

Reportable: Yes / No
Circulate to Judges: Yes /
No

Circulate to Magistrates: Yes / No

**IN THE HIGH COURT OF SOUTH
AFRICA**

(Northern Cape Division)

Case no: 479/06

Date heard:

22-02-2008

Date

delivered: 29-02-2008

In the matter of:

PATRICIA LEONORA BENS

APPLICANT

versus

**LLOYD SAM
MELODY MADUBELA
2ND RESPONDENT**

1ST RESPONDENT

Coram: **MAJIEDT J**

JUDGEMENT

MAJIEDT J:

1. This matter was heard in the Motion Court. The plaintiff applies for default judgment in the amount of R7 977 010.00 plus interest and costs against the first defendant only at this stage. After hearing argument, I had reserved judgment which I now hand down.

2. Plaintiff's claim is for damages suffered as a consequence of injuries sustained during a motor vehicle accident which had occurred on 18 May 2003 outside Uppington. At the time of the accident she was a passenger in a motor vehicle driven at the time by the first defendant and allegedly owned by the second defendant and her late husband. Plaintiff avers that the accident was caused solely by the negligence of the first defendant who:

- a) drove at an excessive speed in the circumstances;
- b) failed to keep to the vehicle under proper control;
- c) failed to apply the brakes of the vehicle either timeously or at all;
- d) failed to take any or adequate steps to avoid the accident when by exercising reasonable care he could have done so.

3. It is not necessary for purposes of this judgment to deal with plaintiff's averments with regard to the negligence of the second defendant. Summons was served on the first defendant on 24 April 2006 and he delivered notice of his intention to defend the action on 23 May 2006. Despite having been called upon to do so in terms of the Rules, the first defendant has failed to file a plea to

the particulars of claim and his attorneys of record withdrew in accordance with the prescripts contained in the Rules on 10 August 2006. First defendant is therefore in default of plea.

4. Plaintiff originally claimed for damages in the sum of R4 831 400.00, interest and costs of suit. The increased amount of her claim, as set out in par 1 of this judgment, is as a consequence of additional and updated medico-legal reports.
5. The notice of set down, reflecting the plaintiff's increased claim as set out in par 1 above, together with annexures which include an affidavit by plaintiff and affidavits by the experts who had compiled medico-legal reports as well as an affidavit of an actuary, were all served on the first defendant on 30 January 2008. First defendant is therefore in default of plea and the matter has been properly set down in terms of the provisions contained in Rule 31(2)(a).
6. The plaintiff has filed an affidavit in which she avers that the first defendant was negligent in the respects set out above. She also stated therein that she had received an amount of R25 000.00 as compensation from the Road Accident Fund (RAF) which, in terms of statutory prescripts, is the limit of the payment that the

RAF is in law obliged to make to her as a non-fare paying passenger. She also provides information in the affidavit with regard to her present medical condition, namely the fact that she is a tetraplegic, permanently confined to a wheelchair, permanently unemployable and dependant on the assistance of a full-time aide. From her affidavit it appears that the first defendant had lost control of the vehicle around a sharp bend, causing it to collide with a road excavation, whereafter it rolled several times.

7. A number of affidavits by experts, containing their medico-legal reports as to plaintiff's medical condition, were also filed off record. These are affidavits of:
 - a) An orthopaedic surgeon who describes her injuries as being tetraplegia at C4 right and C5 left and a complete lesion of C5/C6 downward. He also confirms that she requires a full-time caregiver and that she has lifelong unemployability.
 - b) A spinal cord injury specialist who confirms the orthopaedic surgeon's observations *supra*;
 - c) A physiotherapist who confirms that the plaintiff will require a fulltime attendant, more accessible accommodation at home and also

independent mode of transport for herself;

- d) An occupational therapist who confirms the plaintiff's unemployability and special needs;
- e) An industrial psychologist who also confirms that the plaintiff is permanently unemployable;
- f) Lastly there is an affidavit and a detailed report of an actuary who calculated the nett value of the plaintiff's loss of income and future medical expenses. According to his calculations the plaintiff's nett total loss amounts to R7 202 010.00, which has to be reduced by the amount compensated by the RAF, namely R25 000.00, as set out above.

8. There is ample authority that the quantum of a plaintiff's damages can, as an exception to the general rule requiring oral evidence, be proved by way of affidavit in default judgment proceedings. See in this regard *inter alia*:

Havenga v Parker 1993(3) SA 724 (T) at 725 I – 726 G;

De Waal v Kruger, unreported judgment, Northern Cape Provincial Division (Kriek JP), case number 692/93 delivered on 23 November 1994.

9. The aforementioned two judgments relate only to the affidavits of experts to prove quantum in a damages claim in a default judgment matter. In the present matter Mr Haddad, who appeared for the plaintiff, submitted that I should also allow the affidavit of the plaintiff to be received in lieu of *viva voce* evidence to prove, *inter alia*, negligence. He motivated this submission on the basis of the plaintiff's severely restricted mobility in that she is permanently confined to a wheelchair and is a tetraplegic. I must also add that the plaintiff is resident in Uppington, some 400 km from the seat of this Division.
10. In **Dorfling v Coetzee 1979(2) SA 632 (NC)** at 635 C-F, Basson AJ (as he then was) held that in actions for damages *viva voce* evidence of the cause of action should be adduced even in default judgment applications. The learned Judge held that:

“Ek meen dat in die reël getuienis van die skuldoorsaak gelei moet word in gevalle waar skadevergoeding geëis word maar dat dit aan elke Hof oorgelaat moet word om te besluit of in 'n bepaalde geval afgesien kan word van sulke getuienis.

In die geval van motorbotsings meen ek dat dit noodsaaklik is dat getuienis oor die skuldoorsaak ook voorgelê word sodat bepaal kan word (i) of verweerder wel nalatig was, (ii) of eiser bydraend nalatig was en (iii) in laasgenoemde geval die mate van eiser se skuld met betrekking tot die skade. Dit is eers nadat al die feite wat as bewys van die skuldoorsaak aan die Hof voorgelê is, oorweeg is dat die Hof kan besluit of die volle bedrag van die bewese skade toegeken moet word en of daar 'n verdeling van skadevergoeding moet wees ingevolge art 1 van Wet 34 van 1956.”

I agree with this approach for the reasons mentioned by the learned judge. The present case is however

exceptional by virtue of the fact that:

- a) The plaintiff is severely restricted in mobility;
and
- b) In the present matter the first defendant's negligence can be inferred on a balance of probabilities on the *res ipsa loquitur* maxim and there can be no possibility whatsoever of contributory negligence, given the uncontroverted facts averred by the plaintiff in her affidavit.

11. The first defendant has had sufficient opportunity to furnish his defence to the plaintiff's claim and has quite clearly on the probabilities chosen not to defend the matter. In the premises I am of the view that under these circumstances I should permit the plaintiff's affidavit to be received as evidence of the negligence of the first defendant herein.
12. This brings me to the question of the quantum of the plaintiff's damages. It is clear that the plaintiff has been quite severely injured and that these injuries are of lasting permanency. She will be confined to a wheelchair, for the rest of her life, will require a special attendant and will require independent mode of transport for her needs. She is a tetraplegic and suffers

from faecal and urinary incontinence. She also experiences severe pain from time to time and will require ongoing medical treatment and physiotherapy. Most importantly, I have no doubt whatsoever that the experts are correct in their assessments that she is unemployable for the rest of her life.

13. The actuary, Mr Munro, has furnished two detailed reports, the last of which was compiled on 22 August 2007. I am satisfied with the calculations, assessments and assumptions made therein with regard to the special damages relating to past loss of income of R94 600.00, future loss of income in the sum of R2 317 500.00 and present and future medical costs in the amount of R4 789 910.00 for a total of R7 202 010.00. This amount has to be reduced by an amount of R25 000.00 received as compensation from the RAF.
14. All that remains to be determined is the amount of general damages for pain, suffering, disfigurement, discomfort, disability and loss of amenities to be awarded to the plaintiff. In **Sandler v Wholesale Coal Supplies Ltd 1941 AD 195** at 199, Watermeyer JA noted that:

“[i]t must be recognised that though the law attempts to repair

the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

There can be little doubt that no amount of money can ever adequately compensate plaintiff, a healthy 21 year old (she was born on 29 July 1981) at the time of the accident, but the compensation awarded can, so one hopes, go some way to providing her with a degree of solace.

- 15.** Plaintiff has, on the advice of her lawyers, submitted in her affidavit that an amount of R800 000.00 as a global award for general damages would be apposite in the circumstances. An analysis of comparable awards is necessary to test this submission, bearing in mind the oft stated caveat that no two cases are exactly similar; See, *inter alia*

Van Blerk JA in **Marine & Trade Insurance Co Ltd v Goliath 1968(4) SA 392 (A)** at 333 G:

" comparison with other cases though never decisive is instructive ... comparison can only be usefully undertaken where the circumstances are clearly shown to be broadly similar in all material respects." (emphasis added)

16. Regrettably the bald averment by the plaintiff regarding the amount of general damages has not been motivated further at all by Mr Haddad during the course of his argument.
17. In **Khaya Sgaty v Road Accident Fund**, unreported judgment, Eastern Cape Division case no 682/2000, delivered on 4 July 2001, Jennett J awarded R800 000.00 for general damages to a 29 year old teacher who had sustained a fracture dislocation of the cervical spine at the C5 level with resulting paralysis from the shoulders downwards, thus leaving the plaintiff a permanent tetraplegic. The sequelae of the said injuries are broadly similar to those in the present matter, namely:
- a) Mr Sgaty is permanently confined to a wheelchair;
 - b) He is permanently unemployed;
 - c) His chances of recovery are nil;
 - d) He requires a fulltime attendant;
 - e) He frequently experiences marked pain in his shoulder;
 - f) He has faecal and urinary incontinence.

With reference to two earlier cases where awards had been made on comparable facts and

circumstances, namely **Steenkamp v Minister of Justice** (Corbett & Buchanan, The Quantum of Damages in Bodily and Fatal Injury Cases, Vol I, p186) and **Pretorius v Geldenhuys** (Corbett & Buchanan, The Quantum of Damages in Bodily and Fatal Injury Cases, Vol I, p803), Jennett J awarded the sum of R800 000.00 for general damages. I accept as a reasonable assumption that the award of R800 000.00 proffered by the plaintiff herein on advice of her lawyers is based on the **Sgaty** case.

18. The plaintiff in **Kekae v Road Accident Fund [2001] 2 All SA 37 (T)** was a 56 year old healthy male, the father of eight children, who was employed as a driver. He sustained a fracture dislocation of his L1 and L2 vertebrae with resultant paraplegia and head and abdominal injuries. The main sequelae of these injuries were:

- a) Faecal and urinary incontinence;
- b) Loss of sensation from L4 downwards;
- c) Complete loss of sexual function;
- d) Osteoporosis in the pelvis, suffers from chronic causalgic pain in his right lower limb;
- e) Diminished intellectual capacity due to diffuse brain damage;
- f) Permanent unemployability.

Chaitowitz AJ awarded R220 000.00 for general damages.

19. The **Sgaty** matter, supra, is virtually on all fours with the present matter as regards general damages. While that award has been made more than six years ago and provision has to be made for the inflationary effects on the value of money, I am of the view that a similar award, namely R800 000.00, would nevertheless be apposite in the present matter. Mr Sgaty was a well qualified teacher and led a very active professional and social life. He was a keen tennis and table tennis player and was furthering his studies to enhance his qualifications. In the present matter Ms Bens has a Matric qualification and was employed on a casual basis as a stocktaking clerk for 4 to 6 days per annum. She had aspirations of studying to become an air hostess. In the circumstances, I am of the view that her situation is somewhat different to that of Mr Sgaty. A similar award for general damages would consequently be proper in these circumstances.

20. I issue the following order:

Default judgment is entered against the first defendant for:

1. **Payment of the sum of R7 977 010.00.**
2. **Interest on the abovementioned sum at the rate of 15.5% per annum from the date of this judgment to date of payment.**
3. **Costs of suit.**

**SA MAJIEDT
JUDGE**

FOR THE PLAINTIFF : MR VERNON HADDAD
Kimberley Elliot Maris Wilmans & Hay,

DATE OF HEARING : 22 February 2009
DATE OF JUDGEMENT : 29 February 2008