



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **29 MARCH 2023**

Signature: _____

CASE NO: 36727/2008

In the matter between:

KOTSANE BIZZA MOKETE

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] On or about the 6th day of February 2006 at about 03h00 in Alexandra township the plaintiff had been a passenger in a Toyota Corolla motor vehicle. Somehow the vehicle attracted the suspicions of police officers who were on patrol in a marked Toyota Condor motor vehicle. When the police signalled the Toyota Corolla vehicle to stop the driver failed to do so. A shootout ensued in which the plaintiff sustained injuries from police gunfire.
- [2] The plaintiff launched a civil case against the Minister of Police.
- [3] The defendants have since conceded the merits, what remains for this court to determine is the quantum of damages.
- [4] As per the report of the specialist orthopaedic surgeons Drs. Ledwaba and Mafeelane, the plaintiff sustained an incomplete spinal-cord injury as a result of a gunshot injury.
- [5] Common cause facts in this matter are as established from expert reports and joint minutes by experts for both plaintiff and defendant. These will be referred to herein as and when necessary.
- [6] The plaintiff was also called to testify under oath during the hearing. Similarly, reference will be made to his evidence where relevant.
- [7] The heads of damages at issue are the following:
- 7.1 General damages;
 - 7.2 Loss of earnings (past and future)
 - 7.3 Future medical expenses and living expenses;

B. GENERAL DAMAGES

- [8] The assessment of the quantum of general damages is a comparative exercise of prior cases on bodily injuries. Describing this process, Potgieter JA said:

“...It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters...”¹

[9] Courts use past awards as a guide only and are expected to exercise a judicious discretion to ensure that the award is fair to both the plaintiff and the defendant.

[10] Dealing with a need to strike a fair balance in considering awards, Holmes J sounded a warning in *Pitt v. Economic Insurance Co Ltd* 1957 (3) SA 284 (N)² that:

“The 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”.

[11] Eksteen J in *Ambrose v Road Accident Fund* 2011 (6C4) QOD 13 (ECP) at [48] also had this to say:

“General damages: In assessing an award for general damages the court has a broad discretion to award what it considers to be fair and adequate compensation. The court will generally be guided by awards previously made in comparable cases and will be alive to the tendency for awards to be higher in recent years than was previously the case. (Compare *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA) 457D-E). In considering previous awards, it is appropriate to have regard to the depreciating value of money due to the ravages of inflation. It would however be inappropriate to escalate such awards by a slavish application of the consumer price index. (See *AA Onderlinge Assuransie Assosiasie BPK v Sodoms* 1980 (3) SA 134 (A)).”

¹ *Protea Assurance Co. Ltd* 1971 (1) SA 530 (A) at 530-536.

² 1957 (3) SA 284 (D) at 287E-F

Appearing for the defendant, Mr Malatji made detailed submissions and referred to various previous comparable decisions on awards for general damages in similar circumstances.

[12] In the matter of *Motloung v. South African Eagle Insurance Co. LTD* decided in 1996 in the Witwatersrand Local Division, concerning a young woman who had been paralysed from the waist down, and who experienced bowel and bladder problems, she was awarded R240,000.00 in respect of general damages. The present value of this award is approximately R935,000.00. The plaintiff's condition in that case was worse than that of the present plaintiff.

[13] In the matter of *Fortuin v Minister of Safety and Security (2728/02)* [2007] ZAWCHC 3, decided on the 25th day of January 2007, the plaintiff, a 28-year-old female at the time, was shot in the back at Bonteheuwel, Cape Province, and suffered a gunshot wound. Her injuries and *sequelae* were in short, the following:

Gunshot entrance wound in the right lower back and exit wound in the left abdominal wall, she also sustained intra-abdominal injuries. Her spinal cord injury caused paralysis and neurological dysfunction of her bladder and bowel. She would continue to experience accidents of incontinence from time to time for the rest of her life.

She had to be taught how to insert catheter every three to four hours to assist the elimination of urine from her bladder and was required to do so at least twice during working day. Her sexual activity with her husband was adversely affected by these complications and she walked through the aid of crutches. A wheelchair became a necessity as she was in fact an "Incomplete paraplegic".

Her daughter basically assumed a role of a carer for her mother. She was hospitalised from 29th March 2000 and was discharged in September 2000, that is after a period of six months.

She had symptoms of depressive disorder as well as post-traumatic stress disorder relating to the traumatic event of being shot, chronic pains, loss of mobility coupled with the embarrassment of poor bowel and bladder control.

She was awarded R350 000.00 in respect of general damages. The present value of this amount is approximately R800 000.00.

[14] In *Nokemane v Road Accident Fund* (621/2008) [2010] ZAECGHC 24 (8 April 2010), decided on the 8th of April 2010, plaintiff was neurologically an ASIA B T8 paraplegic, meaning he had no preserved sensory or motor function below the mid chest, was wheelchair bound and his condition was irreversible and permanent.

He was left with mild spasticity, a restricted range of movement of his right shoulder and right little finger, lack of bladder and bowel control, erectile dysfunction and an inability to ejaculate.

He suffered from back pain aggravated by prolonged sitting. His respiratory functions diminished as a result of paralysis of the abdominal muscles. He could not cough, sneeze or blow his nose to expel mucous and needed to be assisted to do so.

He was a 39-year-old businessman at the time of the delivery of the judgement and was married.

He was healthy, active, motivated and trained at the gym pre-morbid. Post-morbid had to empty his bladder by using a catheter every six hours, with each process taking up to 45 minutes.

He was emptying his bowel onto a linen saver and that process was taking up to an hour a day. When he was told he would never walk again he felt it would be better to have died and considered suicide.

The court awarded an amount of R800 000.00 for general damages. The present value of this is approximately R1 380 000.00

Plaintiff's injuries and their *sequelae*:

[15] Plaintiff is a 42-year-old male who was shot at, while sitting at the back seat of a motor vehicle on the 6th day of February 2006 and sustained an incomplete spinal cord injury T1 lesion.

At the moment he is not using catheter, he is able to transfer himself from a wheelchair to the bed, he is not totally dependent on other people (although he asserts otherwise) and has a urinary catheter that gets changed regularly at Jane Furse hospital.

- [16] He was hospitalised from 06/02/2006 until 15/05/2006, thereafter, he was taken to jail using a wheelchair. He does manage to walk with a walker. He is spastic with hyperreflexia. He will benefit from attending rehabilitation to reduce muscle spasms and pains that are troubling him and also to prevent hip and knee contractures. The KAFO (knee-ankle-foot) orthosis will improve his standing and walking balance and also improve some of his activities when using devices.
- [17] He is able to transfer from the bed to the wheelchair by himself and also able to take few steps with the aid of walking frame. He complains of consistent muscle spasms and pains.
- [18] **His chances of rehabilitation of important bodily functions, thus also the ability to walk are good. The spinal cord is only partially damaged below the level of injury.** Both sensory and motor function of the dermatomes and key muscles activated by the S4 and S5 segment of a spine are preserved. Early orthotic treatment may contribute to an improvement in the plaintiff's ability to walk. Orthotic treatment is possible in cases of incomplete spinal injury.
- [19] The plaintiff arrived at the practice of the Orthotist, walking with the support of elbow crutches, until he was assisted with a wheelchair to enter the reception.
- [20] Plaintiff stays in a three bedroomed house and other surrounding rooms which are electrified, with his four siblings at the same yard. There is running water at the outside tap, and he uses a pit toilet at home.
- [21] Mr. Malatji submitted that what is apparent from the comparative cases, is the fact that the injuries and *sequelae* in the *Nokemane* case are more serious compared to the injuries and *sequelae* sustained by the plaintiff in this matter. It was further submitted that the injuries and *sequelae* in the matter of

Motloung are equally more serious compared to that of the plaintiff in this matter.

[22] Mr. Malatji then made reference to the *Fortuin* matter with more comparable 'incomplete spinal cord injury' and its *sequelae* caused by gunshots. That notwithstanding, the *Fortuin* case remains more serious in comparison to the plaintiff's case in this matter.

[23] Mr. Coetzee SC made submissions on behalf of the plaintiff and referred to numerous cases such as:

23.1 *Maholela v Road Accident Fund* 2006 QOD A3-3 (0) where the plaintiff had suffered from paraplegia caused by injury to the lumbar spine. The court awarded general damages in the amount of R 600 000.00 the 2020 value being R1 328 000.00.

23.2 *Robyn v Road Accident Fund* 2013 (6A3) QOD 32 (GNP) Where the plaintiff had suffered a fracture dislocation of the spine at T12/ LI level. She was rendered a complete motor and sensory paraplegic. An open reduction, internal fixation and bone graft was performed. She would, however, remain a paraplegic with all the classic *sequelae* of paraplegia, including complete motor paralysis of both legs, complete incontinence of the bowel and bladder and absent sexual function. The court awarded general damages in the amount of R 920 000.00 the 2021 value being R1 351 000.

23.3 *Webb v Road Accident Fund* 2016 (7A3) QOD 24 (GNP) a 20-year-old male suffered a L1 burst fracture with T12/L dislocation injuries which left him paralyzed. He further suffered a displaced radius and ulna fracture. He was wheelchair bound with all the accompanying difficulties of paraplegia. He developed bedsores and suffered chronic back pain and he self-catharsises and experienced intermittent bladder infections. His paraplegia left him with a neurogenic bladder. He was awarded R1 500 000,00 the 2021 value being R 1 867 000.

- [24] On behalf of the plaintiff it was submitted that this case is the most comparable to the plaintiff's case. Reference was also made to the *Nokemane and Morake* matters, in common with plaintiff's counsel.
- [25] Counsel for the plaintiff submitted that the plaintiff is entitled to compensation for general damages in an amount between R 1 500 000.00 and R 1 800 000.00.
- [26] Counsel for the defendant suggested that an amount of R900 000.00 in general damages would constitute a fair and reasonable compensation for the injury and sequelae suffered by the plaintiff in this matter.

C. PAST AND FUTURE LOSS OF EARNINGS

Plaintiff's version:

- [27] Plaintiff is claiming past and future loss of earnings against the defendant on the basis that at the time of the shooting incident he was self-employed as a hawker or street vendor selling clothes, cigarettes, cold drinks, flowers, both at Witbank taxi rank in Mpumalanga and at Alexandra taxi rank in Gauteng Province. He used to work from Monday to Friday until late. He was making about R2 500.00 to R3 000.00 per month. He would sometimes assist his uncle with welding but he did not make mention of any income from that. His self-employment as a hawker/street vendor commenced in 2004. He was purchasing his stock in Johannesburg three times in a month spending about R5 000 per purchase. He would transport some of his stock to Witbank where he had someone working for him at the salary rate of R70 per day. He was spending about R110.00 on return fare to transport his stock to Witbank twice every week.

He was also renting a place where he was staying in Alexandra at a cost of R750.00 per month. When asked in cross-examination how much he was making per month before deductions, his answer was around R11 000.00 or R10 000.00. His evidence did not explain how the amount of R2 500 - R3

000.00 was determined. He had only testified that he spent about R 5000 on stock purchases three times in a month and the disbursements relating to his salesperson and transport as well as accommodation. No documentary or some form of corroboratory evidence has been provided at all in support of his claim of self-employment in the informal sector.

Information from the medical experts:

- [28] From the joint minute of the Occupational Therapists Ms. Moleboge Setoaba and Ms Riska Le Roux, who had sight of the Orthopaedic Surgeons Dr L.A. Ledwaba and Dr Mafeelane's report, the following appears:
- [29] "4.3 **From his narrative**³, Ms. Setoaba notes that at the time of the incidence he did not have a full time employment; he was working on casual work/ "piece jobs" or contract work as a General Manual Labourer doing various task. Due to the nature of the work, he was not able to continue working after the incidence. Ms. Le Roux notes that at the time of the incidence in February 2006, the claimant was working as a street vendor in the Alexandra area of Johannesburg where he was selling clothes, cigarettes, snacks and flowers."
- [30] Mr. Tshepo Tsiu the Industrial Psychologist had the following to say about plaintiff's loss of earnings: "7.1.1.3. Mr Mokete was working as a self-employed Vendor selling snacks, flowers, cigarettes and clothes on the street at the time of the incident. He reported that he was earning an average of R3000.00 profit per month (R36 000.00) per annum. After deducting operational costs, as reported by him unconfirmed. These self-reported figures therefore require further investigation and verification before being adopted and deference is given to factual information in this regard. 7.1.1.4 Deference is also given to an assessor to verify that he was indeed economically active in this occupation at the time of incident and for an opinion on his business' pre-accident financial performance as well as growth potential, but for the accident."

³ Emphasis added

35. From the above joint minutes it is clear that the experts being the Occupational Therapists and the Industrial Therapists projected the plaintiff's past and future loss of earnings simply on the basis of the plaintiff's self-reported statement without any further proof or verifications whatsoever.

[31] The actuarial calculations by Manala Actuaries and Consultants also relied on the joint minutes of the industrial psychologist which minutes simply relied on the plaintiff's self-reported information, without any proof and/or verification of the facts as it appears in paragraph 12 thereof.

Plaintiff's evidence

[32] The plaintiff testified. He confirmed the date of the shooting incident. As at the date of the trial he was 41 years old, his date of birth being 28 December 1980. His highest education level is grade 8.

[33] Plaintiff currently reside at home with his mother and sister at Ga-Masemola outside Polokwane in Limpopo Province. This is a rural village.

[34] Plaintiff sustained injuries to his spine on the day of the incident such that he can no longer walk or do anything on his own without needing assistance. His wife left him due to this.

[35] He cannot sleep for even 30 minutes. His mother and sister help him go to the toilet and to bath.

[36] The wife he referred to above, was his girlfriend who left on realising that he could no longer do anything including sexual intercourse.

[37] After the incident, the plaintiff was hospitalised from February to July at Johannesburg General and then South Rand Hospital. His day to day life has changed drastically. He can no longer go out of the yard. He needs to be helped in everything and has since become withdrawn from other people.

[38] The shooting meant that plaintiff became bedridden. He earns R1900 by way of SASSA grant per month.

- [39] At the time of the incident he was a hawker and also did welding work assisting his uncle. He used to sell clothing, food, snacks etc. at Mpumalanga and Gauteng. He used to work Monday to Saturday and made R2500 to R3000. After the incident he cannot do anything anymore.
- [40] He used to stock-up in Johannesburg three times in a month spending about R5000 per instance. He would transport some of his stock to Witbank where he had someone working for him at the salary rate of R70 per day. He was spending about R110.00 return fare to transport his stock to Witbank twice every week. He was also renting a place he was staying in Alexandra at a cost of R750.00 per month.
- [41] When he was asked how much he was making per month before deductions, his answer was around R11 000.00 or R10 000.00.
- [42] It was put to him in cross-examination that his evidence has not answered how the amount of R2 500 - R3 000.00 profit was determined, on the basis of the outlay of R 5000 for stock less his disbursements in a month. His evidence on loss of earnings was thus concluded. There was no documentary or other form of corroboratory evidence provided at all in support of plaintiff's claim of having been self-employed in the informal sector.

The law:

- [43] The plaintiff bears the onus to prove his case on a balance of probabilities. He must adduce sufficient evidence of his income in order to enable the court to assess and quantify his loss of past earnings and future loss of earnings.⁴
- [44] The joint minutes of the industrial psychologists' report the projections of the plaintiff's past and future loss of earnings are based on the plaintiff's self-reported statements without any further proof or verifications whatsoever.
- [45] The actuarial calculations by Manala Actuaries and Consultants also relied on the joint minutes of the industrial psychologist which minutes simply relied on

⁴ Mlotshwa v Road Accident Fund (9269/2014) [2017] ZAGPHC (29 March 2017) para 14.

the plaintiffs self-reported statements without any proof and/or verification of the facts.

- [46] In this case, as in *Mlotshwa v Road Accident Fund* (footnote *supra*), the plaintiff's claim for loss of earnings was based on the plaintiff having been a hawker in the informal sector with no documentary or similar evidence having been adduced before the trial court. The court held as follows at para [21]:

"The court is alive to the nature of the informal sector in South Africa and that the livelihood of many of our people is dependent on generating an income in this sector. Our courts can never discriminate against members of society engaged in this sector. However, the courts cannot turn a blind eye to the duty of a litigant, where he bears the onus, to provide sufficient proof of income. The proof of such income even if based on estimates or averages, is after all, often than not, peculiarly within the knowledge only of the plaintiff. The defendant cannot be prejudiced simply on the say so of a litigant of an average income he earns per month and what remains after payments, without providing evidence as to how the average before the payments was generated. It appears common cause between the parties that there has been a past loss of income and there will in all likelihood be a future loss of earnings. However, the paucity of evidence is such that it calls upon me, in exercising the wide discretion I am afforded, to embark upon conjecture and speculation in quantifying the damages. I am not at large to do so."

- [47] In the result, the plaintiff has failed to prove his heads of damages for past loss of income and future loss of earnings.

D. FUTURE MEDICAL EXPENSES AND LIVING EXPENSES

- [48] The issue of the future medical and related costs has since been settled in the amount of R 3 187 490.00, save for the issue of contingencies to be applied.

[49] On a conspectus of all the facts of this matter, including the passage of time from the date on which the injuries were sustained to date, I am of the view that applying a contingency of 15% on this head of damages would be a fair consideration.

[50] Although plaintiff was represented by 2 counsel, the issues dealt with and attendant complexity do not in my analysis justify costs of two counsel to be borne by the defendant who is a State department.

[51] In the result, I make the following order:

- (a) The plaintiff is awarded an amount of R950 000,00 for general damages.
- (b) The plaintiff did not succeed in proving loss of earnings, accordingly, I grant **absolution from the instance** on this head of damages.
- (c) The plaintiff is awarded an amount of R3 187 490,00 being the agreed amount for future medical expenses and other living expenses. A contingency deduction of 20% is to be applied to this amount, with the resultant amount being R2 549 992,00.
- (d) The defendant is ordered to pay plaintiff's costs including costs of one counsel.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 24 August 2022

Date of Judgment: 29 March 2023

On behalf of the Plaintiff: Adv. S.J. Coetzee S.C.

With : Adv. Spangenberg.

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 29 March 2023.