

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

CASE NO: 17406/2007

DATE: 10 OCTOBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

GROBBELAAR; LOUISE JOHANNES

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] This is an action brought by the Plaintiff against the Defendant as a statutory insurer in terms of the Road Accident Fund Act 56 of 1996, as amended, for damages arising as a result of injuries Plaintiff sustained in a motor collision that occurred near the N2 highway in Scottburgh on 3 December 2003.

[2] Plaintiff was driving a motor vehicle with registration number NPS 43521 when it collided with motor vehicle with registration number N[...] that was driven by one B L Mkhize ("the insured driver") allegedly due to the negligence of the latter. He sustained a fracture on his left femur and left patella.

[3] The court is to decide upon the issue of quantum of general damages. In terms of the particulars of claim

Plaintiff claimed an amount of R530 000.00, encompassing all damages, of which R100 000.00 was for general damages. He subsequently on the date of trial amended the amount to R600 000.00. The Defendant opposes the claim arguing that an amount of R250 000 would be appropriate.

[4] The parties have settled the merits on a 70/30% apportionment in favour of the Plaintiff. They settled, albeit conditionally other categories of damages with the Defendant agreeing in respect of Past and Future Medical Expenses to furnish the Plaintiff with an undertaking as envisaged in s 17 (4) (a) of the Act and to pay an amount of R900 000.00 for Past and Future Loss of Earning Capacity.

[5] At the beginning of the trial the parties notified the court that the joint minute of the therapists was going to be tendered in evidence and that each party was going to call its Industrial Psychologist. However evidence was placed before me by viva voce evidence of the Plaintiff and his wife who testified on the Plaintiffs personal circumstances, the nature of the injuries he sustained and the circumstances of the accident.

Plaintiffs evidence

[6] At the time of the Accident he was working as a truck driver for 12 years earning a monthly salary of R2 900. Prior to that, he worked for the mines picking up gold until he was retrenched. In the collision he sustained injuries on his left femur, knee and neck. He was transported from the accident scene by ambulance to Hibiscus, a private Hospital where he underwent an operation with pins and screws inserted in his leg. He thereafter had to attend Physiotherapy being taught to gain movement again on his left leg. After 6 days he was discharged and instructed to return to hospital in three months cycles for further treatment and monitoring of progress. He was wheeled out of hospital in a wheelchair, but he refused to continue using the wheelchair at home. He said he did not want his family to see him in that condition. He therefore used crutches.

[7] At home he still could not walk. For some time he was like a small child, depended on his wife and 2 sons for assistance on everything. He visited the hospital as an out-patient on a tricycle basis attending therapy and receiving Voltarin injections for pain and Panado until 2 years ago when he was furnished with a knee brace by Dr Frank Bumbada, paid for by the Workmans Compensation Fund. The brace has become part of his life because his knee tends to dislocate if he tries to walk without it. The tricycle visits to hospital stopped three years ago when he received the knee brace. He has since then been using Panado for pain. He has to live through the pain every day and cannot sleep normally he tries and sleep on his right side but cannot do that for long as his leg goes numb. He can only manage four hours of sleep. If he walks for long the left foot gets swollen. He still suffers from pain and frequently uses Panado as pain killers.

[8] With regard to amenities or capacity to live life, he reckoned he was not the same person anymore. He said he used to laugh and play Rugby with the kids but not anymore. He also feels sad that he cannot do the normal things that a man does at home, like Tend to the garden, change a flat tyre or a light bulb. Since he was a little boy one of his greatest love and hobby was karate. He also liked swimming but now cannot do all those things anymore. He stayed at home for 14 or 16 months surviving on the UIF payment before he went back to work. He still cannot walk long distances, after walking for 20 minutes he always has got to rest for 10 minute then start walking again. His work is located inside the premises of his residence. It is about a ten minute walk.

[9] According to his wife Plaintiff could not walk after his discharge from the hospital. His son had to carry him from the car into the house. At home he would just lie there without moving. He was very emotional as well and unable to use ablution without assistance. After he got better Plaintiff refused to go out with the family. Even refuse to walk along the beach which they used to do together and something he very much liked. He would just not go outside.

[10] The accident further caused hardship to the family. Since Plaintiff was out of work their water and electricity was cut off for 21 months. She had to work at a school so as to generate an income, to provide also for their two young children who were 11 and 8 years old at the time. They also had to move to a one bedroom apartment and used candles. They ate the food that came from the school that she would have prepared for the kids during the day. The court also observed that she could not finish her testimony, 10 years after the accident, she still felt very emotional about the turn of events at the time. She did not finish her evidence.

[11] Plaintiffs Counsel then submitted that the court must also take into consideration that as a result of the accident he stands to lose his current job and if he does he is going to suffer as he is no longer employable, it being very unlikely that he will get another job. He therefore implored the court to award Plaintiff an amount of R600 000 for general damages. Comparable with the award in *Smit v Padongelukkefonds* (2003) in **Corbett and Honey, The Quantum of Damages in Bodily and Fatal Injury Cases**, Vol. V at E3-11.

[12] Whilst Counsel for the Defendant argued that the court should consider that Plaintiff no longer taking any treatment and using only Panados for the actual pain. Also that although it has been stated in the Orthopaedic reports that after 10 to 15 years he will need a replacement of his knee brace. He is currently 54 years old and in 10 years he will be nearly 65 or 70. Therefore that would not interfere with the quality of his life. The court must consider as well that he never received or sought counselling. Immediately after being healed he secured a job with the same employer as a site manager for a period of 8, a position less exerting than being a truck driver, even though it involves standing and walking. He subsequently gained another employment in 2013 up to date.

[13] Counsel then submitted that an amount of R250 000.00 would be appropriate. In justification thereof Counsel referred to various cases where the claimants sustained injuries that are somewhat similar to those suffered by the plaintiff. They are illustrated in (4) Corbett & Buchanan indicating awards granted ranging from R82 000.00 to R345 000.00 in today's value for a combination of femur and knee fracture injuries. The highest amount of R345 000 was awarded where the claimant sustained injuries of a fracture of the right femur, right tibia and serious damage to ligaments of right knee and the lowest amount of R82 000 was for a crack fracture of left patella and cut lip.

[14] In *Smit* that Plaintiff's Counsel referred to a 24 year old pregnant claimant with injuries of a fracture of left femur (compromising the left knee) as well as right femur, pelvis, left arm and left ankle with internal fixation in both femurs and left arm. She had sepsis in right femur requiring insertion of new pin but sepsis recurring. The left knee becoming stiff and developing osteo-arthritis. She initially suffered unbearable pain and spent 5 days in intensive care unit, about 6 to 7 weeks in hospital, 6 months in a wheelchair and 5 months on crutches, and having to re-learn to walk with the aid of physiotherapy. She walks slowly and with a limp and still experience pain, unable to squat or kneel. Having difficulty playing with the children, climbing stairs, into a car, standing or walking too far and having forfeited pre-accident enjoyment of cycling, camping and needlework. She was awarded general damages in the amount of R320 000. It is the equivalent of R600 000 in 2014. The injuries and after effects of *Smit* are more and a little bit severe than those of the Plaintiff.

[15] On the practice of following previous awards *In Protea Assurance Company Limited v Lamb* 1971(1) SA 530 (A) at 536 A-B, Potgieter JA put 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 awards in broadly similar cases, **regard being had to all the factors which are considered to be relevant** in the assessment of general damages."

[16] The purpose for which damages are paid is a relevant factor to be considered when general damages are assessed. Which is to compensate for the pain and suffering of the claimant resultant from the injuries caused by the accident (improvising for the scarring and disfigurement) informed by subjective factual allegations. See Burchell and Hunt '*Principles of Delict*' at 135. The damages are personal and connected directly to the claimant with his physical and mental make-up providing the crucial test. As indicated the assessment is subjective. In *Sigourney v Citibanks* 1960 (2) SA 552 (A), that is what is suggested. The claimant must be able to recover damages for the full extent of any pain that he actually suffered. Therefore the court's determination of this portion of the damages that relate to pain and suffering is primarily based on the testimony of the Plaintiff that relates to his personal experiences.

[17] Compensation is also for loss of amenities of life, being an attempt to place the injured person in the position he would have been if the injury had not been inflicted, to recompense for the loss. It is not intended to restore the lost amenities, though but compensate the claimant for not being able to enjoy the full use of all of his five senses. In this instance the test that is applied is objective bearing in mind that the award is primarily for the benefit of the claimant. Claasen J in *Reynecke v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 412 (W) it was recognised that the court in its discretion can take into account the extent to which the money awarded can be utilised for the benefit of the victim or will redound to the benefit of the victim's heirs. This is commensurate with the victim meeting the demands of life with regard to personal, work and family and compensating that which has been impaired as attested to *in casu*. Therefore the evidence of both the Plaintiff and his wife together with the guideline of previous awards played a significant role in determining what is fair and reasonable.

[18] Plaintiffs Counsel has implored the court to consider the possibility of Plaintiffs future employability being unlikely. Due to the fact that it is factor that is considered in the determination of future loss of earnings and earning capacity, it should rather remain within that realm than determine general damages. The argument is not necessarily outright irrelevant, however it is my finding that this should not play a significant part in the final determination of a determination of the award for general damages. All the same I am not persuaded that the question of his employability will drastically have an impact to his capacity to enjoy life further than the factors already considered.

[19] The parties requested the court to make certain agreements between them to be incorporated into the court's order.

[20] After careful consideration of the evidence placed before me, the authorities on awards made in similar circumstances referred to by the parties, the expert reports and Plaintiffs injuries and the *sequelae* thereto, I am of the view that an amount of R300 000,00 is a fair and reasonable compensation for the Plaintiffs general damages.

[21] It is therefore ordered that:

[21.1] The Defendant is liable to pay 70 % of the Plaintiff's proven damages.

[21.2] The Defendant shall pay an amount of R210 000 (Two Hundrend and Ten Thousand Rand) for the Plaintiffs general damages,

And by agreement between the parties

[21.3] The Defendant shall pay an amount of R910 000.00 (Nine Hundrend and Ten Thousand Rand)

for the Plaintiffs past and future loss of income,

[21.4] The Defendant shall pay the total amount of R1 120 000.00 (One Million One Hundrend and Twenty Rand) in damages arising out of a motor vehicle collision, which occurred on 3 December 2003.

[21.5] The amount as mentioned in 3 (three) above is payable on or before 28 November 2014 into the Trust account for the Plaintiff's attorneys of record with the following details.

WIM KRYNAUW ATTORNEYS

ABSA-TRUST ACCOUNT

ACC NR: 4[...]

REF: TG0143/HN/KH

[21.6] The Defendant shall furnish the Plaintiff with an undertaking as envisaged in Section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996, for 70% of the costs of the future accommodation of the Plaintiffs in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on 3 December 2003, after such costs have been incurred and upon proof thereof.

[21.7] The Defendant shall pay the Plaintiffs taxed or agreed party and party costs on the High Court scale, which costs shall include the costs attendant upon the obtaining of the Medico- Legal reports and or addendum reports and or preparation fees and or joint minutes if any and as allowed by the taxing master of the following experts:

[21.7.1] Dr Read - Orthopaedic Surgeon;

[21.7.2] Dr Oelofse- Orthopaedic Surgeon;

[21.7.3] A Roos- Occupational Therapist;

[21.7.4] B Moodie- Industrial Psychologist;

[21.7.5] Munro-Actuaries;

[21.7.6] J Sauer-Actuaries

[21.8] In the event that costs are not agreed upon the Plaintiff agrees as follows:

[21.8.1] The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;
and

[21.8.2] The Plaintiff shall allow the Defendant 7 (seven) court days to make payment of the
taxed costs.

[21.9] The contingency fee agreement entered into between the Plaintiff's attorney and the Plaintiff is
invalid.

[21.10] The Plaintiff's attorney shall only be entitled to recover from the Plaintiff such fees as are
taxed or assessed on an attorney and own client basis. The fees recoverable as aforesaid are not to
exceed 25 % of the amount awarded or recovered by the Plaintiff.

[21.11] The Defendant shall be liable to pay cost of the fight tickets obtained for Mr Mahomed to
testify at the trial on the 9th of October 2014 and as allowed by Taxing Master.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

On behalf of the Plaintiff: Adv Jordaan

Instructed by: Wim Krynauw

Attorneys On behalf of the Defendant: Adv Putuka

Instructed by: Lindsay Keller