

SOUTH AFRICA / JUDGMENT

Mthimunye v Road Accident Fund (40765/2015) [2019] ZAGPPHC 154 (11 April 2019) [2019] ZAGPPHC 154

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane

CASE / FILE NUMBER

40765/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE

NO: 40765/2015

11/4/2019

In

the matter between:

TOLI
CLARA MTHIMUNYE
PLAINTIFF
and
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

PHAHLANE , AJ

INTRODUCTION

- [1] The plaintiff instituted action against the defendant herein, the Road Accident Fund as a result of the motor vehicle accident which occurred on the 16th August 2014 near Witbank, N4 Highway. Plaintiff who was a back-seat passenger aboard a bakkie, reportedly lost consciousness upon impact and was transported by an ambulance to the Witbank General Hospital. It is reported that she regained consciousness after ± two days and was admitted for two weeks.
- [2] The plaintiff was 44 years old at the time of the motor vehicle accident and she was unemployed.
- [3] It is averred in paragraph 7 of the plaintiff's particulars of claim that as a result of the aforesaid accident, the plaintiff sustained Head injuries and certain bodily injuries.
- [4] The plaintiff served and filed Notice in terms of Rule 28, to amend paragraph 10 of its Particulars of Claim to read that:

The Plaintiff has suffered damages in the amount of R 1 248 612.00 which amount are comprised as follows:

10.1 Past hospital, medical and related expenditure

R 10 000.00

10.2 Estimated future medical hospital and related expenses R 200 000.00

10.3 Past loss of earnings/earning capacity

R 140 785.00

10.4 Future loss of earnings/earning capacity

R 147 827.00

10.5 General damages

R 750 000.00

TOTAL

R 1 248 612.00

ISSUES

FOR DETERMINATION

- [5] At the commencement of the proceedings, Advocate Sevhukwana on behalf of the plaintiff informed the court that the merits of the matter were previously settled 100% in favour of the plaintiff. He also informed the court that, there was also an offer on loss earnings as is and that his instructions were to accept and/or admit same. The only issue in dispute and for my determination is the quantum of general damages.
- [6] The matter came before me on the basis that neither of the parties would lead oral evidence and that issues in dispute were to be determined by the court solely on the evidence contained in the various experts' reports filed by the plaintiff and the submissions made during argument. The defendant produced no medico-legal reports and conceded to the correctness of the plaintiff's reports. The injuries are common cause and the impact on the plaintiff and the sequelae are reflected in the reports of the experts. In this Judgment, I will focus only on the reports I was referred to by counsels as they confined themselves to the primary experts which have made the diagnosis regarding the nature and extent of the injuries suffered as a result of the accident.
- [7] In assessing the amount to be awarded to the plaintiff for general damages, the following reports were considered:

Dr Peter T. Kumbirai - Orthopaedic Surgeon

- [8] He stated that the plaintiff sustained Head injuries with Glasgow Coma Scale of 12/15; right knee injury; right ankle injury and right shoulder with right acromio-clavicular joint dislocation. He notes that the X-rays of the right shoulder done by Drs. Bezuidenhout, Van Niekerk & Partners Inc, Radiologists showed: Rockwood Type III acromio-clavicular joint dislocation with complete disruption of the acromio-clavicular joint capsule and coraco-clavicular ligaments. The clinical and radiological findings were 10% UEI and 6% WPI
- [9] He further stated that the plaintiff suffered severe acute pain for two weeks which subsided over four weeks and as a result, plaintiff continued to suffer the inconvenience and discomfort of pain in the right shoulder, right knee, and right ankle which is exacerbated by prolonged standing, walking and lifting of heavy weights, and that the acromio-clavicular joint is chronically dislocated with prominent clavicle.
- [10] He opines that the plaintiff will benefit from an open reduction plus reconstruction of the coraco-clavicular ligaments to reduce the dislocation, correct the deformity, improve the weight-carrying capacity of the shoulder girdle and improve the quality of life.
- [11] He noted the plaintiff's complaints and stated the sequelae of head injury that - there was personality changes in that plaintiff was short-tempered; had recurrent headaches; poor short-term

memory; and poor concentration span. According to him, serious long-term impairment/loss of body function has been suffered; as well as severe long-term mental and behavioural disturbances or disorder due to the sequelae of head-injury have been suffered as confirmed in the RAF 4 signed by him. He further stated that the pain in the right shoulder, right knee and right ankle will limit her choice of occupation as occupations which require prolonged standing, walking and lifting of heavy weights will aggravate her symptoms. She will not be able to compete fairly in a job on the open labour market.

Dr L.F. Segwapa - Neurosurgeon

- [12] He also stated that the plaintiff suffered head injuries with initial GCS of 11/15; soft tissue injury to the lower back (spine); musculoskeletal - abrasions on the hands, and she's reported to have never been in an accident before.
- [13] The doctor noted that plaintiff suffered headaches which were experienced at least four times a month and has memory problems in that she is forgetful since the accident. He stated that the records showed that on the day of the accident, her GCS was ranging between 11/15 and 12/15 and two days later it had improved to 15/15. However, these are features of a moderate traumatic brain injury either due to direct trauma or secondary to acceleration deceleration effects of the impact.
- [14] Regarding post-accident status, he stated that plaintiff has neurocognitive impairments. She should undergo detailed neuropsychological evaluation by the clinical psychologist to determine the extent of her cognitive impairment. The risk of developing epilepsy is currently at 3-5%. She is suffering from post-concussion headaches and that it is well documented in the neurosurgical literature that $\pm 80\%$ of patients suffering from post-concussion headaches recover within 2-3 years. However $\pm 20\%$ of patients remain with the chronic symptoms. He concluded by saying that it would be fair to award adequate compensation for the damages incurred as a result of the injuries sustained in the accident.

Dr JFL Mureriwa - clinical psychologist

- [15] A report compiled by Dr Mureriwa confirms what has been noted by the Neurosurgeon as well as the Orthopaedic Surgeon regarding the injuries sustained and the impact of the accident. He noted that immediately after the accident, plaintiff was unconscious as she was found lying on the ground as she has been thrown out of the vehicle. On the clinical status and behaviour of the plaintiff during hospitalization, he stated that plaintiff was confused and could not remember things that happened from the day of the accident does not remember anything about the accident itself or hospitalisation.
- [16] According to him the overall disability is moderate but performance of life activities is severely affected. The EEG phase abnormalities indicate failure of inhibitory mechanisms which renders the plaintiff vulnerable to attention problems, anxiety and poor impulse control. The EEG deviations from normal and the psychological problems to which they give rise, are consistent with the mild traumatic brain injury of which she was diagnosed. The

estimated duration of post-traumatic amnesia according to him was 1-4 weeks and states that it was very severe.

[17] Counsel for the plaintiff submitted that what is contained in all the reports is an indication that the plaintiff has been healthy before the accident, a point which was never disputed.

[18] Relying on the case of Mkhonta v RAF (20703/12) [2018] ZAGPPHC 471 (29 March 2018) plaintiff's counsel argued that an amount of R950 000.00 is a fair and reasonable amount to be awarded to the plaintiff. In this case, the plaintiff was awarded the sum of R760 000.00 made up as R950 000.00 less the apportionment of 20%

[19] This court will reiterate on what was said by Sekhukhune AJ that:

[12] "The uncontested experts reports have outlined the injuries, sequelae in details, the reasons for findings made and opinions expressed and the defendant could not offer any substantial dispute regarding the opinions and findings of these experts.... .."

And

"In making an award, a Judge has a large discretion to award what the judge in the circumstances to be fair and adequate compensation to the injured party for the sequelae of the injuries, see Protea Assurance Company Ltd v Lamb 1977 (1) SA 530".

[20] Counsel also referred this court to the case of B v RAF (247712015)

[2017] ZAECPEHC 42 (5 September 2017) and argues that this court should take into consideration the fact that the undisputed experts reports, the sequelae of the injuries, and the affirmation by the defendant's counsel that the findings of the experts were a true reflexion of the plaintiff's injuries and that those injuries cannot be separated, are factors which should persuade this court to award the plaintiff the same amount of damages awarded to the plaintiff in the case of Mkhonta supra.

[21] I interpose to state that counsel for the defendant provided me with Heads of Arguments in support of his closing argument, for which I am indebted. However, I take note of the fact that these heads of argument are in support of the arguments made by counsel on behalf of the plaintiff.

[22] Counsel for the defendant referred to the same reports the plaintiff's counsel referred the court to - and that is the report of the Neurosurgeon Dr L.F. Segwapa where he made a finding on the severity of the Head injuries that the plaintiff sustained a moderate to a severe traumatic head injury - and counsel submitted that this finding was supported by a Clinical psychologist Dr Mureriwa.

[23] He informed the court that the defendant did not appoint experts and that there was an offer of R400 000.00 for general damages that was previously made by the defendant and such could not be justified as it was too little. He told the court that this offer was not sufficient at all as it was only directed at the head injuries and overlooking and/or not considering the

orthopaedic injuries noted by the Orthopaedic surgeon. He submitted that the plaintiff's experts (ie. Dr Segwapa - Neurosurgeon) makes it very clear that the severity of the injuries emanated from the Head Injuries and that there were other soft-tissue injuries sustained by the plaintiff.

- [24] He further submitted that this is a compelling factor which his client (ie. RAF) should have considered when tendering an offer on General Damages. He states that the defendant decided to intentionally and deliberately overlook this aspect. He concluded by saying an amount of between R650 000 . 00 and R800 000.00 was justifiable.
- [25] I agree with the submission made by plaintiff's counsel that the nature and extent of the injuries and sequelae must be taken into account holistically when determining the award for damages. The injuries cannot be assessed on their own without the resulting sequelae .
- [26] I have consider d several cases as well as the cases referred to by both counsels during argument in making submissions on the amount that should be awarded as general damages or the determination of what constitutes an appropriate award.
- [27] JJ Gauntlett SC in *The Quantum of Damages* Volume 1, Fourth edition, Juta, 1995 page 5 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".

- [28] In the *Road Accident Fund v Marunga* 2003 (5) SA 1.65 SCA the Supreme Court of Appeal confirmed the dictum of Broom DJP in *Wright v Multilateral Motor Vehicle Accident Fund* 1997 NOP-Corbett and Honey: *The Quantum of Damages in Bodily and Facial Injury Cases* Vol 4 at E3-31 where it was set out:

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

- [29] 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 lo 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".

- [30] In the case of *Protea Insurance Company v lamb* 1971 (1)_ SA 530 (A) at 535H., 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 5368;

"...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. "

[31] In *De Jongh v Du Pisani* 2004 (12) All SA 565 (SCA), at 682i it was reiterated that:

"the court in determining quantum for general damages must have regard to previous comparable cases. The principle is that an award will be fair if it demonstrates consistency with previously decided cases of a similar nature. In doing so, however, it must not be overlooked that a court is vested with a discretion which is to be exercised with due regard to the peculiar facts of the matter it is seized with".

[32] It should be noted that the use of comparable cases is not a hard and fast rule that should be strictly applied. Two cases can never be the same, hence the need for judicial adjudication in cases for general damages. See *Road Accident Fund v Marunga* supra.

[33] Having regard to the reported cases, the expert reports and arguments presented, I am of the view that an amount of R860 000.00 is fair, just and reasonable amount to be awarded for the general damages suffered by the plaintiff.

[34] Turning to the issue of loss of earnings, counsel for the defendant submitted that the amount tendered for loss of earnings is a fair and reasonable amount. He stated that he agrees with the submissions made by the plaintiff's counsel. He concluded by submitting that the court is entitled to exercise its discretion to decide on the amount which has to be awarded to the plaintiff by taking into consideration the fact that the plaintiff suffered severe head injuries as well as soft tissue injuries which cannot and should not be ignored.

[35] In *Road Accident Fund v. Guedes* 2006 (5) SA 583 (SCA) 587 A - B, the Supreme Court of Appeal addressing the assessment of compensation and a trial Judge's discretion stated:

"The court necessarily exercises a wide discretion when it assesses the quantum of the damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just."

[36] There are no opposing expert reports from the defendant regarding this issue. Under the circumstances, I am of the view that the actuarial calculations as depicted on a report compiled by Robert Koch's Actuarial dated 8th October 2018 are correct. I take note of the fact that plaintiff's counsel also informed the court when the matter was proceeded with, that there was an offer on loss earnings as is and that his instructions were to admit or

accept the offer, and counsel for the defendant confirmed same. The plaintiff is therefore entitled to be awarded an amount of R 288 612.00 in respect of loss of earnings which in my view is a fair, reasonable and equitable amount.

[37] I note that counsel for the parties handed me a draft order with terms to which they confirmed to court that they were a reed upon by both, but omitting aspects I was still to find on.

ORDER

In the result I make the following order:

1. The draft order marked X attached hereto is made an order of court.

P. D. PH AHLANE

ACTING JUDGE OF THE HIGH COURT

Heard on

: 05 April 2019

For the Plaintiff : Adv T.M. Sevhukwana

Instructed by

: LEPULE MOKOKA INC

For the Defendant : Adv O. Molibana

Instructed by

: BRIAN RAMABOA INC

Date of Judgment : 11 April 2019

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION - PRETORIA)

CASE NO.: 40765/2015

Held on THE 05TH April 2019 at Court 6D

Before the Honourable Justice Phahlane AJ

TOLI CLARA MTHIMUNYE

PLAINTIFF

ROAD ACCIDENT FUND

DEFENDANT

DRAFT ORDER

Having heard counsels, and having read the papers filed of record:

IT IS ORDERED

1. The Defendant concedes merits 100% in favour of the Plaintiff;

1.1 That the Defendant pay Plaintiff the sum of R1 148 612,00; comprised as follows;

1.1.1 An amount of R860 000,00; in respect of General Damages;

1.1.2 An amount of R288 612,00;

in respect of Loss of Earnings, such amount to be deposited into Lepule, Mokoka Inc. Trust Account No

ACCOUNT HOLDER : LEPULE MOROKA INCORPORATED

BRANCH NAME : PRETORIA

ACCOUNT NUMBER : 1497 147697

BANK NAME :

NEDBANK

BRANCH CODE : 160445

TYPE OF ACCOUNT : TRUST

REFERENCE : MR LEPULE/XX4116

1.2 The capital amount referred to in paragraph 1 above will not bear interest unless the Defendant fails to effect payment thereof within Fourteen (14) calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25% per annum calculated from and including the fifteenth (15) calendar day after the date of this Order to and including the date of payment thereof.

2. The defendant shall furnish the Plaintiff with an undertaking for future medical expenses in terms of section 17(4)(a) of the Road Accident Fund Act as amended resulting from a motor vehicle accident which occurred on the 16th of August 2014.

3. The Defendant to pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale such costs to include but not limited to:

3.1 The costs incurred in obtaining payment of the amounts mentioned in paragraph 1.

3.2 The costs of and consequent to the employment of counsel including counsel's charges in respect of his full preparation fee as well as his High Court day fees including for the 01st March 2019 and 05th April 2019.

3.3 The costs of all medico-legal, Joint minutes, addendum reports and radiological obtained by the Plaintiff as Well as such reports furnished to the Defendant and/or its Attorneys. as well as all reports in their possession and all reports contained in the Plaintiff's bundles if any.

3.3.1 The reasonable and taxable preparation. qualifying and reservation fees. if any, in such amount as allowed by Taxing Master, of the experts mentioned in 3.3 above:

3.3.2 The reasonable costs incurred by and on behalf of the Plaintiff, as well as the costs consequent to attending the medico legal examination of both parties;

4. There is valid contingency fee agreement between Plaintiff and Plaintiff' s attorney.

5. In the event that costs are not agreed the Plaintiff agrees as follows:

5.1 The Plaintiff shall serve the Notice of Taxation on the Defendant's attorney of record ;

5.2 The Plaintiff shall allow the Defendant 14 (fourteen) court days to Make payment of the costs.

5.3 Should payment not be effected timeously , Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed costs from date of allocator to date of final payment

BY ORDER OF COURT

R E G I S T R A

Plaintiff's counsel: T.M Sevhukwana

Cell no : 071 129 2098

Defendant's Counsel: O Molibana

Cell no : 084 830 8100

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