

IN THE HIGH COURT OF LESOTHO**HELD AT MASERU****CIV/T/504/19**

In the matter between

PEKENENE DONALD NCHERE**PLAINTIFF**

AND

ROADS DIRECTORATE**DEFENDANT****JUDGEMENT**

Coram: Banyane AJ

Date of Hearing: 01/10/19

Date of Judgment: 11/11/19

SUMMARY

Law of Delict - claim of damages caused by a pit dug on the side of a road used by pedestrians - the ambit of liability for omissions by the Roads directorate, a body responsible for maintenance of roads - onus lies on the plaintiff to prove both liability and entitlement to the amount of damages sought under various heads.

ANNOTATIONS

Books

K.G. Mckerron, The Law of Delict, 9th Edition, Juta & Co.

Cases

Pillay v Krishna and Another 1946 AD 946

Sandler v Wholesale Coal Suppliers Ltd 1941 AD SA 194

Yeko v SA Eagle Insurance Co. Ltd (Ciskei Supreme Court – 1986)

National University of Lesotho and Another v Thabane LAC [2007-2008]
476

Kruger V Kotzee 1966(2) SA 428

Pitt v Economic Insurance Co Ltd 1957 (3) SA 284

AA Mutual insurance V Van Jaarveld (1974(4) SA 729(A)

Gwaxula V Road accident Fund (09/41896) [2013] ZAGPJHC 240

April V Minister of Safety and Security 79/07[2008] ZAECHC 14

Nkofi V Ramoreboli CIV/T/631/13,

Philander V Minister of Safety and Security 473/2011(2013) ZANWHC 51.

Municipality of Cape Town V Bakkerud [2000] ZASCA 174

Rudman V Road Accident Fund 2003(2) SA 234(SCA)

Protea Assurance Co. Ltd V Lamb 1971(1) SA 530

Statutes

Roads Directorate Act No.15 of 2010

High Court Rules No.9 of 1980.

Introduction

[1] This is an action for damages resulting from certain bodily injuries sustained by the plaintiff when he fell into a pit dug on a road reserve.

[2] In his declaration, the plaintiff avers that on the 30th Day of April 2015, he fell into an unprotected pit on the side of the road near Mookoli T junction along the main North 1 public road and that he was terribly injured from the fall. This resulted in him suffering damages, which he holds the defendant, a body responsible for maintenance of roads, liable. The claim for damages is made up as follows;

- | | |
|---|---------------------|
| (a) Pain and suffering | M100, 000.00 |
| (b) Discomfort and disability | M 81, 142.00 |
| (c) Loss of past and future earnings | M150, 000.00 |
| (d) Loss of amenities of life | M 70, 000.00 |
| (e) Past and future medical expenses and disfigurement | M 30, 000.00 |
| (f) Medical expenses already incurred | M 48, 858.00 |
| (g) Interest at the rate of 18% <i>tempore morae</i> . | |
| (h) Costs of suit. | |
| (i) Further and /or alternative relief. | |

[3] The defendant was served with the summons on the **23rd July 2019**. A notice of appearance to defend was not filed. The case was then placed on the uncontested motion roll for the **19th August 2019** for hearing. On the said date, advocate Masiphole on behalf of the plaintiff informed the Court that **on Friday 16th August 2019**, he received a call from one Advocate Palime who conveyed the defendant's desire to defend the matter, promising to file the necessary papers 'soonest'. The case was postponed to the **26th August 2019** to enable defendants to file their opposing papers. None were forthcoming until Advocate Masiphole again appeared before Court on the **30th August 2019** to obtain a hearing date in terms of **Rule 27(3)** of the **High Court Rules No.9 of 1980**. The

matter was set down to proceed on the **01st October 2019**. At this time still, no papers had been filed nor did the defendants appear before Court despite another notice issued per the directive of the Court and served on the defendants on the 11th September 2019. The hearing then proceeded in terms of **Rule 41(1)**.

Evidence adduced

[4] The plaintiff testified that on the evening of the day in question, around half-past seven (7), he was on his way to board a taxi home from an auto teller machine(ATM) situate at Mookoli, when he accidentally slipped into a pit aside the road where he was walking. He told the Court that there was no sign indicating a hazard or danger ahead nor was the ditch covered with anything. He fell on some steel pipes in the hole and fractured his left femur. He could not get himself out of the pit, he had to call his niece to rescue him. He was taken and admitted into hospital for fifteen (15) days.

[5] At the hospital, he underwent a surgical procedure in terms of which his bones on the left fractured femur were supported with steel plates; that he still has this fixation on the femur. He stated that he continued to attend medical check-ups until the date of hearing and is yet to continue such regular checkups in the next years.

[6] He handed in payment receipts and his health booklet as proof that he indeed sought medical treatment in relation to the injury and incurred expenses during the period of hospitalization, and during the follow-up visits.

[7] As regards the effect of the accident on him, he told the Court that he suffered a lot of pain during the fall, during his hospitalization and the surgical procedures and he continues to endure more pain.

[8] As to how the incident affected his earning capability, he says he is unable to do his bricklaying work as he did prior to sustaining this injury and he is therefore unable to provide for his three children, two of which are in high School and one still at primary level. He says these kids are his sole responsibility because his estranged wife left them with him in January 2019 and that he now depends on his sister's assistance for payment of their school fees. He told the Court that he believes that the reason why the wife left him is boredom because he could no longer satisfy her in bed due to his situation after the accident.

[9] He said he similarly cannot perform tasks like gardening which were easy to do prior to the accident and that he cannot longer carry heavy weights, and is only able to carry a five liters of water.

[10] He alleges that he has been disfigured because only one leg is functioning and the other, no more. He can no longer walk independently but has to now rely on the assistance of crutches for his movements. He stated that he incurs further costs for transport every time he has to go for medical check-ups.

Issues for determination

[11] The issues that arise in this case are; whether the defendant is a liable to any damages that the plaintiff has claimed, if the answer is in the affirmative, the quantum of damages proved. It is prudent to first deal with the question of liability.

Liability

[12] The plaintiff's evidence is to the effect that, after the accident, he conducted his investigations which revealed that the hole was attributable to the Defendant, and that the road on which the accident occurred fall under defendant's jurisdiction.

[13] In the absence of anything to the contrary, it is discernible that the pit was dug as part of road maintenance or a matter related thereto because it appears from the evidence that the opening uncovered some pipes have been erected underneath. The **Roads Directorate Act No.15 of 2010** establishes the Directorate and states the functions of the directorate to include, planning, development and maintenance of all roads under its jurisdiction and to carry out quality assurance for all roads falling within its area of jurisdiction (s 4(1) (b)). The next question to be addressed is whether there exists a duty of care on the part of the defendant to take action aimed at averting foreseeable harm to the road-users on the area in question.

[14] As a general Rule, liability arises from omissions, where a person, in this case the defendant, has, by prior conduct created a potential risk to others, but has failed to take precautions to prevent danger from materializing. (**R.G Mckerron; The Law of Delict p14**). As correctly pointed out by the plaintiff's counsel, it is a trite principle of our Law, following **Pillay V Krishna & Another 1946 AD 946** that in civil cases, the plaintiff bears the onus to prove his case on a balance of probabilities. In respect of liability for damages in a case such as this one, the plaintiff ought to prove existence of a legal duty on the part of the defendant to warn the public of the hole/pit and that the defendant failed to do so, and that the failure is the cause of the accident. (See **Municipality of Cape Town V Bakkerud [2000] ZASCA 174**. Counsel referred the Court to the case of **Kruger V Kotzee 1966(2) SA 428** to submit that the defendant was under a duty to guard against occurrences such as the one that precipitated this litigation by taking reasonable steps including putting warnings around the hole in order to avert any harm occurring.

[15] Regard being had to the fact that the hole has been dug near a road, where regular movement of people is reasonably expected, it is clear that this created potential risk to the pedestrians using the road in question. A legal duty on the defendant therefore existed to barricade or warn the public walking on the area of the presence of that hole. The reason for this is simple, it is that unwary pedestrians, particularly at night, might stumble and fall into this pit. The defendant's failure to do so, under the circumstances, establishes blameworthiness on its part. It is therefore liable to the extent of proved damages.

[16] Having found that the defendant's failure to act is the sole cause of the accident, I proceed now to deal with the amount to be awarded as damages.

SPECIAL DAMAGES

Past and future medical expenses and disfigurement

Medical expenses already incurred

[17] The plaintiff, alleges that he was hospitalized for two weeks and underwent an orthopedic surgery (open reduction and internal fixation (ORIF) due to the fracture on his left femur. Under this head, he claims an amount of **M 48 000** for expenses already incurred. A concession was however made during submissions that the actual amount incurred for medical treatment per the bundle of receipts tendered is only **M 1 029**. It is significant to note that the plaintiff spent only 6 days in Hospital as depicted in these receipts that he was discharged on the 6th May 2015 and not fifteen (15) days as alleged in his declaration. Clearly the amount claimed under this head has been grossly inflated.

Future medical expenses

[18] As regards future medical expenses, it was argued that since plaintiff is not yet healed, he still continues to seek medical treatment. The plaintiff submits that **M 20 000** is a reasonable amount under the circumstances.

[19] The difficulty I have about this proposed amount is that it is not supported by self-explanatory medical assessment on the condition of the plaintiff. There is no evidence adduced in relation the nature of treatment further required by the plaintiff, its estimated duration in the future nor frequency of attendance to same.

[20] The only document supplied is an assessment report prepared by Doctor Makhothi, on 12th July 2016 which reveals;

*"This is to certify that I have examined the above mentioned client aged 46 years who accidentally felt (sic) on the 31st April 2005, while walking He sustained fracture on left femur post ORIF, with nails and plating fixation, he is limping with stiffness of the left knee and severe osteoarthritis
Legal permanent incapacity is 10%".*

[21] This assessment, without supplementary oral evidence, is wanting in many respects. It does not establish the exact impact of the injury on the plaintiff nor whether or not there is a possibility of healing. Whether the "10%" incapacity relates to his movements or incapacity to perform certain activities remains unclear. Details on these issues was imperative, particularly in view of the following crucial aspects of this case;

a) The surgery done on the plaintiff, as I understand it, involves the internal fixation of metal plates and nails on the fractured bone, done with the purpose of guiding the healing process of the bone. The plaintiff told the Court the metal plates are still in his thigh and he is unable to independently walk and that the injured leg is dysfunctional.

b)The recordings as gleaned from the health booklet however suggest the possibility of healing of the orthopedic injuries sustained. These are;

On **25/10/16**, the Doctor has recorded "*we propose to remove the plate but patient has to come next year because we do not have an opportunity to attend to him for the moment*"

On **22/03/17**, the doctor has recorded; that the plaintiff was hospitalized on 17/03/17 and discharged on 22/03/17 and "*removal of 2 screws, 'site' well healed on 21/03/17*"

On **28/07/18**, it is also recorded that "*knee flexion contracture and home program taught. His knee is functional and he can walk without clutches for short distances*".

[22] While it is true that the plaintiff underwent physiotherapy on various dates as reflected in the health booklet, it appears to me that he has exaggerated the effect of the injury because these identified damning facts are left unexplained. it is true, per the 28th July 2018 recording that he might walk with limb and be unable to walk long distances without the crutches, however in the absence of any other medical evidence, it seems to me that the physiotherapy might result in full , albeit not immediate, recovery. I cannot therefore accede to the amount claimed although it is undeniable that he continues to seek medical treatment in relation to the injury. In my assessment of an appropriate award, I will therefore be guided by the amounts incurred in the past.

[23] As indicated earlier, the plaintiff has spent M 1 029 as hospital expenses as of the date of hearing of this matter. M1029 less the amount of M 249 which he paid upon his discharge from hospital is M 780, which he spend for a period of three (3) years counting from July 2015 to June 2018. This means he spends roughly M 260 yearly. In 12 years, he will have spent M 3 120. As I have already stated, there is nothing to suggest the number of years during which he is expected to seek further medical attention.

[24] Regard being had to transport needs concomitant to seeking medical attention and inflation adjustment, an amount of M 5 000 would be appropriate.

Loss of past and future earnings

[25] Plaintiff testified that before these injuries, he had been working as a bricklayer and earned an amount of **M1, 750.00** on monthly basis. He says the accident changed his life drastically as he is now unable to work as a bricklayer as he did before and as a result he has lost his source of income. He says he has not been able to get his earnings from **May 2015 to October 2019** (for a period of 54 months). He has thus already lost earnings in the sum of **M94, 500.00**.

[26] As regards future earnings, it was argued that had it not been for the accident, the plaintiff would still be working and he would ordinarily be expected to retire at the age of 60, that is, in the year 2030 because he is currently 49 years of age. This assumption was made in view of the retirement age under the Public Service Act of 2005. A calculation of his annual earnings would be M 21 000 and this multiplied by the years remaining until he reaches 60, amounts to M 231 000.00. This added with 94 500 for lost earnings amounts to M 325 000.00. The plaintiff's claim under this heading is only half of the amount, which he opines is a fair amount for both parties. The case of **Pitt V Economic insurance 1957(3) SA 284** was cited in this regard.

[27] In a claim under this head, the plaintiff must prove that he will probably suffer financial loss or diminution of his income. In **Rudman V Road Accident fund 2003(2) SA 234(SCA)** at para 11, the Court said: "*There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.*"

[28] I turn now to the facts relating to the claim for future loss of income. The effect of the injury on his capacity to earn income will also be addressed. He testified that as a result of the injuries sustained he can no longer do the bricklaying job. Despite the fact that the plaintiff did not produce any documentary evidence to support an allegation on the monthly earnings, the absence of evidence to gainsay his version, that he was a bricklayer leads to acceptance of his allegation. There cannot be any doubt that the brick-laying work demands one to be physically fit and able to work at heights and outdoors. The health booklet reveals that the plaintiff complained of the knee pain and flexion difficulty over the past years. Regard being had to the pressure asserted on the joints in brick-laying job, he was and still is in no position to carry on this work until he will have healed.

[29] In the case of **Pitt V Economic insurance(supra)** it was stated at **p287** of the judgment that the object of awarding compensation for loss of income is to put the plaintiff financially in the position in which he would have been but of the injuries. However, owing to uncertainties of the future, it is not possible to make any precise calculation in this respect. It was said; *"The court's task in estimating damages is always a difficult one. Basically one has evidence as to the plaintiff's affairs, but when, in addition, the future has to be scanned, the Court is virtually called upon to ponder the imponderable"*.

[30] In an endeavor to calculate a fair amount under this head, I will resort to Applicable principles found in the cases of **AA Mutual insurance V Van Jaarveld (1974(4) SA 729(A)** and **Gwaxula V Road accident Fund (09/41896) [2013] ZAGPJHC 240**. It has been stated that; when assessing damages for loss of earnings, normal consequences and circumstances of life which beset every human being and which directly affect the amount that a plaintiff would have earned should be taken into account. These are referred to as contingencies. In the calculation, a

deduction should be made for both favourable and adverse contingencies which vary from case to case, including taxation, state of health, early death, loss of employment, promotion prospects, retirement at earlier age etc.

[31] *In casu*, no sufficient details have been placed before Court in relation to the following significant aspects; a) the history of the plaintiff's employment/ stable work history b) the permanence or otherwise of the employment at the time of the injury, c) what position he held, d) no medical evidence on prospects of future employability/his employability status, e) Chances of permanent employment have not been suggested to exist etc. to enable the Court to make the contingency deduction.

[32] I will therefore be guided by factors that have been elucidated in evidence for purposes of calculation of damages under this head. The evidence reveals that the plaintiff developed osteoarthritis and has to use the crutches for movement. These would no doubt render him unable to cope with bricklaying work which require him to stand or walk for most of the day.

[33] Another important factor to consider is that since the accident in 2014, the plaintiff had not been able to work. Assuming that the plaintiff is still employable, the injuries and use of crutches place him at a disadvantage in relation to his uninjured peers, in the open labour market. This means, the chances that he can immediately secure employment are minimal. He would probably remain unemployed for approximately one year. He will continue to suffer loss of earnings because it is likely that he can no longer be able to secure employment on full-time basis, and he is, as a result, likely to perform short-term jobs, earning meagre income. Clearly the injury affected his earning capacity. Resultantly, he will remain unable to fulfil the role of father to his children.

[34] Regard being had to these considerations, the pertinent question is what award would be fair and adequate compensation for the plaintiff in respect of both his loss of past and future earnings.

[35] The calculations made by plaintiff's counsel are based on assumptions. As I have stated above, the plaintiff's evidence is insufficient on important factors to be considered under this head. This leads to a substantial reduction in the amount claimed because, the plaintiff cannot be awarded a huge amount which he failed to sufficiently justify, at the expense of the defendant. For these reasons, I think it would be appropriate to reduce the calculated figure of M 325.000 being the total amount for lost income and loss of future earnings, by 75 percent. The amount of M73 024.00 is in my view fair and just under the circumstances explained above.

GENERAL DAMAGES

[36] I turn now to the question of general damages comprising pain and suffering, discomfort and disability, disfigurement and loss of amenities of life. Summed up, the plaintiff has claimed an amount of M 261.142.00 in respect of general damages.

[37] Authorities are legion that the assessment of general damages lies in the discretion of the judge to award a fair and adequate compensation in the circumstances of each case. **Sandler V Wholesale Coal suppliers Ltd 1941 AD 199, Protea Assurance Co. Ltd V Lamb 1971(1) SA 530**. In executing this difficult duty of valuing damage in terms of money, Courts do so on the basis of evidence presented. Factors such as the nature and extent of the injuries, permanence, severity and their impact on the plaintiff's life are taken into account. **Nkofi V Ramoreboli CIV/T/631/13, Philander V Minister of safety and security 473/2011(2013) ZANWHC 51**. The fairness of the award should not be viewed in favor of the plaintiff only, but the defendant as well. This means

the Court should not lean in favor of the plaintiff at the expense of the defendant **Pitt V economic insurance** (supra).

The following were submissions under each head.

Pain and suffering

[38] It was submitted that; before and after his hospitalization to date, he endured great or acute pain as a result of the injury he sustained; that; the period of plaintiff's hospitalization subsequent to the incident coupled with the fact that he cannot walk properly on his own except with the help of the two crutches, point to the fact that he endured an unbearable pain. An amount of M 100.000 is claimed under this heading. The case of **Sandler V Wholesale Coal** (supra) was cited in relation to the proper approach in the assessment of general damages.

Discomfort and disability and loss of amenities of life

[39] The total sum of the amount claimed under this head is **M151, 142.00**. In the like manner, Counsel, during submissions emphasized the excruciating pain that the plaintiff had to endure during and after the open reduction and internal fixation procedure. The court's attention was also directed to the fact that the plaintiff is unable to walk without the aid of crutches. The fact that plaintiff has been walking with the help of crutches from **May 2015** to date was argued to be indicative of the seriousness of the injuries he sustained and the disability caused by this injury. The case of **Yeko V SA Eagle insurance Company Limited Ciskei Supreme Court, 1986** was cited in support of this submission.

[40] With regard to damages for loss of amenities of life it was submitted that due to the injury, the he is not able to do the work of bricklaying as he used to before the incident, unable to even work in the garden to grow vegetables for his family due to the plates inserted on the fractured femur, unable to satisfy his wife in bed, he no longer has the free and unfettered use of his left leg and that he limps as he walks with the help of crutches.

It was submitted that these activities, which require the use of healthy legs have been and continue to be affected. The case of **National University of Lesotho & Another V Thabane LAC [2007-2008] 476** was cited in support.

[41] In assessing the amount to be awarded to the plaintiff for general damages under these various heads, I deem fit to endeavor to make a single/global award because claims under all the heads arise from one injury and the submissions in respect of each individual head adopted almost a similar reasoning. This holistic approach was adopted in **April V Minister of Safety and Security 79/07[2008] ZAECHC 14** where the Court made the following useful remarks;

"In making an award for this part of the claim, it is necessary to recognize (a) a degree of overlap in the various categories under which damages are awarded, and (b) the duty to avoid giving double compensation because things which have elements in common are called by different names.

[42] On the evidence presented, the consequences of the accident on the plaintiff can be summed up as follows; he endured pain during the fall on the steel pipes, during the time he awaited help and during the orthopaedic surgery/ procedure, he continues to suffer knee pain, the discomfort caused by the pain endured in surgery, the discomfort caused by the use of the clutches for prolonged periods, the wearing of special orthopaedic shoes, plaintiff developed osteoarthritis, His movement has been limited due to the injury. The emotional consequences of all of these is also considered. The overall picture as revealed by evidence is that the plaintiff was severely injured, has suffered much and will possibly continue to suffer in the future. The accident drastically changed his life although there seems to be a possibility of healing.

[43] Having taken into account all of the above considerations, the physical, and emotional consequences of the plaintiff's injuries, justifies an

award of M 70 000.00 for general damages which I consider fair and just in this case.

Disposition

[44] In the result, default judgement is granted in favour of plaintiff and he is awarded damages as follows;

- a) Medical expenses (already incurred) M1 029
- b) Estimated future medical expenses M 5 000
- c) Estimated Loss of past and future earnings M 73 024.00
- d) General damages M 70 000
- e) Costs of suit.

**P. BANYANE
ACTING JUDGE**

For Plaintiff: Advocate Masiphole

For Defendant: no appearance