

SOUTH AFRICA / JUDGMENT

Makupula v Road Accident Fund (1635/07) [2010] ZAECMHC 17 (8 April 2010) [2010] ZAECMHC 17

COURT

Eastern Cape High Court, Mthatha

BEFORE

Z.M. Nhlangulela

CASE / FILE NUMBER

1635/07

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT: MTHATHA)
CASE NO: 1635/07
DELIVERED ON : 08/04/2010

In the matter between: NWABISA BEAUTY MAKUPULA Plaintiff
 And
 ROAD ACCIDENT FUND Defendant

JUDGMENT

NHLANGULELA J:

[1] By way of action the plaintiff claims damages in a representative capacity for payment of R2 500 000,00 against the defendant. The claim arises from a motor vehicle collision which took place on 11 June 2007 on a

gravel road situated at Zinkonzweni Location, Libode, and in which Mzuchumile Makupula, an eight years old grandson of the plaintiff, was involved.

[2] On 19 November 2008 Greenland AJ granted an order in favour of the plaintiff that the defendant was liable to compensate the plaintiff for injuries sustained by her grandson. A further order was granted that the defendant furnishes an undertaking in

terms of s 17(4) (a) of the Road Accident Fund Act, No. 56 of 1996. Consequently, this is a judgment on quantum in respect of future loss of earning capacity and general damages.

- [3] After hearing the oral evidence of Mrs Nolusapho Nontsikelelo Makupula, Mr Frederick Gideon de Kock, perusing documents which were discovered by consent between the parties and hearing arguments advanced from both sides I came to the conclusion that the issues for decision in this matter are the following:
- (a) What is the appropriate contingency deduction to be applied on the capital amount for future loss of earning capacity that was agreed to by the parties; and
 - (b) What is the appropriate award for compensation in respect of general damages for the injuries that were sustained by Mzuchumile?

I next deal with the evidence that was adduced on behalf of the parties.

- [4] Ms Makupula is the grandmother of Mzuchumile. She told the Court that Mzuchumile was five years old when he was struck by a slow moving motor vehicle on 11 June 2007 in her presence. She called her husband to the scene of accident to assist. The husband

of Ms Makupula and driver of the motor vehicle rushed the grandson to St Barnabas Hospital, Ntlaza and then to Bedford Hospital,

Mthatha. Mzuchumile would not be admitted to these hospitals as the doctors were on strike. Ms Makupula observed that her grandson

sustained abrasions on the side of the head, broke some teeth and had injuries on his mouth. He had lost consciousness for a while after the accident but regained it on his way to the hospital. The grandson bled profusely on the head and neck. According to Ms Makupula the injuries sustained by the grandson resulted in adverse behavioural effects upon him. She observed that he suffered from headaches, which occurred two times a week, he was forgetful, irritable and exhibited aggressive tendencies towards his peers and elders. The grandson was rough at play with Bandile, his younger brother, and friends. She often received complaints that he injured his friends by throwing stones at them. When she calls upon him to desist from his aggressive behaviour he often refuses to listen and reacts violently towards her. Mzuchumile was reported to her by a school teacher to be uncooperative and often refused to adhere to instructions by leaving the classroom frequently to play outside. Ms Makupula observed further that Mzuchumile tended to sleep early and was no longer able to wake up on his own in the mornings. According to the witness the new behaviour of Mzuchumile seems to be permanent. He is no longer a normal child to her ever since the occurrence of the accident.

- [5] The medicolegal reports compiled by an orthopaedic surgeon, neurosurgeon, neuropsychologist, occupational psychologist, educational psychologist and industrial psychologist confirm the evidence of Ms Makupula that, postmorbidly, Mzuchumile's abnormal behaviour is attributed to the injuries sustained in the accident. Drs Keely and du Trevou, the Neurosurgeons, state in their reports that Mzuchumile sustained significant

bruising and abrasions on the right side of the head and face. The upper incisor teeth were broken and knocked out of the mouth. They diagnosed presence of primary brain injury (the diffuse axonal injury) with

transient loss of consciousness that was followed by a rapid return to normal state of alertness. They described this as a comparatively mild form of brain injury which does not exhibit any measurable intellectual embarrassment. Due to post concussional

syndrome that developed from brain injury the child suffered headaches every 1 to 2 days in a week; but these headaches resolved

within 18 months after the accident. The child also suffered pains due to injuries he sustained for two to three weeks after the

accident. Treatment that was given to Mzuchumile was brufen and panado syrups to tone down the pain. He was treated at St Barnabas

and Bedford hospitals. He also used state clinics and private doctors.

[6] Mr Ian Meyer, the Clinical Psychologist, stated in his report that the traumatic effect of the brain injury suffered was enough to trigger altered personality functioning in the child which developed into memory dysfunction, uncooperative and aggressive behaviour and restlessness and motorical hyperactiveness. Such behaviour impacted negatively, to some degree, on Mzuchumile's

scholastic functioning and vocational potential.

[7] Mr de Kock is an Industrial Psychologist who testified on behalf of the plaintiff as an expert. He confirmed the new behavioural pattern to which Ms Makupula alluded to as being attributed to the injuries Mzuchumile sustained in the accident. He told the Court that he was assigned a task of evaluating Mzuchumile's psychological functioning to determine the extent to which injuries

sustained in the accident may have affected him educationally and vocationally. Mr de Kock states in his report that, based on the reports by Mr Meyer and Dr Keeley, the neurocognitive injuries suffered by the child can be described in the following terms:

"...Mzuchumile has suffered a mild/moderate concussive type neurocognitive disorder, of which the sequelae may still show spontaneous improvement although it is doubtful. There are strong indicators of post-traumatic ADHD, which is reflective of hypofrontality and is probably responsible for his weak scholastic performance and dismal progress. Mr Meyer recommends that he should be referred to a paediatrician for assessment with a possible view to a description of Ritalin therapy as a first line option. He further presents with prominent problems within the domain of socio-emotional or personality functioning having developed unco-operative and aggressive behaviour with an intermittent inclination towards acting out in a violent manner, which is likely to impact negatively to some degree on his scholastic functioning and vocational potential. Pivotal areas of impairment are attention, concentration, memory, complex visual perception, gestalt and coordination, executive

functions, and emotional, personality and behavioural changes”.

Vocationally, Mr de Kock assessed the preaccident history of the child and found that, premorbidly, Mzuchumile enjoyed average general intellect; upon attaining 18 years of age in 2021 he would have finished grade 12 at school,

enter ad hoc and informal labour market at 18 years in 2021. After some three years he would be absorbed in full employment as a clerical worker

performing administrative tasks until retirement at 65 years of age. Now that the accident has occurred the would exist school at grade 10 look for work for approximately 5 years and probably end up being absorbed in a full time job but at unskilled level. Mr de Kock stated that due to cognitive deficits and inhibition disorder the child would have to take up a job requiring a relatively low functioning level of intelligence with the result that he might find himself in competition with other workers of high competency that he does not have. For this reason he will have a problem with retaining employment in an open labour market.

[8] Asked by Mr Bloem, counsel who appeared on behalf of the plaintiff, to give an opinion on the amount of deductions for risk factors to be applied in the assessment of loss of earning capacity Mr de Kock stated that it would be fair to work on the basis of estimation as prepared by Dr R.J. Koch, the Actuary. The actuarial report shows that during the uninjured state the threat to Mzuchumile's career path is approximately half of 47 years (about 22,3% 25%) of working life from job entry stage at 18 years of completing grade 12 to retirement stage at age 65 years. He stated further that contingency deductions after Mzuchumile was injured, and taking into account the additional historical factors, should be double the 25% that is applicable during the state when Mzuchumile was not injured.

[9] During cross examination Mr de Kock conceded that, premorbidly, Mzuchumile had learning problems. Postmorbidly, the learning problem would have been exacerbated by neurocognitive deficits. At the injured state there is an indication that if Mzuchumile was not referred for Ritalin therapy, a remedial educational therapy, there is a possibility that his weak scholastic

performance can drop even further to curtail his scholastic progress. Ms Gumede, the Educational Psychologist, confirms in her report that the assessment of Mr de Kock that Mzuchumile would not be suited for the mainstream education post grade 12 but would fit in a special programme for learners with special education needs. Miss Andiswa Gowa, the Occupational Therapist, concurs with Mr de Kock that Mzuchumile cannot sustain employment in an open labour market.

[10] Mr Bloem informed the Court at the outset of the trial that there was a dispute concerning the admissibility of the medicolegal report of Mr de Kock. In view of the fact that Mr de Kock has testified and was cross examined by Mr Rugunanan, counsel who appeared on behalf of the defendant, it is proper that the report of Mr de Kock be admitted in evidence.

[11] In dealing with the claim for loss of future earning capacity I take cognizance of the fact that the figures as estimated by Dr Koch are admitted by both parties. The question to be answered is what contingency deductions should be applied to the uninjured and injured states of Mzuchumile. Mr Rugunanan submitted that the Court should in the exercise of its discretion find that 30% and 50% contingency deductions for the uninjured and injured states respectively should be applied because there are good reasons for such adjustments to be made. I am persuaded that the adjustment as proposed by Mr Rugunanan should be applied for the following reasons: At page 30 of the report by Mr Meyer it appears that, premorbidly, Mzuchumile's educational development profile was affected by learning problems. Mr de Kock's assessment was premised on the impact of traumatic brain injury on educational progress of Mzuchumile without taking into account the total picture of the child's developmental history. The report shows that Mzuchumile was involved in the accident, had no sibling from whom to match his development and that his parents and maternal uncles and aunts had an educational path which did not go beyond standard 9 education. Those members of the family who were employed performed work which required semiskill or no skill at all. Therefore, there will be adjustments to be applied as requested by Mr Rugunanan because Mzuchumile's profile, prior to and after the motor collision, reflected negatively on his educational and vocational success.

[12] The capital figures that were calculated by Dr Koch were R1 527 369,00 for the uninjured state and R315 741,00 for the injured state. These figures are admitted by both sides. Consequently, contingency deductions at 30% for the uninjured state and 50% for the injured state are appropriate. The final calculations to be allowed should be the following:

Uninjured Injured

R1 527 369,00 R315 741,00

Less deductions Less deductions

at 30% R 458 211,00 at 50% R157 871,00

R1 069 158,00 R157 871,00

Nett Value: R 911 287,00

[13] I now proceed to deal with the question of general damages.

[14] The proper approach to the assessment of general damages has been stated in a plethora of decided cases. In this division it was stated in the case of *Mxolisi Mngani v Road Accident Fund* Case No. 09/2008 dated 21/01/10 (unreported) (ECM) in para. [11] that:

*“It is a trite principle of our law that a court in search of an appropriate quantum for general damages must have regard to previous comparable cases. As stated by the Supreme Court of Appeal in *De Jongh v Du Pisani* [2004] 2 All SA 565 (SCA) at 682I an award made will be fair if it is consistent with previous cases of similar facts and law. However, such an approach is never applied mechanistically and a court*

has to exercise its discretion based on the peculiar facts of the case presented to it. In this regard see Benjamin N.O. v Road Accident Fund reported in Corbett and Honey: The Quantum of Damages Vol. 5, B4-205, at 207. Schoeman J referred to the cases of De Jongh and Benjamin, supra, with approval when dealing with general damages in the case of Benade, supra, in paragraphs [29] and [30]. I am bound to follow these decisions as well.”

[15] Mr Bloem submitted that a sum of R350 000,00 is an appropriate award to be made in favour of the plaintiff. He pinned his faith on the

unreported judgment of Plasket J in Nomabhadhi Princess Mbola v Road Accident Fund Case No. 625/2005 dated 30/10/2008 ((ECG). He regarded the Mbola case as being comparable to the present case in all fours. Mr Rugunanan submitted that damages should be assessed within the bracket of R150 000,00 – R500 000,00 which were awarded in the cases of Nanile v Minister of Post & Telecommunications C & H, Vol IV at A430 and Bulelwa Nonkwali v Road Accident Fund Case No. 771/2004, dated 21 May 2009 (ECM) respectively.

[16] It seems to me that the facts in the case of Mbola are comparatively similar to the facts of this case. The relevant facts in the case of Mbola are that in 2005 the victim of accident, a child of tender age, was injured when she was struck by a motor vehicle. She sustained

orthopaedic injuries in the nature of abrasions to her forehead and a concussive head injury. The head injury presented the victim with permanent neurocognitive deficits which were attributed to a mild traumatic brain injury. The court awarded damages in the sum of R300 000,00; which was reduced to R270 000,00 due to contributory negligence of the claimant. In awarding these damages the court was guided by the “modern approach” towards the assessment of general damages as adopted in Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) but doing so subject to a warning that was issued by the Supreme Court of Appeal in De Jongh, supra. The Supreme Court of Appeal in De Jongh warned against the exercise of judicial discretion in the fixing of general damages through bland reliance on the tendency towards higher awards as observed in the recent past. In terms of the case of De Jongh both a conservative award based on old cases and a higher award based on recent cases are the factors to be taken into account as the appropriateness of neither of the two awards can be measured with mathematical precision. The case of Nanile involved a 3 year old victim of a motor vehicle collision and in Nonkwali the victim was an adult female educator. The nature, duration and severity of injuries sustained by victims of accident were far more serious in Nanile and Nonkwali than the injuries sustained by the victim in case of Mbola. Although the cases of Nonile and Nonkwali do not compare favourably to the present case, I accept the submission by Mr Rugunanan that somewhere between the awards made in those cases lies and appropriate award to be applied in this case. Despite the concession made by Mr Rugunanan that the case of Mbola was the most comparable case to the present one he pressed an argument, unsupported by facts or law, that this Court should adopt a conservative approach by awarding damages at R220 000,00. To do so would be an improper exercise of discretion flying in the face of the warning that was issued by the Supreme Court of Appeal in the case of De Jongh.

[17] I agree with the words of Plasket J in paragraph 23 of the judgment in the Mbola case that a Court is enjoined by judicial authority to exercise a broad discretion to award fair and adequate compensation. To that end as Plasket J stated so eloquently in the case of Mbola, I must take into account the nature of the injuries sustained by Mzuchumile and the effect thereon on his day to day and future life expectancy including his educational and vocational prospects. Further, I must look at the broad patterns of awards made by courts in the past. I must also ensure that the compensation to be awarded reflect the changing values in our society, improvements in the standard of living and the fact that awards have traditionally been lower in this country than in many others. In other words both the patterns as observed in the application of the conservative and modern approaches to the awarding of compensation should be applied without undue emphasis of one approach above the other. In the light of these considerations I find that the case of Mbola is the closest to the present matter on the facts and law. This case bears the hallmarks of both the conservative and modern approaches

and consequently, the appropriate guide on which to award just compensation which is fair to both the plaintiff and the defendant.

[18] Mr Bloem argued strenuously that the child should be compensated for an injury to the arm at R50 000,00. There is no clear medical evidence

available to assist the Court in the assessment of compensation for a damaged arm. In my view such injury should be addressed together with other injuries that were clearly identified by expert witnesses.

[19] Consequently, a sum of R300 000,00 ought to be a fair and adequate compensation to be awarded in favour of the plaintiff under the head of general damages.

[20] On the question of costs, Mr Bloem submitted that the defendant should pay the costs of two counsel who were employed by the plaintiff to prosecute this action against the defendant. Such costs are resisted by the defendant. Mr Rugunanan contended on behalf of the defendant that costs of one counsel would be reasonable. Mr Bloem relied on the case of Nonkwali, supra at page 22, paragraph [37]. There the principles on costs applicable in a case of this nature were reiterated by Dawood J in the following terms:

“ His Lordship Mr Justice Coleman J, in Koekemoer v Parity Insurance Co Ltd & Another 1964 (4) 138 (T) at 144H-145A held that relevant considerations pertinent to whether the costs of two counsel should be awarded are as follows:

The volume of evidence (oral or written) dealt with by counsel or which he or they could reasonably have expected to be called upon to deal with;

The complexity of the facts or the law relevant to the case;

The presence or absence of scientific or technical problems and their difficulty if they were present;

Any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case;

The importance of the matter in issue, insofar as that importance may have added to the burden of responsibility undertaken by

counsel.”

Dawood J awarded costs of two counsel on the basis that the matter was complicated by the involvement of nine expert witnesses, including contrary expert witnesses, who were engaged by both parties, the damages claimed were substantial (R4,1m damages were awarded), the issues of fact and law for determination were difficult and the evidence to be adduced was scientific, technical and voluminous. In this case, the only basis on which these costs were resisted was that Mr Bloem had been involved as counsel for the plaintiff in the case of Mbola whose facts and law were very similar to those applicable in this case. He had no problems in dealing with that case and he acquitted

himself very well and was even successful in his course. Therefore, in this case Mr Bloem could have simply appeared without being assisted by Mr Sambudla; so were the contentions advanced on behalf of the defendant.

[21] I accept that all the issues that obtained in the case of Mbola are applicable in this case. It is correct that Mr Bloem appeared on behalf of the plaintiff in those proceedings. I also take into account the fact that the case of Mbola was finalized on 30 October 2008. The judgment on that case was available to Mr Rugunanan as well. However, the disquieting manner in which the defendant handled its preparations for trial is a factor that should be taken into account towards the assessment of costs. The plaintiff delivered all the reports of expert witnesses by December 2009, well beyond 19 November 2008 when the issue of liability was disposed of. From that stage, settlement of the outstanding issue of quantum could have been considered and finalized before commencement of the trial. Further, there are no contrary expert reports in this case as Professor Schlebusch, the clinical psychologists who compiled a report on the request of the defendant, confirmed the reports of Dr Keeley and Dr du Treu in material respects. The report of Professor Schlebusch was based on the information derived from the majority of the experts who had been engaged by the plaintiff including Mr de Kock. The only pretrial minute dated 07 November

2008 also shows that the defendant did not participate in a conference which had been arranged to curtail the issues towards the

settlement of disputes between the parties. The reason why those who represented the defendant refuted the veracity of the report of Mr de Kock, which was based on the reports of Dr Keeley and Mr Meyer, escapes me. In my view the defendant ought to have admitted the evidence of Mr de Kock and all other expert witnesses well before the trial date to avoid full scale preparation and engagement of two counsel in the trial. It was prudent of the plaintiff to treat her case as important and complicated, and to anticipate a trial on all the issues of the case which could only

be explained by a long list of necessary expert witnesses.

[22] On the foregoing considerations it has become clear that there were good reasons for the plaintiff to ensure that two counsel were retained. Consequently, there will be an order made that the defendant pay the costs of two counsel as well as the qualifying expenses of experts who compiled the reports on behalf of the plaintiff.

[23] In the result the following order shall issue:

1. The Defendant pay the Plaintiff the sum of R911 287,00 in respect of loss of earning capacity;

The Defendant pay the Plaintiff the sum of R300 000,00 in respect of general damages;

3. The Defendant pay the Plaintiff's costs of suit, and such costs to include the costs attended upon the employment of two counsel and the reasonable qualifying, reservation, travelling and accommodation fees and expenses, if any, of Dr R. Keeley, Mr I. Meyer, Mr P.A. Olivier, Mr G. de Kock, Ms A. Gowa, Dr du Trevou, Ms Z. Gumede and Dr R.J. Koch.

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Heard on : 24 March 2010

Counsel for the plaintiff : Adv. G.H. Bloem who appeared
with Adv. L. Sambudla

Instructed by : S Z Jojo Attorneys

MTHATHA

Counsel for the defendant : Adv. S. Rugunanan

Instructed by : Mnqandi Incorporated

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