

SOUTH AFRICA / JUDGMENT

Nkosi v Minister of Police (31446/2015) [2019] ZAGPJHC 285 (22 August 2019)

[2019] ZAGPJHC 285

COURT

South Gauteng High Court, Johannesburg

BEFORE

Sutherland

CASE / FILE NUMBER

31446/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 31446/2015

In the matter between

MDUDUZI NKOSI

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

Sutherland J:

INTRODUCTION

- [1] The plaintiff, Mduduzi Nkosi has sued the defendant, the Minister of Police, for damages arising from an unlawful shooting which shattered his right arm and the resultant permanent injury and debilitating consequences. The trial was conducted in two stages. The first stage related to the liability of the defendant and the judgment has been given holding the defendant liable in such sum of damages as shall be proven. This judgment is in respect of the second stage which addresses the computation of those damages.
- [2] There are three heads of damages to determine:
- 2.1 Future medical expenses;
 - 2.2 General damages for pain, suffering and loss of amenities of life;
 - 2.3 Future loss of earnings and loss of earning capacity.
- [3] To facilitate the determination in respect of each of these heads, the parties reached agreement not to lead any oral evidence. Factual evidence has been derived from the medical experts who submitted reports on the condition of the plaintiff. These experts have, where appropriate, given joint minutes setting out their agreements. It was agreed to use the defendant's actuarial computations.
- [4] Despite the agreement reached between the parties about merely arguing the matter from the expert reports, the counsel for the defendant sought to repudiate certain aspects of this body of evidence, eg the occupational therapists list of aids and the treatment by clinical psychologists in addition to a psychiatrist. This is inappropriate. It may be that the court has reason to reject evidence as unpersuasive, but a party is not at liberty to repudiate the basis upon which it is agreed that a matter be argued, unless the court sanctions such a retraction which has been formally made.
- [5] This issue is of significance mainly in respect of the future medical treatment. No doubts are raised about the plaintiff's physical condition, the details of which shall be recounted hereafter. In respect of the future loss of earnings, the only area of debate is the appropriate formula for contingencies to apply. In respect of general damages, there is no difference of opinion on the facts; the only dispute is the computation of a figure, having regard to comparative awards.

THE PLAINTIFF'S PHYSICAL CONDITION

- [6] The plaintiff, aged 26 at the time, was seated in his car when shot with a rifle. The shot penetrated the car door and entered his right forearm. The plaintiff is right handed. The effect was to shatter both the radius and the ulna. The extensor tendons and flexor tendons were implicated too, causing neurological damage and directly affecting the hand, which now has a permanent claw presentation. The wound, as illustrated in a photograph was a gaping mass of flesh and

bone almost the entire length of the dorsal forearm.

- [7] Initially he was hospitalised for about 9 days. Surgery was performed. A plate was inserted by screwing it over the fracture line of the radius. The comminuted ulna was aligned with a rod through the fragments that remained. The tendons were repaired. Subsequent surgery occurred to clean and debride the area of surgical intervention to address a vascular problem and associated bleeding. Subsequently it was determined that the ulna had not united appropriately.
- [8] He was readmitted to hospital a week later to deal with a skin graft, the material harvested from the upper leg. There remains a scar of significant size
- [9] Among the permanent consequences are weak hand muscles and loss of sensation over parts of the hand. This will expose him to risk of injuries because he cannot feel anything on those parts. He is exposed to risk of low grade sepsis and infections. His pinch grip is compromised. The claw deformity results in dysfunctional coordination and loss of dexterity. This impacts adversely on writing and holding utensils for eating and drinking, in dressing and for driving a

vehicle. No restoration of normal hand function is possible, though physiotherapy will likely improve utility over time.

- [10] Plastic and reconstructive surgery is recommended to address repairs to the nerves and tendons.
- [11] Degenerative osteoarthritis will occur. This can be treated medicinally.
- [12] The plaintiff suffered post-traumatic shock and presents now with post-traumatic stress disorder. He is depressed. He experiences headaches. He is socially withdrawn. He cannot shake hands with right hand which is a social embarrassment. Other agility-dependent activities like soccer have been abandoned, as much owing to his emotional status as to physical compromise.

FUTURE MEDICAL EXPENSES

- [13] Several medical practitioners attended on the plaintiff. The plaintiff took up the stance that it would accept the defendant's actuarial calculations, save for arguing different contingencies, an element which is axiomatically not the actuary's to determine. I was, subsequent to the hearing, sent a further computation by the defendant's actuary in which contingencies were suggested for each type of treatment, rather than as a globular factor. The costs included differ from the initial calculation which had been agreed between the parties would be used. Because of that reason, I ignore it.
- [14] The parties were agreed that some recommended expenses were duplicated and that these duplications needed to be identified and eliminated. This task proved troublesome because of the risk of confusion.

[15] After the conclusion of the oral hearing, it remained unclear what the parties respective positions were on the reconciliation of the several recommended medical expenses which overlapped one another. As a result, I issued a directive which provided thus:

1. Upon consideration of the submissions advanced in the oral hearing in relation to the computation of an appropriate sum to be awarded in respect of future medical expenses, it remains unclear what the position of the parties are on the exercise.
2. A further actuarial calculation based on different assumptions was furnished by the defendant upon which comment by the plaintiff is not yet forthcoming.
3. To achieve clarity the parties are directed to prepare and submit the following:
 - 3.1. A comprehensive schedule of the treatment and costs in respect thereof which each party alleges should be allowed for.
 - 3.2. The list shall table the exact treatment, the medical practitioner who recommended it, and the sum recommended. All duplications shall be eliminated from the calculation.
 - 3.3. The contingencies which each party contends should be applied, either to each item of treatment or as a globular factor must be stated, and the reason for the selection of that % being proposed.
 - 3.4. The information must be presented in a manner than enables like for like comparison between each party's viewpoint.

[16] In due course, the plaintiff predictably objected to the revised actuarial reports sent to me by the defendant. The plaintiff furthermore, as instructed by me, presented a table which resolved the overlapping recommendations and cross referenced the schedule to the expert reports.

[17] The defendant, not only did not respond by the stipulated time, but when eventually responding, did not present a rival table or offer a rebuttal to the table presented by the plaintiff. I accept the plaintiff's reconciliation table as a proper reconciliation and I reproduce it here:

SPECIALIST SURGEON EXPENSES	NUMBER	TREATMENT	AMOUNT (ZA)	DEFENDANT'S	
ACTUARIAL PLAINTIFF'S ACTUARIAL	1	Ulnar Nerve Repair	115 133 2 2	Degenerative	
Osteoarthritis Medication	142 658 4 3	Admission for Blood Transfusion	9 055 5 4	Gastrointestinal	
Naenophrage Investigation Fees	7 043 6 5	Facility and Ward Fees	3 018 7 6	Torrential Upper Gastro-	
intestinal Bleeding	99 081 8 7	Corrective Wrist and Finger Joint Surgery	12 673 9 8	Digital	
Synovectomy	16 861 10 9	Digital Joint Surgical Replacement	29 507 11 10	Prosthesis	
Modification of Vehicle to Safety Factors	78 346 13 12	Treatment of Side Effects of Analgesia	247 701 14	Sub-Total	
828 521	ORTHOPAEDIC EXPENSES	13 Conservative Treatment	222 109 21	Sub-	
Total	222 109	PLASTIC SURGEON EXPENSES	14 Reconstruction Surgery	350 000 22	Sub-Total
350 000	PHYSIOTHERAPY	15 Assessment and Treatment	889 36 16	Treatment Sessions (Initial)	
7 528	37 17	Treatment and Re-evaluation Sessions	23 471 38 18	Treatment Sessions (Long-Term)	
92 351					

39 19 Assessment and Treatment Session (Post Operation) 747 40 20 Treatment Sessions (Post Operation) 10 014 41 21 Treatment and Re-evaluation Sessions (Post Operation) 659 42 Sub-Total 135 659 PSYCHIATRIC EXPENSES 22 Medication and Psychiatric Consultations 105 079 25 Sub-Total 105 079 CLINICAL PSYCHOLOGY EXPENSES 23 Psychotherapeutic Intervention 19 965 26 Sub-Total 19 965 OCCUPATIONAL THERAPY EXPENSES 24 Occupational Therapy 18 284 28 25 Wash Mitt/Glove 773 29 26 Curved Bath Brush 6 779 30 27 Anti-slip Bath/Shower Strips 1 420 31 28 Bath Grab Bar 241 32 29 Adapted Nailclipper 896 33 30 Elastic Shoelaces 1 542 34 31 Soap Dispenser Holder 581 35 32 Button Hook/Zip Puller 542 36 33 Squeezy Toiletries Bottles 562 37 34 Shoehorn/Sock Aid 2 121 38 35 Winter Gloves 4 859 39 36 Rubber Gloves 1 104 40 37 Gardening Gloves 1 273 41 38 Stick Blender 2 663 42 39 Food Processor 3 978 43 40 Lightweight Pots and Pans 3 978 44 41 Hand-held Vacuum Cleaner (Dust Buster) 2 784 45 42 Butler's Trolley 5 361 46 43 Electric Carving Knife 1 332 47 44 Electric Can Opener 1 940 48 45 Pot and Pan Holder 1 735 49 46 Easigrip Knives 2 159 50 47 Anti-slip Cutlery Grips 2 730 51 48 Nelson Knife 6 557 52 49 Utensil/ Other Tubing 678 53 50 Jar and Bottle Opener 1 318 54 51 Kitchen Spread Board with Spikes 589 55 52 Bucket on Wheels 479 56 53 Long-handled Broom 694 57 54 Height-adjustable/Long-handled Mop 1 851 58 55 Wheeled Shopping Basket/ Bag 2 574 59 56 Steering Wheel Spinner Grip 1 121 60 57 Lightweight Wheeled Suitcase 4 470 61 58 Infant Care Items 5 659 62 59 Automatic Washing Machine/Dryer Combo 15 975 63 60 Dishwasher 10 484 64 61 Plateguard 123 65 62 Dycem Mats 226 66 63 One-handed Tray 395 67 64 Backpack/Slingbag 318 68 65 Workplace Assistive Devices 27 917 69 66 Home-based Care Services 742 059 71 67 Domestic Assistance (Current Accommodation) 148 188 72 68 Domestic Assistance (Own Dwelling Place) 355 651 73 69 Gardening or General Assistance 120 358 74 70 Maintenance 102 276 75 71 Transport and Convenience Services 270 627 76 72 Transport and Convenience Services 17 967 77 Sub-Total 1 908 191 TOTAL 3 569 524 Minus 10% Contingency 356 952.40 TOTAL 3 212 571.60

[18] The only remaining controversy is whether all the recommendations of the occupational therapists ought to be accepted as necessary. Some comment on the list provided and the thought that went into compiling the list are warranted. The impression made on me in reading this list is that every conceivable aid has been recommended, without regard to lifestyle of the plaintiff or a genuine investigation into whether he has, in the period that has elapsed since sustaining the injury, coped without these aids. In the absence of concrete evidence to substantiate a material disadvantage if these aids are not supplied, the opinion dictating the recommendations is unconvincing. Many items are ordinary household devices which would be acquired in

any event. In my view this list is nothing more than a blatant attempt to inflate the quantum of damages, conduct in which both

occupational therapists are culpable. It is an abuse of the role that medical practitioners are expected to play in litigation.

- [19] I accept that the recommendation for occupational therapy is appropriate (item no 34) R18 284.00, but for the balance, the items are wholly unsubstantiated or unconvincingly alluded to in the reports. On the premise that the plaintiff is likely to acquire some devices for strictly personal use to ameliorate the clumsiness he must experience, I shall make a lump sum allowance of R50 000.00. That sum added to the sum recommended for therapy per se, I shall round up the gross figure for occupational therapy to R70 000.00.
- [20] In my calculation the gross sum I accept for the calculation for future medical treatment is R1 731 333.00.
- [21] The appropriate contingency to be applied is argued by the plaintiff to be a 10% deduction. The defendant has suggested several contingencies, of either a lesser figure, or no contingency, in respect of different treatments. Although that approach has much to recommend itself, in my view, it is not necessary to take such a detailed approach in this case. I accept the proposal of a globular 10% contingency deduction.
- [22] The final figure for future medical treatment would therefore be R1 558 199.00. I shall round this sum off as R1 559 000.00.

LOSS OF FUTURE EARNINGS AND LOSS OF EARNING CAPACITY

- [23] The premise of his pre-morbid and post-morbid prospects are agreed as between the industrial psychologists in a joint minute. The plaintiff was in secure employment prior to the injury and had been for about five years. The job was as a stage-rigger with the SABC. His injury rendered him unfit to perform that kind of work again which was classed as medium to heavy work. On return from convalescence he retained his employment but was redeployed to perform administrative work which he continues to do four years later, at the time of the trial. He suffered no past earnings loss, save perhaps an incalculable sum for speculative overtime. His earnings have indeed increased.
- [24] The calculation of his prospects relate to two issues. First, an assessment of his career prospects within the SABC and second, his vulnerability were he to be retrenched and had to compete on the open market. He has matriculated and did a course in Human Resources. He has no other specific tertiary skills training. He could not fall back on doing work requiring a degree of manual labour, even of a light nature. He is apparently capable of administrative work of a general kind but, axiomatically, so are countless other persons who have no disability. Although paradoxically, his disability could place him on a shortlist for that very reason, it is barely an advantage. It was argued that present rumours of mass retrenchments by the SABC, ostensibly part of the fallout of grave and much publicised maladministration, should be factored into a calculation. It is not evident that his risk of retrenchment is more or less than anyone else in employment, and that factor, in my view, would be too speculative.

[25] The industrial psychologists rely on information from employees in management of the SABC. In my view, the basis of the information they adopt is thin, but in view of the consensus between the experts and my own impression of the plaintiff as an articulate and intelligent person, I am persuaded that he had prospects of advancement pre-morbidly and subject to his disability has prospects post morbidly. The shift to an administrative role is said, without substantiation, to have been charitable. Plainly, were he not capable, he could not have been accommodated nor would he have still been performing such work four years later, if incapable of giving satisfaction. The real question is whether his prospects in the SABC that existed before injury have been dented. In my view they have not; the progression from rigger to clerk has made no difference to his income. There is no information on the life span of a rigger and the notion of a career path existing at all is unsubstantiated. What is therefore the chief factor to weigh in this computation is the vulnerability if his position in SABC is lost. He clearly has reduced

scope for work. This is, therefore, a case where the compensation due is for loss of earning capacity, about which inevitably a greater degree of value judgment is present.

[26] The issue of a career path which would result in increasing earnings to a plateau of Patterson grade C2 medium quartile (R439 000.00:

2019) was agreed between the Industrial Phycologists. The base line figure with which to work is an annual salary of R323 749.00 in 2018. They respectively suggest a peak earnings to be reached at 42.5 years and 45 years, a small difference.

[27] They debate focussed on what contingency ought to be allowed. A sum of

R3 024 626.00 is suggested, as recommended by the plaintiff's Industrial Phycologist, with contingency factors of 5% pre-morbid and 55% post-morbid.

[28] The defendant's view is that reflected in the defendant's actuarial report. Two scenarios are posited, each based on the views of the parties respective Industrial Phycologists. These recommendations are not very different; with pre-injury contingency of 20% and a post-injury contingency of 35% the sums are

R1 898 270.00 and R2 027 791.00, a difference of a mere R129 521.00 or 6.8% more than the lower figure. The difference between the parties lies in the contingency factor chosen.

[29] In my view the figures presented by the defendant's actuary seem more useful. As a guideline, I take the recommendation as presented. In my view a sum rounded up to R2 million does justice to the prognostications.

[30] Accordingly, for loss of future earning capacity, I award the sum of R2 million.

GENERAL DAMAGES

[31] The sums proposed by the parties are R750 000.00 and R500 000.00 respectively. The parties referred me to several cases, none on all fours with the predicament of the plaintiff.

- [32] Many of the cases that address damages in a shooting by the police in which damages are awarded include, in the award, a portion for the injuria of detention, sometimes false arrest and the like. This matter is unlike those matters. It is more akin to the type of consideration that takes place in road accident claims, albeit that the award must still incorporate the injuria of being subjected to what must have rightfully seemed to be a murderous attack on him and the trauma that followed it. The psychological treatment prescribed has mostly to deal with the trauma of that nature which he continues to suffer.
- [33] I was referred to *Roe v RAF* [2010] ZAGPJHC 19. A sum of R600 000.00 was awarded. A 44 year old was injured, variously, whilst riding a motorcycle. The chief injuries were to the right leg. Six fractures along the length of the leg were sustained. There were also fractures of the teeth and some facial soft-tissue wounds. He underwent multiple surgery, skin grafts, and rehabilitation. There were post-operative complications and infections. It is argued that in 2019 money, the sum of R750 000.00 equates to this award.
- [34] It is plain from the account given of the plaintiff's condition that his predicament is worse than that of *Roe*. The disabled arm is a major loss of amenities that illustrates this distinction, more so than a leg.
- [35] I did not find the other references helpful in drawing a comparison. *Roe v RAF* is helpful because it contrasts the destruction of a limb. *Roe* could use his leg eventually, albeit pain persisted. The Plaintiff, here, deprived of the full use of an even more important limb, will never be free of the loss and the psychological harm is more intense. I am of the view that the sum of R750 000.00 is indeed appropriate.

CONCLUSIONS

- [36] Accordingly the Defendant is liable to the plaintiff thus:

- (1) In respect of future medical expenses:

R1 559 000.00

- (2) In respect of general damages: R

750 000.00

- (3) In respect of loss of earning capacity: R2

000 000.00

- (4) Total:

R4 309 000.00

- [37] The Order

- (1) The defendant shall pay to the plaintiff the sum of R4 309 000.00 (four million three hundred and nine thousand rand) within 30 Days of the date of this judgment.
- (2) Should payment not be made by the aforesaid date, the amount will bear interest at the rate of 10.5% per annum from 30 days after the date of this order to date of final payment.
- (3) The defendant shall pay the plaintiff's taxed party and party costs on the High Court scale, which costs will include the following:

3.1 The costs of obtaining all expert medico legal reports from the plaintiff's experts which were furnished to the defendant, namely:

3.1.1 Dr David Hatchuel (Specialist Surgeon);

3.1.2 Lee Randall (Occupational Therapist);

3.1.3 Dr M Fayman (Plastic & Reconstructive Surgeon);

3.1.4 Mr Michael Sissison (Clinical Psychologist);

3.1.5 Dr Leon Fine (Psychiatrist);

3.1.6 Dr KD Rosman (Neurologists);

3.1.7 Dr DJ Engelbrecht (Orthopaedic Surgeon);

3.1.8 Meryll Shein (Industrial Psychologist);

3.1.9 Joshua Sandler (Physiotherapist);

3.1.10 Gerald Jacobson (Actuary).

3.2 The reasonable taxable reservation, preparation and qualifying fees, if any, of the experts of whom notice was given to the defendant;

3.3 The reasonable taxable transportation costs incurred by the plaintiff in attending medico legal consultations with the parties' experts, subject to the discretion of the Taxing Master;

3.4 The reasonable taxable costs of preparing the trial bundles;

3.5 The reasonable taxable travelling costs, costs of preparing the pre-trial conferences and preparation of pre-trial minutes and the costs for attendance of pre-trial conferences of the plaintiff's attorney;

3.6 The reasonable costs of the plaintiff's attorney for preparation for trial;

3.7 Costs of counsel.

- (4) The following provisions will apply with regards to the determination of the aforementioned taxed and agreed costs:

4.1 The plaintiff shall serve the Notice of Taxation on the defendant's attorneys of record;

4.2 The plaintiff shall allow the defendant 15 (fifteen) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3 Should payment not be effected timeously, plaintiff will be entitled to recover interest at the rate of 10.5% on the taxed or agreed costs from date of allocator to date of final payment.

(5) Payment of both capital and party and party costs must be made to the Trust Account of Logan Naidoo Attorney, the details of which are as follows:

ACCOUNT NAME: LOGAN NAIDOO ATTORNEY TRUST ACCOUNT

BANK:

STANDARD BANK

ACCOUNT NO.: 000 [...]

BRANCH: BALFOUR PARK

BRANCH CODE: 009 [...]

REF.:

LN/NKO 1431/tn

ROLAND SUTHERLAND

Judge of the High Court

Gauteng Local Division, Johannesburg

Date of hearing: 20, 21 and 25 June 2019

Date of judgment: 22 August 2019

For the Plaintiff: Adv JC Pieterse

Instructed by Logan Naidoo Attorney

For the Defendant: Adv N Makopo

Instructed by the State Attorney

(Mr K Maile)

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