

SOUTH AFRICA / JUDGMENT

Mdinginya v Road Accident Fund (71/07) [2008] ZAECHC 179 (29 October 2008)

[2008] ZAECHC 179

COURT

High Courts - Eastern Cape

BEFORE

Y Ebrahim

CASE / FILE NUMBER

71/07

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JUDGMENT

PARTIES:

DIBANDLELA ERIC MDINGINYA

vs

ROAD ACCIDENT FUND

Case Number: 71/07

High Court: Bisho

DATE HEARD: 30 July 2008

JUDGMENT

DELIVERED: 30 October 2008

JUDGES: Y EBRAHIM

LEGAL REPRESENTATIVES –

Appearances:

for the Applicant: Mr A G Dugmore

for the Respondent: Mr M Ndzondo

Instructing attorneys:

Applicant(s): I C Clark Inc

Respondent(s): Mlonyeni & Lesele Inc

CASE INFORMATION -

Nature of proceedings: Action for damages

Topic: Quantum

Key Words: Motor vehicle accident – general damages & loss of income – permanent disability – assessment of quantum

IN THE HIGH COURT OF SOUTH AFRICA

BISHO

CASE No. 71/07

In the matter between:

DIBANDLELA ERIC MDINGINYA Plaintiff

and

ROAD ACCIDENT FUND Defendant

Y EBRAHIM J:

Introduction

The plaintiff claims damages from the defendant in terms of the Road Accident Fund Act ('RAF Act'), No. 56 of 1996, as a consequence of the plaintiff sustaining bodily injuries in a motor collision. The claim is for future medical expenses and future loss of earnings, together totalling R721 193,00, and general damages in the sum of R250 000,00.

Application for postponement

On the trial date the matter was postponed by agreement to the following day to afford the defendant time to prepare an application for the postponement of the trial.

When proceedings resumed on the next day Mr Ndzondo stated that an application had not been prepared as he had been unable to procure the requisite supporting affidavit. The reason for this was that he had been informed by a staff member at the local offices of the defendant that it was not necessary for the defendant to furnish such an affidavit but that its attorneys were obliged to do so. Although he had pointed out that the affidavit had to be attested to by a representative of the defendant the individual would not accept this and hence he was motivating the application from the bar. Mr Ndzondo disclosed further that he only had instructions to apply for a postponement and could not to represent the defendant in a trial due to the lack of 'proper instructions'. Accordingly, if the postponement was refused he would have no option but to withdraw from the matter.

Mr Dugmore, who appeared for the plaintiff, opposed a postponement. He said that the defendant was displaying 'downright disregard' for the Court. The plaintiff was ready to proceed with the trial and desired that it be finalised. The application was improper and should be refused with costs on an attorney and client scale.

In reply Mr Ndzondo indicated that he did not have any submissions regarding the question of costs save that the Court should bear in mind that the defendant intended defending the action.

The application for a postponement was dismissed and the defendant ordered to pay costs on an attorney and client scale. Mr Ndzondo thereupon asked to be excused as his mandate did not extend to representing the defendant in the trial. This was granted and the trial proceeded on an undefended basis.

Plaintiff's case

Mr Dugmore placed on record that the parties had reached agreement on the following issues:

(1) the collision between the two motor vehicles (referred

to in paragraph 3.1 of the plaintiff's particulars of claim) occurred on 15 January 2005 on an unnamed road at the Highway taxi rank, Mdanstane; (2) the defendant would issue an undertaking in terms of s 17(4)(a) of the RAF Act to pay the costs of the plaintiff's future medical expenses; (3) the plaintiff's future loss of income amounted to R553 280,00.

In his testimony the plaintiff stated that when the incident occurred his motor vehicle was parked next to the pavement because it had a mechanical problem. He had opened the bonnet and was sitting on the radiator with his legs over the front of it and was trying to repair the carburettor. He heard a noise and saw a truck reversing towards his vehicle. Before he could jump out of the way the truck collided with his motor car, pinning his legs against the vehicle. This caused him to lose consciousness and he awoke three days later in the hospital. He had severe pain in his left leg and back as a result of the impact in the area of the knees. He experienced pain daily and had to take painkillers for relief. His one leg was now shorter than the other and he could not stand for long periods or walk long distances or run. He could not pick up heavy objects now and was no longer able to work as a backyard mechanic repairing motor cars nor could he carry on with the taxi business he had recently started.

The plaintiff's evidence established that the collision was caused solely by the negligence of the driver of the truck (with registration CKY 893 EC) and that he sustained certain injuries as a consequence thereof.

On 16 November 2005 the plaintiff was examined by Dr P A Olivier, an orthopaedic surgeon, who detailed in a medico legal report the results of his examination and the conclusions he had reached.¹ He confirmed during his testimony that the plaintiff had sustained a serious orthopaedic injury on the left side of the pelvis. This was called a Malgaigne injury. He explained that the pelvis consisted of a left and right hand hemi pelvis connected

by thick fibrous ligaments which were rigid and almost as solid as bone. When the vehicle collided with the plaintiff the energy of the impact to his left knee joint was transferred to the ligaments and, in so doing, disrupted them and shifted the left hemi pelvis

upwards.

In the opinion of Dr Olivier the plaintiff's condition was permanent. There was instability of the left midi pelvis as the ligaments would not regain normality. The plaintiff would be unable to perform work of a physical nature or carry out repairs on motor cars or drive for long periods even if he were treated with analgesics and anti inflammatory medication, physiotherapy or a corset. Getting in and out of a motor vehicle would cause him discomfort. The instability of the left midi pelvis and the development of arthritis meant he would always experience pain. Pain would be more pronounced when sitting or standing due to weight on the pelvis and this would intensify with physical activity such as bending and squatting. Standard orthopaedic practise was to treat the patient conservatively with medication to control the daily pain as surgery had been found to be ineffective. When Dr Olivier examined the plaintiff again on 15 April 2008 he observed he walked with a slight antalgic gait (in other words, with a limp) as the left leg was shorter because of the upward displacement of the left midi pelvis by 1cm.

Quantification of general damages

Mr Dugmore conveyed that his research of the case law had not revealed any cases in which an award for general damages for an injury of this nature had been made. He contended that in the absence of such guidance the Court should take account of what had been awarded for an injury to the hip as the sequelae thereof were similar to those of the injury sustained by the plaintiff to his pelvis. In the case of *Peters v RAF2* the plaintiff sustained a fracture of the pelvis and acetabulum; the prognosis there was that he would at a later stage develop osteoarthritis. Initially treatment would be conservative but five years after the collision he would have to undergo a complete hip replacement as a temporary procedure. As Mr Peters was 43 years old a revision procedure would be necessary in fifteen years time and thereafter no further procedure was anticipated for the remainder of his life. The Court awarded the sum of R180 000,00 for general damages (the present day equivalent being R231 000,00). Mr Dugmore submitted that on the basis of this award the plaintiff's claim of R250 000,00 for general damages could not be considered excessive but was conservative.

In the present case, on admission to hospital the plaintiff was placed in traction for five weeks and a 'Denham pin was inserted in the left proximal tibial area'.³ He stated that he experienced severe pain which has persisted and plagues him daily. The prognosis for the plaintiff's injury is far less optimistic than that given in relation to the injury of the claimant in the *Peters* case. According to Dr Olivier the plaintiff's condition cannot be treated surgically as such a procedure has not been successful. He considered the plaintiff's disability to be permanent and it would cause him pain and discomfort on a daily basis. The pain could be controlled with analgesics but could not be relieved completely. Due to the shortening of his left leg the plaintiff would require a pair of build up shoes for the rest of his life. He cannot stand for long periods or walk long

distances nor can he run. It was the view of Dr Olivier that he would 'be able to be a community walker and perform his normal everyday activities in and around the house'⁴ but would 'walk with a slight limp that will produce a slight degree of permanent disfigurement'.⁵

After weighing up all the circumstances, I am of the opinion that an appropriate award for general damages is the sum of R250 000,00.

Future loss of income

Dr Olivier held the view that the plaintiff's 'working capability is on a permanent basis negatively influenced' and he would not be 'able to compete in the open labour market'.⁶ There was no prospect either of him carrying on with his taxi business nor would he be able to undertake work as a motor mechanic.

Mr Dugmore pointed out that the plaintiff had testified that he earned R1 000,00 per week prior to the accident. However, the claim of R553 280,00 as detailed in the particulars of claim had been based on a weekly income of R500,00 and was therefore conservative. Furthermore, the provision for a contingency of 30% was similarly conservative as it took account of the fact that the plaintiff might be eligible for a pension prior to the age of 65 years, as was presently the case.

I am accordingly satisfied that this claim should be allowed as the plaintiff has proved that he will suffer a loss of income amounting to R553 280,00.

Costs

In the absence of cogent reasons to order otherwise it is trite that costs should follow the result. The plaintiff has succeeded in proving his claims and is entitled to an order that the defendant is liable for the costs of the action. Such costs are to include the costs of the medico legal reports and qualifying expenses, if any, of Dr P A Olivier and Dr M Tarboton, the reasonable full day reservation fee of Dr Olivier and the costs of a CT Scan, an inspection in loco, a sketch plan and photographs of the scene.

In the result, there is an order in the following terms:

1. The defendant is ordered to pay the plaintiff the sum of R803 280,00;
2. The aforesaid amount shall bear Interest at the legal rate from a date fourteen days after the date hereof to date of payment;
3. The defendant shall issue an undertaking in favour of the plaintiff in terms of Section 17 (4) (a) of Act No. 56 of 1996 to pay the costs of:
 - (a) future accommodation of the plaintiff in a hospital or nursing home, or
 - (b) the treatment of or rendering of a service to him, or
 - (c) the supply of goods to him,

arising from the injuries sustained by the plaintiff, after such costs have been incurred and upon proof thereof;

4. The defendant shall pay the plaintiff's costs of suit, which are to include the following:

4.1 costs of the medico legal reports and qualifying expenses, if any, of Dr P A Olivier and Dr M Tarboton;

4.2 costs of the CT Scan carried out on the plaintiff on or about 16 November 2005;

4.3 costs of one inspection in loco with counsel;

4.4 costs of the sketch plan prepared by Roelf Berg;

4.5 costs of the photographs of the scene;

4.6 the reasonable full day reservation fee of Dr P A Olivier;

4.7 interest on the costs at the legal rate from a date fourteen days after date of allocator to date of payment; and

5. The plaintiff is declared a necessary witness.

Y EBRAHIM

JUDGE OF THE HIGH COURT 29 October 2008

Counsel for the Plaintiff: A G Dugmore

Attorneys for the Plaintiff: I C Clark Inc

EAST LONDON

Mdinginya v RAF.CVJ

1 Medico Legal Report of examination on 16 November 2005

2 Judgment delivered on 18 August 2003, Bisho Case No. 256/2002

3 See fn 1 at p. 4

4 See fn 1 above at p. 10

5 See fn 1 above at p. 10

6 See fn 1 above at p. 11

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Prepared on 9 October 2026 · Esheria