

SOUTH AFRICA / JUDGMENT

Matloga v Passenger Rail Agency of South Africa (22673/2019) [2024] ZAGPJHC 1194 (21 November 2024) [2024] ZAGPJHC 1194

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nkoenyane

CASE / FILE NUMBER

22673/2019

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
JOHANNESBURG

CASE NO: 22673/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE: 21 November 2024

SIGNATURE

In

the matter between:

MATLOGA
MULAIFA JUSTICE
PLAINTIFF
and
PASSENGER
RAIL AGENCY
DEFENDANT
OF
SOUTH AFRICA

Summary: Damages

– bodily injuries – determination of quantum- facts and
experts’ opinions undisputed – court ensure
that just and
fair compensation awarded even facts are undisputed.

JUDGMENT

NKOENYANE AJ

1.

INTRODUCTION

1.1. Public transport providers, such as PRASA, taxi operators, and bus services, bears a legal and moral obligation to ensure the safety and well-being of their passengers. This duty is deeply rooted in the unique relationship that arises between the carrier and the passenger, often formalized through a contract but not exclusively dependent on one. Beyond the contractual sphere, public transport entities also carry public law responsibilities, reinforcing the significance of their role in safeguarding commuters. A failure to uphold these obligations constitutes a wrongful act in the context of delictual liability, potentially rendering them accountable for damages suffered by passengers.

1.2. This case involves the quantum of damages PRASA must pay when a passenger is injured when falling out of a moving train.

1.3. On or about 16 May 20h19 at approximately 19h30, the Plaintiff was a fare paying passenger with a valid train ticket in a passenger coach, (here in after referred to as the “coach”) of a train between Limindlela and Leralla train station when the train caught fire and he was pushed through the open doors while the train was in motion by the other commuters to get away from the fire.

2. ISSUES IN DISPUTE:

2.1. The issue of quantum is outstanding and to be decided by the Court. The Plaintiff is claiming a total amount of R1,838 560.00 (One million eight hundred and thirty-eight and fifty-six rands).

3. ISSUES NOT IN DISPUTE

3.1. The parties have settled on merits at 100% in favour of the Plaintiff.

4. THE PARTIES:

4.1. The Plaintiff is Mulaifa Justice Matloga, an adult male with full legal capacity born on 1st December 1988 currently residing at Kaarlfontein, Ivory Park, Gauteng Province.

4.2. The Defendant is Passenger Rail Agency of South Africa (PRASA), a public company incorporated in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 (as amended). It has limited liability with its place of business and domicilium citandi et excutandi at 1040 Burnett Street, Hatfield, Pretoria, Gauteng Province. It is trite that the Defendant is under a public law legal duty to provide safe public rail transport.

5. As a result of the accident the Plaintiff sustained the following injuries;

5.1. The Plaintiff suffered a soft tissue injury to his left ankle with no scarring.

6. EXPERTS

6.1. The Plaintiff obtained the medico-legal reports from the following experts in support of his claim, whilst the Defendant did not submit their medico-legal reports, due to the facts that they considered the injuries minor:

6.2. Dr. Peter T Kumbirai (Orthopedic Surgeon)

6.3. Drs. Mkhabele & Indunah (Radiologist)

6.4. Tiyani Chauke (Occupational Therapist)

6.5. Tasneem Mohamed (Industrial Psychologist) 1

6.6. G.A Whittaker (Actuary)

7. INJURIES SUSTAINED

7.1. The Plaintiff indicated to the experts that he had a soft tissue injury to his left ankle.

7.2. Dr. Peter T Kumbirai (Orthopedic Surgeon) gave evidence that a person has 5 ligaments around the ankle. These ligaments do not show up on an X-ray as it does not contain calcium. Dr. Kumbirai explained that there are type 1, type 2, and type 3 injuries that can exist in the ligaments.

7.3. In type 1 and type 2 injuries to the ligaments, a person`s ligaments are still intact, and in a type 3 injury the ligaments are no longer intact, and a person would experience instability when walking.

7.4. Dr. Kumbirai concluded that the Plaintiff only has a type 1 or 2 injury to his ankle.

8. TREATMENT RECEIVED

8.1. The medical records shows that the accident occurred 16 March 2019. The Plaintiff was referred to Tembisa Hospital on the same day.

8.2. The Plaintiff received a below knee backslap.

8.3. The Plaintiff was discharged the same day and given analgesia tablets and crutches.

9. COMPLAINTS / SEQUELAE

Physically

9.1. The Plaintiff indicated to the experts and the experts produced the reports which may be summarised below, in that he experiences pain with prolonged walking, standing and cold weather.

9.2. The Plaintiff is a healthy person in his early 30`s, with no sign of systemic disease.

9.3. The Plaintiff does not have any scars.

9.4. The gait of the Plaintiff is normal.

9.5. The Plaintiff does not have deformities.

9.6. The Plaintiff`s left ankle has a full range of movement.

9.7. The Plaintiff`s left ankle is neurovascularly intact.

9.8. The surrounding soft tissue of the Plaintiff`s left ankle is intact.

9.9. No underlying bony injury is noted.

9.10. The reports further indicate that the Plaintiff is able to perform daily activities such as:

9.10.1 Eating, Food preparation, toilet use, bathing, dressing, grooming, sleep

9.10.2 Washing dishes, tidying up, cleaning floors, laundry, ironing

9.10.3 Banking and shopping

9.10.4. Walking to the park;

10. The Plaintiff further advised his team of medical experts that he is able to walk 20 minutes to church, 30 minutes to the taxi rank, and 32 minutes to small shops. The various reports further indicated that he is able to sit for up to 45 minutes in a taxi.

10.1. The Industrial psychologists' report indicated the Plaintiff is capable of doing plumbing jobs as an unqualified plumber.

11. Psychologically

11.1. The medical report further gave the glimpse that no evidence of psychological sequelae, such as depression, PTSD, anxiety, or sleep disturbances, was presented.

12. Loss of Amenities of Life:

12.1. The Plaintiff indicated in pleadings that he used to play recreational soccer and that he is no longer able to play soccer as a result of the pain that he chronically suffering in his left ankle.

12.2. Dr. Peter T Kumbirai testified that the Plaintiff did not disclose soccer activities and opined that the injury would not preclude future sports participation.

12.3. The medical opinion of Dr. Peter T Kumbirai is that pain perception varies individually, and the Plaintiff's condition may be temporary.

13. LOSS OF EARNINGS: PAST AND FUTURE

13.1. The Plaintiff's highest qualification is Grade 10, without formal certification.

13.2. The Plaintiff is able to perform light to medium employment and is therefore still employable.

13.3. Pre-accident, the Plaintiff had a job as a cleaner as opined in the evidence presented before Court. The Plaintiff worked from 22h00 – 06h00 from Monday to Friday. His duties consisted of cleaning the conference rooms and gambling floor using a vacuum cleaner, cleaning windows using a step ladder, and taking out trash bins.

13.4. The previous employment of the Plaintiff was light to medium in nature.

13.5. The evidence brought before the Court which was not disputed was that the Plaintiff did not keep a job or for long and made it a habit to change his job every couple of months.

13.6. The evidence was further provided that at the date of the incident, the salary of the Plaintiff was R 2 300,00 as a cleaner. After the incident that Plaintiff is doing plumbing jobs as an unqualified plumber. He does approximately 5 jobs per month, totaling R 500,00 – R 600,00 per job.

13.7. I therefore accept the plaintiff's evidence that he was employed at the time of the accident, as a cleaner and earned R 2 300 per month. After the accident the plaintiff did not return to his employment and has been self-employed ever since

13.8. It is clear that the Plaintiff is still capable of earning an income that is similar than what he earned as a cleaner at his previous employment. He is able to pay other workers R 100,00 [one hundred rands] per day to dig trenches for him.

13.9. It is thus clear that the Plaintiff can still be employed, and he is capable of earning a similar income than what he did before the incident. As can be seen from the fact that the Plaintiff averages up to 5 plumbing jobs per month, and as a result is capable of making upward of R3 000,00 [three thousand rands] per month.

13.10. The Plaintiff is claiming R 72 417,00 [seventy-two thousand four hundred and seventeen rands] for past loss of earnings, and R 1 066 143,00 [One million sixty-six thousand one hundred forty-three rand] for future loss of earnings. The total claim amount for loss of earnings is R1 138 560,00 [One million one hundred and thirty-eight five hundred and sixty].

13.11. The Supreme Court of Appeal, having regard to the precarious employment circumstances of the plaintiff, held that contingencies should be fixed at 50% in respect of past loss of income as well as future loss of income in *AA Mutual Assurance Association Ltd v Maqula*[1].

13.12. In contrast to the matter above, the Court in *Van Dyk v Road Accident Fund*[2] considered a matter where the Plaintiff, a machinist aged 44, sustained an undisplaced fracture of the left malleolus (a bone in

the ankle joint). The Court had to determine the appropriate contingency deductions to serve as a basis for calculation by actuary

of loss of future earnings. Based on the Plaintiff's stable and consistent employment record at the time of the collision, the Court considered as fair and proper to apply a contingency deduction of 10% to the past loss of earnings, and 25% contingency deduction for future loss of earnings.

13.13. Most of the expert reports for the Plaintiff agree with each other that long prolonged jobs are not suitable for the Plaintiff. The plumbing jobs do not expose him to long protracted standing hours.

13.14. The evaluation of the evidence for quantum entails an inquiry as to the capacity to be employed, this is based on extent to which the injuries sustained by the plaintiff has affected his employability, lifestyle and general well-being, and the extent to which the plaintiff should be compensated.

13.15. The determination of the amount to be awarded for a loss does not require proof on a balance of probabilities. Courts have historically held that the evaluation of such losses involves an element of estimation. When assessing damages tied to uncertain future events, such as claims for loss of earning capacity, the plaintiff is not required to prove their case on a balance of probabilities, unlike matters of causation. Instead, the plaintiff may rely on the court's discretion to assess and determine fair compensation for the loss.

13.16. Quantifying a loss of income is a nuanced and complex process. To determine the present value of such a loss, essentially the lump sum that would adequately compensate for all future income forfeited, a court has two primary approaches. The first is to estimate an amount that seems fair and reasonable. However, this method is fraught with uncertainty, often resembling little more than a speculative leap into the unknown. The second, and far more reliable approach, involves employing precise mathematical calculations informed by evidence-based assumptions. This is the realm of actuaries, whose expertise aligns with the preference consistently expressed by our courts.

13.17. The courts, much like avid puzzle enthusiasts, rely on actuaries to piece together the intricate puzzle of financial loss. These actuarial wizards employ a universally accepted method to determine the present value of a plaintiff's loss. First, they calculate what the plaintiff could have earned had life gone smoothly and accidents remained the stuff of bad TV dramas (future income but for the accident). Next, they assess what the plaintiff can actually earn post-accident, factoring in any newfound limitations (future income notwithstanding the accident). Finally, they perform the ultimate legal subtraction: the difference between these two figures reveals the actual loss of income. In other words, it's a bit like balancing the scales—except instead of justice, it's income that's

weighed, and instead of Lady Justice, it's actuaries with calculators.

13.18. To determine the plaintiff's future income, both “but for” and “notwithstanding” the accident, the actuaries, ever the diligent number-crunchers, found solace in the wisdom of the industrial psychologists' reports. In her expert opinion, Ms. Tasneem Mohamad, Industrial Psychologist, stated that the plaintiff's career prospects pre-morbid, mind you were somewhat confined. However, like any true underdog story, the plaintiff has shown remarkable resourcefulness. Despite the limitations, the plaintiff has demonstrated an impressive ability to pivot, even venturing into the world of self-employment.

One might say, if there were a prize for turning lemons into lemonade, the plaintiff would certainly be in the running.

13.19. It is clear from the evidence on record that the plaintiff has not been rendered functionally unemployable due to the minor injuries sustained in the accident. Although the plaintiff's condition limits his ability to perform tasks that require the extensive use of his foot, he remains capable of undertaking medium to hard physical work that does not involve significant foot activity. Additionally, the plaintiff retains the capacity to meet the demands of his pre-accident position as a general worker. With the appropriate rehabilitation, which would have been undertaken by this stage, the plaintiff is well-positioned to compete for employment opportunities within his field of work.

13.20. In the result I find that the plaintiff has proven his claim to the extent as appears in the order below herein.

13.21. Given the fact that the Plaintiff has a somewhat unstable employment history, and the fact that the Plaintiff is capable of earning income after the incident, the Court should grant a lower amount for future loss of income.

14. GENERAL DAMAGES

14.1. The Plaintiff is claiming an amount of R500 000,00 for general damages. A globular figure for pain, suffering, loss of amenities of life, disability and disfigurement.

14.2. The matter of *Van Dyk v Road Accident Fund*[3] a 44-year-old female machinist sustained the following injuries as a result of the accident: an undisplaced fracture of the left malleolus with tearing of the surrounding soft tissues. Leg immobilized in a plaster cast for two and a half months. The fracture bone united without complications, but chronic inflammation developing in the ankle due to fibrotic scar tissue, and ultimately capsulitis of the ankle and tendonitis of the lower leg. The plaintiff experienced chronic but low-grade pain daily. The amount awarded is presently valued at R 271 000 in today's monetary terms.

14.3. In *Alla v Road Accident Fund*[4] the plaintiff was a 41-year-old correctional officer employed by the Department of Correctional Services at the St Albans Prison. He sustained a fracture of the ankle resulting in displacement of distal tibio-fibula joint and soft tissue injury requiring open reduction and internal fixation. He had difficulty walking long distances, standing for long periods, climbing stairs or walking on uneven terrain. He had the possibility of developing osteoarthritis and requiring joint replacement. The amount awarded is presently valued at R 371 000 in today's monetary terms.

14.4. It is trite that previous awards in comparable matters are intended to serve only as a guide and should not be slavishly followed. Each case must be determined upon a consideration of its own facts.

14.5. Although the Plaintiff suffered similar injuries to the case outlined above, it is also clear that the injuries suffered by the Plaintiff is less severe than the injuries outlined in the cases above.

14.6. The purpose of an award for general damages is to compensate a claimant for the pain, suffering discomfort and loss of amenities of life to which he has been subjected as a result of the particular injuries that were sustained. Although the determination of an appropriate amount in this regard is largely a matter of discretion, some guidance can be obtained by having regard to previous award made in comparable case.

14.7. The Defendant submits that a lower amount for general damages should be awarded given the fact that the Plaintiff only suffered a tissue injury to his left ankle. The Plaintiff's ankle is not deformed, has a full range of movement, and is neurovascularly intact.

14.8. Dr. Peter T Kumbirai testified that the Plaintiff did not require surgery in the past and does also not require any surgery in the future to his ankle.

14.9. A judicial consideration of general damages for a plaintiff who suffered soft tissue injuries to the left ankle in an accident. The defendant conceded the injury but argued that it was not severe, emphasizing the principles of contingency deductions and the lack of permanent disability or significant impact on the plaintiff's quality of life. The assessment of damages is guided by established legal principles, precedents, and considerations relevant to the nature of non-pecuniary losses. Below is a structured summary:

14.10. Nature of the Injury: The injury is described as a soft tissue injury without permanent impairment. The plaintiff retains the ability to walk unaided for extended periods (e.g., 30 minutes) and continues to earn an income, albeit in a different capacity. Reports from medical experts

(Orthopaedic and Occupational Psychologists) confirm that the injuries have not severely impacted the plaintiff's quality of life.

Legal Principles for General Damages:

14.11. Judicial Discretion: The court has the discretion to award damages, ensuring fairness and adequacy based on the injury's impact.

14.12. Fair Compensation: In assessing the compensatory award, the court must be fair to both sides, i.e. an award must be a just compensation and must not as stated in *De Jongh v Du Pisanie* not “pour largesse from the horn of plenty at the defendant's expense.

14.13. Difficulties in Quantification: Cases like *Sandler v Wholesale Coal Suppliers* [5] and *Hendricks v President Insurance* [6] highlight the challenges of converting subjective experiences of pain and suffering into monetary terms.

14.14. Comparable Cases: Prior awards serve as guidance, but each case must be adjudicated on its unique facts, as noted in *Dikeni v Road Accident Fund*.

15. Key Factors in Assessment:

15.1. Age, gender, lifestyle, and severity of the injury. Subjective experience of pain and suffering. Potential for future medical interventions.

Comparable awards in similar cases.

Conclusion:

The judgment carefully applied legal principles to assess and quantify general damages. It balanced the plaintiff's right to compensation

for pain, suffering, and loss of amenities with fairness to the defendant, ensuring a just outcome grounded in precedent and judicial

discretion.

16. PAST MEDICAL EXPENSES

16.1. The Defendant requested copies of the medical schedules, invoices, vouchers and proof of payments. The Plaintiff did not provide the Defendant with any proof of past medical expenses. As a result, there is no basis to award any past medical expenses.

16. FUTURE MEDICAL EXPENSES

16.1. The medical experts testified that the Plaintiff might benefit from the following devices.

16.2. The total for future medical expenses is R149 205.00 (One hundred and forty-nine two hundred and five rands).

Description of item Full cost per unit Duration Present or capitalised value Assistive devices Trolley R1,200.00 10 years R2,879.00 Hose pipe R280.00 5 years R1 191.00 Thermoregulatory heat packs R450.00 2 years R4,432.00 Low bench R250.00 10 years R600.00 Shopping bag on wheels R400.00 2 years R3,939.00 Perching stool with backrest Dr Peter T. Kumbirai dd 11.3.2024 Orthopedic Surgeon Medical consultations & pain medication (consult general practitioner intermittently, + analgesics & non-steroidal

anti-inflammatory drugs for pain management) R2,500.00 R5,000.00 10 years R5,997.00 R 107 802.00 Occupational therapy: Occupational therapy Therapist travelling time x2 home visit Occupational therapy - work hardening program (if secures employment) - assume now Therapist travelling time R915.00 R915.00 R915.00 R915.00 R 7 320.00 R 1 830.00 R 9 150.00 R 2 745.00 Transportation: Medical appointments assume 1 p.a. Occupational therapy x6 Occupational therapy - work hardening x 7 R779.00 R250.00 R292.00

16.3. The Occupational Therapist, Ms. Chauke testified that the prices referenced in her report represent average market rates and that she does not rely on a standardized catalogue to determine these figures.

16.4. She further acknowledged the possibility of obtaining the items listed in her report at costs lower than those stated.

16.5. Ms. Chauke also noted that the Plaintiff would benefit from 8 hours of occupational therapy. Should the Plaintiff secure employment, an additional 10 hours of therapy would be required as part of a work-hardening program, including 3 hours conducted at the Plaintiff's place of employment.

16.6. Dr. Kumbirai provided evidence that the Plaintiff would require future consultations and pain medication for a period of at least 10 years, estimating the associated costs to be R 5,000.00 per annum.

16.7. The actuary highlighted that while future improvements in the Plaintiff's condition might lead to adjustments in the projected costs, the Court should still weigh the evidence presented by Dr. Kumbirai in its considerations, notwithstanding the inherent uncertainty.

Conclusion

The evidence presented by Ms. Chauke, Dr. Kumbirai, and the actuary provides a foundation for determining the reasonable costs associated with the Plaintiff's future care and therapy. Adjustments may be necessary should the Plaintiff's condition improve, but the estimates provided are deemed reasonable for current planning purposes.

16.8. I thus disallow the physiotherapist travelling time in the amount of R21,045 (Twenty-one thousand and forty-five rands). The evidence provided at trial indicates that the Plaintiff is able to travel to the physiotherapist. I direct that such medical services as may be required be provided in the form of a medical voucher at a public hospital, in the amount of R107,802 (One hundred and seven eight hundred and two rands). But for the fact that the state of the public health and the defendants may frustrate the plaintiff when such services are required, I therefore grant the amount in cash.

16.9. I will further disallow the Occupational Therapy and travelling allowance for the Occupational Therapist in the sum of R21,045.00. The Plaintiff will be able to travel to the therapist on his own.

16.2. The experts agreed that the plaintiff will not require future medical interventions, nor is any surgery anticipated. The Radiologist report states that;

16.3. There is normal alignment of the ankle mortis.

16.4. There are no fractures seen

16.5. There are no loose intra-articular bodies

16.6. The surrounding tissues are intact.

16.7. And finally underlying bony injury is noted.

17. I find that medical vouchers will suffice for this purpose of attending physiotherapy at a public hospital. I am deterred from issuing such an order as with the current state of public medical facilities including the Defendant's state of readiness, I may be unnecessarily burdening the Plaintiff in this regard.

ORDER:

1. The Defendant is liable to compensate the Plaintiff in the following manner:
2. The Defendant shall pay the capital amount of R826 840 (Eight hundred and twenty thousand eight hundred and forty rands) in respect of Plaintiff's claim for delictual damages, calculated as follows:

General Damages

R 200 000.00

Assistive devices

R19,038.00

Future Medical Expenses and Care R107, 802.00

Past and Future Loss of Earnings R500 000.00

Total R826,840.00

3. Defendant shall pay the aforesaid amount into the Plaintiff's attorneys trust account.
4. Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale A, such costs to include:
 - 4.1. The costs of Counsel, and
 - 4.2. The preparation of medico-legal reports and joint minutes of the following experts:
 - 4.2.1. Dr Peter Kumbarai (Orthopedic Surgeon);
 - 4.2.2. Ms. Tiyané Chauke (Occupational Therapist);
 - 4.2.3. Ms. Tasneem Mohamed (Industrial Psychologist); and
 - 4.2.4. Algorithm Consultant and Actuaries (Actuary)
5. The Defendant shall effect payment of the amount stated in paragraph 2 to the Plaintiff by no later than (90) ninety calendar days from the date of service of this order.
6. In the event of the aforesaid amount not paid timeously, the Defendant shall be liable for the interest on the amount at the rate of 11.5% per annum calculated from 20 February 2025 to the date of payment.
7. There is no contingency fee agreement between the Plaintiff and the attorney, the attorney shall only charge the Plaintiff the ordinary attorney and client fees, which may be taxed and shall not exceed 25% of the amount awarded to the Plaintiff.

ME NKOENYANE

ACTING JUDGE OF THE HIGH COURT

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' representatives by email, and by uploading it to the electronic file of the matter on CaseLines . The date and time for hand-down is deemed to be 16h00 on 21 November 2024.

APPEARANCES:

Plaintiff: Plaintiff's Counsel: ADV B LUKHELE Instructed by: SEKGOAPE ATTORNEYS Defendant's Counsel: Adv L. Ntshangase Instructed by: JERRY NKELI & ASSOCIATES Date of Hearing: 27th JULY 2024 Date of Judgment: 21 November 2024

[1] 1978

(1) 805 A

[2] 2003 (5E8) QOD 1 (AF)

[3] 2003 (5E8) QOD 1 (AF) at paras 22 and 23.

[4] (338 /2010) [2012] ZAECPEHC 96 (13 November 2012) para 9-11.

[5] 1941 AD 194 at 199

[6] 1993(3) SA 158 (C)

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