INTHEHIGHCOURTOFSOUTHAFRICA

(EASTERNCAPE–GRAHAMSTOWN)

CaseNo.:CA283/2011
Dateheard:26April2011
Datedelivered:09June2011

Inthematterbetween:

NOMA-TSHAYINASYLVIAMPONDO Appellant

and

THEROADACCIDENTFUND Respondent

APPEALJUDGMENT

DAMBUZA,J :

[1] Theplaintiffclaimeddamagesfromthedefendan tinrespectofinjuries sustainedbyherinamotorvehiclecollision.The defendantconcededmerits and the matter went on trial before the Court *a quo* . Amongst others, an awardofR350,000.00wasmadebythetrialJudgein respectofthegeneral damagessufferedbytheappellantasaresultofth ecollision.Theappellant wasalsoawardedR320,031.79forpasthospitaland medicalexpensesand R1,731,902.00forfuture loss of earnings. The res pondent was ordered to provide the respondent with an undertaking in terms of Section 17(4) of the RoadAccidentFundAct,Act56of1996inrespecto ffuturemedical,hospital, and various other expenses. The appellant now appe als, with leave of the court *aquo,* againsttheawardforgeneraldamages.

[2] The grounds of appeal are that the trial judge erred in considering the case of **Strydom v RAF**[1] to be a "benchmark" in determining the amount to be awarded to the appellant for general damages, and in finding that the appellant's circumstances were slightly more serious than **Strydom's**. The appellant also contends that the award of R350,000.00 is disturbingly inappropriate.

[3] In terms of the evidence led before the trial court on 2 May 2005 the 47 year old[2] appellant was a passenger in a motor vehicle that collided with another vehicle. The injuries sustained by the appellant in that accident are set out in the various medico-legal reports which form part of the record. These include medico-legal reports prepared by Dr P A Olivier, an orthopaedic surgeon, Dr Neil Holmberg, an ophthalmologist and Dr Kepler, a plastic surgeon. The appellant's husband, Cyprian Lafleni, a colleague of the appellant, Ntombekhaya Bashman, the appellant and Dr Olivier testified in the Court *a quo*.

[4] Dr P A Olivier had examined and consulted with the appellant on two occasions, at first in August 2009 and thereafter on 4 March 2010. The trial court, it would seem, relied largely on the medico-legal report prepared by Dr Olivier.

[5] As a result of the accident the appellant sustained musculo-skeletal and multiple soft tissue injuries. She sustained lacerations on the face, a fracture

[1] Case no ECD 202/04 decided on 19 May 2005

[2] The appellant was born on 23 October 1963.

involving the base of the femoral neck and a trimalleolar fracture of the right ankle (an injury associated with significant intra-articular cartilage damage). She was admitted at St Dominics Hospital for approximately five weeks, two of which were spent in the Intensive Care Unit. A number of medical procedures were performed on her. The right ankle was fixed with a plate and screws and the fractured femoral neck was fixed with a plate and a Lag screw.

[6] Subsequent to her release from hospital the plaintiff was re-admitted as a result of complications (as a result of the wearing away or "death" of the bone tissue the Lag screw had broken loose from the femoral neck). A total replacement of the right hip had to be performed. The complications, however, continued and two more operations had to be done to the right hip; firstly, because sepsis had set in, to remove the septic hip prosthesis and to insert a spacer in order to alleviate the deep seated infection and, further, to perform a second hip replacement. By March 2010 the appellant presented with symptoms suggestive of osteoarthritis of her right ankle, including pain, discomfort and swelling when she walked or stood for long periods. At the time of consulting with Dr Olivier in August 2009 she still presented with pain on her right hip when performing weight bearing activities and painful clicking sensations on her right leg. She had to manoeuvre her hip in a certain direction to relocate it and to clear pain. She was unable to squat. The appellant walked with an antalgic gait as a result of a 1cm shortening of the left leg. Despite all the medical treatment, however she will always continue

to walk with a limp and the extensive scarring on her face and body is permanent.

[7] Dr Olivier's opinion was that the appellant would still need three revision procedures to her hip to alleviate inevitable prosthesis related complications and that after 20 years from the time of the accident she would need an ankle arthrodesis.

[8] According to Dr Olivier appellant suffered severe pain and discomfort for a period of 16 weeks following the accident and the primary total hip replacement. She further suffered the same degree of pain and discomfort for the 16 weeks following the removal of the hip prosthesis and replacement of the spacer and again the same degree of pain and discomfort for the 16 weeks following the second hip replacement. She will experience the same level of pain and discomfort for the same period following the anticipated hip revision procedures and the anticipated ankle arthrodesis. She will also always experience slight or occasional discomfort as a result of degenerative changes in the midtarsal joints.

[9] Regarding the injuries to the appellant's face I can do no better to describe these and their effect on the appellant than the following description in Dr Holmberg medico-legal report:

> "EYELIDS AND ORBITS
> Evaluation of her right upper eyelid revealed a small post traumatic eyelid margin notch on the medial aspect of her eyelid. She also had a 3mm right

sided ptosis. A ptosis is a lower positioning of the eyelid as a result of injury to the levator muscle or nerve influencing the action of that muscle. Evaluation of her facial musculature revealed a right sided partial facial paralysis. The facial nerve is responsible for innervating the muscles associated with facial expression. A facial palsy, therefore, causes a droopy face on the side of the paralysis. This is the reason for fluid spillage from the right sided corner of her mouth. This also causes various grades of inability of eyelid closure. Clinically she has a good right sided eyelid closure but her husband says that she sleeps with her eyelid partially open which causes her discomfort when she wakes up in the morning. The facial palsy is also responsible for the excessive right sided tearing. The facial nerve plays an integral part in the lacrimal pump mechanism which drains tears away from the eye. Any disorder of this mechanism leads to a watery eye. Numerous disfiguring scars were also noted on the right side of her face."

[10] The trial Court remarked that the injuries resulted in a:

> ”…drooping of the right side of her face and which affect the functioning of the shape of her mouth. Her right eye is deformed, and tear ducts are damaged so that tears constantly flow down her cheek. Her right cheek has developed an involuntary twitch”

and

> “…a pitiful impression in the witness box. The effect of her facial injuries were clearly visible. She repeatedly wiped tears from her right cheek, which was afflicted with a constant tick. She confirmed that she had been in much pain and discomfort since the accident. While the plaintiff was unable to articulate her emotions with the clarity and force that some might have done, she made it abundantly clear that she is acutely distressed by the results of her physical injuries and, in particular, by the facial disfigurement. She said she is often embarrassed by questions from friends and strangers about her looks. When she drinks, the liquid often dribbles from the right side of her mouth. She has lost the desire to interact socially, and is afraid that her husband might soon be driven to “look for somebody else”. The pain and discomfort she frequently

> experiences has made her irritable. She no longer performs the normal supportrolesofamotherandwife.Mostpoignantly,theplaintiffsaidthatshe wasonce“beautiful”,butnolongerconsidersherselfinthatlight.”

[11] Dr Holmberg also remarked that the teary right eye is a nuisance, resulting in the patient having to intermittently wipe excessive tears and that this can interfere with the vision of that eye. There were, however, no indications for surgery at the time as the appellant had “adequate voluntary eyelidclosure.”

[12] Atthetimeofthecollisiontheplaintiffwas aGrade1teacher.Shehas, since the accident been assigned administrative duties as she is no longer able to teach Grade 1 because of her injuries. She was described by her colleague, Bashman, as having been an energetic Grade 1 teacher, a good netball player and coach and generally an outgoing person prior to the accident.Shehadalsobeenintimatelyinvolvedin herchildren’slives.Byall accounts, as a result of the injuries sustained by her in the collision, she became withdrawn, could no longer participate in sporting activities or continue teaching as she could not stand or squat, had become emotional andsufferedageneraloverallpersonalitychange.

[13] Rule49(3)oftheRulesofCourtrequiresthat,in statingthegroundsof appeal an appellant shall specify the findings of fact and the rulings of law appealedagainst.Thereforethenoticeofappealshouldstateclearlywhether theappealisonapointorpointsoflaworonfactorboth.[3]

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[3] Erasmus; **SuperiorCourtsPractice** *;* atB1-357.

[14] I have already stated what the grounds of appeal are as they appear in the notice of appeal. But it was submitted in the appellant's Heads of Argument and before us during argument that the trial court erred on three further aspects in its judgment; in finding that two hip operations were performed on the appellant, instead of four, in failing to consider the probability that the appellant will suffer "girdlestone effect" and in failing to take into consideration Dr Olivier's opinion regarding the probability of arthrodesis on the appellant's right ankle.

[15] Indeed the trial judge states that two hip operations were performed on the appellant. It is, however, clear from the record that four hip operations were performed on the appellant's right hip.

[16] Regarding the probability of a "girdlestone effect" Dr Olivier testified that there is a 50% chance that a stage could be reached at which no further hip replacement can be performed on the appellant; in this condition the head and neck of the femur will have disappeared, there will be considerable bone loss and resultant shortening of the leg by approximately 7 to 8 cm. If this happens, the appellant will walk with a severe limp which Dr Olivier compared to polio case and she will need a built up shoe; a condition considered more serious than above knee amputation.

[17] As to the likelihood of an ankle arthrodesis the record reveals that Dr Olivier's opinion differs from that of Dr Mackenzie whose medico-legal report

also forms part of the record. Dr Mackenzie's opinion is that no arthrodesis will be necessary. As already stated Dr Olivier was of the opinion, in both his medico-legal report and in his evidence at the trial, that an arthrodesis will have to be performed on the appellant's ankle. According to Dr Olivier he had already observed degenerative changes on the X-Rays of the appellant's ankle injury. Dr Mackenzie, however, did not testify at the trial and Dr Olivier's opinion in this regard was therefore not canvassed with him.

[18] *Mr Louw* submitted that although the above three grounds were never specifically raised in the application for leave to appeal and in the notice of appeal they are sufficiently covered in the notice of appeal. I do not agree. The reference to two hip operations instead of four is factual misdirection which is unrelated to the **Strydom** case being used as a benchmark. The failure to take into account the probability of an arthrodesis to the appellant's ankle and absence of reference to the girdlestone effect would, if properly raised and found to be factors that were ignored by the trial judge, constitute an irregularity. But because these issues were not raised before the judge *a quo* in the application for leave to appeal and in the notice of appeal the respondent was not alerted thereto prior to the filing of the appellant's Heads of Argument. Notably, the respondent has not made any submissions in respect thereof in its Heads of Argument.

[19] In my view, the submission by *Mr Louw* that the grounds of appeal as they are incorporate the issues raised in the Heads of Argument cannot stand. Specific grounds of appeal are set out in the notice of appeal. In any event it

is trite that a ground of appeal is bad if it is so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of law made by the court *a quo* in relation to the subject-matter of the appeal.[4] A point not taken in the Notice of Appeal is thereby waived and cannot be taken except by leave of the appeal court and on terms as to adjournment and costs.[5] I am therefore of the view that the issues raised by the appellant only in her Heads of Argument cannot be heard on appeal.

[20] But, I am persuaded that the reliance by the trial court on **Strydom** as a "benchmark" in determining the quantum of general damages is wrong. The Learned judge *a quo* at paragraph 16 of his judgment states:

> "Closer to the mark is the unreported judgment of this division in *Donne-Lee Strydom v Road Accident Fund* (ECD 202/04 per Froneman J, dated 17 May 2004), which was among a number of judgments to which I was referred. In that case, the plaintiff, described as a young and attractive woman, was awarded general damages of R200000.00 for injuries broadly comparable to those suffered by the plaintiff. I am informed that the current value of that amount is R277000.00. Other awards to which I was referred by both representatives involving hip replacements and facial disfigurement and combination of orthopaedic injuries and scarring are roughly in the same order. In my view, the award in *Strydom* is consistent with the modern trend of awards for general damages. Save that the injuries in this case are in my judgement slightly more serious, the facts are also comparable to those in the *Strydom* matter. I accordingly intend to use that award as a benchmark."

[21] It is widely accepted that assessment of general damages is not an easy exercise. When considering past awards made in comparable cases a

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[4] Erasmus at B1-357.

[5] Erasmus *(supra)* at B-358.

proper basis for comparison must be ascertained. In this exercise the court should, in my view look at the pattern of awards made in comparable circumstances rather than a singular award made in respect of injuries similar to the case at hand.

> "It is not enough to compare the general nature of the injuries; all factors affecting the assessment of damages must be taken into account. Once it is established that the circumstances are sufficiently comparable, then such cases are to be used to provide a general yardstick to assist the court in arriving at an award 'not substantially out of general accord with previous awards in broadly similar cases'." [6] (My emphasis.)

[22] In my view a court, by restricting itself to one comparable case unduly fetters the discretion it has in assessing a neutral, fair and reasonable compensation for the plaintiff. I agree therefore that the trial court misdirected itself in its approach in assessing the award of general damages in this case and that this court on appeal in entitled to interfere and consider afresh the amount of damages awarded by the trial court.

[23] In **Strydom**, the 23 year old plaintiff had sustained facial injuries, a fracture of the proximal phalanges of the index finger and a posterior dislocation of the right hip. The facial wounds were sutured at the Frere Hospital East London, but had to be redone at the East London Private Hospital. An open reduction and internal fixation of the right index was done and a full thickness skin graft to the right upper eyelid. Two pieces of glass were removed from her forehead. She was left with a 3cm scar on her right

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[6] Corbett; **The Quantum of Damages**, Vol 1 at 5.

cheek and an 8cm scar that ran from her mouth towards the ear on the right side. She also had scars on her scalp, eyelid and lip but those were no longer visible at the time of the trial. Although the scars to the plaintiff's right cheek were still visible they were not offensive. Her eyes were "teary" and she suffered stabbing headaches which were found to be of a permanent nature. No complication had yet presented in respect of the hip injury by the time of trial (18 months after the collision) and it was anticipated that the plaintiff would require a hip replacement in about 25 years after the accident and another one 15 years thereafter.

[24] In **Mlalandle v Road Accident Fund** *(1496/2007)* [2010] ZAECGHC 124 (17 December 2010) general damages of R325,000.00 were awarded. The plaintiff had sustained a fractured clavicle, a fracture of the blade of the right scapula, multiple bruises, brachial plexus paralysis of the right hand and three fractured ribs. At first she was treated with analgesic medication and her arm was immobilised in a sling. Later an open reduction and internal fixation of the right clavicle was performed. She also received physiotherapeutic treatment and occupational therapy. Because of persistent contractures in the ligaments of the metacarpophalangeal joints on the right hand, the hand was operated on. The operation was unsuccessful and the fingers on that hand remained unable to flex. She experienced severe pain for about three weeks; thereafter the pain subsided over the following six to eight weeks. The shoulder operation resulted in temporary aggravation of pain for three to four days whereafter it gradually subsided.

[25] In **Vukubi v Road Accident Fund** 2007 (5) QOD 188 (E) general damages of R300,000.00 (present day value of R400,000.00) were awarded. The plaintiff had sustained a severe dislocation of the right knee joint and tears to the patella tendon and cruciate ligaments. She had also sustained a closed fracture of the humerus and closed fractures of the radius and ulna. Treatment comprised of debridement to the knee and reduction and internal fixation of the knee joint. The humerus fracture was immobilized and an open reduction and plating of the radius and ulna fractures were performed. An 80% chance of knee replacement surgery and 60% chance of revision surgery was anticipated. It was anticipated that degenerative changes in the radio-ulna joint would cause future pain and discomfort. The plaintiff walked with a slight antalgic gait, was unable to bend her knee completely, could not walk long distances and was unable to participate in some sporting activities.

[26] In **Andiswa Mzenzana v RAF** *,* an unreported decision of the then Ciskei Division under case No 449/06, general damages in the amount of R350,000.00 (present day value- R440,000.00) were awarded. The plaintiff had sustained fractures on the left tibia, the right acetabulum, an “ulcer” on the left heel, a contusion on the lungs and injuries on the left knee and left ankle. She was left with numerous scars over the left heel area. She was immobilized on traction for two months and would be given analgesics for pain, which she particularly felt on her left hip, knee and ankle. She also experienced pain on her lower left leg. It was anticipated that a hip replacement would have to be performed 10 years from the time of the accident and that such operation would probably have to be followed by two

revision procedures. She would walk with an antalgic gait for a big part of her life. She could not participate in any weight bearing activities, particularly in sports. A year after the collision degenerative changes had begun to set into her right hip, knee and ankle.

[27] The injuries sustained by the appellant in this case and the *sequelae* thereto are, in my view, more serious than those suffered by the plaintiff in the above cases. Indeed the appellant is older than the plaintiffs in the above comparable cases; she being in her forties and they in their twenties. But the injuries have left her more disabled and scarred than them. She has had four operations to her hip. The complications with those operations resulted in her experiencing more pain and suffering than in the other cases. Dr Olivier testified that the hip revision operations which the appellant still has to endure are considered more risky and more complicated than the previous operations. The prospect that she will probably suffer the girdlestone effect must on its own cause the appellant considerable distress and anxiety. Therefore although the injuries sustained by the plaintiffs in the other cases are of sufficient similarity to merit comparison between the awards made therein and in this case, the award to the appellant must be commensurate with the seriousness of the pain and suffering that she endured. I do not however agree that the amount of R850,000.00 suggested on behalf of the appellant is appropriate in this case. In my view an amount of R550,000.00 is more appropriate. For that reason, the appeal must, in my view, succeed.

[28] The following order shall therefore issue:

[28.1] Theappealsucceedswithcosts.

[28.2] Paragraph 3 of the order of the trial court is set aside and replacedwiththefollowingorder:

> "The defendant shall pay the plaintiff the sum of R550,000.00inrespectofgeneraldamages."

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N.DAMBUZA
JUDGEOFTHEHIGHCOURT

TSHIKI,J

Iagree.

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P.W.TSHIKI
JUDGEOFTHEHIGHCOURT

EKSTEEN,J

Iagree.

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J.W.EKSTEEN
JUDGEOFTHEHIGHCOURT

Appearances:

For the appellant: Adv S.S.W. Louw instructed by Whitesides of Grahamstown

For the respondent: Mr M Wolmarans instructed by NN Dullabh & Co. of Grahamstown