Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON LOCAL DIVISION – EASTERN CAPE)

Case No: EL 321/08
ECD 721/08
Date Heard: 16/03/11
Date Delivered: 30/06/11

In the matter between

NTOMBIZANDILE NDABA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

REVELAS J

[1] The plaintiff, a 45 year old woman, instituted an action against the defendant for damages arising from a motor vehicle accident that occurred on 7 February 2004. The plaintiff was travelling as a passenger in a taxi when the collision occurred on the national road between East London and Ndantsane. She sustained multiple orthopaedic injuries and a ruptured bladder during the accident and she was admitted to the Frere Hospital where she spent just over four months.

[2] The defendant has conceded liability to fully compensate the plaintiff for such damages as she may prove and the only issue to decide in this matter was the quantum of the plaintiff's damages.

On certain heads of damages (past and future medical expenses) agreement had been reached prior to the trial and what remained in dispute was the plaintiff's alleged past and future loss of earnings as an informal hawker, and general damages. The plaintiff claimed as follows:

Past Loss of Income:	R175 804.00
Future Loss of Income:	R549 861.00
General Damages:	R500 000.00
Total:	R1 225 665.00

[3] The plaintiff testified on her own behalf and called three witnesses. They were her neighbour (Mrs Wosintsi), one of the orthopaedic surgeons who had prepared a medico-legal report in respect of her injuries (Dr PA Olivier) and an industrial psychologist who prepared a report on the plaintiff's past and future loss of earnings (Dr HJ van Daalen). The defendant called no witnesses. Dr Olivier's report and the medico-legal report of Dr Berkowitz (also an orthopaedic surgeon), were handed up by agreement. The actuarial report of Dr RJ Koch, on the plaintiff's past and future loss of income also became part of the evidence.

[4] Dr van Daalen, the plaintiff, and her neighbour, were however taken to task during cross-examination by counsel for the defendant, on the question of the plaintiff's past and future loss of earnings. Dr Koch's actuarial calculations were based on the facts noted in report of Dr van Daalen, who had received the information from the plaintiff. During a pre-trial meeting the parties specifically agreed to dispense with the oral testimonies of actuaries.

[5] Very little seemed to be in dispute as far as the plaintiff's injuries and her treatment were concerned. The parties were in

agreement that the defendant was to be ordered to undertake, in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to compensate the plaintiff for future medical treatment. The primary enquiry during the trial was aimed at establishing the approximate income generated from the plaintiff's hawking. The plaintiff kept no record of her earnings and therefore there was no real prospect of establishing an accurate figure. It is convenient to deal with the less contentious issues first.

General Damages

[6] An adequate award for general damages (for pain, suffering disfigurement, disability and loss of amenities) "*must be fair to both sides-it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense*".[1] The plaintiff, who was 42 years old at the time, was travelling with her youngest child, a mere baby, when the collision occurred. The plaintiff's legs were trapped inside the vehicle and she had to pass her baby through the window to onlookers while waiting to be freed from the mangled vehicle. This caused her much distress. Thereafter she was admitted to the Frere Hospital with very little recollection of the accident. Upon admission the following injuries were noted: A straddled pelvic fracture, a right femural "midshaft" fracture and a bladder injury (rupture) as a result of blunt abdominal trauma. She also sustained an injury to her right shoulder and a dashboard left knee injury. The latter injury she sustained as a result of being trapped between the seats of the taxi she travelled in.

[7] At the hospital, a Denham pin was inserted in the region of the right proximal tibia. A balanced skeletal traction was performed and the wound on her arm was stitched. A catheter was inserted as a

[1]Pitt v Economic Insurance Company Ltd 1957 (3) SA 284 (D) E-F per Holmes J

result of the ruptured bladder. The fractured femur was also treated by means of a delayed internal fixation with a plate, screws and a bone-grafting procedure.

[8] When the plaintiff consulted with Dr Olivier in 2010, she presented with multiple complaints. These were a painful right shoulder pain in the pelvic area backache, a painful right hip and right knee. She still suffers from all of the aforementioned. The plaintiff has difficulty in using her right arm. She is unable to lift it above her shoulder. Pain in the pelvic area is increased when she climbs stairs or walks, and during sexual intercourse. The plaintiff walks with a limp and her knee is often painful and swollen. She is unable to bend forward or stand for more than a few minutes without pain. All her orthopaedic complaints are aggravated by inclement weather. She suffers permanently from discomfort and intermittent pains. Given her impairments, she is unfit for any type of employment in the open labour market which requires any physical activity and she can no longer trade as a hawker. This was the conclusion of both orthopaedic surgeons who examined the plaintiff.

[9] A removal of the internal fixation of the right hip joint and shaft of the right femur is predicted. Because of degenerative changes, the plaintiff is bound to have a total knee replacement in the future. Her shoulder and hip might also later require replacement. The plaintiff's injuries are of a serious and permanent nature.

[10] The plaintiff's evidence was that the injury (the pelvic injury in particular) has had a negative impact on her relationship with her husband as she no longer enjoys sexual intercourse. She is no longer able to participate in dancing at church which she loved and her social life has also become limited. She used to be a community

walker, an enjoyable activity which she can no longer participate in. She is also no longer able to cook for her family. Her daughter has taken over this task and this has caused some friction in the home. Clearly, the sequelae of the accident had impaired the plaintiff's quality of life substantially.

[11] Courts have a broad discretion in determining quantum for general damages. It amounts to what is to be fair and adequate compensation based on the facts pertaining to the plaintiff herself and the nature and impact of her injuries. There is a tendency for awards to be higher than in the past as a result of our higher standard of living and different value systems. The aforesaid approach sanctioned by the Supreme Court of Appeal in *Road Accident Fund v Marunga*[2]. Although the approach to be adopted is to compare awards in similar cases, the question of non-patrimonial loss still remains within the discretion of the court[3].

[12] It is useful in this mater to be guided by awards made in similar cases where plaintiffs were granted compensation for multiple orthopaedic injuries. Here are few examples. In *Ntuli v Road Accident Fund*[4] an amount equal to R221 000.00 at current value was awarded to such a plaintiff. In *Muller v Road Accident Fund*[5] the plaintiff was awarded R265 000.00 at present value and the plaintiff in *Vilakazi v Road Accident Fund*[6] was granted R464 000.00 at present value.

[13] In *Vilakazi* (*supra*) the plaintiff suffered from multiple injuries which included head injuries, and soft tissue back injuries. Her left leg had broken in three places. Seven years after the collision she was still using crutches. Her face was also disfigured by scarring.

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[2] 2003 (5) SA 164 (SCA), paras 23-29
[3] De Jongh v Du Pisanie NO 2005 (5) SA 457 SCA
[4] 2009 5J2 QOD 207 (SE)
[5] 2007 5F3 QOD 40 (SE)
[6] 2007 5 QOD J2-160 (T)

Her injuries were clearly considerably worse than those sustained by Mrs Ndaba, the plaintiff in this matter.

[14] In the *Ntuli's* case, (*supra*) the plaintiff had been employed as a municipal worker when she was injured and suffered multiple injuries. Her circumstances were very similar to those of the plaintiff. She was also in her early forties, enjoyed dancing and was a community walker. Her pelvic injury resulted in a drop foot, a disfigurement which was a factor taken into account in the award granted to her. She could still manage dancing and did not have the limited mobility of the plaintiff in this case, who suffers discomfort in almost any physical position she assumes. Here it must be pointed out that the plaintiff was described as "obese" in the medico-legal report, which is a fact which may contribute to her discomfort.

[15] In *Roux v Road Accident Fund* (unreported decision under case no EL 397/02 ECD 1066/2, dated 15 August 2005), the plaintiff suffered comparable injuries (fracture of the left libia, right knee injury, and substantial deformity of the right leg). He also suffered substantially diminished amenities of life. Roux was awarded approximately R250 000.00 in present terms.

[16] Reference were also made to other awards which I have read and need not list in this judgment. Suffice it to say, that in none of the cases that were comparable, was an amount awarded which is close to what the plaintiff claims in this case for general damages (R500 000.00).

[17] After considering past awards and all the factors relevant to the assessment of damages in this particular case, I have formed the view that an amount of R300 000.00 will be adequate compensation to the plaintiff for general damages.

Past and Future Loss of Earnings

[18] The plaintiff's claims under these two heads were the subject of much debate during this trial, which had to be postponed when the defendant raised the point that the plaintiff did not have a hawking licence. This led to an application by the plaintiff to re-open her case to lead evidence in rebuttal of this point. The defendant opposed the application, but a few days prior to the hearing the defendant abandoned the point it raised, and the necessity for the application to lead further evidence fell away. The parties reached an agreement on the legality of the plaintiff's business activities and wasted costs, which was made an order of court.

[19] The facts set out below, pertaining to the plaintiff, are relevant in establishing her loss of income as a result of the motor vehicle accident.

[20] The plaintiff is married with three children. Her husband works for Auto Tyres as a driver. They live in a three roomed house which is supplied with electricity and running water. She completed grade eight at the Ngwenyathi High School at the age of nineteen. She commenced working as a hawker in 1984. She stopped working in 2003 when her child was born and her plan was to resume work as soon as this child was able to walk. However, she could not resume her work because she was involved in the accident in February 2004. When the accident occurred this youngest child (who was seven years old in 2010) must have been one year old. Assuming that she interrupted her hawking for one year for this child, the same would apply to her two older children.

[21] The plaintiff's hawking business consisted primarily of selling vetkoek at St Luke's Higher Primary School. She told Dr van Daalen

she sometimes sold sweets and fruit there as well. In addition, she sold other small articles such as candles, matches, single cigarettes, sachets of sugar, chips and sweets in the community and from her home. She told Dr van Daalen that she would sell the vetkoek at 50c each. It cost her approximately R21.00 per batch to make the vetkoek consisting of flower, oil milk and yeast. She made about R55.00 per day from these vetkoek sales.

[22] Cigarettes and candles sold at R1.00 per item. Matches and chips were sold at 50c per item and sugar went for R1.50 per cup. Loose sweets and teabags cost 20c and 25c each. Yeast was sold for R1.20 per sachet and paraffin for R2.00 a bottle (750ml). The profit margin on all there items were evidently very low. No evidence was proffered as to the approximate daily profits the sale of these items generated, or how much she sold and from where exactly. It appeared to be mostly from home.

[23] The plaintiff told Dr van Daalen that she was able to generate R600.00 per week from her hawking activities. For the plaintiff to have made R600.00 per week from her hawking trade, particularly the confectionary (vetkoek) side of it, must have involved considerable effort and industry on her part. She first had to make the vetkoek. She then had to walk three kilometres to the school, carrying the two 25 litre paint buckets with 150 units of vetkoek (75 per bucket). It would be fair to assume that if she was able to make the same profit (R55.00 per day) from selling vetkoek at home, she would have mentioned this to Dr van Daalen.

[24] What vexed the calculation of the plaintiff's approximate earnings, apart from the absence of records such as receipts and bank accounts, was that the plaintiff's evidence and calculations did not make provision for certain very important factors, such as school holidays and public holidays during which the plaintiff would

obviously sell nothing at the school. The plaintiff attempted unsuccessfully to prove that she earned R31 200.00 per year, (based on a profit figure of R600.00 per week). This was the figure upon Dr Koch based on his calculations. The plaintiff, at best, earned R275.00 per week (consisting of five school days) from selling vetkoek at the school. Moreover, there are approximately nine public holidays per year which do not fall within the school holidays. The school vacations account for at least a further fifty six days of a year fall in non-school weeks (discounting the week-ends).

[25] If the plaintiff carried two full twenty five litre buckets of vetkoek to St Luke's School, she would hardly be able to carry fruit and sweets as well. To arrive at a profit figure of R600.00 per week, would mean that the plaintiff made about R330.00 per week from selling the low profit loose grocery items and vetkoek from home. I find this hardly likely, given that most of her profit must have been generated from the sale of vetkoek at school, where there is a large and concentrated number of children.

[26] Although the plaintiff could at least provide some information as to how many confectionary items (vetkoek) she sold per day at the school, the sales figures for the grocery items were absent. In addition, anyone of her family could sell loose groceries from home. Her accident could not have caused a loss in this regard. If the shortfall between the R600.00 and R270.00 per week as illustrated above, was made up by larger quantities of vetkoek sold at home, (as submitted by the plaintiff), that information would have been furnished to Dr van Daalen and it was not. The plaintiff's case as presented, was that the lion share of her income was generated from the school sales. That is also more probable scenario.

[27] Dr Koch's calculations are based on the plaintiff's evidence that the plaintiff earned R600.00 per week for fifty two weeks a year

(R31 200 in 2003). Allowance was made for the fact that the plaintiff will reach the normal retirement age of 60 years. No provision was made for general contingencies. Inflation at the rate of 6.34% per year and nett capitalisation rate at 2.5% per year, were factors taken into account. Sliding scales for an earlier death was also brought into account and the following figures were arrived at in Dr Koch's report and claimed by the plaintiff: Past loss of earnings: R175 804.00. Future loss of earnings: R549 861.00. TOTAL: R725 665.00. Week-ends, holidays and the year prior to the accident (2003), in which she reared her child and did not trade, are not accounted for.

[28] At best for the plaintiff, her sales of vetkoek at the school took place on approximately three hundred days per year, not 365 days per year. At R55.00 per day, she thus made approximately R165 00.00 per year from her sales at the school. The remainder of her income, which she did not sufficiently prove, must have been considerably less for the reasons set out above.

[29] The above exercise demonstrates the flaws in the plaintiff's calculations. This is a question which could have been best resolved by the parties, as suggested by Dr Koch in his report as to how general contingencies should be factored in. The plaintiff should also not unduly benefit from her insufficient evidentiary contribution towards establishing what her income was, at the defendant's expense.

[30] In *Bridgeman NO v Road Accident Fund*[7] van Heerden J said the following:

> "*In order to claim compensation for patrimonial loss, a plaintiff must discharge the onus of proving, on a balance of probabilities, that such a loss has indeed occurred. That does*

[7]QOD 5 B4-1 at B4-23

not mean that the plaintiff is required to prove the loss with mathematical precision – however, the plaintiff is required to place before the Court all the evidence reasonably available to enable the Court to quantify the damages and to make an appropriate award".

[31] The plaintiff did have an income as a hawker, but in my view, R31 200.00 per annum was an exaggerated figure. The figure has to be reduced and that reduction must be arbitrary to a large extent. It must also be noted that *"..... it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis for assessment*".[8]

[32] When assessing damages for loss of earnings, allowances are usually made for contingencies not specifically provided for in actuarial calculations. The flaws in the plaintiff's calculations outlined above can only be appropriately addressed by providing for a substantial contingency figure of 50% in respect of both past and future loss of income of earnings. There need not be a distinction between the two types of loss of income, on the facts of this case. (See: *AA Mutual v Maqula*.[9])

[33] In the result, the plaintiff is entitled to the following amounts in respect of her loss of earnings.

Total Past and Future loss of income:	R725 665.00
Less Contingency of 50%:	- R362 832.50
Total loss of income:	R362 832.50

[8]Per Rose Innes AJ in Monumental Art Co v Kenston Pharmacy Pty (Ltd) 1976(2) SA 111 (c) at 118 E
[9]1978(1) SA 805(A)

[34] To sum up, the full award is as follows:

Loss of Income (Past and Future Damages):	R362 832.50
General Damages:	R300 000.00
Total:	R662 832.50

[35] In the result, the following order is made:

1. Defendant shall pay to the plaintiff the sum of R662 832.50 as and for damages;
2. Defendant shall pay interest on the sum aforesaid at the legal rate of interest from a date fourteen (14) days after judgment to date of payment;
3. Defendant shall provide the plaintiff with a certificate in terms of Section 17 (4) (a) of the Road Accident Fund Act in respect of future medical expenses;
4. Defendant shall pay the plaintiff's costs on High Court tariff as between party/party which costs shall include:
   4.1 Costs of the action for the proceedings on the 10th, 13th, and 14th of September 2010 and the 16th of March 2011.
   4.2 The qualifying expenses in respect of plaintiff's witnesses, Dr PA Olivier, Dr HJ Van Daalen and Dr RJ Koch, as may be agreed between the parties or as may be directed by the Taxing Master;
   4.3 Costs of photographs;
   4.4 That plaintiff is declared a necessary witness.
5. Defendant shall pay interest on the taxed costs at the legal rate of interest from a date fourteen (14) days after allocatur by the Taxing Master.

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E REVELAS
Judge of the High Court

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