THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 183/2004

In the matter between

THE ROAD ACCIDENT FUND **Appellant**

and

PETRUS JACOBUS DELPORT NO **Respondent**

CORAM: ZULMAN, VAN HEERDEN et PONNAN JJA

HEARD: 15 FEBRUARY 2005

DELIVERED: 31 MARCH 2005

Summary: Delict –personal injuries – Quantum of damages – Assessment of damages for loss of earning capacity and general damages – appeal court declining to interfere with awards made by trial court

---

JUDGMENT

ZULMAN JA

[1] The respondent is the *curator ad litem* of Helen van Rooyen (the patient). The patient suffered horrendous permanent injuries in consequence

of a motor collision which occurred on 16 January 1997. The respondent instituted an action against the appellant for the recovery of damages suffered by the patient following upon the injuries sustained by her. The Pretoria High Court (Hartzenberg J) awarded damages in the total sum of R3 616 697,57, computed as follows:

Past medical expenses	R 525 774,58
Damages for loss of earning capacity	R1 840 923,00
General damages for pain, suffering and the loss of the amenities of life	R1 250 000,00

[2] The appellant, with the leave of the court below, appeals to this court only in respect of the awards for loss of earning capacity and general damages, contending that the order made by the court below should be set aside and substituted with awards of R845 212,00 and R800 000,00, respectively. The total amount in dispute is thus some R1 445 711,00.

[3] The injuries sustained by the patient that are set out in detail in various medico-legal reports tendered in evidence (including a comprehensive report by a Dr Richard Holmes, a psychologist) are not in dispute. The appellant accepts that those injuries have rendered the patient totally disabled and that, from the date of the collision she has not been - nor will she in the future be - able to earn any income. It further accepts, as held by the court below, that the

patient's earning capacity, subject to an adjustment for contingencies, must be calculated on the basis that in 2003 she had a life expectancy of 22 years.

The patient's personal and work history

[4] The patient was born on 4 November 1960 and was thus 36 years old at the time of the collision. She matriculated in 1977, the year her first daughter was born. Her second daughter was born in 1981. Her first marriage, which was not a success, lasted some four years from 1982 to 1986. She first worked as a personnel clerk at a business called Cremart which became part of Genkem in 1985. She worked there until 1989 when she obtained a position as a personnel officer at the Rand Mutual Hospital, where she was responsible for the administration of approximately 400 workers. She remained in that position until November 1993 when, together with her present husband, she began work in a restaurant in Melville, Johannesburg.

[5] Her second marriage, which commenced in 1988, was a particularly successful and happy one. Her daughters accepted her husband as their father and he regarded them as his own children. In his undisputed evidence, her husband described the period which he had spent with the patient, before the collision, as the best nine years of his life. It is apparent from the evidence that there was a very close and loving relationship between them. They enjoyed a fulfilled and energetic life style. They bicycled and exercised together,

participated (on a competitive level) in Latin-American and ballroom dancing, and took overseas trips together. Their close bond extended into the work place and each manifested a warm enthusiasm for life and work. They enjoyed a high standard of living and each complemented the other in the skills that they brought to the workplace.

[6] According to the evidence of a friend, a certain Mrs Starck, who was a co-employee at Genkem, the patient then earned approximately R3500,00 per month and was an outstanding worker. The personnel manager at the Rand Mutual Hospital, Mr Richardt, testified that the patient, whom he regarded as an excellent worker, earned approximately R4500,00 per month whilst in the employ of the hospital.

[7] The restaurant, which the patient subsequently operated together with her husband, in his words ‘as equal partners’, could serve 250 persons at any one sitting. It was open approximately 20 hours a day and was very successful, with a turnover of approximately R2 million a year. Although they had two managers, the patient was responsible for numerous administrative tasks, including the purchasing of supplies and the maintaining of the books of accounts. She played a key role in the management and undoubted success of the restaurant business, displaying at all times a great capacity for work. The patient’s husband testified that the patient drew R6000,00 per month from the

business although this was not reflected on the books of account of the business.

[8] At the end of 1996 the patient and her husband sold their house in Johannesburg for a profit of approximately R2 million. They then purchased a house in Seaview, Port Elizabeth, where they intended to relocate. Their plan was to take an overseas holiday for a few weeks in May/June 1997 and, after their return, to purchase and operate a new business. They had already started investigating various business possibilities. Shortly before the collision, a 20% share in the restaurant business was allocated to the two managers of the business. The remaining 80% was subsequently sold to the two managers for approximately R1,2 million. After the collision the patient's husband had purchased and operated two restaurants in Port Elizabeth, subsequently selling one of them.

The accident and its sequelae

[9] The patient was rendered immediately unconscious in consequence of the collision and remained so, without any sign of movement, until her arrival at the Kroonvaal Private Hospital later that same day. The physical injuries suffered by her were a severe head injury (in association with a loss of consciousness) and widespread injuries to the chest, left wrist, pelvis, left thigh and left lower leg.

[10] At the Kroonvaal Hospital she required intubation and ventilation. She was admitted to the intensive care unit on the day of the collision and in due course various operative procedures had to be performed on her. On 21 January 2003 she was transferred to the Flora Clinic. She was again admitted to the intensive care unit where her condition was described as ‘critical and unsatisfactory’. She still required naso-gastric feeding, intropic support and ventilation via a tracheostomy. Her Glasgow Coma Scale was recorded as 6/15. She remained in the intensive care unit at the clinic until 31 January 1997, during which time she required several courses of antibiotics for a chest infection. She was then transferred to the neurological high care unit where she remained until her transfer on 27 February 1997, at her husband’s request, to the Greenacres Hospital in Port Elizabeth. The patient was subjected to further operative procedures before being discharged on 27 May 1997 to her home in Port Elizabeth, where she remained in the care of her husband, a full-time resident enrolled nurse, and a team of care assistants. After three years she was once again institutionalised in Port Elizabeth. Since 18 February 2003, the patient has been in the care of the Lily Kirschman Frail Care Unit in East London. Her daughter, Elizabeth Keulder, who testified during the trial, lives in East London and visits her twice a day.

[11] It is common cause that the patient is unable to speak; that she has no

control over either her bladder or her bowel and has been fitted with a catheter which needs to be changed every four weeks; that she is not able to swallow and is fully on a gastronomy feeding tube for all her nutritional and fluid needs; that she has little, if any, movement of the right side of her body and only very limited control of her left hand. She still suffers from headaches; abdominal cramps; discomfort of the bladder; numerous bladder infections; spastic contractions of the right arm; intermittent pain of the left hip; and general body stiffness. She, however, has no significant loss of sensory function. This means that she experiences - but has no independent means of alleviating – pain and discomfort (especially when being handled).

[12] The patient has been rendered patently incapable of any form of work. In the opinion of Dr Holmes she has suffered ‘an obliteration of her pre-morbid employment prospects, employability and potential to derive an income.’ She has been rendered profoundly disabled, is in need of twenty-four hour care and is completely dependent on the assistance of others. She is essentially confined to her bed. As such she has been denied the opportunity of any form of social interaction beyond her immediate environment and does not have any means of mobility.

[13] The patient can now communicate only through non-verbal facial expression, nodding and shaking her head, and making use of an alphabet

communication board on which she ‘spells out’ words using her left hand. Because of her limited control of this hand, communication with the alphabet board is slow and extremely laborious and only possible with people who know her very well, such as her daughter. While she could benefit from the provision of an assistive/augmentative communication device, her ability to communicate will still remain severely compromised. It should be noted that, despite the fact that the appellant was issued with a certificate in terms of s 17(4) of the Road Accident Fund Act 59 of 1996 in respect of the patient’s accommodation and medical and hospital expenses, the appellant’s handling of the matter since the trial has been such (more about this later) that the patient has not yet been provided with any of the assistive devices recommended for her use by the medical and other experts.

[14] In his report, Dr Holmes describes the patient’s neuro-psychological and emotional condition in the following terms:

‘Retention of sharpness of mind (described as “one hundred percent” by her daughter);

Some loss of memory (for a period in her life);

Good long-term memory (good recall of previous events);

Ongoing severe depression;

Feelings of extreme frustration (when being handled, showered and toileted, etc.);

Ongoing tendency to cry (emotional lability);

Ongoing good sense of humour (but inability to give expression to the same);

Having a very active mind (“trapped in her body”);

No ability to communicate (conventionally, that is) and

An acute awareness of her situation and limitations resulting in profound emotional trauma.’

[15] Put simply, the patient is a person with an alert and active mind trapped in a non-responsive body. She is completely unable to engage in the ordinary functions of life. The undisputed evidence is that, before the collision, she was a happy, dynamic and active person who enjoyed amenities such as cycling, competitive dancing and travelling. She is now clearly unable to participate in any such activities or indeed to lead anything resembling a normal life. A video recording was led in evidence depicting her present condition. Any viewer of that video tape cannot help but be deeply moved by the graphic way in which her plight is depicted thereon.

In the words of Dr Holmes:

“The psychological and emotional trauma experienced by her, on an ongoing basis, is profound – almost defying contemplation and appreciation.”

Damages for loss of earning capacity

[16] The appellant attacks the way in which the court below dealt with the patient’s past loss of earnings, the contention being that it was incorrect to find, as the court below did, that the patient would have entered the

employment market some seven months before March 1998. In my view this argument was correctly rejected by Hartzenberg J who found, on the undisputed evidence of the patient's husband as well as her daughter, that she was the type of person who was so highly motivated and industrious that she would in all probability have returned to work during August 1997 shortly after her overseas trip. That was the date used by the actuary, Mr Jacobson, in making his calculations.

[17] As regards the patient's loss of future earnings, the appellant contended that the court below erred in employing the fiction that, had there been no collision, the patient would have returned to the structured labour market. Hartzenberg J dealt with this contention in the following terms:

'Ek bevind dus dat die pasiënt 'n verlies aan verdienste vermoë gehad het. Vanweë die werklike verloop van haar beroepsloopbaan, is daar 'n hele aantal onsekerhede. Die eiser het om veilig te wees hierdie eis probeer kwantifiseer deur die pasiënt se verdienste vermoë in die gestruktureerde arbeidsmark te bepaal. Ek het reeds aangedui dat ek van mening is dat dit minder behoort te wees as wat sy waarskynlik sou verdien het deur saam met haar man besigheid te doen... Die enigste oorblywende vraag is dan of die berekening wat namens die pasiënt gebruik is, realisties is of nie. Die eiser gebruik vanaf 1 Augustus 1997 'n jaarlikse inkomste van R46 560,00. Dit is minder as R4 000,00 per maand. Sy het reeds in 1993 R4 500,00 verdien. Mnr Jacobson, die aktuaris, het vanaf 2003 toegelaat vir inflasie teen sewe persent per jaar. Hy het egter ook gekapitaliseer teen tien persent. Hy het toegegee dat sy inflasiekoers dalk te hoog kan wees maar het aangevoer dat as dit die geval

is, sy kapitalisasiekoers ook te hoog is. Hy hou vol dat die netto effek as jy die inflasiekoers en die kapitalisasiekoers teen mekaar opweeg, redelik en billik is en op die wyse waarop die getuienis aangebied is, is daar werklik geen rede om nie daardie getuienis van hom te aanvaar nie. Vanweë die feit dat daar hier met ‘n fiksie van die gestruktureerde arbeidsmark gewerk word en vanweë die feit dat die pasiënt en haar eggenoot hulle in besigheid sou bevind het, meen ek dat daar groter voorsiening vir gebreurlikheide toegelaat moet word as waarvoor Mnr Jacobson toegelaat het.’

In my view the learned judge was correct in rejecting that contention. If anything, the assumptions relied on by him redounded to the appellant’s benefit. Prior to the collision, the patient had been drawing approximately R6 000,00 per month from the restaurant business and according to the uncontested evidence of her husband, during October 2003 the restaurant manager employed by him in his restaurant in Port Elizabeth was earning, as a salaried employee (working regular hours), R 6 500,00 per month (plus certain benefits). When Mr Jacobson’s calculations were put to Dr Holmes during the trial, the latter’s view was that they were ‘very, very conservative… certainly lower than it should be’. In my view the remaining evidence supports this view. Moreover, Hartzenberg J made greater allowance for that fiction than Mr Jacobson did, by increasing the contingency factor in respect of both past and future loss of earnings from 5 to 10 percent and 15 to 20 percent, respectively. I can find no fault with his approach in this regard.

[18] The final objection to the assessment by the court below of the patient's loss of future earnings was based upon the proposition that she would have ceased working at age 55. This contention is belied by the uncontradicted evidence of the patient's husband and daughter that she would, given her disposition, in all probability have continued working at least until the age of 65. That, indeed, was the finding by the court below and there appears, on all of the available evidence, to be no basis for interfering with it.

[19] The appellant contends that any amount awarded to the patient for loss of earning capacity should be reduced in some way because she will be confined to an institution for the rest of her life and, accordingly, so the argument went, her living expenses will thereby be reduced. The court below dealt as follows with that contention:

'Ek wil net op hierdie stadium meld dat ek definitief verskil van Mnr Delport [counsel for the appellant in the trial court] wat aanvoer dat daar op 'n manier 'n vermindering van die pasiënt se skade moet wees omdat sy nou bedgekluister is en gevolglik nie meer mooi kan aantrek nie, nie kan reis nie en nie geld kan uitgee op vermaaklikheid nie. Dit lê nie in die mond van die persoon wat verantwoordelik is vir die pasiënt se toestand om 'n voordeel te wil beding vir hierdie gevolg wat myns insiens niks met die delik pleger te doen het nie.'

[20] It is not necessary to express a view on the correctness or otherwise of the learned judge's general statement in this regard. This is so as no evidence whatsoever was led by the appellant as to the nature or extent, if any, of such

savings. Nor, was this aspect canvassed during the cross-examination of the respondent's witnesses. In those circumstances, it can hardly be contended that the learned judge erred in not reducing the amount awarded for loss of earning capacity by failing to take into account alleged savings, the existence, nature and extent of which had not even been touched on in the evidence before him.

General damages

[21] I now turn to consider the award of R1 250 000,00 as general damages for pain and suffering and the loss of the amenities of life. I refer to what I have stated above in regard to the patient's obvious severe pain and suffering and loss of the normal amenities of life. In addition, the patient has effectively lost her husband as a result of the collision – he no longer visits her and is apparently planning to divorce her. His evidence in this regard was to the effect that, although he still loves her, his feelings for her are akin to that felt for a child and not a spouse. This loss of an exceptionally happy marriage relationship obviously severely exacerbates the patient's psychological and emotional suffering. This is a case where the patient is acutely aware of her pain, discomfort, profound disablement, total dependence upon others and loss of nearly all the amenities of her pre-collision life. She has to cope with that awareness for the rest of her not inconsiderable life span.

[22] It is trite that an award of general damages, falling as it does within the wide discretion of the trial court, will not lightly be interfered with by a court on appeal. The position is well summarised by HJ Erasmus and JJ Gauntlett[1] in these terms:

> "(a) ...
>
> (b) Where the assessment of the amount of damages is a matter of estimation rather than calculation, the trial court has a wide discretion to award what it in the particular circumstances considers to be fair and adequate compensation.
>
> (c) Where the amount of damages is a matter of estimation and discretion, the appeal court is generally slow to interfere with the award of the trial court - an appellate tribunal cannot simply substitute its own award for that of the trial court. However, once it has concluded that interference is justified in terms of the principles set out in (d) below, the appeal court is entitled *and obliged* to interfere.
>
> (d) The appeal court will interfere with the award of the trial court:
>
> (i) where there has been an irregularity or misdirection;
>
> (ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court;
>
> (iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made. In order to determine

[1] In the title on 'Damages' 7 *Lawsa* (reissue) (revised by PJ Visser) para 117 p 89.

> whether the award is excessive or inadequate, the appeal court must make its own assessment of damages. If upon comparison with the award made by the trial court there appears to be a "substantial variation" or a "striking disparity", the appeal court will interfere.'

[23] In my view the finding of the court below is manifestly free of any misdirection or irregularity. It carefully considered the question of general damages and motivated its conclusion inter alia with reference to the principles enunciated in *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A). Although the sequelae of the injuries sustained by the patient are more serious than those in the *Katz* case, that case is similar in many respects to the present case. In *Katz* an award of R90 000,00 was made in respect of general damages. Translated to the values prevailing at the time of the trial, the award made in the *Katz* case is approximately R1 452 000,00, which is some R200 000,00 higher than that awarded by the court below in this matter. Having said this I do not believe that courts should necessarily be wedded to previous awards, particularly those in which circumstances may differ.

[24] The matter was well put by Brand JA in *De Jongh v Du Pisanie NO* [2004] 2 All SA 565 (SCA), in the following terms:

'[64] ... die vasstelling van nie-patrimoniële skade [is] in die diskresie van die hof. By die uitoefening van die hof se diskresie is vergelyking met toekennings in vorige sake 'n

nuttige hulpmiddel omdat dit darem vir die hof die breë parameters oftewel ‘n patroon aandui waarbinne sy toekenning tuisgebring moet word. Dit is ook ‘n nodige riglyn omdat konsekwentheid in toekennings ‘n inherente vereiste van billikheid is. Nietemin bly dit steeds ‘n riglyn. Dit vervang nie die hof se diskresie met ‘n letterknegtige gebondenheid aan die aangepaste waarde van vorige toekennings nie.

[65] Die stygende tendens van toekennings in die onlangse verlede is, soos ek alreeds gesê het, duidelik waarneembaar. Die effek daarvan is egter weer eens nie met matematiese presiesheid bepaalbaar nie. Dit is nie seker presies wanneer die tendens begin het en wanneer dit sal eindig nie. Dit het bes moonlik reeds tot ‘n einde gekom. ... As die vorige beslissings wat as maatstaf dien reeds met inagneming van die stygende tendens gemaak is, kan dit nouliks geregverdig word om op grond van dieselfde oorwegings sonder enige bykomstige rede, ‘n verdere styging toe te laat. Daarbenewens verg die tendens klaarblyklik nie die vermenigvuldiging van vroeëre toekennings met ‘n voorafbepaalde of bepaalbare faktor nie. Op die ou end is die tendens maar net nog ‘n oorweging wat die hof geregverdig is om in ag te neem wanneer hy, by die uitoefening van sy diskresie, na vorige toekennings, veral in ouere sake, as riglyn verwys.’

[25] In so far as guidance is to be sought from previous awards and although the amount of R1 250 000,00, at first blush, appears high, I certainly do not regard it as excessive (“buitensporig”) as contended for by the appellant. Given the circumstances of this case, in particular the extremely serious injuries which the patient suffered and their tragic sequelae, I certainly would have awarded, as general damages, an amount which would not have differed

substantially, if at all, from the amount awarded by the court below. I accordingly see no warrant for interfering with the exercise by that court of its discretion.

The appellant's conduct after the trial

[26] Before concluding this judgment I believe that it is necessary to record what can only be described as deplorable conduct on the part of the appellant. Notwithstanding the fact that the appellant conceded that the patient was entitled to an award of approximately R1 600 000,00 in respect of loss of earning capacity and general damages, it made no payments on account of such award before December 2004. Judgment was given by the court below in favour of the respondent on 22 October 2003. Thereafter various attempts were made to obtain payment from the appellant of the admitted amounts. Those attempts were unsuccessful. The respondent was obliged to bring an application during August 2004, claiming:

1. An order that the appellant pay for the appointment of the curator *ad litem* and the curator *bonis* of the patient as well as the attendance at the trial by the curator.
2. A declaratory order confirming that the appellant was liable for 100% of the past medical costs claimed in terms of the s 17(4) undertaking given by the appellant.

3. Payment of an amount of R1 720 000,00 being partial payment of the loss of earnings and general damages awarded to the respondent.

[27] The application was opposed and an opposing affidavit raising various technical issues was filed. Before the hearing of the matter it was settled by agreement between the parties in the following terms:

1. The appellant conceded liability for the costs of the curator *ad litem* and curator *bonis*;
2. The appellant also conceded liability in respect of the payment of 100% of the patient's past medical costs claimed in terms of the undertaking;
3. It was agreed that the appellant would pay R1,6 million to the respondent pending the appeal to this court, in five monthly instalments of R320 000,00 each.

The agreed instalments of R320 000,00 were paid for the months of December 2004, and January and February 2005.

[28] When the failure of the appellant to make timeous payment of the non-disputed amounts was put to counsel for the appellant in this court, he sought time to obtain proper instructions and to thereafter file a written response explaining what, on the face of it, amounted to a shocking breach by the appellant of its statutory obligations. Subsequently a detailed written explanation and apology was filed by the appellant. The appellant apologised

‘without reservation’ for the delay that was caused in making payments and for any inconvenience and discomfort caused to the patient, her relatives and any other involved parties. It stated that the purpose of the written explanation was aimed not at ‘justifying the conduct of the Road Accident Fund but … at placing facts before the Honourable Court which are with respect necessary to enable the Honourable Court to fully understand the circumstances of the matter.’ In the result the appellant undertook to pay the balance of the amount of R1 600 000,00 before or on 28 February 2005; to reconsider the past medical expenses paid in terms of the undertaking given and to make ‘an adjustment payment’ before or on the abovementioned date; and furthermore promptly to pay any further amount ‘that may still be owing as a result of the imminent judgment’ of this court inclusive of any relevant costs, if applicable. The respondent was furnished with a copy of the explanation and apology and accepted the contents thereof. The respondent furthermore confirmed that the balance of the amount of R1,6 million had in fact been paid as undertaken.

[29] The court thanks those representing the appellant for the comprehensive and detailed explanation as well as the promptitude with which it was been furnished. The hope is expressed that there will not be a recurrence of such conduct on the part of the appellant in similar cases in the future.

Conclusion

[30] Reverting to the merits of the matter I am satisfied, in view of what I have said above, that the appeal is without merit. Accordingly the appeal is dismissed with costs, such costs to include the costs attendant upon the employment by the respondent of two counsel.

_____

R H ZULMAN
JUDGE OF APPEAL

VAN HEERDEN JA)
PONNAN JA)CONCUR