

SOUTH AFRICA / JUDGMENT

Nokemane v Road Accident Fund (621/2008) [2010] ZAECHGHC 24 (8 April 2010) [2010] ZAECHGHC 24

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M. Roberson

CASE / FILE NUMBER

621/2008

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 621 / 2008

DATE HEARD: 8 MARCH 2010

DATE DELIVERED: 8 APRIL 2010

NOT REPORTABLE

In the matter between

MZOLISI NOKEMANE PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

ROBERSON J

- [1] On 16 December 2005 the plaintiff was struck by a motor vehicle on the N2 freeway near Aberdeen in the Eastern Cape. He suffered a number of injuries, the most serious of which was a thoracic spinal cord fracture which resulted in permanent paraplegia. He instituted this action against the defendant for payment of his damages, alleging that the sole cause of the accident was the negligence of the driver of the vehicle which struck him. The defendant conceded liability for 100% of the plaintiff's damages and the trial proceeded on the issue of quantum only, specifically general damages and contingencies in respect of past and future

loss of income.

[2] The defendant has already paid to the plaintiff the sum of R441 410.00 for past medical and hospital expenses and a further amount under this head of R43 513.84, for the adaptation of the plaintiff's motor vehicle, was not in dispute. The defendant gave an undertaking to pay future hospital and medical expenses, in terms of s 17 (4) (a) of the Road Accident Fund Act 56 of 1996. It was also agreed that certain sums which had been paid to the plaintiff after the accident were collateral benefits and were not to be deducted from the award.

[3] Reports by several experts were admitted by agreement, and the plaintiff and two industrial psychologists, Dr. D. Steyn, the plaintiff's witness, and Ms B. Furnell, defendant's witness, testified briefly, for the purpose of handing in further

documents.

GENERAL DAMAGES

[4] In addition to the spine injury, the plaintiff suffered the following injuries:

Lacerations to the forehead

Fracture of right humerus and scapula

Fracture of right fibula

Fracture of two ribs

From the date of the accident he was treated in various medical institutions, eventually being discharged from the Western Cape

Rehabilitation Centre on 13 February 2007. Treatment included a reduction and fixation of the thoracic fractures, reduction and

plating of the humeral fracture, and a plaster cast on the tibial fracture. Unfortunately clinical notes of further treatment were scant but according to the plaintiff he was at one stage ventilated for some time and treated for a pressure sore which had developed while in hospital.

[5] The plaintiff is neurologically an ASIA B T8 paraplegic, which means that he has no preserved sensory or motor function below the mid chest. He is wheelchair bound and his condition is irreversible and permanent. He has been 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 inability to ejaculate.

[6] He presently suffers from back pain which is aggravated by prolonged sitting. His respiratory function has been diminished as a result of paralysis of the abdominal muscles. The result is that he cannot cough, sneeze or blow his nose to expel mucous and needs assistance to do so. Should he develop a severe chest infection, he would need respiratory physiotherapy. He has since the accident experienced pressure sores and will be prone in

the future to suffer from pressure sores. Further possible future conditions or complications will be osteoporosis, faecal impaction and bowel obstruction, haemorrhoids, bladder infections and stones, urinary tract infections, and inflammation of upper limb joints owing to overuse. A less likely, but potentially life threatening, future affliction is syringomyelia, which occurs when an area within the spinal cord becomes filled with fluid. All of these conditions would require some type of medical treatment, including surgery and admission to hospital.

- [7] The plaintiff is now 39 years old, and married with one child. Prior to the accident, he was a healthy, active, and motivated person, who trained at gym and ran a taxi business and, with his wife, a spaza shop, in addition to his full time permanent employment as a driver at SPP Canning. This employment came to an end as a result of the accident, and a few months after the accident he sold his taxi because the taxi business could no longer be financially sustained. His daily life now mainly consists of going to gym to train his upper body and watching television, and occasionally visiting the spaza shop which is still operating. He attends church one day a week. He is able independently to empty his bladder, by using a catheter every six hours, each process taking up to 45 minutes. He takes medication to empty his bowels onto a linen saver, and this process can take up to an hour a day. He is able to wash himself on his bed and dress himself. He currently drives a specially adapted motor vehicle and can transfer himself from his wheelchair into the vehicle, but needs another person to put the wheelchair into the vehicle.
- [8] The plaintiff has not adjusted well psychologically to his condition. When he was told that he would never walk again he felt it would be better to have died and he considered suicide. He could not accept that his life had changed so profoundly. At the rehabilitation centre he encountered other similarly affected patients and realised he was not alone in his condition and could still be to some degree independent. He had the recurrent dream that he could walk again and would wake up hoping that the dream was true. Although he goes to church, he has otherwise withdrawn socially as he does not like people whom he does not know to see him in a wheelchair. He has become more anxious for his daughter's safety, worrying that she might be hit by a vehicle. He is upset when he visits the spaza shop because he is reminded of the enormous change in his life and he believes that the fall in sales is a result mainly of his financial inability to stock the shop as he did before. He has not yet emotionally accepted his disability and as a result of his Christian faith believes that one day he will walk again. The experts used words such as 'despondent and forlorn', 'dejected', and 'depressed', when describing his demeanour at interviews. He told the clinical

psychologist who interviewed him that 'die lewe is nie lekker nie'. He has minimal sexual contact with his wife and

perceives that she no longer finds him sexually attractive because of his condition. He requires counselling sessions to assist him in emotionally accepting his condition, as well as joint sessions with his wife to restore their sexual relationship.

[9] Overall, the plaintiff's situation was aptly described by Dr. E. Baalbergen, of the UCT Private Academic Hospital Rehabilitation Unit, who said in his medico-legal report:

'Spinal cord injury is one of the most devastating injuries that can be sustained. Every aspect of the life of the spinal cord injured is affected and lifelong medical follow up is recommended.'

Merely to compare the plaintiff's former life of energy, resourcefulness and achievement, with his present life of relative immobility, dependence, daily indignities, and sadness, brings home the reality of the enormity of his loss and what he has to face in the future.

[10] Mr. Rademeyer, who appeared for the plaintiff, submitted that an award of R850 000.00 for general damages would be suitable, while Mr. Smuts, who appeared for the defendant, submitted that R700 000.00 was more appropriate. I was referred by both counsel to a number of cases where awards were made for paraplegia with similar sequelae to the present case. All the cases involved profound and irreversible changes in the lives of the plaintiffs. I will refer to four of them, which I have found to be of assistance because of their similarity to the present case and because in my view they display to some extent a pattern of recent awards for such injuries.

[11] In *Ndaba v Road Accident Fund 2002 (5A3) QOD 1 (T)*, a 35 year old man who had been a keen and successful sportsman, and who had been motivated to make the best of his life despite a disadvantaged background, was awarded R600 000.00. In *Mohalela v Road Accident Fund 2006 (5A3) QOD 3 (O)*, the plaintiff who was 40 years old at the time of the accident in 1996, and who had been in a managerial position at a mine, as well as a part-time teacher, was awarded R600 000.00. His degree of paralysis was a little less than in the present case. In *Swanepoel v Road Accident Fund 2008 (5A3) QOD 40 (NC)*, the plaintiff, a farmer and professional hunter, suffered a spinal injury resulting in, inter alia, weakness in his arms, restricted neck movement, spasticity of the legs, severely affected walking ability, sphincter and sexual

problems. His condition would worsen over time. He was awarded R800 000.00. In *Khumalo v Minister of Law and Order 1998 (4A3) QOD 131 (W)*, the most severe of all these cases, the plaintiff who was nineteen years old at the time of the accident was not only a paraplegic confined to a wheelchair, but had his legs and penis amputated. He was awarded R400 000.00.

[12] Mr. Smuts sought to distinguish *Maholela* from the present case on the basis that the plaintiff in that case enjoyed a higher socio-economic standard of living than the plaintiff in the present case. The plaintiff's standard of living and his status at work were factors taken into account by the court in *Maholela* when awarding general damages. However I do not see much distinction between the two cases. In the present case the plaintiff, with a standard five education, had not only found fixed employment but through his own entrepreneurship had successfully built up two businesses from which he earned an income and in which he took an active part. He was well regarded by his employer and the loss of this employment and his diminished roll in his businesses, especially after he had built them up, cannot be understated.

- [13] Mr. Smuts submitted that R850 000.00 would over-compensate the plaintiff, if one had regard to the award in Khumalo, a more severe case, the present value of that award being R813 000.00. I have however not considered Khumalo in isolation but also in the context of the other awards to which I have referred. Further I have had regard to the modern tendency to make higher awards, which was taken into account in *Road Accident Fund v Marunga* 2003 (5) SA 164 SCA at paragraph [34].
- [14] Mr. Smuts also submitted that the award in Ndaba was too generous. I agree that it is a little on the high side in comparison to the other cases to which I have had regard, but not to the extent that it falls outside the pattern of awards. In any event, that award is now worth R953 000.00, a considerably higher amount than the amount which the plaintiff is claiming.
- [15] Mr. Smuts also submitted that the life expectancy of the plaintiff should be taken into account. Dr. Baalbergen said in his report that there were no life expectancy figures in South Africa for the spinal injured population and he relied on an Australian study, which gave a life expectancy of 91% for such persons. Dr. Baalbergen said that provided the plaintiff had access to private medical care and the prescribed follow-up treatment, it was not unreasonable to apply this percentage in South Africa. Mr. Smuts submitted that this percentage was based on first world conditions, to which the plaintiff does not necessarily have access. There was however no contrary evidence presented to conclude that the plaintiff's life expectancy was any less than that suggested by Dr. Baalbergen, and no reason to believe that he would not have access to private medical care, and I accept Dr. Baalbergen's evidence on the plaintiff's life expectancy.
- [16] I am of the view that having regard to the above mentioned comparable cases, their varying degrees of severity and the depreciation in the value of money, an award of R800 000.00 for general damages is reasonable and appropriate.

PAST AND FUTURE LOSS OF EARNINGS AND CONTINGENCIES

- [17] A very helpful joint minute prepared by Dr. Steyn and Ms Furnell was submitted which set out agreed amounts for the plaintiff's pre- and post-morbid income and other points of agreement. I was asked to make rulings on pre- and post-morbid contingencies, after which the information would be submitted to an actuary for assessment of loss. It was not disputed that in his injured state the plaintiff will not be able to generate an income beyond 55 years of age.

SPP Canning

- [18] It was agreed that the plaintiff would not find further employment and that he would have worked until 65 years of age. His salary at the time of the accident and his salary as at 1 March 2010 had he still been employed were also agreed. Counsel were in agreement that the usual contingencies of 5% to past and 15 % to future income should be applied and I am satisfied that those allowances are reasonable.

Spaza shop – pre morbid income

[19] The joint minute reflected that the plaintiff's nett income from the spaza shop prior to the accident was R4 667.00 per month. Mr. Rademeyer suggested contingencies of 10% and 20% for past and future income respectively. Mr. Smuts suggested 50% and 60% respectively. He referred to the following factors: the economic downturn; the rise in competition (many new spaza shops have opened in the same area since the plaintiff began his business and the plaintiff acknowledged that this competition had affected the business adversely); the fact that the plaintiff's wife was prominently involved in the business and should share in the profits or be paid a salary; and the lack of evidence regarding the difference between turnover and profit. Dr. Steyn and Ms Furnell agreed that the plaintiff would, as a result of his business acumen, have grown the business and this factor in my view balances to some extent the negative factor of the economic downturn. Economic downturns are also cyclical and level out, and an economic upswing may eventually occur. The competition of other spaza shops on the other hand, is a concrete and significant

factor which in my view warrants a higher contingency than that suggested by Mr. Rademeyer. With regard to the role of the plaintiff's wife in the business, it is apparent from the reports that the shop was to some extent a joint venture, although the plaintiff appears to have financed the business and also played an active role in running the business, working after hours in the shop and regularly travelling to buy stock. I do not agree that there is insufficient evidence regarding the difference between turnover and profit. In their initial separate reports, Dr. Steyn and Ms Furnell went into a lot of detail and had regard to a lot of documentation in assessing the income from the shop and I see no reason not to accept that the amount they eventually agreed was, as they referred to it, the plaintiff's nett income. Taking into account all these factors, I would allow a contingency of 15% to the past pre-morbid income and 25% to the future pre-morbid income.

Spaza shop – post-morbid income

[20] The plaintiff's current nett income from the shop was agreed in the joint minute as R2 500.00 per month. This drop in income from before the accident is most probably a result of increased competition from other spaza shops and the plaintiff's inability to purchase stock as he did before. The contingency for competition is therefore already incorporated in this current income. Mr. Rademeyer suggested a contingency of 25% for past post-morbid income because of the recent economic downturn. Mr. Smuts' submission regarding the role of the plaintiff's wife remained the same, but post accident her involvement in the shop has been significantly reduced because she has had to care for the plaintiff, as well as look after their young child. The business employs two assistants who are paid salaries. I think that Mr. Rademeyer's suggestion of 25% for past and 20% for future post-morbid income is fair and reasonable.

TAXI BUSINESS

[21] The joint minute recorded a pre-accident profit of R3 500.00 per month and counsel were agreed that contingencies of 10% and 20% to past and future income respectively were appropriate and I am in agreement.

FUTURE ENTERPRISE

[22] Dr. Steyn and Ms Furnell were agreed that in addition to running the shop the plaintiff would probably start another commercial venture in the future. Dr. Steyn was of the view that such venture would be an extension of the existing spaza shop or another similar business, and Ms Steyn was of the view that the plaintiff could start another taxi business. Whatever the enterprise, they were agreed that the nett income would be R1 500.00 per month, and the earliest commencement date of the enterprise would be 1 January 2011. Counsel were agreed that a contingency of 20% should be applied to income from this enterprise and again I am in agreement.

ORDER

[23] Before making an order, I mention that the trial was set down for hearing on 8 March 2010 and commenced on 9 March 2010. The defendant made an offer of settlement on 9 March 2010. There was no dispute that the plaintiff was entitled to his costs of the action up to and including that date.

The following order is made:

23.1 The defendant is to pay to the plaintiff the following amounts:

R800 000.00 for general damages

R43 513.84 for past medical expenses

23.2 The defendant is to provide the plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996, in respect of future hospital and medical expenses.

23.3 The following contingencies are to apply to loss of income:

SPP Canning income: 5% on past income and 15% on future income

Spaza shop pre-morbid income: 15% on past income and 25% on future income

Spaza shop post-morbid income: 25% on past income and 20% on future income

Taxi business pre-morbid income: 10% on past income and 20% on future income

New enterprise: 20% on future income

23.4 The defendant is to pay the plaintiff's costs of the action on the party and party scale, up to and including the costs of 9 March 2010, which costs include the travelling and accommodation costs of the plaintiff's attorney, advocate and expert witness Dr.D. Steyn, as well as the qualifying expenses of the following expert witnesses:

Dr. E. Baalbergen

Ms E. Wakefield

Ms M. Fourie

Dr. I. Breytenbach

Dr. D. Steyn

Mr. T. Schkolne

The plaintiff's wife, Mrs. Veronica Nokemane, is declared a necessary witness.

23.6 In the event of the parties reaching agreement on the amounts for past and future loss of income, leave is granted to approach this court to make such agreement an order of court. In the event of the parties not reaching agreement on the amounts for past and future loss of income, or any issue of further costs, leave is granted to either party, on notice to the other party, to approach this court for leave to reopen his case with a view to the resolution of any such dispute.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

Plaintiff: Advocate H. Rademeyer instructed by Van Der Spuy, Cape Town, c/o Neville Borman & Botha, Grahamstown.

Defendant: Advocate F.J. Smuts, instructed by Edward Nathan Sonnenbergs, c/o Nettelton Attorneys, Grahamstown.

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