

REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 (GAUTENG NORTH, PRETORIA)

16/11/12

CASE NO: 24883/2008

(1)	REPORTABLE: YES/NO	<input checked="" type="radio"/> YES <input type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="radio"/> YES <input type="radio"/> NO
(3)	REVISED.	
	2012.11.16	<i>Tate</i>
	DATE	SIGNATURE

In the matter between:

ABRAHAM MATTHYS SMIT(as curator *ad litem* to SAMUEL TEBOGO TSOTETSI)

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MAKGOKA, J:

[1] This is an action for damages in terms of the Road Accident Fund Act, 56 of 1996 ("the Act") pursuant to a motor vehicle collision on 20 May 2006 during which Mr. Tebogo Tsotetsi, then 27 years old, suffered a fracture of the right femur and a severe head injury. He was cyclist when the collision occurred. The plaintiff is a *curator ad litem* on behalf of Mr Tsotetsi, by an order of this court on granted on 2 November 2012. In his amended particulars the plaintiff claimed R3 000 000 for

loss of earning capacity and R1 000 000 for general damages. The defendant has conceded the merits in full, meaning the plaintiff is entitled to 100% of his proven damages.

[2] The parties have agreed on an amount of R251 949 in respect of loss of earnings and earning capacity. All I need to do is to decide on an appropriate percentage of contingency deduction. The parties have also agreed that the defendant will furnish Mr. Tsotetsi with an undertaking in terms of s 17(4)(a) of the Act. Accordingly, the only issue for determination is the *quantum* of general damages and a contingency deduction to be applied to the agreed amount in respect loss of earnings and earning capacity.

The injuries, treatment and consequences

[3] I have already alluded to the nature of injuries sustained by Mr. Tsotetsi. He was initially treated at the Heidelberg Hospital on 26 May 2006, the day of the collision. He was examined, x-rayed and admitted for treatment. The right femur fracture was initially treated conservatively with traction, but he later underwent an open reduction and internal fixation of the right femur. He was discharged after 26 weeks, with medication and mobilising with the aid of crutches.

[4] At the time of the accident, Mr. Tsotetsi was employed by a garden service company as gardener, where he earned R200 per week. He was absent from work for 18 months following the accident, during which he received no income at all. He was unable to do gardening work after the accident, and was unemployed for an extended period. From approximately 2008 to the present he has been employed to wash cars. He works 2 days per week (Wednesdays and Saturdays) and earns R15

per car. This is said to be a sympathetic gesture from the owner of the car wash business. He reportedly washes 4 cars per day. His average monthly income is therefore R480. He was reportedly rendered unemployable from 1 September 2011.

The experts' reports

[5] By agreement the expert reports prepared on behalf of Mr. Tsotetsi were handed in. The experts are Dr. M. Lichtenberg (orthopaedic surgeon); Ms. Sara Boyman (occupational therapist); Ms. Christa du Toit (industrial psychologist); Dr. S Braun (plastic and reconstructive surgeon); Mr. Alex Stipinovich (speech and language therapist); Dr. J. Scheltema (neurosurgeon); Ms. Marilyn Adan (neuropsychologist) and Dr. Shevel (psychiatrist).

[6] From the totality of the expert reports, Mr. Tsotetsi experiences difficulties with the following: standing longer than an hour; carrying 20 litre buckets; walking for longer than 30 minutes; weekly headaches; depressed mood and severe memory losses; irritability; social withdrawal; occasional suicidal thoughts; loss of libido; sleep disturbance; daytime fatigue; diminished enjoyment of life; and no plans for the future.

[7] The following clinical observations and findings were made on assessment. There is shortening of the right lower limb for 3.5 cm and the limb is in 20 degrees external rotation, where, given his young age, a femoral osteotomy and internal fixation is recommended. He has inconspicuous healed lacerations above the brow; and two intradermal cysts on the left outer can thus of the left eye. He also

has a severe to moderate organic brain syndrome – post-traumatic, with associated frontal lobe symptomatology and post-traumatic epilepsy. He exhibits inconsistency in performance; significant difficulties with concentration, including impulsivity and distractibility; adynamic, presenting with reduced drive and motivation to complete tasks; he tires easily and exhibits reduced endurance. Neuropsychological assessment results showed marked diffuse neuropsychological deficits and difficulties with strong frontal lobe overlay.

Future loss of earnings/loss of earning capacity - contingency deduction

[8] As stated in the introduction, the parties have agreed on an amount of R251 949 in respect of this head of damages. A contingency deduction has to be applied to this amount. In this regard I refer to Robert Koch *The Quantum Yearbook* 2012, p102, where the learned author states the following 'sliding scale' to be applicable: ½ % for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age.

[9] In *Road Accident Fund v Guedes*¹, the trial court had arrived at the *quantum* of its award on the basis of an actuarial calculation of the income the respondent (26 years old) would have made but for the accident and the income she stood still earn, from which figures it made contingency deductions of 10% and 30% respectively, and then awarded the difference. On appeal to it, the SCA concluded that the trial court had misdirected itself in its 'but for' scenario contingency deduction, based on the trial court's misunderstanding and misapplication of the 'sliding scale' guideline

¹ 2006 (5) SA 583 (SCA)

by Koch. The SCA concluded that with proper application of the guideline, the trial court should have made a deduction of 19.5%. The appeal was allowed and the contingency deduction was altered from 10% to 20%.

[10] I would categorise Mr. Tsotetsi as a youth – he was only 27 years old at the time of the accident. Given all these considerations, it seems a contingency deduction of 20% is fair and justifiable. Applying that percentage deduction to the agreed amount, the net loss is R201 559.20.

General damages

Purpose, approach and general principles

[11] I turn now to general damages. Arriving at an appropriate award for general damages is never an easy task. The difficulty in placing monetary value on pain and suffering, loss of amenities of life and disability, is described by Gauntlett, the learned author in *Corbett, The Quantum of Damages* vol 1, 4ed, at pages 4-5 as follows:

“In determining the award of damages to be made under the heading general damages there are of course no scales upon which one can weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which makes it possible to express that in terms of money with any approach to certainty. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge’s views of what is fair in all circumstances of the case. (*Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.)”

[12] The purpose of awarding general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which he or she has been subjected as a result of the particular injuries that were sustained. Although the determination of an appropriate amount in this regard is largely a matter of

discretion, some guidance can be obtained by having regard to previous awards made in comparable cases. Past awards in comparable cases afford a useful guide in determination of general damages.

[13] Awards in previous cases can, however, only offer broad and general guidelines in view of the differences that inevitably arise in each case. The process of comparison is not a meticulous examination of awards, and should not interfere upon the court's general discretion (*Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535H-536A). The previous awards should obviously be updated to present day values in order to properly serve as a basis for comparison. In making such an adjustment, one should be mindful of the fact that, whereas it is permissible to have regard to the general depreciation in the value of our currency by utilising the consumer price index (CPI) a slavish adherence thereto may lead to undesirable results.

[14] I am quite aware of, and take into account, the recent tendency by our courts to make higher awards than has been the trend in the past. See *Marunga* (supra) at 160G-H, where the rationale therefor was articulated, with reference to *Wright v Multilateral Vehicle Accident Fund*, Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injuries Cases* vol 4 at E3-31

[15] I also take into consideration that the remarks in *Marunga* were tempered later in *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA) at para 60 where, after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court reaffirmed conservatism as one of the

multiple factors to be taken into account in awarding general damages. The court concluded that the principle remained that the award should be fair to both sides – it must give just compensation to the plaintiff, but ‘not pour out largesse from the horn of plenty at the defendant’s expense’, as pointed out in *Pitt v Economic Insurance Company Limited* 1975 (3) SA 284 (N) at 287.

[16] The injuries sustained by Mr. Tsotetsi are severe, with serious and long term adverse consequences. They have resulted in serious effect upon his life. Prior to the accident he was completely healthy. The injuries have left Mr. Tsotetsi with a negative alternation of his physical condition. The injuries are unavoidably connected with gross pain and suffering for extended periods of time. He is likely to undergo surgical procedure to fix the area of fracture. It is likely to be followed by another one in the distant future for the removal of internal fixation from the femur. All these would result in further pain and suffering for him. According to Dr. Lichtenberg, orthopaedic surgeon, the surgical procedure would require approximately 10 days of hospitalization and three months of ambulation on crutches. To the date of examination by Dr. Lichtenberg, he suffered from intense symptoms of pain in the area of right thigh, which improved only after 3 months. He also complained of frequent headaches. The pain symptoms are of such intensity that he is prevented from resuming his work, and limits his overall physical performance, even in normal life circumstances.

[17] As to the awards made in previous comparable cases, I have had regard to the following cases: *Bikawuli v Road Accident Fund* 2010 (6BB4) QOD 17 (ECB); *Sterris v Road Accident Fund* 2010 (6B4) QOD 26 (WCC); *Tobias v Road Accident Fund*

2011 (6B4) QOD 65 (GNP); *Mgudlwa v Road Accident Fund* 2011 (6E3) QOD 1 (ECM); and *Venter v Road Accident Fund* 2011 (6E3) QOD 7 (GNP).

[18] In the final analysis, I must make an award that is just and fair on the particular facts of the present case. In the circumstances, taking into account the nature of Mr. Tsotetsi's injuries and their *sequelae*, the awards in previous comparable cases and the decline in the value of the currency in the last decade, I am of the view that an amount of R 650 000 would constitute a fair and adequate compensation for Mr. Tsotetsi.

[19] To sum up. The total of the plaintiff's damages is R 851 559.80 made up as follows:

Future medical treatment	An undertaking in terms of s 17(4)(a) of the Act
General damages	R 650 000.00
Loss of earnings and/or earning capacity	R 201 559.80

[20] The parties' counsel have agreed on a comprehensive draft order, subject to my conclusion on the two amounts reflected above. I have inserted the total of the two amounts in the draft order.

[21] In the result the draft order attached hereto, dated, initialled and marked "X", is made an order of this court.



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 5 NOVEMBER 2012

JUDGMENT DELIVERED : 16 NOVEMBER 2012

FOR THE PLAINTIFF : ADV N ENGELBRECHT

INSTRUCTED BY : *RAPHAEL KURGANOFF INC*
JOHANNESBURG, AND VAN
STADE VANDER ENDE, PRETORIA

FOR THE DEFENDANT : ADV C DÁLTON

INSTRUCTED BY : *MOTLHE JOOMA SABDIA INC, PRETORIA*

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

16

PRETORIA 16 NOVEMBER 2012
BEFORE THE HONOURABLE MAKGOKA J

CASE NO: 08/24883

In the matter between:-

SMIT, ABRAHAM MATTHYS
DU PLESSIS, ANDRIES PETRUS JACOBUS
(as curator ad litem to TSOTETSI, SAMUEL TEBOGO)

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

~~DRAFT ORDER~~

Having heard counsel for both parties / ~~By agreement between the parties~~, the following order is made:-

1. The Defendant is ordered to pay a capital amount of R851 559.80 to the Plaintiff, in full and final settlement of the Plaintiff's claim. Payment shall be made into the trust account of the Plaintiff's attorneys, details as follows:
Raphael Kurganoff Trust Account
First National Bank, Rosebank Branch
Account Number: 50650 111 260
Branch Code: 253305
2. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of SAMUEL TEBOGO TSOTETSI (hereinafter referred to as "the patient") in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 20 May 2006, after such costs have been incurred and upon proof thereof;
 - 2.1 In terms of the statutory undertaking referred to in paragraph 2 above, the Defendant shall pay:-
 - 2.1.1 the reasonable costs of the creation of the Trust referred to in paragraph 4 below and the appointment of the Trustee;
 - 2.1.2 the reasonable costs of the furnishing of security by the Trustee;
 - 2.1.3 the costs of the Trustee in administering the patient's estate, as determined by Section 84(1)(b) of the Administration of Estates Act 66 of 1965, as amended, according to the prescribed tariff applicable to curators.
3. The Defendant will pay the agreed or taxed party and party High Court costs of the action to 5 November 2012, such costs to include:-

- 3.1 The costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;
- 3.2 the cost of the application for the appointment of the *curator ad litem*;
- 3.3 the cost of the *curator ad litem* in obtaining any court order including appearances;
- 3.4 the preparation expenses of the Plaintiff's experts Dr. M. Lichtenberg, Dr. J. Butters, Dr. S. Braun, Alex Stipinovich, Dr. J. Scheltema, Marilyn Adan, Dr. Shevel, Sarah Boyman, Christa du Toit, and Mr. G. Whittaker if any as may be agreed or allowed by the Taxing Master;
- 3.5 costs of counsel; and
- 3.6 the Plaintiff's attorneys shall serve the notice of taxation on the Defendant's attorneys and shall allow the Defendant 7 (seven) court days within which to make payment of such costs.
4. The requisite steps shall be taken by the Plaintiff with a view to forming a trust to, *inter alia*, administer and/or manage the financial affairs of the patient and that such trust shall be formed within 3 (three) months of the date of this order.
 - 4.1 The Trustee shall be required to furnish security to the satisfaction of the Master in terms of Section 6(2)(a) of the Trust Property Control Act 57 of 1988, as amended.
5. The trust instrument shall provide for the following:-
 - 5.1 The separation of the property of the trustee/s from the trust property;
 - 5.2 Ownership of the trust property vests in the trustee/s in their capacity as trustee/s;
 - 5.3 The trustee/s shall provide security to the satisfaction of The Master in terms of Section 6(2)(a) of the Trust Property Control Act, 57 of 1988;
 - 5.4 Procedures to resolve any disputes shall be subject to the review of any decision made in accordance therewith by the above Honourable Court;
 - 5.5 Amendment of the trust instrument shall be subject to the leave of the above Honourable Court;
 - 5.6 The trustee/s is authorised to recover the remuneration of and cost incurred by the trustee/s in administering the undertaking in accordance with the undertaking;
 - 5.7 The patient shall be the sole income and capital beneficiary;
 - 5.8 The trust property is excluded from any community of property in the event of the marriage of the patient;

- 5.9 The trust shall terminate on the death of the patient whereafter the trust assets shall devolve on his estate;
- 5.10 The trust property and administration thereof is subject to annual reporting by an accountant;
6. The capital amount referred to in paragraph 1 above, shall be paid by the Defendant directly into the trust account of the Plaintiff's Attorneys of record, Raphael Kurganoff Incorporated, for the benefit of the patient.
7. The statutory undertaking referred to in paragraph 2 above shall be delivered by the Defendant to the aforesaid Raphael Kurganoff Incorporated within 14 (fourteen) days of the date of this Order;
8. Raphael Kurganoff Incorporated will invest the capital amount less attorney and client fees and disbursements in terms of Section 78(2)(A) of the Attorneys Act, 53 of 1979, with First National Bank, Rosebank, for the benefit of the patient, the interest thereon, likewise accruing for the benefit of the patient which investment shall be utilized as may be directed by the Trustee of the Trust, when created;
9. The Contingency Fee Agreement signed by the Plaintiff with Raphael Kurganoff Incorporated on 16 June 2012 is herewith cancelled and Raphael Kurganoff Incorporated shall therefore not charge in terms of a Contingency Fee Agreement. Raphael Kurganoff Incorporated shall therefore render an attorney and own client statement of account to the Trustee, of the trust to be formed;
10. The party and party costs referred to in paragraph 3 above, as taxed or agreed, shall be paid by the Defendant directly into the trust account of Raphael Kurganoff Incorporated for the benefit of the patient. After deduction of the legal costs consultant's fee for drawing the bill and attending to its settlement or taxation, the balance shall be paid into the trust unless same has not yet been created, in which event, such balance shall be invested in terms of Section 78(2)(A) of the Attorneys Act, 53 of 1979, with First National Bank, Rosebank, for the benefit of the patient, the interest thereon, likewise accruing for the benefit of the patient and shall be utilized as may be directed by the Trustee of the Trust, when created.

BY THE REGISTRAR