

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 2372/2009

In the matter between:-

BOLAWANE SARAH MOKOENA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 22 OCTOBER 2010

JUDGMENT BY: RADEBE, AJ

DELIVERED ON: 4 NOVEMBER 2010

JUDGMENT

INTRODUCTION

[1] The plaintiff instituted action against the defendant on 14 May 2009. The cause of action arises from a motor vehicle collision that occurred on 26 August 2006 at Mohapi Street, Phahameng, Bloemfontein. The plaintiff, whose date of birth is 10 April 1945, was a pedestrian at the time of the collision with a motor vehicle, then driven by one Lwaiphi James Qakoshe (the insured driver).

[2] In her particulars of claim the plaintiff alleges that the sole cause of the collision was the negligence of the insured driver. She then proceeds to allege various aspects of such negligence. As a result of the said collision, the plaintiff sustained specific bodily injuries which resulted in her suffering special as well as general damages. She claims those damages under two headings:

2.1 Special damages – R75 000.00

2.2 General damages – R200 000.00

[3] In due course and prior to the trial date the defendant conceded liability for the damages suffered by the plaintiff, but the quantum thereof remained in dispute. Further, the defendant offered to settle the claim for special damages through giving the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund, No. 56 of 1996 (“the Act”).

[4] The matter came for trial before me on 19 October 2010. In his opening address Mr. Cilliers, counsel for the plaintiff, recorded the following aspects as having been agreed and settled between the parties:

- 4.1 the issue of liability is conceded 100% in respect of plaintiff's proven damages;
- 4.2 the defendant is liable to provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Act;
- 4.3 the defendant is to pay plaintiff's party and party costs on a High Court scale, as taxed or agreed; such costs to include the qualifying and reservation fees of plaintiff's one expert, Dr. J.J. Fourie, an orthopaedic surgeon;
- 4.4 the defendant admits Dr. Fourie's report dated 16 January 2009 which is annexure "A" to the particulars of claim;
- 4.5 the only issue in dispute is the extent of general damages suffered by the plaintiff and the amount to be awarded to the plaintiff.

Mr. J.C. Coetzer, counsel for the defendant, confirmed all the above.

PLAINTIFF'S EVIDENCE

- [5] The plaintiff gave evidence concerning the injuries she sustained in the aforesaid collision when she was a

pedestrian, namely:

- (a) a ligament injury to the right knee;
- (b) a nerve damage in the right leg;
- (c) injury to the right ankle;
- (d) bruises to the left of her thoracic spine;
- (e) injuries to the ribs.

[6] Prior to the accident she was leading an active life – doing household chores, walking long distances between Botshabelo and Thaba Nchu, playing netball, going to church. All these activities, save for playing of netball, which she had stopped in 2002, had been compromised as a result of the collision. She has to depend on other household members for assistance with cleaning of the house, washing and other activities. She limps and uses a crutch to get around. She was limping and using a crutch when she had to attend court for this case and she attributes this to the aforesaid collision.

[7] According to the plaintiff, she suffers a lot of pain on the right leg. This results in her not being able to get a proper and good sleep - a situation she finds herself in every night. Her

right leg becomes numb at times, causing her to think it is lifeless. Prior to the collision she could walk for a long period of time. After the accident she can manage only up to five to six minutes walking.

[8] Immediately after being discharged from the out-patient, Department of the Pelonomi Hospital in Bloemfontein, she attended physiotherapy totalling eight sessions. She now takes Disprin painkillers, which she barely affords to buy since it costs her R2,00 a packet. She cannot afford more sophisticated painkillers. For the past four years she has been using a crutch on a daily basis.

[9] Under cross-examination plaintiff testified that the injuries cause her pain, so severe that at times she cries. She conceded that at the age of 62 years (when she was injured) and now 65 years old there are age-associated ailments. She further conceded that the chest pain, as reported by her own specialist, Dr. J.J. Fourie, is minimal. She further confirmed that she was not admitted to hospital as an in-patient, but was treated and discharged on the same day of the accident.

[10] The plaintiff's notice in terms of Rule 36(9)(a) & (b) introduced the expert's report by Dr. J.J. Fourie, which was admitted into evidence by consent, summarises the plaintiff's injuries and treatment as assessed on 9 October 2008. The following aspects of the report need to be taken notice of:

10.1 the source of information used to compile the report was

- (a) interview and examination of the plaintiff;
- (b) statutory medical report completed by Dr. Pule;
- and
- (c) hospital records.

10.2 the plaintiff, an adult female, was born on 4 October 1945, is a pensioner, right-handed, unmarried, no dependants, plays no sport and has a Grade 3 education.

10.3 She was a healthy person, has had no operations and no injuries prior to the collision. As a result of the collision, the plaintiff sustained the following injuries:

- “(a) Ligament besering van die regter knie. Die besering het bestaan uit 'n mediale kollaterale ligament en anterior kruisligament besering.

- (b) Senuwee besering van die regter been. Die besering word nie in die notas of in die statutêre verslag aangedui nie, maar word volledig bespreek.
- (c) Moontlike besering van die regter enkel. Die besering is nie aangeteken nie.
- (d) Kneusing links torakaal sonder hemo- of pneumotoraks. Die besering is nie aangeteken nie.”

10.4 Plaintiff attended physiotherapy sessions in Botshabelo Hospital and when it was realised that there was no improvement in her knee, she was referred back to Pelonomi Hospital for further treatment.

10.5 The plaintiff complained of “neurologiese uitval van die regter onderbeen”. Although there were no indications thereof, according to her description of the discomfort, it presents as what is called “drop foot” (“n peroneale senuwee besering met ‘n hangvoet”).

10.6 Her present complaints were chest pain (found to be minimal); night pain in right knee; occasional swelling of the knee; restricted movements; instability when she stands; peroneal nerve injury on the right side; and, swelling of the right foot which suffers the drop foot syndrome, although this was found not to be profound.

10.7 The complaints can therefore be classified into three categories, namely,

10.7.1 Chest pains – no fractured ribs and minimal pain which can be treated with steroids.

10.7.2 Peroneal nerve injury on the right hand side, which can be handed through active physiotherapy over a period of three to four years.

10.7.3 Right knee injury, with a 5 – 10% possibility of knee replacement.

10.8 The estimated future medical expenses would be in excess of R130 000,00 if all procedures are undertaken, that would involve future pain and suffering for six to eight weeks.

10.9 The plaintiff suffered severe pain during the accident and is now in chronic pain and suffering as a result of the knee and the peroneal nerve injury. There is also no guarantee that the symptoms will be completely eradicated through the suggested treatment.

The plaintiff closed her case. The defence also closed its case without calling any witnesses.

ARGUMENT

[11] Counsel for the plaintiff cited various cases in support of his submission that an award of between R120 000,00 and R150 000,00 would be fair in respect of general damages. Counsel for the defendant argued for a lower award of between R40 000,00 and R60 000,00.

EVALUATION

[12] It is common cause that the plaintiff has to an extent suffered long-term sequelae from what initially appeared to be a mild injury. She has up to the date of the trial not been able to fully recover from the knee and ankle injuries sustained in the collision on 26 August 2006.

[13] When plaintiff was taken to hospital, immediately after the collision, her injuries were apparently regarded as mild. She was treated and discharged. This court does not lose sight of that fact, but can also not penalise the plaintiff for the decision taken by the hospital when diagnosing her injuries.

[14] The report by Dr. J.J. Fourie was compiled following his examination of the plaintiff on 9 October 2008 – more than two years after the collision. In that report Dr. Fourie

confirmed the knee and ankle injuries, but has very little to say about the chest problems, which plaintiff pointed to him, except to remark that the origin of the chest problems cannot be determined. Dr. Fourie went on to make a point about the sequelae of the bodily injuries and made observations as tabulated in his report on page 6 – 7. These have already been referred to by me in paragraph 10.7 above.

- [15] In the case of **ROAD ACCIDENT FUND v MARUNGA** 2003 (5) SA 164 at 165 B it was held that:

“in cases in which the question of general damages arose, a trial Court had a wide discretion to award what it considered to be fair and adequate compensation to the injured party.

There was no hard and fast rule of general application requiring a trial Court to consider past awards, although the Court might derive some assistance from the general pattern of previous awards.”

It is very rare that a court can find cases in respect of which the claimants have suffered exactly the same bodily injuries as well as sequelae. One claimant might have sustained an ankle injury or a knee injury, but be able to walk normally

again, play, run long distances after a few weeks or months.

[16] In exercising its wide discretion, a court should not lose sight of the varying consequences of injuries caused by negligent driving of motor vehicles, when making awards. Such consequences should be approached objectively and such objectivity should be apparent irrespective of the injured person's socio-economic or educational background. There should be no discrimination in terms of race, gender or economic background.

[17] Further in applying the objective test when exercising its wide discretion, the court takes cognisance of the need to avoid sympathising with the victims of road accidents, to the extent that the position of the defendant is compromised. In **SIGOURNAY v GILLBANKS** 1960 (2) SA 552 (A) on 572 C it was held that:

“Nothing closely linked with the peculiar circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in the size of the awards where the circumstances

are broadly similar.”

[18] The awards made in respect of general damage are as readily quantifiable as awards in respect of special damages. This fact should be borne in mind whenever a court is confronted with a case of quantifying general damages to avoid moving towards “thumb-sucking” amounts.

[19] General damages have a wide range which comprise of, *inter alia*, shock, pain and suffering, loss of enjoyment of amenities of life, disfigurement, disability and contumelia. The evidence in this case, i.e. plaintiff’s *viva voce* evidence and the expert’s report compiled by Dr. J.J. Fourie, show that the plaintiff suffered these aspects of general damages to varying degrees. There has been less or no emphasis on the aspect of shock and contumelia.

[20] Plaintiff testified that:

20.1 She suffers a lot of pain, causing her sleepless nights.

She has difficulty turning her body and has to sleep on one side of her body throughout the night. At times she feels numbness on her ankle and suffers what is

regarded as a “drop foot”. Dr. Fourie’s report states that she will continue to suffer pain and future suffering for six to eight weeks when she undergoes further surgery and hospitalisation.

20.2 Insofar as loss of enjoyment of amenities of life, the plaintiff testified that whereas she used to walk long distances of $\pm$ 20 kilometres, she can now only walk for five minutes. Undoubtedly, in her prime years she was a physically fit person, playing netball and having social matches with her friends. She has lost enjoyment derived from socialising with friends and of going to church. She now has to have the priest and prayer groups coming to her home to give her service. She has thus lost the freedom of fully associating with the other members of her church.

20.3 The plaintiff further testified that she is now disfigured and walks in a limp, using a crutch since the date of the accident. When Dr. J.J. Fourie consulted with her on 9 October 2008, he made the following observations – on page 17 of indexed papers – amongst other things:

“Funksionele inkorting:

Loop:

- Mev Mokoena vind dit moeilik om op ongelyke terrein te loop omdat die knie onstabiel voel en die voet soms meegee en vashak.
- Sy het vir 'n lang tyd met twee krukke geloop en help haarself nog met een kruk as sy op ongelyke terrein loop.

..... sy kan nie swaar voorwerpe hanteer nie.”

[21] In deciding the appropriate award for general damages, I have considered all of the above, which may be summarised as the following factors:

- (a) the nature of the injuries;
- (b) the sequelae thereof;
- (c) the various aspects of general damages;
- (d) the degree to which each aspect of the general damages has been suffered;
- (e) the extent to which such damages are likely to continue to be suffered;
- (f) comparative cases and awards thereof;
- (g) the lapse of time from the date when the injuries were sustained to the date of the final award. In this respect

I make reference to the Classified Listing of inflation adjusted awards as published in the Quantum Yearbook by Robert J. Koch, 2010. In the case of **PUTUMA v RAF** 2008 5E8 QOD 13 (SE) the award of R105 000 in 2008 has escalated to R120 000 in 2010 figures. Similarly, in **VAN DYK v RAF** 2003 5 QOD 519 (W) an award of R90 000 in 2003 has escalated to R135 000 in 2010.

[22] In the result I come to the conclusion that an award in the sum of R120 000,00 in respect of general damages will be fair and equitable.

[23] I therefore make the following order:

- (a) The defendant concedes liability 100%.
- (b) The defendant is ordered to pay an amount of R120 000,00 to the plaintiff in respect of general damages.
- (c) The defendant is ordered to furnish the plaintiff with an undertaking as envisaged in section 17(4)(a) of Act 56 of 1996 covering 100% of the costs for future medical and hospital or nursing home expenses and of any other treatment, including physiotherapy services or

goods that the plaintiff may require as a result of the injuries sustained by her in the motor vehicle accident on 26 August 2006.

- (d) The defendant is ordered to pay plaintiff's taxed or agreed party and party costs on the applicable High Court scale, which costs shall include the qualifying and reservation fees of the orthopaedic surgeon, Dr. J.J. Fourie.

N.H. RADEBE, AJ

On behalf of the plaintiff: Adv. H.J. Cilliers
Instructed by:
Honey Attorneys
BLOEMFONTEIN
(REF: A PRINSLOO/cvdm/J02145)

On behalf of the defendant: Adv. J.C. Coetzer
Instructed by:
Lindsay Keller Attorneys
c/o Matsepes Inc
BLOEMFONTEIN
(REF: C M DU PLOOY/LT/LIN5/0156)

/sp