



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

Date: 10.06.2020

Signature: _____

CASE NO: 81278/15

In the matter between:

DERRICK MBOKAZI

Applicant

and

MINISTER OF POLICE

1st Defendant

THABO EVANS MOHALE

2nd Defendant

JUDGMENT

BHOOLA AJ :

Introduction

[1] The Plaintiff, an adult male born on 5 November 1980, claims damages for injuries he sustained on 15 October 2012 as a result of being shot in the leg by the second defendant, a police officer employed by the first defendant. The merits have been previously settled 100% in favour of the plaintiff. By agreement between the parties, the matter proceeded before me only on the issue of quantum. Counsel's submissions, following filing of written heads of argument, were heard via videoconference as per the Judge President's Consolidated Directive of 11 May 2020.

[2] It is common cause that the plaintiff was shot by the second defendant and suffered a fracture of the right tibia and fibula. The bullet entered the right distal leg anterior laterally and exited the right distal leg medially. The plaintiff was then treated at Middelburg hospital where he is recorded as having received the following treatment:

- 2.1 Clinical and radiological examination;
- 2.2 Debridement right leg and external fixator right tibia - external fixator removed 20 July 2013;
- 2.3 Above knee POP right lower limb from 20 July 2013 for 6 weeks;
- 2.4 Pain and anti-sepsis management;
- 2.5 Crutches, physiotherapy and rehabilitation.

[3] In his amended particulars of claim the plaintiff claimed damages in the amount of R 7 116 525-00 made up as follows:

- 3.1 Future Medical Expenses: R 1 896 983-00
- 3.2 Past Loss of Income: R 1 054 641-00
- 3.3 Future Loss of Income: R 3 664 901-00
- 3.4 General Damages: R 500 000-00

The issue in dispute

[4] The plaintiff's injuries are not in dispute and defendant's counsel agreed that the injuries would affect the plaintiff's employment potential in that he will not be able to perform his pre-injury work. The only issue between the parties was the

contingencies to be applied to determining plaintiff's future loss of income as well as the determination of general damages.

Expert evidence

[5] The Plaintiff instructed and filed reports from the following experts: Dr Peter Kumbirai (Orthopaedic Surgeon); Ms Tebogo Matsape (Occupational Therapist); Ms Lowane-Mayayise (Industrial Psychologist); Mr Robert Kock (Actuary) and Johan Potgieter / Gustov da Silva (Actuary). The Defendant instructed Dr Rangongo (Orthopaedic Surgeon); Mr Simon Moraka Baloyi (Occupational Therapist); and Ms Talia Tulmad (Industrial Psychologists) and filed their expert reports. Joint minutes were also prepared by the relevant experts.

[6] By agreement between the parties the joint minutes and expert reports were admitted into evidence and no further evidence was led. In their joint minutes the Orthopaedic Surgeons agreed that the plaintiff sustained a fracture of the right tibia and fibula as a result of a gunshot wound. They recorded that the plaintiff is presently complaining about pain in the right leg, which is exacerbated by prolonged standing, walking and lifting heavy weights, he is not able to run due to pain and has recurrent discharges on the right heel on medial and lateral. The plaintiff is said to also suffer from post-traumatic stress disorder and panics when he sees a gun. The experts also noted the right short limb gait, 10° varus distal irregular right tibia thickened cortex medially, right ankle swelling as evidenced by intermalleoli circumference of right 30cm and left 28cm, dorsiflexion right ankle 7° and plantar flexation right ankle 12°. Both experts confirmed that the plaintiff was treated with debridement of the right leg and external fixator which was removed after nine months (on 20 July 2013), was in plaster of paris (POP) for 6 weeks, and that X-rays taken showed a malunion of the distal right tibia and fibula with 15 degrees lateral angulation with bullet fragments at the fracture site, in other words, long term to permanent right leg impairment. Both doctors agree that the plaintiff will require debridement of the right leg and corrective osteotomy to correct the malunion to prevent the chance of developing osteoarthritis and to correct the 2-plane deformity. Their joint minutes also note that the plaintiff informed Dr Kumbirai that he was a

carpenter for a contractor, and worked on fitting doors, wall units and roofing. He informed Dr Rangongo that he had in service training for carpentry. His job involved prolonged standing, walking, climbing of ladders and lifting of heavy weights. He never went back to work on carpentry projects because of pain in the right leg. He has been unemployed since.

[7] In their Joint Minutes the Occupational Therapists note that the plaintiff was 34 years old with grade 10 level of education when they conducted their assessments. He reported to Mr Baloyi that he was employed as a General worker for his uncle's carpentry shop at the time of the accident. He reported to Ms Matsepe that he was self-employed and working as a painter. He never returned to his pre-accident job and he is currently unemployed. Considering the injuries sustained and indicated prognosis, they agree that the plaintiff is best suited for sedentary categories of work with additional restrictions to positional tolerance. They further note that he is not suited for work falling within the light, medium, heavy or very heavy categories, given his mobility restrictions, load handling restrictions and limitations with functional position. They agree that his ability to return to his pre-accident work is compromised as a result of the incident and that he presented with residual limitations, which may affect his work capacity. Furthermore, they note that he is an unfair competitor and will remain a vulnerable employee within the open labour market. They conclude that his vocational prospects have been significantly affected by the incident and he will continue to remain limited into his future. They noted that the plaintiff presents with psychological problems, which may have a negative effect on his interpersonal relationships within the working environment with his colleagues, as well as other social participation settings. This is expected to negatively impact on his occupational performance and future job opportunities if left untreated.

[8] The Industrial Psychologists in their joint minutes state that the time of the accident he was working as an unqualified carpenter and doing roofing. He reportedly earned R 7 000 per fortnight. No proof of income was provided as per their request. The experts therefore stated that they defer to factual information in

this regard. They agree that considering his level of education, career history as well as age as at the time of the incident, the plaintiff would have most likely managed to continue to maintain gainful employment as an unqualified carpenter. Growth in his earnings would have most likely been a result of annual inflationary growth until age related retirement. They agreed that he would have been able to work until retirement at the age of between 60 and 65. They agree that it is evident in the expert reports that the incident in question has a major restrictive impact on his physiological functioning and thus, change in work capacity is indicated. The experts agree that the right tibia and stiffness of the right ankle will limit his choice of employment as jobs which require prolonged standing and walking will aggravate his symptoms. It is therefore their opinion that the plaintiff is unable to resume employment post-accident. Re-entry onto the labour market is also considered highly unlikely. He is thus considered highly likely to remain out of gainful employment for the most part of the remainder of his life.

[9] In regard to the plaintiff's post incident functioning and earning potential, plaintiff's counsel submitted that at the time of the shooting the plaintiff was employed as unqualified carpenter and was also installing roofs. He has never resumed his employment post incident and remains unemployed since then. Dr Kumbirai (the plaintiff's Orthopaedic Surgeon) states that the pain in the right tibia and stiffness in the right ankle will limit his choice of employment as prolonged standing and walking will aggravate his symptoms. In such jobs his estimated decrease in work capacity is at 20%. Ms Matsape, the Occupational Therapist appointed as plaintiff's expert, states that the plaintiff is currently presenting with 'severe limited ROM of right angle, poor muscle strength and endurance and complaints of pain'. She also reported that he never returned to his previous job due to the injury sustained. Ms Matsape reported that based on the plaintiff's test results, the plaintiff would qualify for sedentary employment but she further stated that a sedentary type of job will be compromised due to his level of education. It is her opinion that the plaintiff will not compete fairly in the open labour market type of occupation and that he remains a vulnerable individual within the open labour market after the gunshot. Dr Rangongo, the defendant's expert (Orthopaedic

Surgeon) states that, the plaintiff has a malunion of the tibia with unacceptable angulation. He further states that the plaintiff has a long term to permanent right leg impairment. The Occupational Therapist for the defendant, Mr. Baloyi, states in his report that the plaintiff presented with increased pain in the leg when climbing the stairs or standing for a prolonged period. He further states that the plaintiff will be able to compete in an open labour market in sedentary work only, with some accommodation such as taking breaks in between and the implementation of ergonomics to his work. His ability to compete within the open market is compromised by his use of walking aids and age.

Loss of earnings

[10] The general approach in the assessment of damages for loss of earnings has been restated in a number of decisions. In the matter of *Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)* at page 113 G-I Nicholas JA explained the approach as follows:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award. ... In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an

actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

[11] The Supreme Court of Appeal in the matter of *De Jongh v Du Pisane* 2004 5 QOD J2-103 (SCA) found that contingency factors cannot be determined with mathematical precision, and that contingency deductions are discretionary.

[12] In the matter of *AA Mutual Insurance Association v Maqula* 1978 (1) SA 805 A, the Supreme Court of Appeal, having regard to the precarious employment circumstances of the plaintiff, held that contingencies should be fixed at 50% in respect of past loss of income as well as future loss of income.

[13] Plaintiff's counsel however submitted that applying the 50% contingency deduction decided in *Maqula* would be too extreme. The plaintiff's employment prospects pre-accident would have been much better in comparison taking into account the level of skills and qualifications needed for his particular trade as compared to the plaintiff in *Maqula*. He is employed in the informal sector and *Maqula* involved a chef employed in the formal sector. In these circumstances, plaintiff's counsel submitted that a 30% contingency post injury and 30% pre injury should be allowed. This would constitute a total loss of earnings at R 3 628 385.60.

[14] The plaintiff alleges that he was employed by Maduna construction, but there is no evidence provided as to his status or his earnings pre-accident. Defendants' counsel submitted therefore that, insofar as he stated that he was self-employed for part of the time, if he indeed owned his own business at least a record of all monies coming in or a bank statement would be available but in his case there is none. Thus, while the injuries sustained by the plaintiff are severe and have affected him negatively in the labour market, counsel was not convinced about the nature of his employment and the amount he was allegedly earning. Counsel noted that even the Industrial Psychologists deferred to proof of income, and noted that it was not

forthcoming.

[15] Counsel submitted that the basis of the plaintiff's loss of income is baseless without proof. However, despite this counsel said she would accept that his income may be used as an estimate of his earnings before the accident, but submitted that a contingency deduction of 50% should be applied.

[16] In this regard counsel submitted that the authorities are clear that where there is no proof of income a contingency deduction of up to 50% may be applied and also made reference in this regard to *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805. The court also stated that the law is settled in that a trial court has a wide discretion to award what it considers to be a fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*.

[17] Counsel submitted that since actuarial calculations were done without any proof of income whatsoever the court was required to bear this in mind when coming to a decision on how much the plaintiff should be compensated with. Hence, it was submitted that the amount should be R 2 650 329.50 with 50% contingency applied as per the following calculation:

Actuary calculations of loss of earnings based on the joint minutes

	Past income	Future income
Income if incident didn't occur	R 1 518 507.00	R 3 782 152.00
Minus 50% contingency	R 759 253.50	R 1 891 076.00
Income given incident did occur	Nil	Nil
Total =	R 2 650 329.50	

[18] Having considered the evidence and submissions of counsel, I agree with defendants' counsel that the application of a 50% contingency is appropriate in circumstances where the employment of the plaintiff was precarious and his income unproven. Thus, an award in the amount of R 2 650 329.50 would be fair and reasonable compensation for the plaintiff in respect of his loss of earning capacity.

General damages

[19] The assessment of general damages is a discretionary function of the court which has been described in the matter of *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at page 169 E-G thus:

“This Court has repeatedly stated that in cases which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises, a trial Court in considering all the facts and circumstances of the case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party....”

[20] The exercise of the discretion referred to above is not always an easy task. In this regard in the matter of *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at paragraph 17 the court put it thus:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that...”

[21] Defendant's counsel submitted that an amount of R 280 000. 00 should be paid as compensation in respect of general damages, based on the following authorities, which counsel submitted are more consistent with the plaintiff's injuries and *sequelae*:

Yende v General Accident Versekeringsmaatskappy 1994 4 C&B E5 -21

A 52-year-old male Cleaning Supervisor suffered injuries including comminuted open fracture of right tibia & fibula; lacerations & abrasions to head, eyebrow, upper lip, thumb, right shoulder & left leg. The *sequelae* included operations performed & several to follow; recurring sepsis; extensive skin graft; realignment of tibia; osteoarthritis present & expected to recur; possibility of losing leg; permanent

disablement; shortening of leg a prospect as well as chronic arthritic pain in right leg; stiffness of small joints in right foot & signs of vascular impairment. He was originally awarded R 40 000.00 (2020 value R 179 224.00)

Oliver v Marine & Trade Insurance 1961 1 C&B 478

A 20-year-old male apprentice cabinetmaker suffered compound fractures of the right tibia and fibula. He was out of first team soccer for 20 months. *Sequelae* included that the area was not healing well necessitating skin grafting operation; bone not uniting properly requiring future correcting operation; pain & suffering 3 times more than an ordinary broken leg. The original award was R 2050.00 (2020 R 197 483.33).

Malope v RAF 2003 5 C&B E4 - 7

An adult male suffered amid-shaft fracture of right tibia with effusion of right knee joint; concussion; laceration of scalp & abrasions of elbow & wrist. The *sequelae* included: reduction was unsatisfactory and another operation was performed; plaster cast; bone graft; hospitalised for 6 weeks; non-union of fracture; chronic sepsis. He was awarded R 90 000.00 (2020 value R 213 000.00).

Nomeka v AA Mutual Insurance. Ass. 1974 2 C&B 607

A 22-year-old male labourer suffered comminuted fracture of tibia & fibula. The *sequelae* included injuries turning septic & discharging through plaster cast; further debridement operation; subsequent bone graft; out of action for 4 months & fortunate not to lose limb; limp, bowing and restriction of movement of ankle; unable to continue top level rugby and professional boxing. He was awarded R 4000.00 (2020 value R 272 000.00).

Sekgota v SA Railways & Harbours 1974 2 C&B 410

A 35-year-old female domestic worker suffered a tibia fibula fracture with complications and knee affected. *Sequelae* included six operations including removal of bone fragments & draining of tibial bone abscesses; tibial fracture first fixed with a Miller plate and thereafter Steinman Insurance; long periods of

hospitalisation; permanent shortening; 20 degree loss of flexion of left knee. She was awarded R 4000.00 (2020 value R 272 000.00).

[22] Plaintiff's counsel cited the following case law in respect of general damages awarded to an adult male with gunshot wounds on the leg:

In *Ndzungu v Road Accident Fund (790/2008)* [2010] ZAECMHC 9 (1 April 2010), a 70 year old male suffered a comminuted compound fracture of the tibia with associated fibular fracture. Malunion of the fracture of the tibia and fibia with angulation resulting in 3cm shortening of the leg. Plaintiff was no longer able to walk long distances and walk with a limp and a crutch to aid ambulation. The court granted general damages in the sum of R 220 000-00.

In *Kubayi v Road Accident Fund 2013 (6E4) QUO 27 (GNP)*, the plaintiff, an adult male, suffered an open fracture of the distal tibia and fibula. As a result of external fixation, he developed infection in the area. His physical impairment included: pain in his left ankle exacerbated by prolonged static positions or repetitive movement, strenuous rigorous activity as well as hot weather; loss of functional range of movement in the left ankle; swelling of the left ankle and muscle atrophy of the left foot; leg length discrepancy of approximately 1.5cm; scar on the left leg which partially conceals a healing wound; decreased rate of performance in walking and stair climbing. The court in 2013 awarded general damages to the value of R 300 000-00, which adjusted for inflation was submitted to be R 427 000-00 today.

[23] Having considered the authorities relied upon, I am of the view that the plaintiff's loss of amenities of life and pain and suffering are more in line with *Kubayi v Road Accident Fund 2013 (6E4) QUO 27 (GNP)*. I therefore agree with the plaintiff's counsel that fair and reasonable compensation for the plaintiff's general damages would be an amount of R 400 000 00.

Order

[24] Accordingly, I make the following order: -

1. The Defendant shall pay to the Plaintiff's attorney the following sum in respect of the Plaintiff's claim arising out of an incident that occurred on 21 April 2015, and in which the Plaintiff was injured:

General damages: R 400 000.00

Loss of earnings: R 2 650 329. 50

Future medical expenses = R 78 114.00 TOTAL: 3 128 443.50

2. The Plaintiff nominates the following trust account: RS Tau Attorneys Trust Account Number 4075832238, ABSA Bank, Branch code: 632005, as his account into which this amount must be paid, reference: CIV0021.

3. If the Defendant defaults to pay the amount stipulated in paragraph one within 14 days of this order interest will run on the outstanding amount to be calculated at the rate of 10,25% per annum from date of judgment to date of final payment.

4. The Defendant shall pay the Plaintiff's party and party costs on the High Court scale either as taxed or agreed for the 26/05/2020 and up until to date which costs will *inter alia* include but not be limited to:

4.1 The cost of senior/ junior counsel.

4.2 The costs consequently in the preparation of and obtaining the medico legal and actuary reports and joint minutes/addendum reports that were served on or provided to the Defendant.

4.3 The reasonable taxable preparation, qualifying and reservation fees, if any of the Plaintiff's experts for trial of whom notice was given to the Defendant.

4.4 The reasonable taxable costs of necessary consultations with the said experts and the reasonable taxable traveling, subsistence and accommodation costs of the Plaintiff for attending the medico legal examinations, subject to the

discretion of the taxing master.

4.5 The reasonable taxable costs of traveling accommodation and traveling time of the Plaintiff's attorney on an hourly rate for taking the Plaintiff to all medical appointment/examinations of the experts.

4.6 The reasonable taxable traveling, subsistence and accommodation costs of the Plaintiff for attending court via video conferencing.

5. The party and party costs on the High Court scale either as taxed or agreed shall include any costs attendant upon obtaining of payment referred to in paragraph 1 above, subject to the following conditions:

5.1. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

5.2 The Plaintiff shall allow the Defendant 14(Fourteen) court days to make payment of the taxed costs.

6. There is no contingency fee agreement.



U Bhoola
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Appearance:

For the Applicant: Adv M.M Mojapelo

Instructed by: R S Tau Attorneys

For the Defendants: Adv B. Nodada

Instructed by: State Attorney (N Qongqo)