regard to the social conditions applicable to the lifestyle of the patients, their access to proper sanitation, clean water, clinics, etc. Notwithstanding these differences the outcome of patient treatment are similar;
- k) the plaintiff was diagnosed with a CD4 count of 31 during February of 2001. Patients with a low CD4 count experience more difficulty with recovery for the first three to six months. In the case of the plaintiff he was recovering well within six to eight weeks, and has improved since then. He has gained weight and described his energy levels to Professor Venter as being very good. Patients who

do badly will be very ill at the beginning of the programme, but most of them will pull through, albeit taking more time;

- l) the CD4 count of a normal person will range from approximately 700 to 2000. The virus causes the patient's CD4 count to drop with an increased risk of contracting tuberculosis or pneumonia until the CD4 count reaches about 200. Below that Aids-related illnesses become apparent, and below a CD4 count of 50 a patient is at risk of acquiring the worst Aids-related illnesses;
- m) although the CD4 count is an important predictor of patient viability, other factors are as important in reaching a prognosis;
- n) if the plaintiff had not been treated with ARVs, it is most likely that he would have died within a few months;
- o) the biggest danger to the plaintiff is if he should, for any reason, discontinue taking his medication;
- p) patients who begin treatment and are back on their feet within a month to six weeks are likely to survive for decades. Various models to predict life expectancy are used at various places in the world. Data from Botswana suggests that the outcomes in Southern Africa are similar to those experienced in other parts of the world depending on social support, etc;
- q) the condition of the plaintiff, given that he had a CD4 count of 31, is as good as it could be. His CD4 count would be tested every six months, and the various mathematical models would suggest that the plaintiff's life expectancy would be between 30 and 40 years. These mathematical models include the other vagaries of life such

as social class, gender, access to drugs, sexual orientation, etc;

- r) Professor Venter was of the view that the fact that the plaintiff smoked between two and three cigarettes a day would not impact significantly on the plaintiff's life expectancy. He said smoking was never a good thing, and should always actively be discouraged, but he described the plaintiff's level of smoking as recreational. He did caution that if the plaintiff increased his cigarette consumption to, for example, between 20 and 30 cigarettes a day, that would cause problems;
- s) Although there is a likelihood the plaintiff could acquire tuberculosis, that disease responds well to treatment in KwaZulu-Natal with 95% of patients recovering; and
- t) great importance should be placed on the mood and physical appearance of a patient. The plaintiff was interviewed by Professor Venter prior to the hearing, and he was described by Professor Venter as a happy person who understood the need to take his medication and continue his treatment;
- u) with regard to the percentage of patients who discontinued their treatment after starting, Professor Venter said that in his clinic approximately 18% are lost to the system after approximately two years. This is because a third die, a third move elsewhere and a third lose contact with the clinic. Some patients discontinue their medication because they feel healthy and do not see a need to continue it, whilst others are advised by traditional healers or church movements to discontinue their treatment. Men also tend to

discontinue their treatment more than women;

- v) Professor Venter was of the view that the plaintiff had overcome most of the hurdles he would encounter, to be where he already is. As he was gaining weight and looking and feeling well there was no need to be concerned, because it is very likely that in the plaintiff's condition he was taking his ARVs. Professor Venter was also of the view that there was no probability that the plaintiff would increase his cigarette consumption.

[6] The other witness to testify was Philip Hallisey Hellig who qualified as an actuary in 1974, was a member of the Actuarial Society of South Africa and a fellow of the Faculty of Actuaries in Scotland. He initially worked in the insurance industry and has been doing quantum of damages cases from 1994, since then he has been involved in approximately 2000 cases involving loss of support and loss of income. He referred to the figures in his expert report, indicating that he had left out the contingencies to be applied. He felt that the contingencies with regard to past loss of earnings could reasonably be set at 5% based on the half a percent per year formula used by Robert J Koch in his work 'The Quantum Yearbook' (2011) 104.

[7] On that basis the past loss of earnings would have been approximately 3%. He thought this was appropriate in view of the plaintiff's location, the employment industry in which he was involved, etc.

[8] Mr Hellig opined that with regard to the plaintiff's future loss of

earnings, based on Koch's calculation, the starting point for contingencies would be 17.5%. On the basis that the plaintiff's working life expectancy could be affected by his HIV positive condition, a further contingency of approximately 5% should be added to that figure. He expressed the view that the mortality tables on which he worked were fairly conservative.

[9] Mr Hellig pointed out that the figure for which he made allowance in his calculation of the plaintiff's future loss of earnings of R17 562 was a disability grant which the plaintiff would receive in the future. This should be completely discounted if the award to the plaintiff is to be in excess of R410 000.

[10] That was the plaintiff's case. The defendant led no evidence and closed its case.

[11] Counsel were agreed that the sum of R17 562 in respect of the disability grant for the plaintiff should play no part in the calculation of his estimated loss of earnings. It was also agreed that the plaintiff had no claim for past hospital and medical expenses.

[12] With regard to future medical expenses taking into consideration the future medical expenses itemised in the expert reports, Mr Hellig calculated that the present cost of future medical expenses would be in the sum of R110 359. Mr *Khuzwayo*, who appeared for the defendant, could advance no reason why that amount should not be awarded.

[13] With regard to the plaintiff's general damages, the following aspects are relevant :-

- a) the plaintiff was 24 years old when the incident occurred and is currently 30 years old;
- b) he sustained a single gunshot wound to his right arm and right chest;
- c) he was taken to the Thokozane Clinic, given first aid and transferred to Ngwelezane Hospital in a conscious condition during which his arm and chest were painful and he had reduced movement and use of his right arm;
- d) at Ngwelezane Hospital X-rays were taken and he was referred to the orthopaedic ward where a pressure bandage was applied. He was seen by an occupational therapist, and at that stage could actively extend his wrist through the full range of movement. Although he had full passive flexion and extension of all fingers, he was left with a claw-like appearance of the fingers with active finger extension, reduced flexion and extension of all fingers, poor thumb flexion and adduction, but good extension. He experienced reduced median and ulna sensation. He was discharged home on the 7th April 2005 with a splint and a recommendation for physiotherapy and occupational therapy to follow up;
- e) on the 28th April he was seen as an outpatient and had further follow-ups during 2005 and 2006. During that time he experienced a loss of sensation and pain, together with contractions of his hand, and painkillers were prescribed. He continued to attend at the clinic

every three months and received pain medication, taking about six painkillers a day. By December of 2007 he complained of weakness of the right arm especially grip and hand movements, his right hand remained in a clawed position, and he had constant pain in the arm and shoulder with a reduced range of movement in his right shoulder. In addition the pain was worse in cold weather or with any activity;

- f) his treatment was conservative with dressings and wound care with physiotherapy and occupational therapy. The soft tissue healing was uneventful but pain and restriction of the right arm and hand movement persisted;
- g) on the 9th May 2011 he was again seen by Dr Kelbe the neurologist who recorded complaints of pain in the plaintiff's right arm which is present daily and constantly. The pain starts in his shoulder and involves the whole arm and hand and in the joints and muscles it is worse if he tries to use his arm. His right hand remains clawed even when sleeping, and is largely useless. He continues to use approximately four analgesics per day. Dr Kelbe recorded that the plaintiff had been tested HIV positive during February 2011 and was now on ARV treatment. Dr Kelbe's findings support evidence of impaired nerve function in both the median and ulna nerves of the right hand with mild slowing and reduced amplitudes. Dr Kelbe regards his injuries as permanent and irreversible;
- h) it is important to note that Dr Kelbe is of the view that the plaintiff's disability is strongly influenced by a significant psychogenic overlay

and exaggeration, and that it is accordingly difficult to judge the plaintiff's subjective pain. This behaviour has become so deeply ingrained that it will be difficult to treat and adds to the overall disability experienced by the plaintiff;

- i) the plaintiff formerly engaged in body building and long distance running on a recreational basis, in addition to playing football. He is no longer able to participate in these activities and he finds it both tiring and painful to run;
- j) the disability which the plaintiff experiences in his right hand were set out in the medico-legal report by the occupational therapist Ms M Combrinck. Although he is able to dress and undress himself independently the plaintiff has problems with buttons and shoelaces which are negotiated with his left hand while his right hand is used as a stabiliser only. He is able to eat functionally with a spoon or fork, but cannot eat with a knife and fork due to the lack of powerful prehension grip in the right hand. He is left with a difficulty washing his left arm, shoulder and upper torso because he cannot hold the washing cloth or soap with his right hand. He is assisted in this regard by his wife;
- k) he is no longer able to do tasks which he formerly took for granted in and around the house and is no longer able to play with and interact with his children on the basis he could do before;
- l) the plaintiff had left school in Grade 11 without completing that year. He had engaged in temporary employment until 2004 when he had become employed as a security guard after qualifying himself in

that field. He is no longer able to perform the functions required of a security guard and is no longer employable in that industry;

- m) it is the opinion of all the experts that the plaintiff will need to learn to perform tasks with his left hand. He has already made some progress towards this end by learning to write to some extent with his left hand; and
- n) his life expectancy is in no way affected by the orthopaedic injury which he suffered.

[14] Various cases were cited to me by both counsel for the plaintiff and the defendant with regard to the quantum of general damages which should be awarded to the plaintiff. It is notoriously difficult to compare cases in attempting to arrive at a proper award of general damages, particularly where in many cases, the plaintiffs have suffered multiple injuries which are not identical to the case being considered.

[15] Ms *Bezuidenhout* who appeared for the plaintiff, referred me to Holland v Bendicks 1954 Volume 1 of Corbett & Buchanan : The Quantum of Damages in Bodily and Fatal Injury Cases at page 536 ("Corbett & Buchanan"). It is difficult to reconcile this case with the present one because the plaintiff in Holland suffered fractures of five ribs, a clavicle and all the fingers of her right hand. She underwent two operations and contracted pleurisy. Her hand was 40% disabled and gravely disfigured. For pain and suffering she was awarded £400, a figure which equates to R147 000 in today's terms.

[16] Ms *Bezuidenhout* also referred me to Newhouse v The Road Accident Fund 2003 (5D5) QOD 1 (AF). This matter concerned an arbitration award where a married woman was injured, losing the function of her right hand. She was awarded general damages of R180 000. In today's terms the award to her would be worth R280 000.

[17] Mr *Khuzwayo* emphasised the general difficulty of equating cases with multiple injuries to the present matter. He referred me to Nel v Sun Insurance 1950 (1) Corbett & Buchanan at page 362. As a result of a motor collision the plaintiff suffered fractures to her right wrist and fingers and a disorganisation of the carpal bones. The plaintiff developed osteo-dystrophy. The wrist had to be fixed in a permanent position. The plaintiff would have to rely mainly on his left hand and to become left-handed. For pain and suffering, loss of the amenities of life and disfigurement the plaintiff was awarded £250, a figure which equates to R45 000 in today's terms.

[18] In Pretorius v Ocean Accident & Guarantee Corporation, Ltd 1951 (1) Corbett & Buchanan 367 the plaintiff's wife was injured in a motor collision suffering a fracture of the fifth metacarpal of her left hand together with a chip fracture of her fourth finger, a hairline fracture of the bone of the fourth metacarpal, and a fracture of the articular surface of her radius. The injuries healed but she was left with a partial permanent disability of the left wrist and hand estimated at 8% by the medical witnesses. The damages which were awarded are in today's terms R84 000.

[19] In Jordan v Eagle Star Insurance Company 1955 (1) Corbett & Buchanan 359 the plaintiff was an elderly lady who fell from a bus, fracturing her right wrist and rendering her hand virtually useless. There was a reduction because of her reduced life expectancy and she was awarded £550 for loss of the amenities of life and pain and suffering. That equates to R78 000 in today's value.

[20] Finally I was referred to Botha v Miodownik & Co (Pty) Limited 1966 (3) SA 82 (W). A 25 year old electrician fell into an open hole left by a building contractor. He sustained a serious fracture to his left wrist necessitating two operations. As a result he was unable to indulge in his activities of playing rugby, engaging in gymnastics and being a body builder. His damages of R1 144 equate to R80 000 today.

[21] The updated value of the above awards are all taken from Koch's Quantum Yearbook, 2011. Considering the injuries which the plaintiff has suffered and comparing his case with those referred to above insofar as I am able to do, I would assess his general damages as being R250 000.

[22] With regard to his past and future loss of earnings, I would assess the contingencies for his past loss of earnings as being at 5%.

[23] I accept the evidence of Professor Venter that the effect of his HIV positive status would not have a negative effect on the plaintiff's life

expectancy and future loss of earnings. The plaintiff is presently 30 years old, and if one accepts the evidence of Professor Venter one would expect him to live for a period of 30 or 40 more years. This would take him to the retirement age used by Mr Hellig in his calculations (of 65 years).

[24] Based on the normal contingencies applied by Koch, and taking into account the possibility of a reduced life expectancy, I set the contingencies which should be applied to the plaintiff's future loss of earnings at 23%.

[25] With regard to costs, counsel settled the terms of the order which is reflected below. They were in agreement with the question of costs save for the costs of Dr Herbst. His work, unfortunately, had to be duplicated because he was no longer available. In those circumstances I do not believe it would be fair to burden the defendant with those costs.

[26] In all the circumstances the defendant is directed to pay to the plaintiff :-

1. the sum of R250 000 for general damages;
2. the sum of R110 359 for future medical expenses;
3. the sum of R163 534 for his past loss of earnings;
4. the sum of R536 009 for his future loss of earnings;
5. the costs of the action insofar as it relates to the hearing of the quantum of the plaintiff's damages, and those costs are to include the costs of the plaintiff's travelling and accommodation from Nkandla to Pietermaritzburg and back as well as the costs of the plaintiff's experts

as follows :-

- (a) Dr Kelbe, whose costs are to include the costs of drafting her first and second reports, her qualifying and reservation fees;
- (b) Ms M Combrinck whose costs are to include the costs of drafting her report and her qualifying fees;
- (c) Dr Pienaar, whose costs are to include the costs of drafting his report, and his qualifying and reservation fees; and
- (d) Professor W D F Venter whose costs are to include the costs of drafting his report, his qualifying and attendance fees.

Date of hearing : 31st May 2011

Date of Judgment : 8th June 2011

Counsel for the Plaintiff : E Bezuidenhout (instructed by Botha's Incorporated)

Counsel for the Defendant : T Khuzwayo (instructed by the State Attorney)