THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 144/2002

In the matter between:

ROAD ACCIDENT FUND Appellant

and

AZWINDINI MARUNGA Respondent

<u>Coram</u>: ***Marais, Navsa JJA and Heher AJA***

Date of hearing: **11 March 2003**

Date of delivery: **26 March 2003**

Summary: **Award of general damages in personal injury claim references to past awards interference by court of appeal inadequate motivation by trial court and striking disparity between amount awarded by trial court and amount considered appropriate.**

JUDGMENT

NAVSA JA:

[1] This is an appeal, with the leave of this Court, against an order of the Venda High Court (Hetisani J) on 6 September 2001, in terms of which the appellant ('the RAF'), a statutory insurer established and constituted by the Road Accident Fund Act 56 of 1996, was required to pay the respondent an amount of R375 000-00 as general damages (subject to a 60% reduction by apportionment) flowing from bodily injuries sustained by the respondent in a collision on 8 April 1993 at Cherenzeni in Venda between a motor vehicle driven by an insured driver and the respondent's bicycle. The Court below made no order in respect of costs.

[2] The Court below was called upon to determine only the quantum of damages suffered by the respondent, including loss of income and medical expenses. The only issue before us is the correctness of the determination of the amount of R375 000-00 as general damages.

[3] The RAF contends that the amount awarded as general damages by the Court below is excessive and that whatever the result of the injuries the amount of damages awarded cannot be

justified by reference to comparable decided cases or on any other basis.

[4] The respondent contends that the features of the present case are exceptional and distinctive and that the amount awarded as general damages by the Court below is fair and reasonable in the circumstances

[5] In order to decide the present appeal the following deserve consideration:

(a) the physical injuries sustained by the respondent and their consequences;

(b) the treatment received by the respondent and his experiences flowing from the injuries and their consequences;

(c) evidence by the two orthopaedic surgeons who examined the respondent including their prognoses in respect of the injury to the respondent's left leg;

(d) the judgment in the Court below.

[6] It is common cause that as a result of the collision the respondent sustained the following injuries:

(i) a fracture of the left femur;

(ii) a soft tissue injury in the chest area;

(iii) bruises on the forehead, left arm and left knee;

[7] It is common cause that the respondent received treatment, attended at hospitals and was subjected to surgical procedures as described in this and the following paragraph. On 9 April 1993, the day after the collision, the respondent was subjected to a surgical procedure in terms of which a plate and screws were inserted in his left leg in order to deal with the fracture of the left femur. He spent five months in hospital recuperating, approximately two of which were spent with his left leg in traction and in plaster.

[8] After his discharge from hospital the respondent was compelled to use crutches as a walking aid for approximately five months. During 1997 he was re-admitted to hospital for the surgical removal of the plate and screws. As it turned out the plate had moved and caused a mal-union and angulation of the femur that resulted in a shortening of the respondent's left leg. The respondent spent two weeks in hospital after the plate and all but one of the screws were removed. He attended different hospitals at intervals for a period of approximately four years for treatment of the injuries sustained in the collision. The visits were not all fruitful in that the treatment envisaged did not always materialise.

[9] The appellant's personal circumstances and his experiences following on the collision as set out in this and the following paragraph are not in dispute. At the time of the collision he was 19-years old and in grade 11. As a result of the collision the respondent did not complete the 1993 school year. He returned to school in 1994 but that year was interrupted by several visits to the hospital. He finally completed grade 11 in 1995 and matriculated in 1997. After matriculating the respondent completed a diploma, which would benefit him in a career in the travel industry. He was due to complete a computer course that would enable him to embark on such a career.

[10] Before the collision the respondent was a keen soccer and volleyball player. As a result of the injuries sustained by him he is unable to participate in these sports. The respondent experiences difficulty in lifting objects and cannot remain standing for long periods. His movements are restricted because of the injury to his left leg. He experiences pain in his leg when he walks long distances. From the time of the collision until 1995 he experienced pain in his chest area. The pain attendant upon the surgical procedures and relating to his leg will be dealt with in due course.

[11] I turn to deal with the material parts of the evidence of the orthopaedic surgeons. Dr Lesibana Ledwaba ('Dr L') is an orthopaedic surgeon who testified in support of the respondent's case. Dr L confirmed that the respondent walks with a short limb gait and stated that there was no evidence that he presently experienced pain whilst walking short distances. He testified that the 20 cm surgical scar on the respondent's left leg, which is clearly visible, was not tender and appeared completely healed. The fracture itself had healed.

[12] In so far as the leg-length deformity is concerned, Dr L was of the view that it could be corrected by further surgery and that the chances of success were more than 80%. This surgical procedure would involve breaking the femur and resetting it. Complicating factors are that the bone and muscle have settled into their present position and have been like that for a relatively long period of time. Dr L could not state positively that the respondent's legs would eventually be of the same length. He was of the view that in the event of the corrective surgery being successful the respondent would be able to perform 80% of the functions he was able to perform before

the collision. His left leg would however, never be the same as before.

[13] After corrective surgery there would be the need for further surgery to remove the implant used to set the femur in position. According to Dr L the implant would have to be removed to prevent it from being an irritant. A further factor is that the implant tends to absorb part of the body weight rendering the bone susceptible to fracture. The removal of the implant would cause severe pain and discomfort for a period of five to ten days and the respondent would thereafter suffer moderate pain for a period of six weeks, during which period he would limp and would require the use of crutches. Thereafter the respondent would experience mild pain until he walked normally in approximately sixteen weeks' time.

[14] Dr L referred to an X-ray photograph, which showed that there had been a failure to remove a screw inserted in the left leg in one of the previous surgical procedures. His view was that the screw should not be removed because any attempt to do so might result in complications or further damage.

[15] Dr André Vlok ('Dr V') testified in support of the RAF's case and agreed that the respondent's left leg was weaker than his right leg.

He found the left leg 3.5 cm shorter than the right leg. He confirmed the need for corrective surgery and agreed that the chances of success were high. He too testified that the left leg would never revert to its pre-collision length and held the view that after corrective surgery the left leg would probably be 1-1.5 cm shorter than the right leg. He envisaged the use of a built-up shoe to compensate for this.

[16] Dr V testified that the question of whether the implant envisaged in the resetting of the femur should be removed was open to debate. He conceded however, that since the respondent was young and since patients were prone to discomfort in inclement weather it was reasonable to remove the implant.

[17] Dr V agreed that the screw not removed during the second surgical procedure should be left untouched, as it was highly unlikely that the screw would cause future discomfort.

[18] Dr V was of the view that after corrective surgery the respondent would take between three to four months to recover and that he would experience acute pain for approximately three days after the surgery. Dr V considered that after the first surgical procedure the respondent would have suffered acute pain for two weeks before it settled. He would thereafter have experienced

moderate pain for four to five weeks. Dr V agreed that even after corrective surgery the respondent would not be able to do heavy physical labour. He would, however, be able to perform moderate physical tasks. In respect of corrective surgery Dr V testified that there is a 0.9% chance of infection and a 2.3% chance of a non-union.

[19] The brief overview of the evidence of the two orthopaedic surgeons shows that the only material disagreement is about the need for the removal of the implant to be inserted as part of the envisaged corrective surgery procedure. Dr V did however concede that it was not unreasonable that the implant be removed. Before us counsel for the RAF accepted the need for surgery to remove the implant and conceded that it was a factor to be considered in the assessment of general damages.

[20] I turn to deal with the manner in which the learned judge in the Court below determined the amount he awarded as general damages. In his judgment he accepted that the main injury sustained by the respondent was the fracture of the left femur. He referred to the need for corrective surgery and the envisaged removal of the implant. He referred to the disfigurement in the form of the

respondent's shortened left leg. He recognised that the respondent endured pain and that he will experience pain and discomfort in the future.

[21] The learned judge listed previously decided cases in which awards were made and to which he was referred by counsel as being comparable. He stated that the submission by counsel for the respondent that the awards made in those cases should be multiplied by three or four in order to do justice to the facts of the present case was unsubstantiated. He went on to say the following (immediately before stating the amounts he was awarding under separate heads of damages):

> 'Despite any rebuttal of the plaintiff's argument through decided case law, plaintiff maintains that the defendant's case is hopeless when it comes to the determination of the quantum which would form an award in favour of the plaintiff.'

[22] The learned judge did not state whether he found any of the cases useful. He did not state which factors weighed most heavily with him in determining the quantum of general damages. The statement from the judgment quoted at the end of the preceding paragraph is unclear and unhelpful. The submission by counsel for the RAF that in effect no reasons were supplied for the quantification

arrived at appears well founded. This is an aspect to which I will return later in this judgment.

[23] This Court has repeatedly stated that in cases in 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 a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. This Court will interfere where there is a striking disparity between what the trial court awarded and what this Court considers ought to have been awarded: See *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) at 535A-B and the other cases cited there.

[24] At 535B and following of the *Protea* case Potgieter JA considered what regard should be given to awards in previously decided cases. After considering *dicta* in several decisions of this Court the learned judge of appeal stated that there was no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards. He pointed out that it would be difficult to find a case on all fours with the one being heard but

nevertheless concluded that awards in decided cases might be of some use and guidance.

[25] In the *Protea* case, above, this Court in determining the measure of damages considered all relevant factors and circumstances and derived assistance from the 'general pattern of previous awards'.

[26] The following case (with synopsis) which was included in the list of cases to which the trial Court was referred for purposes of comparison, demonstrates the difficulty and (paradoxically) the usefulness of considering awards in previously decided cases:

Wright v Multilateral Vehicle Accident Fund a 1997 decision of the Natal Provincial Division *Corbett and Honey* Vol 4 E3-31 The plaintiff, a 28-year old woman, sustained a open comminuted fracture of the right femur with complete division of the quadriceps muscle and loss of substantial quantity of bone which extended into the knee joint. There was an initial surgical procedure to repair the quadriceps mechanism and to apply an external fixator plaintiff hospitalised for two weeks and discharged on crutches. Readmitted two weeks later for treatment of infection. Later readmitted for a period of one week for further treatment for infection. At the same time the external fixator was removed and replaced with a pin. Traction applied at home for four weeks. The fracture failed to unite and the plaintiff was again hospitalised for a few weeks

during which an open reduction was carried out for an internal fixation. The plaintiff wore a leg brace with a hinge for several weeks and left with a limitation of flexion in her right knee, bad scarring of the right leg, a shortening of the leg by 3½cm requiring raisers in footwear. She experienced weakness of the leg, residual pain and recurring infections and abscesses, which would in future probably require antibiotic therapy and surgical drainage. Removal of the pin was expected. Plaintiff experienced a great deal of pain, particularly during episodes of infection. She had been an outdoors person but was now permanently unable to run or play sport, kneel or squat. She experienced difficulty in negotiating stairs- awarded R65 000-00 as general damages [value in 2001 (at time of trial in the present case) R81 000-00].

[27] In the *Wright* case (*Corbett and Honey* Vol 4 E3-36) Broome DJP stated:

'I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.'

[28] The *Wright* case at E3-34 to E3-37 is instructive. The learned trial judge considered all the relevant circumstances and set out in detail the reasoning that motivated the award.

[29] Distilled from the undisputed facts referred to earlier in this judgment are the following salient features. The respondent is a young man in his twenties who over and above the surgical procedures that he has already been subjected to, will have to endure two further procedures. The degree of pain and discomfort attendant upon these surgical procedures and the consequences of the injuries have been set out in some detail in paragraphs [7]-[18]. The respondent's mobility was totally and partially impaired for substantial periods and he will be rendered immobile when the envisaged surgical procedures are performed in future. He spent four years attending at hospitals to receive treatment. This was a major disruption in his life. His enjoyment of life must have been severely curtailed by the travelling to and from the hospitals with the discomfort caused by the condition of his left leg. This was at a time in his life when he ought to have been in the full bloom of youth. Furthermore at the time of trial a period of approximately eight years had passed since the collision, only four of which did not include the trauma of surgical intervention. The bone and muscle in the respondent's left leg have settled into their deformed position. The respondent after a period of relative calm in his life now faces the

prospect of repeated future traumatic surgical intervention. This is an important factor to be taken into account in favour of the respondent. With the envisaged corrective surgery the discomfort of walking with a shortened leg will be alleviated but will never disappear. His disfigurement is permanent. The respondent has suffered a permanent 20% loss of power in his left leg. His mobility has been permanently restricted. He will be unable to lift heavy objects. He is a sports lover who was an active sportsman and who is now unable to play sport. The extensive surgical scar on his left leg is obvious. In so far as the corrective surgery is concerned, even though the risk of non-union of the femur and infection is small it cannot be discounted altogether.

[30] The *Wright* case is in the broadest terms close to the facts of the present case. The respondent in the present case is however nine years younger than the plaintiff in the *Wright* case. This is a consideration that should count in his favour. He lost the full use of his left leg in the full bloom of his youth and will have to endure the discomfort of walking with a shortened, less powerful leg for the remainder of his life.

[31] Before considering whether the amount awarded by the trial court should be upset on appeal I return to an aspect touched on briefly earlier in this judgment, namely, the lack of a reasoned basis for the determination of general damages. As a general rule a court which delivers a final judgment is obliged to give reasons for its decisions. In an article in the *The South African Law Journal* (vol 115 1998 pp 116-128) entitled *Writing a Judgment* the former Chief Justice, MM Corbett, pointed out that this general rule applies to both civil and criminal cases. In civil cases this is not a statutory rule but one of practice. The learned author referred to *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) where this Court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's decision. It was pointed out that a reasoned judgment may well discourage an appeal by the loser and that the failure to supply reasons may have the opposite effect, that is, to encourage an ill-founded appeal. The learned author stated the following at 117:

> 'In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state

publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case and quite often they are a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.'

[32] Writing on the same subject in *The Australian Law Journal* (vol 67 A 1993) pp 494-502 the former Chief Justice of the High Court of Australia The Rt Hon Sir Harry Gibbs, considering the same rule of practice in common law countries, stated the following at 494:

'The citizens of a modern democracy at any rate in Australia are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation and the public should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and the delivery of reasons is part of the process which has that end in view.'

[33] This is of course not a case in which no attempt has been made to provide reasons for judgment. It is a case in which the attempt has been inadequate. Even though courts have a wide discretion to determine general damages and even though it cannot be described as an exercise in exactitude, or be arrived at according to known

formulae, a trial court should at the very least state the factors and circumstances it considers important in the assessment of damages. It should provide a reasoned basis for arriving at its conclusions. Regrettably, although the Court below stated the main injury sustained by the respondent and set out the envisaged corrective and further surgery it did not set out adequate motivation for the amount determined as damages.

[34] Having considered all the factors and circumstances relevant to the assessment of damages referred to earlier in this judgment and considering past awards and taking into account the more modern approach to the award of damages as set out in the passage in the *Wright* judgment referred to in para [27] I consider an amount of R175 000-00 an appropriate award of damages. I do not consider it necessary to set out separate amounts in respect of pain, disfigurement, loss of amenities, etc. Since this amount differs so radically from the amount awarded by the Court below and in the light of that court's failure to properly motivate the award this Court is entitled to interfere and upset that determination.

[35] In light of the foregoing it follows that the appeal should succeed. Regrettably the costs of litigation will impact negatively on the amount awarded to the respondent.

[36] I make the following order:

1. The appeal is upheld with costs;

2. Paragraph 5 of the order of the Court below is amended only to the following extent:

   The amount of R375 000-00 (three hundred and seventy five thousand) is substituted by the amount of R175 000-00 (one hundred and seventy five thousand).

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MS NAVSA
JUDGE OF APPEAL

<u>CONCUR</u>:

Marais JA
Heher AJA