

## REPUBLIC OF SOUTH AFRICA



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

CASE NO: 19166/2007

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

24/4/2014

DATE

SIGNATURE

24/4/2014

In the matter between:

JUDAS SKHABELA

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

FIRST DEFENDANT

THE MEC FOR SAFETY AND SECURITY

NORTH WEST PROVINCE

SECOND DEFENDANT

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J U D G M E N T

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KUBUSHI, J

- [1] BREVITATIS CAUSA I shall refer in this judgment as *per* their citation in the main proceedings.
- [2] The first and second defendants seeks leave to appeal to the Supreme Court of Appeal of South Africa, alternatively the full bench of the High Court of South Africa Gauteng Division, Pretoria, against the whole of my judgment, on the *quantum*, handed down on 5 November 2013.
- [3] The appeal emanates from a claim for bodily injuries sustained by the plaintiff on 3 November 2005 when he was shot and hit in his right eye with a rubber bullet by a member of the South African Police Services. As a result of the said shot, the plaintiff's eye was badly damaged and he completely lost sight in that eye. It should be mentioned that at the time of the incident the plaintiff had already lost sight in his left eye during childhood. He as a result of this incident became completely and permanently blind.
- [4] The merits part of the matter was dealt with and finalised by my brother Goodey AJ who handed down judgment on 26 July 2012. The defendants were found 100% liable for the plaintiff's damages either agreed or proven. I as a result only determined the *quantum*.

[5] The defendants' application is based on various grounds stated in their notice of application for leave to appeal in respect of following heads of damages:

- a. Past loss of earnings: according to the defendants' counsel are erred, firstly, in accepting the contradictory versions presented by the plaintiff in respect of the supposed profits made by his business, that is, the spaza shop, the tavern and the scrap metal business; and secondly, in accepting the evidence of the expert witnesses who did not rely on any documentary proof as to the profits of the plaintiff's business ventures. According to counsel the base calculations presented to me by the expert witnesses were thumb-sucked and as such purely speculative.
- b. Future Loss of Earning: the contention is that I erred in accepting and concluding that the Paterson Level B1 scale be used to determine the plaintiff's earning potential in respect of future loss of earnings.
- c. General Damages: the contention is that I erred in accepting and concluding that the plaintiff is entitled to the amount of R1 450 000 as adequate compensation for general damages.
- d. Future Medical and Related Costs: the argument by the defendants' counsel on this point is that when I included the costs for a personal assistance and a gardener I failed to take into account that the plaintiff had two wives; and also to consider that partial rehabilitation is available to the plaintiff to make him functional.

- [6] The defendants' counsel contended at the hearing of the application that the defendants' grounds of appeal are based on the fact that I did not exercise my discretion properly when determining the *quantum* awarded. In this regard he referred me to the judgment in *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (AD). He in particular referred me to the following passage at p99A – G:

'Any enquiry into the damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it, two possible approaches. One is for the judge to make a rough estimate to an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a *non possumus* attitude and make no award. In a case where the court has before it material on which an actuarial calculation can usefully be made, the first approach does not offer any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess" it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling" as to what is fair and reasonable is nothing more than a blind guess. . . . it is not wrong in principle to make an assessment on the basis of actuarial calculations.

Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". . . . The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case. "

- [7] The defendants' counsel based his argument on this judgment to show that I failed to exercise my discretion properly. He, however, misconstrued the principles laid down in this judgment. In my opinion, on the basis of this judgment alone no other court may come to a different conclusion.
- [8] I in actual fact dealt in depth with the issues raised by the defendants in their application for leave to appeal. As regards damages for the loss of income I considered the contradictions the defendants are complaining about and concluded that they were immaterial. The contradictions, as the defendants' counsel rightly submitted, were in respect of the profits of the plaintiff's business ventures. I found the contradictions to be immaterial on the basis that the plaintiff did not rely in his calculations on the business profits but relied on the Paterson Level B1 scale, that is, the earning potential of the plaintiff based on what he earned in 1999 whilst in the employ of the Mine.

[9] It is common cause that the Paterson Level B1 scale is universally accepted as a tool used to project income. Since the future is unknown estimates are used with the best available evidence to compensate for injuries, and in this instance the best available evidence was the salary. Even though tool is said to be speculative, but as *per* the Southern Insurance Association v Bailey NO above, it provides a useful guide. The submission by the defendants' counsel that I erred in accepting the Paterson Level B1 scale as a tool to determine the calculations in this instance, is therefore without merit.

[10] As regards the general damages, I quote the following passage in the Southern Insurance Association v Bailey NO above judgment at 99H which I find apposite in this instance:

"The Appellate Division has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached. The accepted approach is the flexible one described in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199, namely: "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". To adopt a different approach . . . might result in injustice of the kind referred to in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 (HL) at 919."

The passage says it all it is not even necessary to elaborate further.

[11] I am in agreement with the plaintiff's counsel that no grounds were raised in the application for leave to appeal in respect of the award for damages for future medical and related costs. I can as a result not consider this ground.

[12] I conclude therefore that on the basis of the grounds raised in the defendants' application for leave to appeal and as argued in court, no other court may come to a different conclusion and the defendants' application stands to be refused.

[13] I therefore make the following order:

- a. The application for leave to appeal is dismissed with costs.



**E.M. KUBUSHI**

**JUDGE OF THE HIGH COURT**

**APPEARANCE**

HEARD ON THE	: 23 APRIL 2014
DATE OF JUDGMENT	: 24 APRIL 2014
PLAINTIFF'S COUNSEL	: ADV D. T. SKOSANA
PLAINTIFF'S ATTORNEY	: S. NGOMANE INC. ATTORNEYS
DEFENDANTS' COUNSEL	: ADV SKHOSANA
DEFENDANTS' ATTORNEY	: THE STATE ATTORNEYS