Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 11223/05

In the matter between:

SIVUYILE SOBAHLE **Plaintiff**

and

WILLIAM PIETERSEN **First Defendant**

THE MINISTER OF SAFETY AND SECURITY **Second Defendant**

JUDGMENT DELIVERED ON 30 NOVEMBER 2010

GOLIATH, J:

[1] On 4 November 2004 at or near Pearly Beach, Gansbaai, the first defendant, a member of the South African Police Services, wrongfully, unlawfully and intentionally assaulted the plaintiff by shooting him in his left leg with a shotgun. He sustained a serious injury which resulted in a through knee amputation of the left leg. Plaintiff instituted a claim against defendants for damages incurred as a result of the injury sustained by him in the incident, and the *sequelae* thereof. The second defendant conceded liability for plaintiff's damages and the trial proceeded on the question of the quantum of damages only.

[2] The issue of quantum specifically centered on general damages, past and future loss of earnings and future hospital and related costs. The anticipated prosthetic requirements for plaintiff encompassed the biggest component of the claim. Various experts were called to testify on behalf of both parties. Jan Brand (orthotist), Dr P A Olivier (orthopaedic surgeon), Marion Fourie (occupational therapist), Elsa Wakefield (physiotherapist), Dr Johan Lourens (industrial psychologist), Alexander Munro (actuary), Eduardo Nunes (architect), Gilliam Koen (quantity surveyor), Nelphas Jonas (builder), Anthony David Twine, Nozicelo Sobahle and plaintiff testified on behalf of plaintiff. On the other hand William Pietersen, Marq Labuschagne (physiotherapist), Malcolm Freedman (orthotist) Hannes Swart (industrial psychologist) and Dr Richard Marks (orthopaedic surgeon) testified on behalf of defendant.

[3] Plaintiff was 24 years old at the time of the incident. The injury involved the femoral neck and midshaft of the femur, with an associated serious vascular injury. Although the femoral fracture was fixated with an intramedullary nail, and a vascular reconstructive procedure performed, the left lower leg could not be salvaged and had to be amputated through the knee on 7 November 2004. The post operative period was complicated by the fact that plaintiff developed infection of the stump. This condition necessitated a clean-up operation known as a debridement procedure, which was performed on 20 November 2004.

[4] From the date of the incident plaintiff spent many months in hospital and had to undergo numerous operations. As an in-patient, plaintiff spent approximately three months in hospital. Following his discharge plaintiff attended follow-up visits to the hospital as well as the clinic for wound care treatment. He experienced a severe degree of pain and discomfort and had to endure a septic wound ever since the injury in 2004. A moderate degree of pain and discomfort is expected for a period of 12 weeks following stump-related procedures in future. The fitting of a prosthesis may also cause discomfort should complications arise. Considerable improvement is expected once treatment is complete and he has been fitted with a prosthesis. However, it is likely that his physical capacity and

mobility will always be restricted in certain respects. Plaintiff is currently mobilizing with crutches which he finds challenging. Plaintiff will have to adjust to his new life as an amputee.

[5] Adv **Botha**, who appeared for plaintiff, submitted that an award of R500 000 for general damages would be suitable, while Adv **Van der Schyff**, who appeared for defendant, submitted that R350 000 was more appropriate. The search for comparable cases in order to make a proper award for general damages for pain, suffering and loss of amenities of life only leads to broad parameters within which an award may be made. Reference was made by counsel in argument to various cases *inter alia* **Pitt v Economic Insurance Co Ltd**, 1957 (3) SA 284 (D), **Road Accident Fund v Marunga**, 2003 (5) SA 164 (SCA), **Van Deventer v Premier of Gauteng**, 2004 [Corbett & Buchanan: Quantum of Damages Vol 5] E2-1 (TPD), **Galant v Road Accident Fund** 2004 [Corbett & Buchanan: Quantum of damages Vol 5] E2-29 (Arbitration Forum), **De Jongh v Du Pisanie NO,** 2005 (5) SA 457 (A) and **Bovungana v Road Accident Fund**, 2009 (4) SA 123 (E). The search for comparable cases in order to make a proper award for general damages for pain, suffering and loss of amenities of life only leads to broad parameters within which an award may be made. In arriving at an award which I consider to be fair and just I have had regard more particularly to the matters of **Van Deventer v Premier of Gauteng (*supra*)** and **Galant v Road Accident Fund (*supra*)** which, in my view, is reasonably comparable to the present case. Having considered the relevant awards, in my judgment an award of R400 000 00 for general damages is appropriate in the present matter.

[6] During follow-up visits it was noted that plaintiff still had a septic wound and the fracture did not heal. Dr Olivier established that chronic osteitis (bone infection) was present on the left stump. The experts agree that plaintiff will require future surgical intervention and treatment in respect of the osteitis which the parties are *ad idem* should amount to R129 000. Consequently the plaintiff is entitled to the agreed amount of R129 000.

[7] Dr Olivier testified that it is probable that plaintiff will develop stump-related complications and that it is anticipated that plaintiff will probably in future require three stump-revision procedures at ages 30, 40 and 50 respectively at a cost of R33 000 per revision in 2009 terms. Dr Olivier referred to the development of pressure sores and neuromas which are the most common long term complications which necessitates stump-revisions. Dr Marks disagreed with this assessment and expressed the opinion that the initial amputation was a surgical success and that the correct soft tissue bone balance had been achieved. Thus he testified, the stump healed well and the absence of any complaints reduces the need for a stump-revision. Dr Marks rejected the possibility of a late neuroma on the grounds that plaintiff did not report a neuroma-related pain and that a neuroma never develops if the amputation procedure was successful, especially five years after the said amputation. I accept the evidence of both experts in this regard. However, due to the fact that a stump is dynamic and not static, I am satisfied that provision should be made for at least two stump-revision procedures at a cost of R33 000 per revision, subject to a contingency deduction of 10% (ten per cent).

[8] Dr Olivier expressed the view that due to a combination of osteopenia that is already present in the left femure and plaintiff's inability to negotiate uneven surfaces without risk, it is foreseen that he will fall in future and sustain fractions. He anticipates that plaintiff will probably sustain two fractures in future, at the age of 50 and 60. Dr Marks disagrees and sees no reason for plaintiff to develop osteopenia since the stump is weight-bearing and hence loss of gravity is not an issue. Dr Olivier conceded that it is possible that an amputee would not necessarily suffer a consequential fall, thus obviating any fractures. There is no concrete evidence to support the notion that falls, coupled with fractures, are inevitable consequences of those wearing a prosthesis. I am of the view that with proper training in the use of a prosthesis, plaintiff will be able to ambulate with minimal risk of sustaining a fracture.

[9] Both Dr Olivier and Dr Marks anticipate the need to provide for future consultations with an orthopaedic surgeon, but disagreed on the frequency of the

visits. Plaintiff's counsel conceded that it would be fair to both parties to allow for a frequency of two visits at a cost of R660 per consultation, per annum. I am in agreement with his concession. The normal 10% (ten per cent) contingency deduction should be applied.

[10] Similiarly, the need for future medication especially anti-inflammatories and analgesics is not seriously disputed by Dr Marks. However, Dr Marks is of the view that plaintiff's hip condition would require future medication, hence a reduced need for anti-inflammatories and analgesics should provision be made for a hip replacement. Due to plaintiff's limited evidence on this aspect, I am satisfied that provision should be made to provide plaintiff with two months' medication per annum for life as conceded by defendant in the amount of R35 131. Defendant also conceded an anticipated arthroplasty on the basis that a 50% contingency deduction be applied in order to accommodate the 50% probability of such procedure. The amount of R100 000 is accordingly allowed, with a 50% per cent deduction for contingencies.

[11] The issue surrounding the need for a wheelchair is clearly resolved by Dr Olivier's evidence. He testified that he envisages that plaintiff will be a community walker until about the age of 60, when the need for a wheelchair would be most likely. This opinion is confirmed by Mr Labuschagne who testified that the wheelchair would only be required post operatively and then again at the age of 60. In my view it is therefore reasonable for the plaintiff to be provided with two wheelchairs, the first one post-operatively, and the second one as of the age of 60, with the latter including compensation for the servicing for a period of three years in the sum of R37 946 as conceded by defendant. Consequently, I propose to award this amount in full. The experts are in agreement with the need for elbow crutches and crutch ferrules and it is accordingly allowed as claimed by plaintiff. The need for shower and grab rails were not contested and these items are allowed subject to the normal 10% (ten per cent) contingency deduction.

[12] The need for a lumbro-sacral corset is based on the assumption that plaintiff would suffer future mechanical back ache if the patient is going to walk

with a limp. Dr Olivier testified that plaintiff may require a corset intermittently in future, but is unable to predict when it will be required. Dr Marks, on the other hand, is of the view that the absence of a fixed flexion deformity and in view of the fact that the prosthesis will be made to size, there is no basis for concluding that the plaintiff would suffer future mechanical back ache. I am not persuaded that a corset at a frequency of one per annum is reasonable in the circumstances. Due to the uncertain nature of this complication I am prepared to make provision for such an eventuality in the form of six corsets at the rate of R1 500 each. This award is subject to a contingency deduction of 10% (ten per cent).

[13] Plaintiff did not testify about the existence of phantom pains as confirmed by Mr Botha and Dr Marks. No evidence was presented of the probability that phantom pains will return and Dr Olivier conceded that it is possible that this problem has been resolved. The claim for lyrica is accordingly disallowed.

[14] With regard to anticipated domestic assistance, housing requirements and household maintenance, I am in agreement with defendant's submissions in this regard. The main purpose of a claim for damages is not to enrich a claimant at the expense of the State. Plaintiff was not a property owner prior to the incident and failed to lay a basis in fact and/or in law for this claim.

[15] Furthermore Dr Coetzee, a bilateral amputee fitted with a hydraulic knee, is testimony to the fact that despite his disabilities, he is conducting a meaningful family life and continued to practice as a medical doctor. The evidence is overwhelming that plaintiff would be able to attend to his basic domestic chores once fitted with a prosthesis. The evidence clearly established by both orthopaedic surgeons as well as the prosthetist, is of the view that the plaintiff would recover sufficient functionality once fitted with a prosthesis. The claims for anticipated domestic assistance, household maintenance and housing requirements are disallowed.

[16] The prosthetic requirements encompasses the biggest component of plaintiff's claim. Plaintiff initially claimed compensation for a Total Multi-axis Polycentre Hydraulic Knee Joint, also referred to as a "Total Knee". Plaintiff relied on a report filed by Mr Brand which contained the benefits of this type of knee which is safe and exceptionally widely used. Defendant's prosthesist agreed with the initial report and concluded that the Total Knee was well suited for plaintiff. Mr Brand subsequently reconsidered his report and completely rejected the Total Knee in favour of the MPC Plie Knee which is 600% more expensive than the Total Knee. It is evident that the Plie Knee is a new generation advanced knee which has not been well researched to date.

[17] Having analysed the evidence of the experts and Dr Coetzee, who himself is using a hydraulic knee, I could find no compelling reason why the Total Knee would not be appropriate for the plaintiff. Dr Coetzee is able to conduct a meaningful life with this knee. The evidence is clearly that many amputees live active lives with this type of prosthesis. A Plie Knee could perhaps improve the quality of an amputee's life marginally, but not to the extent that it justifies such an expensive knee in this particular case. The plaintiff lives a relatively simple life, does not partake in any strenuous sporting activities and is not engaging in any form of employment. I am satisfied that the Total Knee will be appropriate to restore plaintiff's physical condition to a functional level which will allow him to live a meaningful life. It is safe, robust, allows walking, has shock absorbable qualities, allows for higher activity and is exceptionally widely used. I agree with defendant that fair compensation for the entire Total Knee in the amount of R2 898 235 is appropriate. I therefore propose to award this amount in full.

[18] The parties are in agreement that the plaintiff will require 40 intensive rehabilitative sessions pre- and post-prosthetic fitment at a cost of R375 per session. An amount of R14 673 is accordingly allowed, subject to a contingency deduction of 25% as suggested by plaintiff.

[19] The parties are not in agreement with the need for life long physiotherapy. Dr Olivier testified that plaintiff will in future benefit from physiotherapy because

of any future complications which may arise. Both Dr Olivier and Dr Marks are in agreement that provision should be made for physiotherapy requirements, although Dr Marks is optimistic that physiotherapy will not be required other than post-operatively. With numerous possibilities of secondary complications, fractures, back pain and stump-revisions, I am in agreement that provision should be made for physiotherapy at the rate of R3 500 per annum with a 30% contingency factor. I am not convinced of the need for lifelong physiotherapy as proposed by Dr Olivier.

[20] In the circumstances plaintiff will incur transport costs which are not disputed by defendant. I am of the view that it is fair and just if plaintiff is compensated for all transport costs incurred attendant upon the following, as claimed by plaintiff:

- the prosthetist
- consultations with orthopeadic surgeon
- 40 pre- and post-prosthetic rehabilitation physiotherapy sessions
- costs attendant upon attending hospital for treatment for osteitis
- travelling to Hermanus for an arthoplasty to his hip
- travelling to Hermanus for two stump-revision procedure
- one trip per year for maintenance of the prosthesis
- three trips for a refit of prosthesis during the first five years and one trip every three years thereafter starting at age 37
- return trip to Gansbaai once a year in order to purchase anti-inflammatories and analgesics

[21] The plaintiff has claimed an amount of R133 463 and R847 450 in respect of past income and future loss of earning capacity, respectively. At the time of the incident the plaintiff was a healthy 24 year old male. He is unmarried and has no dependants. He grew up in the Eastern Cape and completed grade 6 at school. He briefly worked as a labourer and thereafter as a taxi conductor. He then moved to his brother in Pearly Beach and was employed as a casual worker in the informal building sector. At the time of the incident he earned R70

(seventy rand) per day. Evidence was led regarding conflicting employment history details given to Mr Swart. Mr Jonas was called to clarify plaintiff's employment record, but it proved difficult due to lack of record keeping in the informal employment sector. Mr Lourens' report states that plaintiff worked for Jonas in 2002 at the rate of R50 per day. There is a paucity of details regarding the exact time plaintiff worked for Jonas and the frequency thereof. It is therefore agreed between the parties that plaintiff was gainfully employed in the informal building sector. However, the main issue in dispute remained the frequency.

[22] In his first report Mr Lourens failed to obtain any collateral evidence in support of plaintiff's alleged advices to him. Unfortunately the subsequent clarifying report is lacking in sufficient detail to conclude that plaintiff worked for Jonas during 2002, 2003 and 2004. I am therefore not persuaded that plaintiff worked an estimated seven to eight months per year on average as a casual labourer.

[23] Defendant avers that future loss of income should be calculated on the assumption that plaintiff was legally employed for a total of three months per annum at the rate of approximately R50 per day. I am not persuaded that this calculation would be fair and just. I will accept that plaintiff was earning R70 per day, for a total of three months per year.

[24] With regard to plaintiff's post-morbid scenario, it is clear that plaintiff has no residual earning capacity. I am in agreement with defendant's view that a reasonable assumption would be that plaintiff would have been gainfully employed as a casual labourer for a least three months per year. With regard to the earning capacity it is common cause that the rate of R100 per day in 2009 terms is the norm. I am satisfied that the usual contingencies of 5% (five per cent) to past and 15% (fifteen per cent) to future income should be applied. It is important to bear in mind that the basis for a damages claim is "likely earnings" not optimal potential earnings as are usually given by industrial psychologists (see **Koch**: The Quantum Year Book VZR 2009 at 104).

[25] Defendant opposed plaintiff's request that the costs of two counsel be allowed. The nature of the issues, the serious injury, inputs by various experts called by plaintiff and the preparation of the case justifies in my view, the exercise of my discretion in permitting the costs of two counsel.

In the result the following order is granted:

The defendant is to pay the plaintiff the following amounts:

1. Second defendant shall pay to plaintiff the sum of R400 000 (four hundred thousand rand) in respect of general damages.

2. Costs of prosthesis R2 898 235 (two million eight hundred and ninety eight thousand two hundred and thirty five rand).

3. The quantum of other future medical and related expenses shall be computed by an actuary based on the findings reflected in this judgment, subject to an agreed net discount rate of 1.5% (one and a half per cent).

4. The quantum of plaintiff's past and future loss of earnings/earning capacity shall be actuarially calculated based on the following assumptions:

   4.1 Past loss of income:- From date of injury to date of judgment, plaintiff would have continued to work as a casual labourer for an average of three months per year earning an income of R70 (seventy rand) per day.

   4.2 Future loss of income: Plaintiff would have earned an income calculated at R100 (one hundred rand) per day for three months of the year, calculated up to the age of 60.

5. Second defendant is directed to pay to plaintiff interest on the actuarial calculated past loss of earnings as from the date of service of the summons on second defendant to date of payment.

6. The amount already paid by defendant in terms of a previous Court Order should be deducted from the total amount due and the balance should be paid within 60 (sixty) days of date hereof and in the event of such payment not being made timeously, defendant shall be liable to plaintiff for the payment of interest on the balance at the rate of 15.5% (fifteen and a half per cent) per annum from the day after the expiration of 60 (sixty) days hereof to the date of payment.

7. Second defendant shall pay plaintiff's taxed costs in the action on the party and party scale which costs shall include but not be limited to:

7.1 Costs of proceedings of 17 March 2010.

7.2 The qualifying expenses of all expert witnesses in respect of whom plaintiff filed reports of summaries of evidence to be led at the trial.

7.3 The costs of obtaining a running record.

7.4 The costs consequent upon the employment of two counsel.

8. Payment of the costs referred to in paragraph 7 shall be effected within 14 (fourteen) days of the date of the Taxing Master's allocator or of settlement of plaintiff's party and party bill of costs.

8.1 Should the costs referred to in paragraph 7 above not be paid by due date, second defendant shall be liable to plaintiff for the payment of interest thereon computed at 15.5% (fifteen and a half percent) per annum from the 15th day of the Taxing Master's

allocator, alternatively the date of settlement of claimant's bill of costs.

9. In the event of the parties reaching agreement on the amounts for past and future loss of income, other future and related medical expenses or any other issue relating to costs, leave is granted to approach this court to make such agreement an order of court. In the event of the parties not reaching agreement on such amounts, or any issue of further costs, leave is granted to either party, on notice to the other party, to approach this court in chambers to present oral argument as to the further conduct of the matter.

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