

SOUTH AFRICA / JUDGMENT

M v Road Accident Fund (08758/16)

[2017] ZAGPJHC 201 (14 July 2017)

[2017] ZAGPJHC 201**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

08758/16

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NUMBER : 08758/16****Not****reportable****Not****of interest to other judges****Revised.****14/7/2017****In****the matter between:****M.****S. PLAINTIFF****and****ROAD ACCIDENT****FUND DEFENDANT**

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] This is an action for general damages in terms of the Road Accident Fund, 56 of 1996 (“Act 56 of 1996”). S. M. (“the plaintiff”) sustained bodily injuries as a result of a motor vehicle collision which occurred on the 1st of March 2014.
- [2] The merits have become settled and the Road Accident Fund (“the defendant”) has conceded liability for 100 percent of the plaintiff’s proved damages. The defendant has settled the amount of loss of income in the amount of R276 877-65 and has also provided the plaintiff with an undertaking in terms of section 17 (4) (a) of Act 56 of 1996 for future medical expenses and treatment.
- [3] The only issue in dispute and for my determination, is the quantum of general damages. Advocate Kahn, representing the plaintiff, has argued that R900 000-00 is an appropriate amount, whereas Advocate Kuta, representing the defendant, submits that amount is too high.
- [4] The defendant produced no medico legal reports and conceded to the correctness of the plaintiff’s reports. The matter was accordingly argued on the conclusions as expressed in the various medico legal reports provided by the plaintiff. These reports include the two reports of Prof John Fleming (orthopaedic surgeon), dated the 15th of September 2014 and the 11th of September 2014 respectively, the report of the occupational therapist, namely, Megan Spavins, and a report of an industrial psychologist, namely, David de Vlamingh.

BACKGROUND

- [5] It is common cause that the plaintiff was a labourer born in 1973 and that he is 44 years old. He was taken by ambulance to the Johannesburg Hospital where he was admitted and stayed for approximately five weeks. He has never returned to work since this accident. As a result of the aforesaid collision, the plaintiff sustained severe bodily injuries which include; (i) a head injury with loss of consciousness; (ii) a dislocation of the left elbow; (iii) degloving of the cubital fossa; and (iv) a severe laceration of the brachial artery resulting in a flaccid left arm.
- [6] The plaintiff was admitted to theatre for debridements on several occasions. An external fixative was placed on the left elbow and a vein graft was performed on the brachial artery. He also had extensive skin grafting, and he received antibiotics, pain killers and analgesics.

THE EXPERT REPORTS

[7] Professor Fleming states that the prolonged immobilisation has resulted in a 'frozen shoulder' with limited movement,

which makes it difficult for the plaintiff to do bi-manual activities. The plaintiff's permanent disability is severe as

he has lost approximately 95% of his power grip in the left arm and hand. The stiffness and bad positioning of his hand has contributed

to his inability to work. Although the degloving injury was stitched up and plastic surgery completed, the main vein carrying blood into the arm, namely the brachial artery was severed, causing the loss of much blood and oxygen to his arm. This resulted in the arm becoming floppy. His spine is out of balance due to the drooping of the left arm. The degree of movement of his shoulders has been severally impaired. Instead of being 60 degrees it is 30 degrees. His elbows are very stiff. Normal elbow movement is 0/150 degrees, however, his movement is -50/70 degrees. The normal values for forearms is 90/90 degrees, yet his movement is -20/40 degrees. The power pinch meter results are 110 units to the right hand and 10 units to the left hand.

[8] The fact that he is unemployable appears in the industrial psychologist report, where it is stated that, although he was working

as a demolition worker at the time of the accident, he is now unable to perform his premorbid tasks which has led to him resigning

as he is no longer ambidextrous.

[9] Advocate Kahn argued that the plaintiff's situation is not akin to a broken arm and should be considered closer to an amputation.

[10] Advocate Kuta argued that the arm has been saved and has not been amputated. The brachial artery graft inserted across the damaged artery saved the arm and it has healed. She referred to the expert report of Dr Fleming, where it stated that the weakness of the left arm and hand will improve with functional activity. Advocate Kuta also referred to the report of the occupational therapist, where it is stated that "Mr M. is able to perform light home maintenance tasks independently but he is slow and inefficient in tasks requiring medium and heavy work and bilateral arm function."

LEGAL PRINCIPLES

[11] In arriving at an appropriate award for general damages, the learned author JJ Gauntlett SC in *The Quantum of Damages* [1] referred to the case of *Sandler v Wholesale Coal Supplies* 1941 AD 194 where the learned Watermeyer JA at page 199 stated;

"...It must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money,...there are no scales by which pain and suffering can be measured, ...The amount to be awarded as compensation can only be determined by the broadest general considerations".

[12] In the case of Protea Insurance Company v lamb 1971 (1) SA 530 (A) at 535H-536A, it was stated that although the determination of an appropriate amount for general damages is largely a matter of discretion of the court, some guidance can be obtained by having regard to previous awards made in comparable cases, however, as stated by the learned Potgieter J at pages 534 to 536B;

"...this process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation,...Comparable cases, when available, should rather be used to afford some guidance,...in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration. "

[13] In AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A), the court held;

"It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. "

[14] There is no hard and fast rule in considering past awards, as it is difficult to find cases on all fours with the one presently being considered.

[15] There is a tendency in our courts towards more generous awards for general damages. See Marunga v The Road Accident Fund 2003 (5) SA 164 (SCA) at 170F where the learned Navsa JA referred to the following passage in Wright v Multilateral Motor Vehicle 1997 (4) reported in Corbett and Honey The Quantum of Damages in Bodily and Fatal Injury Cases Vol. IV at E3-31 where the learned Broome DJP stated that the reason for this is that;

" [There is] ... a natural reflection of the changes in society, in 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 countries."[My

emphasis]

[16] I now proceed to consider some comparable cases and awards made previously.

Cases referred to by the Plaintiff

[17] Various cases were referred to by Advocate Kahn. The case law referred to can be categorized under the following headings (1) minor elbow and shoulder injuries; (2) limitation of an elbow joint and (3) amputation of an arm.

Cases pertaining to minor elbow and shoulder injuries

[18] In the case of *Mulliner v Bendix* 1954 C&B 529, a 68 year old female, sustained an injury to the shoulder and ribs, an impacted fracture of the left humerus, fracture of the left third rib, and lacerations to the forehead. The sequelae were 5 percent limitation of the left shoulder joint, and a permanent nervous condition. The court awarded the plaintiff R3000-00. The current value in 2017 would be R305 000-00[2].

[19] In the case of *Saayman v Commercial Union Insurance Co. of SA* 1972 (2) ECD, a 52 year old railway crane driver, sustained a compound comminuted fracture of the right humerus, fractures of both

radius & ulna, and an injury to the lumbar spine. The sequelae were permanent back ache; a painful shoulder and a future operation to the wrist. He was still able to do some light employment on the Railways. He was awarded R8000-00. The current value in 2017 would be R478 000-00[3].

Cases pertaining to limitation of an elbow joint

[20] In the case of *Laubscher & Another v Commercial Union Ass* 1976 (1) SA 908 ECD, a female sales lady, sustained a severely comminuted supra-condylar shattered fracture of the right humerus. The sequelae were limitation of movement of the elbow joint of 40 degrees; and distortion to the arm, (the one being shorter than the other). She could not be employed in the career of her choice which was selling materials, but she could still work as a saleslady selling linen. The court awarded her damages in the sum of R4000-00. The current value in 2017 would be R155 000-00[4].

[21] In the case of *Bester v South African Eagle Insurance Ltd* 1974 2 QOD 397 (R), a 23 year old female sustained a severe comminuted fracture of the right arm immediately above the elbow. The

sequelae were a 63 degree loss of extension and a 10 degree loss of flexion in the right arm, resulting in a crooked arm with muscular weakness. It was not suggested that she would lose anything in the employment market and was able to cope with her household chores with

assistance. The court awarded her R4050-00. The current value in 2017 would be R198 000-00[5].

Cases pertaining to amputation of an arm

[22] Advocate Kahn argued that a useless left arm is akin to an amputation, and even though the plaintiff's arm was not amputated, it is of no use to him. The following cases were referred to, namely; *De – Felice v South British Insurance* 1962 1 QOD 222 (W) , *Du Plessis v Sentraoer Bpk* 1980 3 QOD 304 (O); *King v Geldenhuys* CPD 1983 3 QOD 379 (C), *Mdunge v Multilateral Motor Vehicle Accidents Fund* 1998 4 QOD J2-145 (N), *Smith v RAF* 2003 5 QOD D2-1 (CA), and *Rens v The MEC for Health: Northern Cape Provincial Department* 2009 6 QOD D2-1 (NCK).

- [23] In the case of De-Felice (supra), the plaintiff whose brachial nerves of the right arm were wrenched out of the spinal column, suffered the following sequelae, namely, a paralysis of the right arm which was later amputated and the shoulder which was immobilized. He also suffered pain to the spinal column. An artificial limb was fitted which was only movable by moving the left shoulder. The court awarded him R5500-00. The current value in 2017 would be R470 000-00[6].
- [24] In the case of Du Plessis (Supra), a 34 year old female meat packer, had her left forearm amputated 15 cm below the elbow joint. She also suffered a neck injury, scalp laceration and a dislocation of the cervical spine in two places. The sequelae were; a laceration requiring suturing and a fusion to remove the increasing neck pain. In addition, the fitting of an elbow prosthesis would be needed. She was unable to obtain further employment. She was awarded R20 000-00. The current value in 2017 would be R448 000-00[7].
- [25] In the case of King (supra), the plaintiff who was a seasonal piece-worker on farm land, had his right arm amputated as a result of being bitten by two bulldogs. The doctor described his injuries as “virtually terminal” and that he was lucky to be alive. He was seriously bitten on both arms, both legs, his throat and face. He was awarded R45 000-00. The current value would be R738 000-00 in 2017[8].
- [26] In the case of Mdunge (supra), the plaintiff who was a 28 year old male scholar and part-time labourer sustained a brachial plexus injury to the left arm, an extensive ocular injury to the left eye, causing irreparable damage to the retina. The sequelae were permanent loss of all useful vision to the left eye, and a left arm which was completely flail, useless and equivalent to an amputated arm. He was awarded R180 000-00. The current value in 2017 would be R524 000-00[9].
- [27] In the case of Smith 2013 (supra) a 5 year old boy sustained a parietal fracture of the right side of his skull. He also suffered a traumatic amputation of the entire left arm. The sequelae were severe pain, shock and distress, resulting in future operations and behavioural problems in the form of aggression and withdrawal. The court awarded the plaintiff R250 000-00. The current value in 2017 would be R538 000-00.
- [28] In the case of Rens (supra), the plaintiff, a 10 year old boy, underwent an above-elbow amputation of his left arm and subsequent thereto, a re-amputation through to the left shoulder. The child was awarded R600 000-00 for general damages. The current value in 2017 would be R920 000-00.

Cases referred to by the defendant

- [29] Advocate Kuta referred to the case of Lee v Road Accident Fund [2010] ZAGPPHC 276 and Smith v Road Accident Fund

- [2011] ZAGPJHC 203. In the Lee case (supra), the plaintiff suffered a fracture of the elbow, an open wound on the head, multiple bruises, cuts, a left knee injury, back and neck injuries, as well as a 3-part fracture of the right knee-cap. The plaintiff was awarded R250 000-00. The current value in 2017 would be R367 000-00.
- [30] In the case of Smith 2011 (supra), the plaintiff who was 52 years old, and employed as a security guard, sustained a scalp laceration, intermittent pain on the lumber spine, shoulder and a right lower leg which had become shortened. He could not lift or carry heavy objects and could not climb stairs. The plaintiff's left and right arms and his elbows were normal with a full range of movement. The court awarded him R300 000-00 for general damages.
- [31] In addition to the cases referred to I found the following cases equally helpful in my assessment of damages. These are the cases of Khumalo v Road Accident Fund (A5020/05) [2006] ZAGPHC 26, AA Mutual Insurance Association Ltd v Van Jaarsveldt 1974 (4) SA 729 and Swanepoel v Road Accident Fund 2008 5 A3 QOD 40 (NC).
- [32] In the case of Khumalo (supra), a 41 year old plaintiff sustained a fracture to the left humerus, a fracture to the left upper tibia, and a fracture to the neck of the left tibia. An intra medullary rush nail was inserted surgically in her fractured humerus, which broke and resulted in the humerus bending to form an extra elbow, causing a gross deformity. The sequelae in this matter included neurological damage to her left hand, resulting in her middle finger, ring finger, and small finger remaining closed, resembling a claw-like unsightly hand. The continued disuse of the left hand resulted in loss of muscle bulk, along her entire left arm, leaving her no control over her left wrist, disabling her from bringing her left hand to her mouth. She was effectively rendered single-handed by the accident, and was no different from a person whose left hand had been amputated. The plaintiff was an unsophisticated woman, who lived in a rural setting with little or no support from family, and would be unable to undergo the intensive post-operative treatment designed to restore the use of her left arm. The plaintiff was right-handed. The plaintiff who was formerly a healthy whole woman, developed a gross disability and deformity. She was awarded R400 000-00 in general damages.
- [33] In the case of AA Mutual Insurance (supra), the plaintiff, a 34 year old male, sustained a dislocation of the cervical spine at C4/5 level with an incomplete tetraplegia. He was completely paralysed for a period of 3 and a half months, where after he was able to walk on crutches. Upon his discharge from hospital, the plaintiff experienced a weakness of grip in both hands and a 4/5 recovery of motor power of the legs. He had spasticity of both legs. He could no longer control his bladder and bowels and sometimes soiled himself. He had a spastic haemaplegia involving his dominant side and his right arm and hand were so badly affected that they could be described as a nuisance. At best his arm could only serve as a prop. His right leg was also affected by the same spastic haemaplegia. The court awarded him R22 500-00 in general damages. The current value in 2017 would be R1 345 000-00[10]

[34] In the case of Swanepoel (*supra*), the plaintiff, a 43 year old adult male had suffered a frontal head injury, and a spinal chord injury at C5 and C6, and fractures of the D6 and D8 vertebraes. He was a quadriplegic from C6 down. Before the accident he was a farmer and professional hunter. He

ploughed his fields, drove the tractor and repaired his cars, and serviced his machines and windmill. Post the accident he could no longer conduct his activities on the farm and could no longer hunt. He was awarded R800 000-00 in general damages. The current value in 2017 would be R1 313 000-00.

[35] Although these cases have been of some assistance, it is trite that each case must be determined upon its own merits and no one case is factually the same as another.

EVALUATION

[36] In this present matter, the salient facts which I must consider in determining an appropriate award for general damages are that the plaintiff has a left arm that is useless. He is unable to bend or use his left elbow and due to the minimal grip of the left hand he cannot use it to eat with. Due to the frozen shoulder his left arm is useless and currently he cannot effectively function with tasks requiring medium or heavy work which require bilateral arm function. He is currently unemployed and has searched for work as a gardener.

[37] Although I cannot award separate amounts for the dislocation of the left arm, the degloving of the cubital fossa and the laceration of the brachial artery, collectively I must still consider the impact of these injuries. Although mention has been made by Professor Fleming that the marked weakness of the left arm and hand will only improve by functional activity, the fact remains that this plaintiff has to compete with able-bodied men to find a job. There is no guarantee that a potential sympathetic employer will give him a job in his current condition. A further factor to consider is whether the plaintiff will be able to undergo the treatment in the future to improve the functioning of the left arm and hand. There is a strong likelihood that he may not find appropriate work to sustain him during the remaining 30 years that he could effectively have been employed, had the accident not occurred. Although the injuries sustained by the plaintiff do not equate to an arm amputation, the limited usage of the left arm and hand is of serious concern.

[38] I find the case of Khumalo (*supra*) to be in the broadest terms, close to the facts of the present case. The injuries sustained by the plaintiff in the Khumalo case and the sequelae, appear to be more or less similar to those of the plaintiff in the present case. Like the plaintiff in the Khumalo case (*supra*), the present plaintiff is in his forties, and basically is single-handed. He too will need further interventions. The injuries

and the sequelae sustained by the plaintiffs in the AA Mutual Insurance case (*supra*) and the Swanepoel case (*supra*) were more severe than the present case. In the AA Mutual Insurance case (*supra*), the plaintiff had haemiplegia to both the right arm, hand and leg. In the Swanepoel case (*supra*), the plaintiff was a quadriplegic. In both these latter mentioned cases there were no

prospects that the plaintiffs would improve by means of functional activity, which is the case in the present matter before me. The injuries and sequelae in the Mdunge case (supra) and the King (case) supra, were also more severe than the present case. The present plaintiff does however appear to have more severe injuries as compared to the injuries in the Lee case (supra) and the Smith 2011 case (supra).

[39] I have considered the award made in the case of Rens (supra), however, that plaintiff was 10 years old and as stated in the case of Marunga (supra), the older the plaintiff, the lower the general damages in comparison to a young person sustaining a similar injury.[11]

[40] The plaintiff's position is worsened to a substantial degree as compared to the cases of Sayman (supra), Laubscher (supra) and Bester (supra), in that in those mentioned cases the plaintiff was still able to work. In comparison, in the case of Du Plessis (supra), where the plaintiff's arm was amputated, that plaintiff was unable to obtain further employment. The court only awarded the plaintiff in the Du Plessis case (supra), R448 000-00 in current value.

[41] Taking into account all the relevant factors, namely the loss of amenities, the fact that his daily life has considerably been changed as a result of the accident, his disability, the need for further interventions, the consequences of inflation and the reduced value of money, I am of the view that an amount of R650 000-00 would be fair and equitable compensation as general damages.

COSTS

[42] On the question of costs, Advocate Kahn argued that the defendant should pay costs on an attorney and client scale for the 15th and the 19th of June 2017. He based this on the fact that the defendant has been aware of this claim this 2015, and has done nothing to attempt to resolve this matter. In addition, Professor Fleming's report, dated the 15th of September 2014, was served on the defendant as far back as the 3rd of July 2015. The defendant being aware of the plaintiff's injuries, did not investigate the matter within the legislated 6 months, and attempted to argue this matter without procuring any reports of their own. Only when the matter was set down for trial on the 15th of June 2017, did the defendant concede liability. In addition, it was only on the Thursday prior to commencing this trial, that the defendant settled the loss of earnings.

[43] Advocate Kuta argued that the defendant and plaintiff attended a pre-trial conference where they both failed to resolve this matter. An offer was made by the defendant, which was later increased, and which was rejected by the plaintiff. It is the plaintiff who then sought an allocation for trial. Accordingly Advocate Kuta argued the defendant is not liable for attorney and client costs or for the costs of the 19th of June 2017.

[44] In evaluating the request of Advocate Kahn, this court has considered the fact that the defendant accepted the reports handed in by the plaintiff, and even though it may argued that the defendant did not procure its own reports, the fact remains they conceded the contents of the reports without wasting further time to obtain additional reports. I do not

find that there was serious misconduct on the part of the defendants. There was no attempt on the part of the defendant to mislead this court or to unnecessarily delay this matter. In fact there were two offers made by the defendant which were rejected by the plaintiff.

[45] Accordingly, in the absence of frivolous, vexatious, reckless or malicious behaviour evident in the defendant's conduct, I do not believe that this is one of the cases where an order for costs on the attorney and client scale should be awarded.

ORDER

[46] In the result, I make the following order;

1. The defendant shall pay the plaintiff the sum of R650 000-00 in respect of the plaintiffs claim for general damages;
2. The defendant shall pay to the plaintiff an amount of R 276 877.65 in respect of the plaintiffs claim for past and future loss of income.
3. The defendant shall be liable to pay interest on the aforesaid amount at the rate of 10.25% p.a. with effect from the 11th of March 2016 until date of final payment.
4. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17 (4)
 - (a) of Act 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of, or rendering of a service to him, or supplying of goods to him arising out of the injuries sustained by the said plaintiff in a motor vehicle collision on the 1st of March 2014, and the sequelae thereof, after such costs have been incurred and upon proof thereof.
5. Defendant to pay the costs of suit.
6. Payment of the aforesaid capital amount and costs shall be payable into the trust account of the plaintiff's Attorneys, namely:

R A Seedat Trust Account

Nedbank, Lister branch,

Account Number [...],

Code: 197805.

7. The plaintiffs claim is not subject to the Contingency Fees Agreement Act.

D DOSIO

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff Adv Z. Kahn

On behalf of the Defendant Adv K. Kuta

Date Heard: 19 June 2017

Handed down Judgment 14 July 2017

- [1] Volume 1, Fourth edition, Juta, 1995 page 5
- [2] The Quantum Yearbook by Robert J. Koch 2017 p25
- [3] The Quantum Yearbook by Robert J. Koch 2017 p36
- [4] The Quantum Yearbook by Robert J. Koch 2017 p16
- [5] The Quantum Yearbook by Robert J. Koch 2017 p7
- [6] The Quantum Yearbook by Robert J. Koch 2017 p10
- [7] The Quantum Yearbook by Robert J. Koch 2017 p11
- [8] The Quantum Yearbook by Robert J. Koch 2017 p15
- [9] The Quantum Yearbook by Robert J. Koch 2017 p19
- [10] The Quantum Yearbook by Robert J. Koch 2017 p5
- [11] Marunga v RAF 2003 5 C&B E3 – 1)

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Prepared on 13 October 2026 · Esheria