IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. A923/97

TROOS TRANSPORT t/a EKONOLINER LUXURY COACH LINES Appellant

and

FAIZEL ABRAHAMS Defendant

JUDGMENT DELIVERED ON 18 FEBRUARY 1998

CONRADIE J.

The respondent is a thirty-six year old roofing carpenter who lost his sight due to a head injury sustained when the bus in which he was a passenger capsized as a result of the negligence of a servant of the appellant. The matter comes before us pursuant to leave granted on petition to the chief justice.

The liability issue was settled. Thereafter, at a pre-trial conference held on 16 May 1996, the respondent's general damages were agreed at R100 00-00. These were claimed for "shock, pain, suffering, loss of the amenities of life and disability." The lost amenities were alleged , generally, to be those "associated with a person who has

lost his eyesight" and, specifically, the inability to enjoy carpentry, gardening, fishing and walking.

After the loss of amenities claim had been settled, a further claim was introduced by amendment, a month before the trial on quantum was to resume on 21 October 1996. This claim read simply "Cost of attendant / driver R600 514-00." In response to a request for trial particulars the respondent specified that he required an "assistant/ driver" as a full-time employee working a 9.2 hour day five days a week. His duties would be to drive the respondent to his mosque three times a day, to collect the children from school and to assist the respondent in shopping and other duties. He would have to possess a driver's licence for light motor vehicles and should preferably be a Muslim with a medical background, having successfully completed a course at the Cape Town Blind Society.

Mr McDougall who appeared for the plaintiff at the trial again represented the respondent before us. He contended that the learned judge *a quo* had correctly found that the claim for an 'assistant/driver' was entirely distinct from the settled claim for loss of amenities of life, and that is was, in essence, a claim for the increased costs of getting about to which the respondent's blindness exposed him. It was hence a claim for future loss in the form of increased living expenses. *Mr Mouton* for the appellant contended on the other hand that the claim was one for the amelioration of the respondent's loss of amenities and was, therefore, the impermissible extension of a claim which had already been settled.

The court *a quo* found that there was no duplication of the claim for loss of amenities of life. The judgment, however, proceeds not on the footing that the respondent was

entitled to the increased cost of transport brought about by his disability, but on the footing that the only practical way to satisfy the respondent's desire to get out of the house was to give him a full-time chauffeur who would also help him move around. The learned judge dealt with the evidence as follows -

" There was a considerable amount of evidence concerning what plaintiff used to do before the accident and what he hoped to do and wished to be enabled to do now. Such activities include going shopping, paying accounts, attending a gymnasium, going fishing, taking his children to school, and, most importantly, for plaintiff is a deeply religious man, attending the mosque.

These are symptoms or manifestations of plaintiff's basic need and desire to get out of the house where, as his counsel *Mr McDougall* put it, he feels imprisoned. It will be apposite to quote some passages from plaintiff's evidence."

Then, after citing passages from the respondent's evidence, he continued :

" What all this is saying is that plaintiff wants to get out into the world, to do things that a sighted person takes for granted, to mix with people, to do household chores, to be an active parent and to practise his faith.

No one can deny him these pleasures which will in some objectively small but to plaintiff important way restore to him some enjoyment of human intercourse and some self esteem.

Various expedients, short of the provision of transport, were suggested to plaintiff. The inadequacy or inappropriateness of these proposals is self evident. Thus it was suggested that plaintiff could use an exercise bicycle instead of going to a gym, but this would deprive him of the company and fellowship of others. It was also suggested that he could go for a walk with his eldest daughter, but this would be additional to and not instead of transport. Plaintiff said his religious beliefs did not allow him to have a '*guide-dog*' or any dog, kept in the house.

Plaintiff had previously relied on friends to take him to the mosque, on a *proamico* basis, but this had not worked; the friends were unreliable and became uninterested in helping plaintiff."

I am persuaded that there is no adequate substitute or alternative to what plaintiff seeks from the court, namely, paid transport to take him out of the house, for whatever purpose, of for no purpose at all other than to escape the confines of four walls."

The language which the learned judge employs, is, with respect to *Mr McDougall's* argument, the language of lost amenities. In *Oosthuizen and Thompson* 1919 TPD 124 E 129 the court equated the loss of amenities of life with the diminution in the "joy of living", and it is that "joy of living" with which the learned judge is here concerned. A loss of that "joy of living" is encompassed in the amount agreed upon. In *Administrator General, South West Africa v Kriel* 1988 3 SA 275 (A) at 288 E-F

Hoexter JA described the amenities of life as "those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body and sound limbs."

The focus of the judgment before us is not on increased expenses. Indeed, there was no evidence about what the respondent's travelling expenses would have been had it not been for his injury. This would have been an indispensable element in proving a claim for augmented future expenses. In my view, the claim could not, once the claim for loss of amenities of life had been settled, have been brought on the footing on which it was. It follows that the award, which was not one for increased living expenses, should not have been made.

In case I should err in this conclusion, I should say that there is another footing on which it seems to me that the award cannot be supported. The court *a quo* intended to provide for the cost of an attendant as well as a chauffeur. The learned judge dealt with the claim in this fashion -

> " All this is by way of providing a yardstick for an unusual and specialised situation. Plaintiff has claimed the cost of an attendant/driver. Someone who would not only drive him around, but would also be able to assist him at his destination.

> This is in my view a reasonable claim; it would not do, for instance, for plaintiff to be taken to a shopping centre and simply dumped there. Similarly if he wished to go, say, fishing. At the gym or at the mosque, it is true, he would be with friends and like-minded persons who no doubt would assist him; in such circumstances he would have less need for an attendant. I am nevertheless satisfied that on a long term, regular basis the sort of person plaintiff reasonably requires will fulfil the dual functions of driver and attendant.

In discussing the remuneration of the assistant/driver, the learned judge emphasised that 'someone more than just a driver' would be required for this particular job. He would have to be remunerated at R2250-00 per month. The discounted value of his services was actuarially established at R538 360-00. That was the amount awarded to the respondent under this head.

The cost of a personal attendant has been sparingly awarded in the South African case law. It has, as far as I know, been allowed only in the case of aggravated physical injury where there have been pressing medical indications for the employment of a care giver, that is to say, where there has been seen to be a need for assistance, equipment and facilities directly related to the injury. I mention the following four cases as recent manifestations of this approach.

In *Ngubane v South African Transport Services* 1991 1 SA 756 (A) it was not even in dispute that the appellant who was permanently partially paralysed by a spinal fracture would need an attendant. The court, therefore, did not consider the propriety of the cost of an attendant.

In *Administrator-General South Africa v Kriel* 1988 3 SA 275 (A) the cost of an attendant for a young girl who had been brain damaged by a gunshot would, was not questioned either. She could not stand or sit unsupported, could not feed herself, and was partially incontinent. Clearly, with respect, an attendant in the form of a nurse/ companion was indicated. (See also *Johannes Dhlamini v Government of RSA*, Corbett and Buchanan, vol 3 p 554).

In *Bennie v Guardian National Insurance Co Ltd,* (Corbett andBuchanan vol 4 p A3-34) the domestic servant to whom the paraplegic plaintiff (who had lost bladder, anal and bowel sensation) was held entitled was really also intended to be a nurse-aide. (p. A3-40.)

Dusterwald v Santam Insurance Ltd (Corbett and Buchanan vol 4 p. A3-45 (at p A3-85) was a case in which it was common cause that the plaintiff was entitled to the cost of a full-time domestic servant and a gardener/handyman. The plaintiff was confined

to a wheel chair and incontinent of bladder and bowels. He had no sensation below the level of a lesion at the fifth dorsal vertebra. He was vulnerable to pressure sores. It is clear from the report that the plaintiff had grave difficulty in his personal management.

There is another class of case in which the cost of a domestic servant or gardener has been awarded to a plaintiff. That is where he was no longer able to perform domestic or gardening services himself. The rationale for an award in this kind of case is that the plaintiff is to be compensated for the loss of value of prospective work. It is really a claim which is equivalent to the income-earner's claim for loss of earnings. The best example of such a case is *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 396 (e) at 406-407 where the court refers, with apparent approval, to *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696 (CA); there is also *Hutchings v General Accident Insurance Co SA Ltd*, Corbett and Buchawan vol 3 p. 737 at 745 where the cost of a labourer to maintain a small-holding, which the plaintiff had previously managed himself, was allowed. It has not been suggested that the respondent's claim falls into this category.

In the present case, there is no expert evidence that the plaintiff, who has been trained to be independent in his personal management, needs an attendant for medical

reasons. The award was not made on this basis. It was made to generally improve his lot. To my way of thinking, it would set a dangerous precedent to allow the injured victim of a delict the cost of a full-time companion to ease his burden under circumstances such as one has here. I do not doubt that all kinds of victims with disabilities who find it difficult to get about would like to have companions to help them be more mobile and generally make them feel better, but the trend in our jurisprudence has not been that expansive and with good reason: the social cost of compensation on such a generous scale would be too large a burden to carry. For this reason, also, I would not have awarded the plaintiff the amount of R538 000-00.

The appeal succeeds with costs. The order of the court *a quo* dated 26 February 1997 is altered by -

(a) the deletion of paragraph 2 thereof;

(b) the deletion of the word and figure "and 2" in paragraph 4 thereof.

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J H CONRADIE

I agree:

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G A KÜHN

I agree:

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C PRISMAN