

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 5102/ 2009

DATE: 23 JULY 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

ANNA CATHARINA GOLES

PLAINTIFF

And

MINISTER OF DEFENCE

DEFENDANT

JUDGMENT

MAVUNDLA J;

[1] The plaintiff is a 47 year old married woman, born on 24th October 1966, and a former employee of the defendant. On the 20th March 2006, a botched operation was performed upon the plaintiff by the personnel of 1 Military hospital, which falls under the control of the defendant. The personnel at the relevant time, were acting in the course and scope of their employment with the defendant. Consequently the plaintiff is claiming from the defendant damages she suffered as the result of a botched operation performed on her.

[2] The defendant has since conceded that the surgery was negligently carried out and accepted liability for this on a 100% basis as per court order dated 15 October 2010. The only outstanding issue is the matter of quantum.

[3] The issue this court is called upon to decide on quantum are the question of:

3.1 The quantum for the loss of past earning;

3.2 The quantum for the loss of future earnings; and

3.3 The contingencies to be applied in respect of future medical and related expenses and loss of income

3.4 The general damages.

[4] The parties have in respect of the issue of quantum agreed as follows:

4.1 The sum to be awarded in respect of past medical and related expenses is an amount of R1 831. 21 (one thousand eight hundred and thirty-one rand and twenty cents);

4.2 The amount in respect of medical and related expenses is an amount of R2 890 387. 00 (two million eight hundred and ninety thousand three hundred and eighty seven rand) before the application of contingencies.

[5] I must hasten to point out that the applicable principles in determining what amount to award have over and over been articulated by and crystallised in the judgments of the courts, *inter alia*, as follows: Holmes J.A in the matter of *Legal Insurance Company Ltd v Botes*¹ held that: “In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.” Nicholas JA in *Southern Insurance Association Ltd v Bailey N O*² held that: “One of the elements in exercising that discretion is the making of a discount for “contingencies” or the “vicissitudes of life”. These include such matters as the possibility that the plaintiff may in the result have less than a “normal” expectation of life: and he may experience periods of unemployment by reason of incapacity due to illness or accident, or labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114-5. The rate of the discount cannot be assessed on any logical basis: the assessment must largely be arbitrary and must depend upon the Judge’s impression of the case.”

[6] In awarding compensation, the Court must strive to balance the interest of both the claimant as well as the defendant. As stated in *Pitt v Economic Insurance Co Ltd*³ cited with approval by the Constitutional Court in *De Jongh v Du Pisanie NO*⁴: “(T)he 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.”

[7] It is trite that general damages are not capable of exact and mathematical calculation neither is pain and suffering capable of being measured in monetary terms. The court will have regard to the circumstances of the particular case and decide what would be a fair and reasonable amount.⁵ The court will also bear in mind that, in the event of a large sum being paid to the plaintiff, properly invested in a high interest yielding portfolio, this would place the plaintiff in a better position to alleviate to a certain extent whatever difficulties and inconveniency he or she may still encounter.⁶ I shall also bear in mind the fact that the court is not necessarily bound to the amounts fixed in previous cases; this is so because every case depends on its own particular circumstances, its own time phase and economic dictates; *vide Road Accident Fund v Marunga*⁷

[8] The nature, extent and sequelae of the botched operation is to be gleaned from the report of Dr. Izak van Heerden (Urologists) who stated that: “a sling which was misplaced, partly through her bladder and also through the intra-abdominal cavity. She subsequently underwent multiple surgical procedures for the removal of the sling, but this was complicated by wound infections, difficulty to remove the sling completely and persistent pain and discomfort. As the result she has a totally dysfunctional bladder with serious urinary incontinence, vaginal discomfort and total inability to be sexually active...”

[9] On clinical examination, Dr. Van Heerden found that the plaintiff is unable to empty her bladder, and has an anterior vaginal wall that is scarred and the examination also revealed an overactive bladder with stress incontinence still present. Dr. Libon Rikhotso (Urologist) on behalf of the defendant, confirmed in his report that the plaintiff has “problem with her large bowel (Irritable Bowel Syndrome) and is receiving treatment for it. ...” Dr. C.P. Davis (MMED O & G(Pret) MCOG(SA)) confirmed in his report that the plaintiff “underwent a Sparc procedure. The technique and postoperative care was far below standard. The leaves MS Goles with:

1. Detrussor, seen on ultrasound as the inability to empty her bladder.
- 2 This inability to empty her bladder leads to repeated bladder infections.
3. The inability to empty her bladder leads to overflow incontinence and she uses 3 pads a day.
4. There is loss of sexual activity since her operation in 2006.
5. Urinary inconsistency will affect her employment capability.
6. Scarring of her Pfannestiel incision.
7. Psychological trauma exacerbating her Irritable Bowel Syndrome.... and is in agreement with the report written by Dr. I. Van Heerden.)” to control her urine stream and perceives herself to be socially

seriously inhibited.

[10] Dr. Annandale (Plastic and reconstructive surgeon,) described the surgical procedures the plaintiff underwent as a cosmetic mutilation of the vaginal wall. Dr Iturralde (specialist Physician Gastroenterologist) concluded that the plaintiff experienced severe symptoms related to irritable bowel syndrome. According to Dr van Heerden the plaintiff has to catheterize to ensure complete emptying of the bladder...and experiences psychological and physical trauma associated with incontinence. This incontinence at this point is severe, and she uses 4 to 5 pads per day and is totally incontinent at night. She has no ability to control her urine stream and perceives herself to be socially seriously inhibited.

[11] The plaintiff was operated upon in 2006. However, as early as in 2004 she was already having stress urinary incontinence.⁸ However, Dr. Van Heerden is of the view that there is 80% chance of a successful reconstructive surgery not only trying to control the incontinence but address the problem of scarring, were plaintiff to immediately undergo this operation⁹. The report of Dr. Rikhosto makes provision for such remedial further procedures¹⁰. It would seem, in my view, once the plaintiff was to undergo the further recommended procedures, her present plight might be significantly but not completely reduced. This might, in my view, impact positively on her future medical costs.

[12] The plaintiff obtained grade ten in 1983 and started working as a personal assistant in 1984. In 1991 she started working for the South African Defence Force and progressed to be a senior grade III Administration clerk.¹¹ At the time of the incident she earned a basic salary of R7, 296 per month. In addition she received an annual bonus of one month's salary. She was on a Salary Level 6 Notch 16 at the time of the incident. She was a member of the Government Employees Pension Fund.

[13] The plaintiff was subsequently permanently boarded from her employment. Mr. A. Lamprecht the Industrial psychologist stated in his report that the plaintiff, before the was relatively healthy, leading a normal life. It is likely that she would have been able to continue a career of her choice until her retirement of 60-65 years old. According to Rita du Plessis, she suffers from a Complex Post Traumatic Stress Disorder¹² and has depressive episodes. She continues to state that Ms Goles will not be able to function in her pre-operation work with her current neuropsychologist profile ...and is not suited for occupation. The prognosis is poor. Her return to her pre-operation employment will depend on her psychiatric recovery, as stated by Rita du Plessis, the prognosis is poor.¹³ The report of Gail Vlok Occupational Therapists discounts the possibility of the plaintiff returning to any form of work in the open market.¹⁴ This view also finds support from the conclusion reached by A. Rossouw the Occupational Therapist¹⁵.

[14] In the heads submitted on behalf of the plaintiff, it was suggested that the following awards be made:

14.1 Past medical expenditure

R1 831. 21

14.2 Future hospital, medical and related

expenditure

R2 890 387. 00

14.3 Loss of income and of earning capacity

R2 031 296. 00

14.4 General damages

800 000. 00

Total

R5723514.21

Past medical expenditure			R1831.21
Future hospital, medical and related expenditure		R2 890 387.00	
Less 20%	R578077.00		R 231131.00
Loss of income and of earning capacity		R2 031 296.00	
Less 20%	R406259.00		R 163037.00
General damages		R800 000.00	
Less 20%	160 000.00		R640 000.00
TOTALS			R4,578178.21

[15] It needs noting that the plaintiff received her basic salary of R 6749 (R7296(1-0.075) per month in 2006/03/20 whilst on temporary incapacity leave but not the performance bonus. I take that according to the joint minutes between Lamprecht and J.C.White (Industrial Psychologists) the plaintiff would have progressed to notch 7. As she has since been declared medically unfit, she will now receive a medical disability pension as of the date of her actual pension at age 65 would be made on her actual earnings she has received over the years and will not reflect the amount she would have received if she was still working as per her pre-incident scenario. For example, if she is declared 100% disabled she would in all probability be able to receive a pension on par with her current salary of R141 872 per annum and she will be able to get

annual increase, which is not necessarily equal to the CPIX + 2%. It could be less.”¹⁶

[16] The amount of R2 890 387. 00 in respect of future hospital, medical and related expenditure was arrived at by the parties with the assistance of their respective experts, including the Actuary consultants. Where there was differences middle course was adopted; vide Annexure “A”. The actuaries also differed in respect of the calculation of the total loss of earnings; vide annexures “B” and “C” and “D”.

[17] The actuary experts of the respective parties, Mr. Sauer for the plaintiff and Mr. Jacobson for the defendant agree that there ought to be contingencies adjustments, but differ as to the relevant percentages to be employed in respect of some of the particular future medical expenses. The same applies also in respect of loss of earnings. Mr. Jacobson pointed out that the plaintiff was paid for the past loss of earnings and there is therefore no need to subject the relevant amount to contingencies. However they reach different results on calculating the total loss of earnings, as seen in annexure “D”.

[18] I am of the view that in respect of future loss of medical expenses, and future loss of earnings. I should discount 20% from the proposed amounts, save the past medical expenses. In this regard, I bear in mind the fact that the, on her own account, she is despondent and sometimes thinks that life is not worth living. Her mental and health state has a potential of adversely impacting and reducing her life expectancy. I also take into account the vicissitudes of life. I also have regard to the fact that, notwithstanding the envisaged compensation, she will continue receiving her pension amount, which will be subject to annual increment, as stated herein above. I also take into account the fact that with a lump sum that will be paid to her, properly invested, the interest yield thereof will in long term offset the present deductions.

[19] In respect of general damages, as already pointed out herein above, this is a matter of the discretion of the court. I do not agree with the amount of R800 000. 00 proposed on behalf of the plaintiff. Neither do I agree with the amount of R500 000. 00 proposed on behalf of neither the defendant, nor the amount of R618 000. 00 which is the 2013¹⁷ equivalent of the amount of R20, 000. 00 awarded in the matter of *Richter v Estate Hammann*.¹⁸ In the exercise of my discretion, I propose to discount 20% to the plaintiff’s proposed figure. The resultant amount of R640 000. 00 is in my view fair and reasonable. In the result, the herein below reflects the total amount R4,578178.21 which I am of the view should be awarded to the plaintiff:

Past medical expenditure			R1831.21
Future hospital, medical and related expenditure	R578077.00	R2 890 387.00	R231131.00
Less 20%			

Loss of income and of earning capacity		R2031296.00	
Less 20%	R406259.00		R163037.00
General damages		R800 000.00	
Less 20%	160 000.00		R640 000.00
TOTALS			R4,578178.21

[20] With regard to the concomitant costs, the parties are agreed that the draft order which was without the award should be made. Both parties employed senior counsel assisted by a junior, deservedly so in my view, regard being had to the nature of the claim and the quantum involved. Provision was also made in respect of the expert witnesses. I have accordingly incorporated all these into the order marked GNC.

[21] In the result the order marked GNX is made an order of the court:

ORDER MARKED GNX

It is hereby ordered as follows:

1. The Defendant is ordered to pay the capital amount of **R4 578 178.21** to the Plaintiff, which amount shall be paid into the Trust Account of attorney Viljoen Stone with the Account Name and Account Number:

Viljoen Stone Trust Account, STONE ATTORNEYS TRUST

ACCOUNT, NEDBANK PRETORIA, BRANCH CODE: 160445

ACCOUNT NUMBER: 1[...], Ref 31A/STONE/ANN

2. The aforesaid capital amount will not bear interest unless the Defendant fails to effect payment thereof within 30 (THIRTY) calendar days of the date of this order, in which event the capital amount will bear interest at the rate of 9% per annum, calculated from and including the date of this order to and including the date of payment thereof.

3. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs to date hereto (excluding such party and party costs as have already been paid by the Defendant), including the following:

3.1 The costs of two counsel including the costs of Monday 2 June 2014, Friday 6 June 2014 and

Thursday 12 June 2014;

3.2 The costs of obtaining of the reports of the following experts by the Plaintiff:

3.2.1 Dr Swart;

3.2.2 Dr van Heerden;

3.2.3 Dr Annandale;

3.2.4 Dr Iturralde

3.2.5 Mrs R du Plessis;

3.2.6 Mr Andre Lamprecht;

3.2.7 Dr Fine;

3.2.8 Ms Rossouw;

3.2.9 Dr Lutrin;

3.2.10 Dr Greef;

3.2.11 Mr Johan Sauer

3.3 The reasonable preparation, qualifying fees of the experts Annandale, Fine, DU Plessis and Lamprecht as listed in paragraph 3.2 above, including the costs of their consultation with the Plaintiffs legal team on the basis that Plaintiff shall only be entitled to the aforementioned fees and costs to and including 20 May 2013.

3.4 The reasonable preparation, qualifying and reservation fees of the expert van Heerden as listed in paragraph 3.2 above including the costs of his consultation with the Plaintiff's legal team up to and including 14 May 2014.

3.5 The reasonable preparation, qualifying and reservation fees of the experts Lutrin and Greef as listed in paragraph 3.2 above, including the costs of his consultation with the Plaintiffs legal team up to and including 29 May 2014.

3.6 The reasonable preparation, qualifying and reservation fees of the experts Iturralde, Rossouw and

Sauer, as listed in paragraph 3.2 above, including the costs of their consulting with the Plaintiff's legal team and the costs of the Actuary - Mr Johan Sauer's attendance at Court on Monday 2 June 2014 and Friday 6 June 2014.

3.7 The costs of the obtaining of the joint minutes of the following experts by the Plaintiff:

3.7.1 Dr Fine / Prof Vorster;

3.7.2 Dr Iturralde / Dr Fetter;

3.7.3 Dr van Heerden / Dr Rikhotso;

3.7.4 Dr Iturralde / Dr Mwantembe;

3.7.5 Mr Lamprecht / Ms White;

3.7.6 Ms du Plessis / Ms Adan;

3.7.7 Mr Sauer/Mr Jacobson.

3.8 The reasonable travelling costs of attending the medico-legal examinations, subject to the discretion of the Taxing Master.

3.9 The costs of two Counsel's preparation and attendance at the following pre-trial conferences:

3.9.1 First quantum pre-trial dated 2 February 2011;

3.9.2 Second quantum pre-trial dated 11 April 2011;

3.9.3 Third quantum pre-trial dated 17 January 2012;

3.9.4 Fourth quantum pre-trial dated 13 February 2012;

3.9.5 Fifth quantum pre-trial dated 20 May 2013;

3.9.6 Sixth quantum pre-trial dated 14 May 2014;

3.9.7 Seventh quantum pre-trial dated 30 May 2014.

3.10 The costs attendant upon the preparation and compilation of the various trial bundles.

3.11 The costs attendant upon the obtaining of payment of the amounts referred to in this order.

4. The Plaintiff shall not make use of the Defendant's medical facilities and/or medical aid scheme, for purposes of treatment, or the supply of goods or services and medicine, arising out of the injuries which are the subject of this matter.

N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 05 AND 12 JUNE 2014

DATE OF JUDGMENT : 23 JULY 2014

PLAINTIFFS ATT : STONE ATTORNEYS

PLAINTIFF'S ADV : ADV J F MULLINS SC / ADV J DU PLESSIS

DEFENDANTS ATT : STATE ATTORNEY

DEFENDANTS ADV : ADV R BEDHESI SC / ADV V BOODHOO

1 1963 (1) SA 608 (AD) at 614 F.

2 10. 1984 (1) SA 98 (AD) at 116H

3 1957 (3) SA 284 (D) at 287E-F.

4 2005 (5) SA 457 CC at 476C.

5 *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.

6 *Vide Southern Insurance Association Ltd v Bailey N O (supra).*

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- 7 2003 (5) SA 164 (SCA) at 170 para [27] etc; *De Jongh V Du Pisanie NO (supra)*
- 8 Vide paginated page 402 of quantum 5 bundle supplementary report of Dr. Garry Fetter; paginated pages 108 and 110 report of quantum Volume 2 bundle of Dr. Mauricio Iturralde
- 9 Vide paginated page 256
- 10 Vide paginated page 187
- 11 Vide report of Rita Du Plessis counselling Psychologist at paginated pages 33 -34 of quantum volume 1 bundle.
- 12 Vide reports of Pro M Vorster and Dr. Fine at paginated pag262 and Janene White Industrial Psychologist who cited Dr. LA Fine (psychiatrist, report dated 20 December 2010 (page 85), paginated pages 306 of quantum volume 1 bundle.
- 13 Vide Industrial Psychologist report of Mr. A. Lamprecht at paginated pages 103-104 of quantum volume 1 bundle.
- 14 Vide last paragraph at paginated page359 of quantum volume 1 bundle
- 15 Vide paginated page 166.
- 16 Vide paginated pages 180-18land 243 of quantum volume 2 bundle.
- 17 Quantum Year Book 2013 by Robert Koch at page 51.
- 18 1976 (3) SA 226 (C)