

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA


CASE NO: 70721/2009

In the matter between:

FRANCISCO THOMAS JUSCILINO NHAMBE

Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE. <del>YES/NO.</del>	
2. OF INTEREST TO OTHER JUDGES: <del>YES/NO.</del>	
3. REVISED	
10/11/10 DATE	 SIGNATURE

ROAD ACCIDENT FUND

Defendant

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JUDGMENT

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Tuchten J:

- 1 The plaintiff claims damages for bodily injuries under the Road Accident Fund Act, 1996 as amended, resulting from a collision which occurred on 23 March 2009 between the bakkie he was driving and the trailer of a truck which turned in front of him.
- 2 I was informed by counsel at the start of the trial that the merits of the plaintiff's claim have been resolved 80/20 in favour of the plaintiff. This

is important, as I shall show later. The trial was conducted on the basis that all that was in issue before me was the quantum of general damages and damages for loss of income respectively. The parties agreed before the trial that no *viva voce* evidence would be led and that I should have receive the various expert reports obtained by the parties on the basis that their contents were admitted as the truth

- 3 The trial began in an unusual fashion: the defendant applied, through its counsel, for a postponement of the trial on the basis that the defendant wished to change its counsel and to have the plaintiff further assessed by medical experts. When I asked counsel why the defendant wished to change counsel, he could not tell me, even though his attorney was sitting in court next to him. When I pointed out to counsel that the defendant had instructed an orthopaedic surgeon, Dr F Liebenberg, who had examined the plaintiff on 28 July 2010 and had provided a report on the same date and asked why the defendant wished to have the plaintiff further assessed, counsel could not answer me. I refused a postponement. Counsel for the defendant then told me that he and his attorney intended to withdraw but asked for the matter to stand down so that he or his attorney could contact the defendant. After a short adjournment granted for this purpose, I was told that counsel and the attorney would continue representing the defendant. The trial proceeded.

- 4 Arising from the collision, the plaintiff was severely injured. He sustained a neck injury, for which a cervical collar was fitted, a fractured left femur, a chest injury and a left knee injury. He underwent two operations on the left femur and physiotherapy and was seen in follow up.
- 5 When the plaintiff saw Dr Liebenberg shortly before the trial, he complained, in relation to his cervical spine injury, of pain on rotation of the cervical spine (for which analgesics gave relief) frontal headaches, pain sometimes present in the left arm, pain to the sternum on rotation to the right and that his symptoms had not improved since the collision.
- 6 In relation to the left femur, he complained of constant pain, especially round the knee area for which analgesics gave no relief, inability to work, inability to sleep on his left side, inability to lift his leg or straighten his knee, a need to use a crutch permanently to walk and a shortening of the left leg. He told Dr Liebenberg that there had been no improvement in his condition in this regard since the collision.
- 7 In relation to the left knee, he complained of constant pain, difficulty and pain when straightening the knee, inability to squat or kneel or do

his work and difficulty in dressing and doing domestic jobs around the house.

8 Dr Liebenberg found that the left femur was 6cm shorter than the right femur with muscle wastage and a reduction of muscle power and that the plaintiff walks with a pronounced limp using crutches

9 Before the collision the plaintiff worked as a fitter and turner, doing hard manual work. As a result of his injuries the plaintiff cannot return to work as a fitter and turner. At best he can perform light sedentary work. Having regard to the standard of education he achieved, he has thus probably lost the whole of his capacity to earn a living and provide for his wife and children.

10 The plaintiff was born on 24 April 1972. He lives in Gauteng but his wife and five children live in Mozambique. He passed Std 7 in 1896 but dropped out of Std 8 because of financial problems. He is a certificated artisan and has a driver's license.

11 The evidence demonstrated that the plaintiff is unlikely ever again to obtain gainful employment. The parties were agreed that he must therefore be assessed on the basis that he has no prospects of future employability.

- 12 Some rather superficial submissions were made during argument regarding the changes to the law brought about by the Road Accident Fund Amendment Act, 19 of 2005 (to the extent that s 6 of the Amendment Act amended s 17 of the principal Act) and the Regulations to the principal Act made by the Minister of Transport and published by notice R.770 in GG 31249 dated 21 July 2008. However, the defendant has not placed in issue before me any issues of liability. Those issues, as I have said, were resolved before the trial started 80/20 in favour of the plaintiff.
- 13 The Amendment Act, published in GG 28374 on 5 January 2006, came into effect on 1 August 2008 pursuant to a proclamation to that effect, R.29 of 2008, published in GG 31249 dated 21 July 2008.
- 14 The regulations too came into operation<sup>1</sup> on 1 August 2008. Under reg 8, the Regulations do not apply to any claim for compensation in respect of which the cause of action arose prior to the date on which the Regulations came into operation. As the plaintiff's cause of action arose on 23 March 2009, the Regulations apply to his claim.
- 15 The parties further placed before me by consent, the reports of two actuaries. Dr Koch and Mr Loots, an employee of a company called

Independent Actuarial Consultants (Pty) Ltd. In fact two reports of Dr Koch, who received his instructions from the defendant's attorneys were submitted, both dated 5 November 2010. The two reports by Dr Koch yield different results because in the one the assumption was made that the present capitalised loss in each year, net of general contingencies taken into account by Dr Koch in accordance with his instructions from the defendant's attorney, was R160 000 while in the other the figure was calculated on an equivalent sum of R167 000.

- 16 The figures of R160 000 and R167 000 were used because under s 17(4)(c) of the principal Act, as amended, limits a plaintiff's claim for loss of income to a capped amount to be determined on accordance with the Act and the defendant's attorney was unsure which figure should be used for the cap.
- 17 In the report of Mr Loots, similarly obtained by the defendant's attorneys, the calculations are similarly made on the basis of capped figures of R160 000 and R167 000.
- 18 Very confusingly, the reports of Dr Koch, on the one hand, and Mr Loots on the other, yield different results. No attempt was made in argument to explain why I should prefer one actuarial calculation over

another. I therefore have no option but to accept the lower calculations which are those of Mr Loots.

19 The issue I was asked to decide in relation to loss of income was first, what the cap to the plaintiff's notional income should be in accordance with s 17(4)(c) of the Act, as amended, and second, what contingencies ought to be applied.

20 Section 17 of the Act as amended reads as follows:

The Fund or an agent shall-

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided

that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

- (1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.
- (b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974).

2) .....

[Sub-s. (2) omitted by s. 6 of Act 19 of 2005.]

- (3)(a) No interest calculated on the amount of any compensation which a court awards to any third party by virtue of the provisions of subsection (1) shall be payable unless 14 days have elapsed from the date of the court's relevant order.
- b) In issuing any order as to costs on making such award, the court may take into consideration any written offer, including a written offer without prejudice in the course of settlement negotiations, in settlement of the claim concerned, made by the Fund or an agent before the relevant summons was served.
- (4) Where a claim for compensation under subsection (1)-
  - a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate-

- (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
- (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d), in accordance with the tariff contemplated in subsection (4B);
- b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon;
- c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding-
  - (i) R180 750 per year in the case of a claim for loss of income; and

[Sub-par. (i) amended by BN 142 of 12 December 2008, by BN 10 of 30 January 2009, by BN 53 of 24 April 2009, by BN 88 of 31 July 2009, by BN 131 of 30 October 2009, by BN 12 of 29 January 2010, by BN 59 of 30 April 2010 and by BN 116 of 30 July 2010.]

- (ii) R180 750 per year. in respect of each deceased breadwinner, in the case of a claim for loss of support.

[Sub-par. (ii) amended by BN 142 of 12 December 2008, by BN 10 of 30 January 2009, by BN 53 of 24 April 2009, by BN 88 of 31 July 2009, by BN 131 of 30 October 2009, by BN 12 of 29 January 2010, by BN 59 of 30 April 2010 and by BN 116 of 30 July 2010.]

- (4A)(a) The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4) (c) quarterly, in order to counter the effect of inflation.

- (b) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.
- (4B)(a) The liability of the Fund or an agent regarding any tariff contemplated in subsections (4) (a), (5) and (6) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act 61 of 2003), and shall be prescribed after consultation with the Minister of Health.
- (b) The tariff for emergency medical treatment provided by a health care provider contemplated in the National Health Act, 2003-
  - (i) shall be negotiated between the Fund and such health care providers; and
  - (ii) shall be reasonable taking into account factors such as the cost of such treatment and the ability of the Fund to pay.
- (c) In the absence of a tariff for emergency medical treatment the tariffs contemplated in paragraph (a) shall apply.
- (5) Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19 (c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.

(6) The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in respect of medical costs, in accordance with the tariff contemplated in subsection (4B), loss of income and loss of support: Provided that the Fund or such agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered.

[S. 17 substituted by s. 6 of Act 19 of 2005.]

- 21 The amended Act restricts claims for non-pecuniary loss to cases where serious injury has been suffered. On any rational basis, the plaintiff has suffered a serious injury and the defendant is in my view precluded by the concession that the merits of the plaintiff's claim have been disposed of from raising any procedural objection to the plaintiff's claim for general damages. It follows from this evaluation that I must approach the quantification of the claim for general damages on general principles, untrammelled by any restrictions imposed by the amended Act and the Regulations.
- 22 On the assumption that the Regulations are, contrary to my conclusion, at all relevant to the evaluation of the claim for general damages reg 3 provides as follows:

3 Assessment of serious injury in terms of section 17(1)(A)

- (1) (a) A third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.
- (b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method:
  - (i) The Minister may publish in the Gazette, after consultation with the Minister of Health, a list of injuries which are for purposes of section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.
  - (ii) If the injury resulted in 30 percent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious. An injury which does not result in 30 percent or more Impairment of the Whole Person may only be assessed as serious if that injury:
    - (aa) resulted in a serious long-term impairment or loss of a body function;
    - (bb) constitutes permanent serious disfigurement;
    - (cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or
    - (dd) resulted in loss of a foetus.
  - (iv) The AMA Guides must be applied by the medical practitioner in accordance with operational guidelines or amendments, if any, published by the Minister from time to time by notice in the Gazette.
  - (v) Despite anything to the contrary in the AMA Guides, in assessing the degree of impairment, no number

stipulated in the AMA Guides is to be rounded up or down, regardless of whether the number represents an initial, an intermediate, a combined or a final value, unless the rounding is expressly required or permitted by the guidelines issued by the Minister.

(vi) The Minister may approve a training course in the application of the AMA Guides by notice in the Gazette and then the assessment must be done by a medical practitioner who has successfully completed such a course.

(2) (a) Unless otherwise provided in these Regulations, the costs of an assessment shall be borne by the Fund or an agent only if the third party's injury is found to be serious and the Fund or the agent attracts overall liability in terms of the Act.

(b) The Fund or an agent may at its cost, at the request of a third party, make available to the third party the services of, or, alternatively, refer the third party to-

- (i) a medical practitioner for purposes of an assessment in accordance with these Regulations; and
- (ii) a health care provider, for purposes of collecting and collating information to facilitate such an assessment if the Fund decides that there is a reasonable prospect that a medical practitioner may assess the injury to be serious and the third party lacks sufficient funds to obtain an assessment.

(3) (a) A third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

(b) A claim for compensation for non-pecuniary loss in terms of section 17 of the Act shall be submitted in accordance with the Act and these Regulations, provided that.

- (i) the serious injury assessment report may be submitted separately after the submission of the claim at any time before the expiry of the periods for the lodgement of the claim prescribed in the Act and these Regulations; and
- (ii) where maximal medical improvement, as provided in the AMA Guides, in respect of the third party's injury has not yet been reached and where the periods for lodgement of the claim prescribed in terms of the Act and these Regulations will expire before such improvement is reached, the third party shall, notwithstanding anything to the contrary contained in the AMA Guides, submit himself or herself to an assessment and lodge the claim and the serious injury assessment report prior to the expiry of the relevant period.
- (c) The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations.
- (d) If the Fund or an agent is not satisfied that the injury has been correctly assessed, the Fund or an agent must:
  - (i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or
  - (ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations.

by a medical practitioner designated by the Fund or an agent.

- (e) The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations.

23 One of the reports handed up by the plaintiff was the serious injury assessment report, form RAF4, completed on 31 August 2010 by a medical practitioner, Dr Ntlopi Mogoru, for submission to the defendant. In section 5 of the form, in response to the question

"If the injury is not on the list of non-serious injuries and did not result in 30 percent Whole Person impairment, as provided in the AMA guides, consider whether the injury resulted in any of the consequences set out below ...",

Dr Mogoru marked section 5.2: Permanent serious disfigurement. The doctor might equally have marked section 5.1: Serious long-term impairment or loss of a bodily function.

24 On any evaluation, therefore, the plaintiff has suffered a serious injury and should be compensated by way of general damages for the pain, suffering and loss of amenities he has sustained as a result of the collision. He has constant pain, which can partly be ameliorated by use of analgesics. His ability to walk, sit comfortably, change positions, get a good night's sleep and perform domestic tasks have

been significantly compromised. His use of a built up boot and his permanent limp are very obvious. Much of his loss of amenities will be permanent. I assess his general damages, before apportionment, at R300 000.

25 In regard to damages for loss of income, counsel asked me to determine whether the cap to be applied is that applicable at the date of the injury or that applicable at the date of trial. Counsel for the plaintiff contended for the former and counsel for the defendant contended for the latter. In my view the answer to this question is to be found in the provisions of s 17(4A)(b) which reads as follows:

In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.

26 There was in fact no notice as contemplated in s 17(4A)(b) issued prior to the date of the collision, the date on which the plaintiff's cause of action arose, because the capped amount, R160 000, was provided for in the Act itself. It appears from the section and its annual amendments by way of notices that the legislature determines the caps to be applied annually. In my view, the legislature did not intend the quantum of the claim for loss of income of a plaintiff in the present circumstances to depend on the length of time which elapsed before

- the matter came before a court while restricting other plaintiffs to the cap in force at the time their causes of action arose. I accordingly answer this question in favour of the defendant. I hold that the capped amount to be applied to the plaintiff's claim for loss of income is R160 000. I therefore accept the calculation in the report of Mr Loots that the plaintiff's loss of income, before adjustment for contingencies, amounts to R234 830 for past loss plus R2 705 259 for future loss.

27 In regard to contingencies, the defendant itself instructed Dr Koch to prepare his report on the basis that there should be a 10% contingency applied to past earnings and a 15% contingency applied to future contingencies. I see no reason not to adopt the figures used by the defendant. This translates to an award for loss of income, before apportionment but adjusted for contingencies, to R211 347 plus R2 299 471, ie R2 510 818.

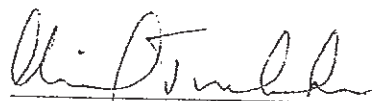
28 My awards are therefore the following:

28.1 The plaintiff is entitled for general damages to R300 000 less 20%, ie R240 000.

28.2 The plaintiff is entitled to loss of income to R2 510 818 less 20%. ie R2 008 655.

28.3 The plaintiff is entitled to the costs of the action.

29 Counsel undertook at the hearing that once I had made my awards, they would embody them in a draft order, in accordance with the practice of this court. I now invite counsel to present me with a draft order or, if they cannot agree on the form of the final order to be made in this action, draft orders so that I can grant a final order in the action.



NB Tuchten  
Judge of the High Court  
10 November 2010