

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3599/06

In the matter between:

SIPHO SIKHOSANA

PLAINTIFF

and

THE MOTOR VEHICLE ACCIDENT FUND

DEFENDANT

CORAM

: Q.M. MABUZA -J

FOR THE APPLICANTS

: MR. M. SIMELANE OF
MBUSO E. SIMELANE &
ASSOCIATES

FOR THE RESPONDENT

: MR. M. SIBANDZE OF
CURRIE & SIBANDZE

JUDGMENT 28/8/09

[1] The Plaintiff was knocked clown by a moving vehicle during May 2003 along the Mdutshane-Njingeni public road. The Plaintiff was a pedestrian. The motor vehicle

SD 205 GS which knocked him down had third party cover issued by the Defendant. The Defendant admits the collision and accepts liability for the third party.

The Plaintiff issued a summons against the Defendant claiming damages sustained as a result of a motor vehicle accident which occurred on the 3rd May 2003. He claimed a total amount of E334,800.00 made up as follows:

• Hospital expenses	8,000.00
• Medical expenses	1,800.00
• Estimated future medical expenses	25,000.00
• General damages for pain and suffering, loss of amenities of life, disfigurement and disability	<u>300,000.00</u>
TOTAL	<u>334,800.00</u>

The Defendant does not deny liability. The parties have agreed that the only issue for determination is the quantum of damages that should be awarded to the Plaintiff in respect of general damages. They have agreed to the following:

- Special damages amounting to E6,000.00
- Estimated future medical expenses in the sum of E20,000.00

The amount of E26,000.00 has been paid to the Plaintiff in respect of special damages and estimated future medical expenses.

The medico-legal report which was filed by consent sets out the injuries sustained by the Plaintiff. The medicolegal report was prepared by Dr. Samson W. Amlak who is an ear, nose and throat specialist based at Manzini. In it he stated that the Plaintiff sustained:

- Severe face and head injury resulting in right forehead laceration extending to the right ear;
- Severe damage in hearing apparatus (inner ear) resulting in complete loss of hearing which is irreversible and not amenable to conventional surgical intervention.
- He has intermittent right side headache, dizziness and experiences right ear noise.

At my request Dr. Amlak amplified his findings by filing an affidavit and I set hereunder salient points of his affidavit:

"5.1.2. First and foremost it must be clear that Mr. S. Sikhosana's condition is permanent. He cannot hear using the right ear.

5.2.3. He suffers from what is known as a sensory neural hearing loss. Here there is damage to the inner ear (sense organ) and or damage to the auditory nerve which conducts the signals to the brain (Neural Hearing Loss). These occur when there is physical or other damage to the end organ or the nerve. Sensory-neural hearing loss is not reversible. No surgery can correct this loss.

5.3.4 The audiometry test that I conducted upon Mr. Sikhosana right ear showed no response at all frequencies and the clinical findings were suggestive of sensory neural acoustic nerve damage (auditory nerve).

5.4.5. Hearing aids cannot help everyone with hearing loss, but they can improve hearing for many people__The louder sounds help stimulate nerve cells in the cochlea (the spiral cavity of the internal ear) so that one can hear. The cochlea serves as the body's microphone, converting sounds pressure and impulses from the outer ear into electrical impulses which are passed on into the brain via the auditory nerves.

5.5.6. Getting used to a hearing aid takes time. The sound one hears is different because it is amplified. One may need to try more than one device to find one that works well.

5.5.7. In the case of Sikhosana the people around him more especially on his right will have to shout. A profoundly deaf person using a hearing aid may hear sounds above 90 decibels whilst a person with normal hearing can hear sounds from 1 decibel. A normal conversation between adults ranges between 40 to 60 decibels.

5.5.8. The prescription of the hearing aid to Mr. Sikhosana is what is known as a medical chance. There is no guarantee that it will work but it does offer psychological benefits to patients.

5.5.9. I have the privilege in my seventeen years career in this field to observe the tremendous undeniable assistance, compliment and value in the quality of life of the individual, when the machine is used. Many people otherwise would have joined the disabled camp.

5.5.10. Indeed the **machine is meant to achieve what ever, the little hearing sense that is available from the damaged ear as it always compliments in the whole hearing process.**

5.10.11. Modern electronic hearing aids use a microphone or an array of microphones to detect sounds. The sounds may be coded into a digital representation and are then filtered to best compensate for the hearing loss. Filtered sounds are then produced by a speaker and directed into the ear canal to enhance the sound sent to the eardrum and beyond. This does not work if the auditory nerve is damaged."

[6] I further called for the Plaintiff to give oral evidence to enable the court to ascertain the nature and extent of his injuries. He confirmed that there was total loss of hearing in his right ear. He explained that the hearing aid was not meant to amplify sound in his damaged ear but in his undamaged ear. The good ear had to now work twice as much in order to compensate for the loss of hearing in the damaged ear. The hearing aid was to assist in this process by boosting the hearing in the undamaged ear.

[7] The Plaintiff stated that he was 35 years old. He is employed by the Swaziland Government in the Ministry of Agriculture as an assistant forester based at Malkerns Research Centre. Before his injury his duties were the same. His job involved: tree seed technology, nursery practice, planting trees and propagating indigenous trees. He carried out storekeeping chores which involved six nurseries and

equipment. He supervised all six nurseries and carried out consultations. He was also responsible for alien invasive plant projects.

[8] He informed the court that he had been employed in the above capacity for twelve years before the accident and seven years after the accident.

[9] There was a yellow discharge in the right ear. He did not state whether or not this discharge was chronic. Whenever it is windy he hears an "ooing" sound in his ear and hoped that it would stop once he obtained a digital aid. It is painful during windy days, otherwise it is not painful. It was the head injury that was painful.

[10] He further stated that he was a supervisor at work and the loss of hearing affected him adversely. He was in charge of twenty people. When he gives orders they often change the orders stating that he could not hear them. They gossiped about him and laughed at him.

[11] Counsel for the parties helpfully submitted a list of relevant cases for the court's assistance plus the authoritative work by Dr. Robert J. Koch: The Quantum Year Book, 2008. Dr. Koch is a respected authority on the assessment of damages in personal injury cases. The court is indebted to Counsel.

[12] I agree with Mr. Sibandze's submission that as far as the court is aware there are no decisions of the Swaziland High Court relating to general damages for the loss of hearing in one ear; the tendency being to

settle such matters out of court. By so saying I am not being critical but merely making an observation. Consequently, one must turn elsewhere for guidance and assistance.

[13] The authorities I intend to examine are set out at page 46 of the Quantum Year Book 2008 by Dr. Koch. This is the list supplied to me by counsel for the parties.

[14] **Mhlangan v Ministry of Justice and Others**

Cape Provincial Division, (unreported) per Dimont J, November 1965. The Plaintiff was a male hotel waiter who was knocked unconscious with batons wielded by two off-duty policemen. He suffered permanent disablement to one finger (middle) **and for loss of hearing in one ear.** He was awarded general damages in the sum of R850,000; the present value is E46,000.00.

[15] **Rosenbrock v British Insurance Co. Ltd:** Natal Provincial Division (unreported) per Friedman J, 1965: The Plaintiff was a 51 year old male butcher. He was injured in a motor accident **and suffered loss of hearing in the right ear,** there were additional injuries such as a fracture of the right tibia and fibula, fractured nose and cornification of wart at back of leg. He was awarded the sum of R900.00; the present value is E46,000.00.

[16] **Silberbauer v Santam Insurance Co. Ltd and Another:**

Cape Provincial Division (unreported) per van Wissen J August 1966.

The Plaintiff was a 42 year old female. She was a Vice-Principal in a girls' school. She was injured in a motor accident. **She suffered injuries in her left ear,** a fracture to her skull resulting in headaches and vertigo, a fractured clavicle and multiple bruises and abrasions.

She was awarded damages for loss of hearing, pain and suffering, loss of amenities and ability to continue teaching, deprived of playing tennis and squash. She was awarded R4,800.00; the present value is E237,000.00.

[17] In **Baso v Minister of Police and Another** Eastern Cape Division per Munnik J, March 1969:

The Plaintiff was a 33 year old male farm labourer. He was assaulted by a policeman.

In a suit for general damages viz. loss of amenities; **deafness in one ear,** he was awarded the sum of R1, 100.00 in respect of loss of hearing (deafness in one ear) shock, pain and suffering. The present value of that amount is E50,000.00.

[18] In **Nyathi v Tshalibe,** Zimbabwe High Court (unreported) per Muchechetere J, November 1988.

The Plaintiff was a middle aged housewife. She was assaulted with an open hand four times on her left ear with severe blows. **She suffered loss of hearing in her left ear.** She was awarded general damages in the sum of Zim \$2,200 for pain, suffering and loss of

amenities. The present value of that amount is R12,000.00.

[19] For purposes of the award in the present case, I have excluded the case of **Nyathi v Tshalibe** on the advice of the learned author that the present official exchange rate from Zimbabwe dollars to South African Rands is uncertain as the amounts are low compared to South African awards and should be used with caution when comparing them to South African rates.

[20] Mr. Simelane urged this court to follow the Silberbaur case for purposes of the award in **casu**. His argument was that the facts were similar to the present case.

[21] In **casu** the Plaintiff is 35 years old. He holds the following academic certificates: a Form V O'Level Certificate, a higher certificate in forestry obtained from Cyprus, a certificate of seed technology from Tanzania, a certificate in labour relations from IBM, Johannesburg.

[22] In Silberbauer, the Plaintiff was 42 years old. She was a Vice-Principal in a girls' school. In addition to loss of hearing she suffered from vertigo. Her ability to teach was affected. She could no longer play tennis and squash.

[23] In **casu**, the Plaintiff has not complained about his inability to continue working; except that his co-workers gossip about him and laugh at him. They change instructions he gives them pretending that they did not hear him. The resultant embarrassment is

not acute. This is not the same as teaching and holding the position of Vice-Principle which comes with heavier challenges and responsibilities. The Plaintiffs duties herein are more physical than academic. The Plaintiff herein seems to have resumed his duties after the accident without any major changes and challenges.

The Plaintiff in **casu** did not lead any evidence to show that he was physically active in any sports. Whereas the Plaintiff in Silberbauer played tennis and squash.

The award in Silberbauer included loss of hearing, pain and suffering, loss of amenities and inability to continue teaching, deprivation of playing tennis and squash. The sole issue to be decided in casu is that relating to the loss of hearing and injuries set out in the medico-legal report by Dr. S.W. Amlak. I have set these out in paragraph 4 above. I have also taken into account the views outlined by Dr. Amlak in the affidavit referred to in paragraph 5 above.

Having pointed out the differences in the two cases, it would not be equitable for me to award damages in the same amounts.

In **Baso v Minister of Police and Another** (above) Munnik J had this to say at page 14:

"In so far as the loss of amenities of life is concerned, that is the deafness, it is not what one might call a minor handicap to be deaf, even though the deafness is

only in one ear. It is perhaps not in the class of losing a limb or the sight of an eye, but nevertheless it is a serious physical defect. But then again one must have

regard to the type of work performed by the plaintiff. He is not, for example, a musician who would be more seriously affected by deafness, or a telephone operator who would be equally affected; he is a farm labourer. The deafness is perhaps not so serious a handicap in his case as in the case of those who follow an occupation in which the hearing plays a greater part. On the other hand it presents him, as it would any other person, with a source of danger because inability to hear on the one side makes it difficult for him to assess distances which vehicles are from him or various things which affect his day-to-day living. He is entitled to be compensated for the fact that he has lost the hearing of his one ear".

The above quotation is apposite in *casu*. The only difference being that the Plaintiff is a forester not a labourer. I have considered all the surrounding circumstances pertaining to the Plaintiff herein and taken into account other previous awards including the award in Silberbauer. I have also considered the fact that the awards in the Quantum Yearbook relate to values for 2008. We are now in the latter part of 2009 and considering the global economic downturn; the inflationary adjustment would be higher than average. In my considered view an equitable and fair award would be

E 120,000.00 (One hundred and twenty thousand Emalangeneni).

The order of the court is as follows:

- (a) The Defendant is ordered to pay to the Plaintiff the sum of E120,000.00 (One hundred and twenty thousand Emalangeneni) being in respect of

general damages for pain and suffering, loss of amenities of life disfigurement and disability.


J.M. MABUZA -J