

SOUTH AFRICA / JUDGMENT

Nkepang v Road Accident Fund (RAF324/22) [2024] ZANWHC 239 (17 September 2024)

[2024] ZANWHC 239

COURT

North West High Court, Mafikeng

BEFORE

Smit

CASE / FILE NUMBER

RAF324/22

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: RAF324/22

Reportable:	YES/NO Circulate to Judges: YES/NO Circulate to Magistrates: YES/NO Circulate to Regional Magistrates: YES/NO In
the matter between:	NKEPANG, BOIKHUTSO DOROTHY Plaintiff and ROAD ACCIDENT FUND Defendant SMIT AJ
HEARD:	3 SEPTEMBER 2024

DELIVERED: 17 SEPTEMBER 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 17 September 2024.

ORDER

(i)
The defendant shall pay to the plaintiff the sum of R400 000.00 (Four Hundred Thousand Rand) in respect of the plaintiff's claim for general damages arising out of the motor vehicle collision on 31 January 2020, in which the plaintiff was injured.

(ii)
Interest a tempore-morae shall be calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996, on the capital amount referred to in paragraph (i) above, upon 14 days having elapsed from the date of this order.

(iii)
The defendant is ordered to pay the plaintiff's taxed or agreed party and party high court costs, such costs, where applicable, to be on Scale B.

JUDGMENT

- [1] The plaintiff instituted an action against the defendant claiming damages for injuries sustained in a motor vehicle accident on 31 January 2020. At the time of the accident, the plaintiff was a passenger in the insured vehicle.
- [2] The plaintiff is Nkepan, Boikhutso Dorothy, a female person born on 8 November 1981. At the time of the accident the Plaintiff was 39 years old. The plaintiff is currently 43 years old. The defendant is the Road Accident Fund, a juristic person established in terms of section 2 of the Road Accident Fund Act 56 of 1996 ('the Act')

which in terms of section 17 of the Act is responsible to pay compensation for loss arising out of motor vehicle accidents.

- [3] The parties as at the date of trial had settled all the issues save for general damages. The legal representatives for both plaintiff and defendant confirmed that the only outstanding issue is general damages and upon determination of this head of damages, the matter will have reached finality. Merits had previously been fully awarded in favour of the plaintiff and no apportionment is applicable.

- [4] Counsel for plaintiff relied on the application in terms of Uniform Rule 38(2) and requested that the reports of the following expert witnesses be admitted into evidence: a) Dr Peter Kumbirai, the Orthopaedic surgeon;
- b) Dr Khensani Maluleke-Baloyi, the Physiotherapist; and c) Dr Sello Solly Selahle, the Plastic surgeon.
- [5] No objection to aforesaid was raised by the defendant and the application was granted, admitting the aforesaid expert reports into evidence. The defendant did not file any expert reports.
- [6] The injuries sustained by the plaintiff, are not in dispute.
- [7] This court is called upon to determine the appropriate award in relation to general damages suffered by the plaintiff. The legal representatives for the plaintiff and the defendant referred to various case law and made submissions on which award they deemed to be reasonable in the circumstances. I considered the case law referred to by the legal representatives, and as quoted in the plaintiff's heads of argument. I also considered the below mentioned case law, which I will discuss herein below.

[7.1] The legal representative for the plaintiff emphasizes the scarring suffered by the plaintiff and the state of pain she remains in; whilst the legal representative for the defendant pointed out that the fracture healed adequately and that the remainder of the injuries were mainly soft tissue injuries. The legal representative for the plaintiff suggested an amount for general damages to be in the region of R400 000.00 to R450 000.00; whilst the defendant's legal representative submitted that an amount in the region of R350 000.00 to R400 000.00 will be appropriate.

- [8] The plaintiff was hospitalised at Mafikeng Provincial Hospital, which records reflect the following injuries sustained:
- a) Laceration on the left wrist;
- b) Right cheek soft tissue injury;
- c) Right shoulder neck of humerus fracture; and
- d) Thoracolumbar spine soft tissue injuries.
- [9] The plaintiff received the following treatment: clinical and radiological examination; wound dressings; a U-slab to the right arm, which was later removed; and pain management. According to Dr Kumbirai the plaintiff's major complaints pertain to pain in her right shoulder which is exacerbated by lifting heavy weights and cold weather. Plaintiff experiences similar pain in her left wrist which is exacerbated by the same factors mentioned afore. Save for the orthopaedic injury, another notable consequence of the injuries sustained, is the scarring the plaintiff suffered. Dr Selahle explains that the plaintiff has a 6 x 5cm abrasion scar on her right cheek. Plaintiff further has a 4cm scar on the anterior aspect of her right shoulder; a 6cm scar on the lateral aspect of her right arm; and

multiple scars on the radial aspect of the distal half of her left forearm on an area of about 18 x 4cm. Dr Selahle states that these scars have no features of scar hypertrophy, but that said scars are cosmetically unsightly and disfiguring. Dr Selahle also finds that these scars are permanent with some prospects of scar improvement by scar revision techniques. I am mindful of the fact that improvement of the scars would require the plaintiff to undergo further medical treatment.

- [10] Dr Selahle records that the plaintiff feels very uncomfortable with these scars and that the plaintiff has suffered from considerable physical pain and suffers emotional pain due to her cosmetically disfiguring scars. As for the narrative test, Dr Selahle determined that the plaintiff suffers permanent serious disfigurement.
- [11] In relation to the fracture, Dr Kumbirai records that the plaintiff suffered severe acute pain for about 2 weeks, subsiding over 4 weeks and she continues to suffer inconvenience and discomfort resultant from chronic pain from the right humerus. Dr Kumbirai finds that the plaintiff's injuries resulted in serious long-term impairment / loss of body function.
- [12] The consequences of the injuries is explained and recorded by Dr Maluleke-Baloyi, in that the plaintiff experiences pain in her back and left wrist; she cannot stretch her hand due to pain in her right shoulder and she is unable to lift or carry heavy objects, she cannot stand for long periods and experiences severe back pain when walking and traveling long distances. Dr Maluleke-Baloyi further records sclerosis and osteophyte formation at the greater tuberosity of the humerus, stating that these are radiological signs of post traumatic osteoarthritis. The fracture of the neck of the humerus has healed adequately.
- [13] The assessment of general damages is a discretionary function of the court which has been described in the matter of Road Accident Fund v Marunga 2003

- (5) SA 164 (SCA) at page 169 E-G as follows:

"This Court has repeatedly stated that in cases which the question of general damages comprising pain and suffering, disfigurement,

permanent disability and loss of amenities of life arises, a trial Court in considering all the facts and circumstances of the case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party..."

- [14] The exercise of this discretion referred to above is not always an easy task. In the matter of Minister of Safety and Security v Seymour 2006

- (6) SA 320 (SCA) at par [17] the court held:

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that..."

[15] In the case of *Dikeni v RAF* 2002 (5) 171 GP Van Heerden J stated:

“Although these cases have been of assistance, it is trite law that each case must be adjudicated, on its own merit. No one case is factually the same as the other. It only provides a guide in the assessment of damages.”

[16] In considering comparable case law, the following cases come to the fore:

[16.1] *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) wherein the plaintiff suffered a fracture of the left femur; a soft tissue injury in the chest area; and bruises on the forehead, left arm and left knee. The court a quo awarded general damages in the amount of R375 000.00, which was the subject of appeal. In that matter the plaintiff was admitted into hospital and underwent surgical procedures through which a plate and screws were inserted in his left leg. The plaintiff was confined to a walking aid for approximately 5 months whereafter the plate and screws had to be surgically removed. The plate had moved and caused a mal-union and angulation of the femur that resulted in a shortening of the plaintiff's left leg. In the *Marunga* matter, the plaintiff was 19 years old at the time of the accident and his schooling was interrupted and delayed by hospital visits. On appeal the award was reduced to R175 000.00, which equates to a current value of R609 000.00.

[16.2] Plaintiff in this matter did not undergo extensive surgery pertaining to the fracture. The injuries experienced in the *Marunga* matter is more severe than that of the plaintiff in this matter. Plaintiff in this matter did however experience severe scarring, which was not present in the *Marunga* matter.

[16.3] *Ngomane v Road Accident Fund* (53010/12) [2017] ZAGPPHC 401 (26 May

2017) is also considered. In the *Ngomane* matter the plaintiff was, at the time of the accident 24 years old and had suffered a severe fracture of the right humerus and right radius and ulna. Since the accident *Ngomane* was left with a dysfunctional left arm and scarring. The orthopaedic surgeon also indicated that *Ngomane* has a weak grip on his right side and cannot lift and carry heavy objects. *Ngomane* complained of experiencing headaches at times. More severe than the matter at hand, *Ngomane* had a radial nerve injury in his active wrist. The court awarded R450 000.00 in general damages, which equates to approximately R600 000.00 in current value.

[16.4] In *Ngomane* the injuries relating to the fracture extends further than that of the humerus. *Ngomane* also sustained a right proximal radius and ulna fracture and a bony ankylosis has formed between the proximal radius and ulna. Similar to the matter at hand, *Ngomane* also experienced scarring and the inability to lift heavy objects. However, *Ngomane* also experienced post-traumatic headaches.

[16.5] *Dlamini v Road Accident Fund* (7796/2010P) [2023] ZAKZPHC 29 (3 March 2023): *Dlamini* was still in school when the accident occurred. He sustained a fracture of the right humerus at the junction of the middle and distal thirds. Also being hospitalized, his arm was immobilised with a U-slab. He was transferred to another hospital. It was noted that he had an isolated injury

to his right humerus with no distal neurovascular deficit. The position of the fracture was found to be unsatisfactory, and he again underwent surgery. He was noted to have a right radial nerve palsy post-operatively and was fitted with a cock-up splint and subsequently discharged. Also of note is that Dlamini had a 6cm post-surgical scar over the medial aspect of the right upper arm and a 4cm post-surgical scar over the lateral aspect of the right upper arm. There was a 2cm post-surgical scar over the anterior aspect of the right upper arm. There was a shortening of the right forearm. It was further recorded that there were some irregularities of the articular surface of the elbow joint compatible with post-traumatic osteoarthritis in the elbow. In Dlamini the court placed notable weight on the fact that he was quite young, 14 years of age when the accident occurred, which injuries resulted in him suffering from early post-traumatic osteoarthritis in his right elbow. He was permanently disabled in that the right elbow experiences pain with strenuous physical activity and has a loss of range of movement in the right elbow joint. The court held that he will experience most of his life in an injured state; and that he was injured when he had not

obtained any skills and left unable to compete for any physical work. The court awarded R550 000.00 in general damages.

[16.6] In comparison to the matter at hand, plaintiff is currently 43 years old. Still, she suffers from pain in her shoulder and wrist, she cannot lift heavy objects, nor can she stand or walk for long periods. Significantly, Dr Maluleke-Baloyi recorded sclerosis and osteophyte formation at the greater tuberosity of the humerus, stating that these are

radiological signs of post traumatic osteoarthritis. The plaintiff, since the accident, is experiencing her life in a state of pain.

[16.7] A further important consideration, in my view, is the scarring suffered by the plaintiff. Apart from the considerable scarring on her arms and shoulder, she has a 6 x 5cm abrasion scar on her right cheek. This scar cannot be hidden away, and as rightly submitted by the plaintiff's legal representative, the scar is out in the open.

[16.8] Mashigo v Road Accident Fund [2018] ZAGPPHC 539: Mashigo obtained several scars as a result of the accident, which the experts found to be unsightly. It was further recorded by the experts that she experienced pain and will again experience pain due to the reconstructive surgery. There was significant scarring covering her breasts. In par [22] of the judgment it was stated:

"...She had lived with unsightly scars to her breasts since the accident and will continue to do so until reconstructive surgery. She might even remain with permanent scarring. She was, as a result of the pain in her breasts, not able to breastfeed her second child and was deprived of the nurturing and bonding experience which is part of the crucible of motherhood. In addition, she suffered minor orthopaedic injuries which impacted negatively on her amenities of life. Taking all this into consideration, I am of the view that an amount of R450 000. 00 will be a fair and reasonable amount in the circumstances..."

[16.9] The scarring and the impact thereof suffered by Mashigo is more severe than that suffered by the plaintiff in this matter, especially considering the nurturing and bonding experience Mashigo lost with her newborn. However, I am alive to the fact that plaintiff in this matter has an unsightly scar on her face, which cannot be covered-up and serves as a daily reminder of the accident.

[17] Having regard to the above case law and the injuries sustained by the plaintiff, the following are, in my view, the main considerations in determining the amount to be awarded to the plaintiff as general damages: (a) the plaintiff was 39 years old at the time of the accident and now has unsightly scars on her arms and face; (b) she is now restricted in her movement and experiences pain; (c) her day-to-day decision making and life choices are dependent on the constraints caused by her injuries; and (d) she exhibits signs of post traumatic osteoarthritis.

[18] The above case law assisted in providing a guideline in considering a fair and reasonable award for general damages. I am mindful that the injuries in the above case law vary somewhat from what the plaintiff experienced and includes other injuries and consequences suffered as a result thereof, often more severe than that of the plaintiff.

[19] Considering the impact of the plaintiff's injuries sustained, and the above case law, I find that an award of R400 000.00 would be fair and reasonable in the circumstances.

[20] There are no exceptional circumstances present to upset the principle that costs should follow the result and in this instance the plaintiff is entitled to costs.

[21] Consequently, the following order is made:

D. SMIT

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES DATE OF HEARING : 3 SEPTEMBER 2024 DATE OF JUDGMENT : 17 SEPTEMBER 2024 For the plaintiff: ADV S K MOJAMBU Instructed by: R S TAU ATTORNEYS 23 Victoria Street Golfview, Mahikeng Email: adminmfk@rstauattorneys.co.za For the Defendant: MR. M. SETATI Instructed by: THE STATE ATTORNEY 1st Floor East Gallery Cnr Sekame Road & Dr James Moroka Drive, Mmabatho Email: maphutis@raf.co.za

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