

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION- MBOMBELA [MAIN SEAT]**

CASE NO: 2737/2019

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 5 June 2024

SIGNATURE:

CELESTE GEBHARD N.O

(CURATRIX AD LITEM FOR SC MKHATSHWA)

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

VUKEYA J

[1] Sicelo Clifford Mkhathshwa, hereinafter referred to as “the plaintiff”, was involved in a motor vehicle accident which occurred on the 21st of April 2017, while he was a pedestrian. This happened at Mkhuhlu, Culcutta, in Mpumalanga. The motor vehicle with registration numbers and plates H[...] 1[...] M[...], was driven by B Nkatini, hereinafter referred to as “the insured driver”.

[2] Although he is currently 23 years old, at the time of the accident he was 17 years old, and therefore a minor. It is alleged that the plaintiff sustained the following

injuries as a result of the accident: a fracture of the left proximal femur and a lumbar spine soft tissue injury. These injuries, according to the plaintiff have caused him, amongst others, chronic pain and tenderness of the left leg and hip; severe left leg shortening of 5.2cm; varus deformity; weakness, instability and moderate limping gait, etc.

[3] The plaintiff was immediately transported to Matikwana Hospital and subsequently transferred to Themba hospital and admitted from 28 April 2017 up to 8 May 2017 where he was treated for the abovementioned injuries. The plaintiff was transferred back to Matikwana Hospital from 8 May 2017 until he was discharged on 26 June 2017.

[4] The plaintiff instituted action against the Road Accident Fund (“the Defendant”) as the liable entity in terms of section 17 (1) of the Road Accident Fund Act 56 of 1996 (‘The Act’). He then caused summons to be issued against the defendant and claimed damages allegedly suffered as a result of the accident under various heads of damages, namely, general damages, future medical expenses and past and future loss of earnings.

[5] The defendant and the plaintiff settled the merits and the defendant conceded to being 100% liable for the plaintiff’s proven damages. The parties also settled the issue of future medical expenses. What remains to be determined by this court are the quantification of general damages and past and future loss of earnings.

[6] Ms Celeste Gebhard was appointed as *curator ad litem* for the plaintiff as recommended by the experts because of his pre-existing condition which rendered him incapable of managing his legal or financial affairs.

[7] At the hearing of the matter, the parties requested the court to proceed in terms of Rule 38 (2) of the Uniform Rules of court and to dispense with the leading of oral evidence of the witnesses but to allow for evidence to be adduced on affidavit. This request was granted. The parties made their submissions on record and also filed their heads of argument.

Summary of the evidence

[8] The evidence of the Orthopedic Surgeon, Dr LA Oelofse, according to the report sworn to and filed as evidence, is that the plaintiff was diagnosed with a lumbar spine and suffers from mechanical back pain. He was also diagnosed with a fracture of the left femur of the upper leg which resulted in severe shortening of the left leg by 5.2cm and which was fully united with lateral angulation. According to this expert, there are signs of lateral compartment osteo-arthritis.

[9] The Orthopedic Surgeon observed that the plaintiff was still severely symptomatic six years after the accident which suggested that there was a definite functional and structural impairment. His observation was that at the time of examination, the plaintiff's condition had deteriorated and that he presented with severe shortening of the left leg and an early development of lateral compartment osteo-arthritis. This was because of the malalignment of the femur.

[10] According to the orthopedic surgeon's observation, the plaintiff has a severe limping gait and experiences pain when running, squatting, walking for long distances climbing stairs and when handling heavy objects. He opines that the plaintiff will not be able to perform manual labor which involves walking, handling heavy objects climbing and standing for long periods and that he is best suited for sedentary to light manual labor type of work. He calculated the plaintiff's whole person impairment at 20% and opined that the plaintiff suffered serious injuries which qualifies in terms of the Narrative Test.

[11] The Educational Psychologist, Ms D Benade, opined that, pre-morbid, it would have been unlikely that the plaintiff would have been able to complete any school grades higher than grade 6 if the accident did not happen due to the learning difficulties he was experiencing. It is likely that he would have dropped out of school early and would have followed a vocational or skills training route.

[12] The expert further states in her report that the plaintiff failed to reach the minimum requirements to be promoted at the end of grades 8 to 11 and eventually dropped out of school at the end of grade 11. She opined that he will have to follow a

vocational or skills training route within the limitation of his physical abilities. According to the Forensic Psychiatrist, the plaintiff has no psychiatric pathology and is not depressed, he however presents with a pre-existing learning difficulty which has been aggravated by the injury sustained in the collision.

[13] The Clinical Psychologist's point of view is that the plaintiff was vulnerable from a scholastic perspective prior to the accident, the added impact of the trauma of the accident together with his residual add to his scholastic difficulties. This leaves him even more vulnerable than he was before the accident. As a result, this will limit his employment options once he enters the open labor market.

[14] According to the Occupational Therapist's report, the plaintiff presented with an asymmetrical posture with a severe pelvic tilt as a result of the severe leg length discrepancy. He had a functional movement in his left hip and knee and the movement of his left hip elicited pain. Even so, it was opined that the plaintiff retains the physical capacity to engage in medium work.

[15] The Occupational therapist thus concluded that, the plaintiff is only suited for sedentary and limited light work where mobility skills are not a pre-requisite. She opined further that the plaintiff's cognitive challenges prevent him from securing the type of work he is suited for, and that is, sedentary and limited light work and therefore, it is highly unlikely that he will be able to secure work within these parameters. It is anticipated that he will struggle to enter the formal open labor market.

[16] The industrial Psychologist's pre-accident postulations are that the plaintiff would have entered into employment in an unskilled capacity due to his susceptibility to spells of employment. He would have entered into the labor market as a cleaner, gardener, construction laborer general worker, etc. He would likely have worked in part-time capacities and would have earned R36 500, 00 per annum. He would have likely reached his career ceiling around the age of 45 years old and would have likely continued to earn annual inflationary increases until retirement age 65.

[17] His post-accident postulations are that the plaintiff will not likely obtain employment given his physical, cognitive and communication limitations. He will probably have to rely on informal generation activities such as vending and recycling and it is anticipated that he will work on a part time basis, working at most two days per week and recuperating the rest of the time.

General Damages

[18] It is a trite principle that in claims for general damages, compensation is awarded for pain, suffering, discomfort, disablement, loss of amenities of life and disfigurement resulting from the injuries sustained from the accident. The authorities have cautioned against the courts' tendency to award higher damages as compensation. There is no mathematical or scientific formula for the computation of the monetary value of pain and suffering, loss of amenities of life and disabilities. (See *A.A. Mutual Insurance Limited v Maqula* 1978(1) SA 801 (A) and *Southern Insurance Association Limited v Bailey N.O* 1984 (1) S.A. 98 (A) at 114.

[19] In assessing the compensatory award, the court must be fair to both sides, i.e. an award must be a just compensation and must not "pour largesse from the horn of plenty at the defendant's expense" as stated in *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA). In *Hully v Cox* 1923 A.D. 234 at 246, the court cautioned the courts against allowing their "sympathy for the claimants" to influence their judgments in considering what compensation to award in cases such as the present.

[20] The plaintiff submitted that after sustaining the injuries, he was hospitalized for a prolonged period of at least two months and suffered pain and suffering as a result of the accident. It is further submitted that the plaintiff will continue to live with pain and limitations and most probably endure pain and suffering in the future. The plaintiff referred this court to several authorities as reference to what it views to be a fair and just award for general damages. This includes the case of *Road Accident Fund v Marunga* 2003 (5) SA 65 (SCA) where a 19 year old sustained a fracture of the femur, soft tissue injuries and bruises was awarded R175 000, 00.

[21] The plaintiff also referred the court to *Smit v Padongelukkefonds* 2003 (5E3) QOD 11 (T) where a 24 year old who had sustained a fracture of the pelvis, bilateral femur fractures, left arm and left ankle injuries was awarded R320 000, 00. In *Grobbelaar v Road Accident Fund* 2015 (7E3) QOD 11 (GNP), the plaintiff, a 44 year old male person who had sustained a fracture of the left femur and left patella was awarded R300 000, 00 in 2014 for general damages.

[22] It was further submitted on behalf of the plaintiff that because he remains with physical limitations and sequelae emanating from the injuries sustained, it is evident that he will continue to live with pain and limitations and most probably endure pain and suffering in the future. Counsel for the plaintiff therefore submits that an amount of R600 000, 00 is a fair and reasonable compensation for general damages.

[23] In respect of general damages the defendant referred the court to the same cases which the plaintiff made reference to, namely *Road Accident Fund v Marunga* (*supra*) and *Litseo v Road Accident Fund* (5637/2016) [2019] ZAFSHC 52 (2 May 2019) where the court awarded an amount of R700 000, 00 to a plaintiff who had sustained a malunited right femur fracture with severe leg length shortening- of more than 6cm.

[24] Counsel for the defendant submitted therefore that an award in the amount of R470 000, 00 – R500 000, 00 is to be considered to be a fair and reasonable award in favor of the plaintiff for general damages.

[25] As already stated above, the court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. In the case of *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at 287E–F Holmes J pointed out the principle and stated that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense. In *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 AT 199, the court stated that 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.

[26] I am in agreement with the above views, and also find it necessary to add that the proper approach to be followed when awarding general damages was also stated in *Bay Passenger Transport v Franzen* 1975 (1) SA 269 (A) where the court summarized it as follows:

“Comparable cases, when available, should rather be used to afford some guidance in a general way, towards assisting the court in arriving at an award which is not substantially out of general accord with previous and broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. All the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and the sequelae may have been either more serious or less than those in the case under consideration”.

[27] In determining general damages the court is called upon to exercise a broad discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered, including their nature, permanence, severity and the impact on her lifestyle. There is no hard and fast rule of general application requiring the court to consider past awards as they are seldom on all fours with the facts of the case under consideration.

[28] A clear observation in *casu* is that the plaintiff and the defendant are not very far apart with regards to the amount to be awarded. The former has submitted that R500 000, 00 is fair and reasonable while the latter is of the view that R600 000, 00 is what the court should award to the plaintiff.

[29] The plaintiff sustained a fracture of the left femur, has had a shortening of the left leg and walks with a limping gait. He has had a moderate anterior angulation at the fracture site and a varus deformity. He has suffered a whole-person impairment of 20%, as noted by the Orthopaedic surgeon, Dr Oelofse. His opinion is that the plaintiff has developed mechanical back pain as a result of the scoliosis and leg

length discrepancy. Furthermore, it was observed that his condition was deteriorating and that the pelvic tilt was causing him the lower back pain. The plaintiff is said to be experiencing chronic pain and finds various tasks challenging. He cannot walk long distances and cannot stand for prolonged periods. It is clear that the plaintiff has severe functional impairment and I am satisfied that he has proven his claim for general damages on a balance of probabilities. It is therefore my considered view that an amount of R600 000, 00 is a fair and reasonable award for general damages under the circumstances.

Loss of Earnings

[30] In *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) the principle was articulated in the following terms by Rumpff JA:

'In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. This was the approach in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:

"In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of damage and as it would have been if the act had not been committed (*Greuber* at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland." See also *Union and National Insurance Co Ltd v Coetzee* 1970 (1) SA 295 (A) where damages were claimed and allowed by reason of impairment of loss of earning capacity.'

[31] It was submitted on behalf of the plaintiff that he was 17 years old at the time of the accident. He was hospitalized for approximately two months and also recuperated for another two months after being discharged from hospital. It was further submitted that the plaintiff had a scholastic delay of about three years at the time of the collision and the experts were of the opinion that he had pre-existing learning difficulties. These pre-existing learning difficulties may have been exacerbated by the injuries sustained in the collision. Counsel requested the court to accept the expert opinion that the plaintiff would have competed for unskilled manual labor position even if the accident did not occur.

[32] Counsel for the plaintiff argued that the plaintiff was significantly limited in his job options as a result of the injuries he sustained following the accident. Furthermore, his cognitive abilities limit him to work of an unskilled nature and therefore his work capacity has been severely negatively impacted and truncated. The actuarial calculations suggested that the amount of R765 997. 00 was the amount for loss of earnings without the application of contingencies. It was counsel's submission that a 5% contingency deduction on the pre-morbid amount for past earnings be applied and that a 15% pre-morbid contingency be applied to the amount for future earnings. According to Counsel, this is reasonable considering that the plaintiff's career ceiling is based on earnings in the unskilled work sector.

[33] On the post-morbid contingency deductions counsel suggested a 40% deduction. She argues that this will acknowledge the plaintiff's significant risks and limitations and to take into consideration that he is regarded as a significantly vulnerable individual and an unequal competitor in the open labor market. It is submitted that this will also compensate for the probable extended periods of unemployment in the future.

[34] Counsel for the defendant suggested higher than normal contingency deductions of less 10/20% for uninjured income and 35% for injured income and therefore proposed an amount of R678 708, 50 be awarded for loss of earnings. He referred the court to the case of *A A Mutual Assurance Association v Maqula* 1978 (1) SA 805 (A) where Joubert JA remarked as follows:

“Having due regard to all these factors in the light of the particular circumstances of the instant matter I am of the opinion that it would be proper and correct to provide for contingency of 50 per cent in respect of past loss of income as well as future loss of income. There is in principle no reason for distinguishing between the two categories of income for purposes of contingencies.”

On the basis of this remark, counsel for the defendant suggested a 50% contingency deductions.

[35] It is trite that the principle which underlies calculations of this nature is that the plaintiff is entitled to a capital sum of money which would place him in the same financial position as he would have been had the accident not occurred. In *A Mutual Assurance Association v Maqula* (supra), the court held that a trial court in an action for damages for personal injuries has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*.

[36] I disagree with the submission for a higher contingency percentage to be applied in the injured scenario of the plaintiff as suggested by the defendant. I have considered the *sequelae* of the injuries sustained by the plaintiff and that the challenges he faces as a result of these injuries have reduced his earning capacity drastically and rendered him unsuited to compete with his uninjured peers in the open labour market. My view is that the plaintiff, being a minor at the time of the accident, did not suffer any past financial loss as he was still in school. To base the calculations on “past income” is an unjustified irregularity.

Conclusion

[37] I therefore decided to disregard the postulations and to consider an award that is fair and reasonable to the plaintiff under the circumstance. My considered view is that because the two parties are not very far apart with regards to the suggested awards, that a median will be fair and reasonable to award to the plaintiff as compensation for Loss of Earnings. It is therefore my respectful view that an

amount of R719 003, 25 is a fair and reasonable award for compensation for loss of earnings.

Order

[37] In the premises, I make the following order:

37.1. SEE THE DRAFT ORDER ATTACHED HERETO AND
MARKED ANNEXURE "X"

VUKEYA LD
JUDGE OF THE HIGH COURT

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