

SOUTH AFRICA / JUDGMENT

Sefuthi v Road Accident Fund (303/2019) [2022] ZAFSHC 268 (14 October 2022)

[2022] ZAFSHC 268**COURT**

Free State High Court, Bloemfontein

BEFORE

AS Boonzaaier

CASE / FILE NUMBER

303/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 303/2019****Reportable:**

NO

Of

Interest to other Judges: NO

Circulate

to Magistrates: NO

In

the matter between:

L.A.

SEFUTHI

Plaintiff

and

THE

ROAD ACCIDENT FUND

Defendant

CORAM: AS

BOONZAAIER AJ

HEARD

ON: 4

OCTOBER 2021

JUDGMENT

BY: BOONZAAIER AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by e- mail. The date and time for hand -down is deemed to have been at 9h00 on 14 October 2022.

BACKGROUND:

[1] This is a claim for damages suffered as a result of injuries sustained by the Plaintiff, a 32 years old female, in a motor vehicle accident that occurred on the 4th of February 2018, at the Verkeerdevlei tollgate between Bloemfontein and Senekal. The Plaintiff was a passenger in the vehicle with an unknown registration number, driven by Mrs. Mmoone Montsi and a motor vehicle with an unknown registration number when the insured driver of the vehicle overtook another vehicle and collided head-on with oncoming traffic.

MERITS

[2] The issue of liability (merits) has been conceded 100% in favour of Plaintiff.

QUANTUM:

[3] Quantum for general damages remains unresolved. The future loss of earnings and future medical expenses were resolved by a settlement between the parties.

[4] Affidavits have been filed by the plaintiff's experts. They have confirmed the content of their respective reports which have also been filed.

INJURIES SUSTAINED:

[5] The plaintiff sustained the following severe injuries:

- a. Right femur fracture;
- b. 5cm laceration forehead;
- c. Multiple facial abrasions;
- d. Abrasions of the left arm;
- e. Lung contusion;
- f. Rib fracture;
- g. Right knee fracture.

SEQUELAE OF INJURIES:

[6] The Plaintiff:

- a) was admitted to Winburg Hospital where after she was transferred to Bongani Hospital and from there to Pelonomi Hospital;
- b) underwent an open reduction and an internal fixation of the right femur.
- c) was discharged on 16 February 2018.
- d) suffers from chronic pain in her right hip, upper leg and knee. Instrumentation became septic and oozes discharge.
- e) experiences inter alia difficulty with standing and walking for long periods of time.
- f) Ascending and descending stairs, inclement weather and lifting heavy objects exacerbate symptoms in her right hip, upper leg and knee.
- g) has unsightly disfiguring scarring, most notably on her face and right hip.
- [7] The experts also noted an antalgic gait (the left leg is 2cm longer than the right) and that she would require orthopaedic built-up shoes to address the limb length discrepancy.
- [8] They also established that there were signs of post-traumatic osteoarthritis of the knee joint as indicated by Dr. Oelofse`s, with a high probability for the osteoarthritis to progress to end-stage osteoarthritis and that she would require a total knee replacement and subsequent revision knee replacements every 12 to 15 months.
- [9] At the time of the accident, the plaintiff was training/working as an Electrical Apprentice. She resumed her training after approximately 5 months and the period she was contracted for subsequently ended. She has been unemployed since her contract ended to date.
- [10] The plaintiff failed the trade test on three occasions post-accident as a result of not being able to cope with the physical aspects of the trade test due to her accident-related injuries and the sequelae thereof.
- [11] Dr. Oelofse concludes that should the plaintiff be accommodated in a light duty/sedentary position, provision should be made for 5 years earlier retirement; however, if not accommodated, she must not be allowed to do physical labour.
- [12] The plaintiff is significantly impaired as a result of the accident considering her physical limitations (only suited for work of a sedentary/light nature), her qualifications, work experience and a need for extensive accommodations which may typically not be of a reasonable nature to the majority of employers.
- [13] It would be difficult for the plaintiff to secure employment in the open labour market. The plaintiff is now an unfair competitor in the open labour market.
- [14] The plaintiff can no longer partake in tennis as she did pre-morbid.

PAST HOSPITAL AND MEDICAL EXPENSES:

[15] The plaintiff was treated at provincial facilities, there is therefore no claim for past medical and hospital expenses.

GENERAL DAMAGES:

[16] The plaintiff has filed various expert medico-legal reports namely:

- a. Dr. Oelofse (Orthopaedic Surgeon);
- b. Dr. Hoffmann (Plastic, Reconstructive and Cosmetic Surgeon);
- c. Rita van Biljon (Occupational Therapist;
- d. Ben Moodie (Industrial Psychologist

[17] The defendant has not filed any reports.

[18] The expert medico-legal reports by the plaintiff's experts thus stand uncontested.

[19] Affidavits have been filed by the plaintiff's experts. They have confirmed the content of their respective reports which have also been filed.

MEDICO-LEGAL REPORT: DR OELOFSE ORTHOPEDIC SURGEON:

[20] Dr. Oelofse gave a report dated 5 December 2019 and stated the following in his report:

"The patient was an Electrical Apprentice at the time of the accident".

"...she resumed her training after approximately 5 (five) months and the period she was contracted for subsequently ended".

"The patient is currently unemployed".

"...her pursuits to secure alternative employment have been futile, due to the impairments caused by the injury she sustained in the accident".

"She experiences pain in her right hip, upper leg and knee when performing activities that require long periods of mobility, as well as lifting and carrying heavy-weight objects".

[21] He further stated in his report that:

"In my opinion the patient qualifies for the narrative test under paragraph Permanent serious disfigurement in combination of the scars on her face, arm and right hip".

[22] He also further stated in his report that:

"she has no history of hip, upper leg or knee problems prior to the incident"

"It is also my opinion that the patient must be accommodated in a permanent light duty/sedentary environment within any future employment..."

“She completed her grade 12 (twelve) and further attained a Diploma in Financial Management”.

“I believe that the injury had a profound impact on the patient’s amenities of life, productivity and working ability and will continue to do so in the future”.

“With successful treatment of the right leg, her productivity will improve, however as the degeneration in her right knee progresses, her productivity will decrease again”.

“Regardless of successful treatment, she will always have a permanent deficit”.

“The injury the patient sustained makes her an unfair competitor in the labour market”.

“She will find it difficult to compete with other healthy individuals to secure.

MEDICO-LEGAL REPORT: DR HOFFMANN – PLASTIC, RECONSTRUCTIVE AND COSMETIC SURGEON:

[23] Dr. Hoffmann gave a report dated 15 July 2020 and stated the following in his report:

“The patient was employed as an Electrical Apprentice at the time of the accident”.

“She was booked off for approximately 4 (four) months”.

“She is currently unemployed”.

“She has been unable to continue with her former employment or secure employment”.

“It is, therefore, my opinion that the patient MUST be accommodated in permanent light duty/sedentary environment...”.

“It is my opinion that the patient would have been able to work to the normal retirement age of 65 (sixty-five) years, if not for the accident and injury sustained”.

“If accommodated in a permanent light duty/sedentary environment, provision must be made for 5 (five) years early retirement”.

“If not accommodated in the aforesaid position she must not be allowed to do physical labour”, alternative employment, resulting in a total loss of income”.

[24] He stated further in his report that her “Her Glasgow Coma Scale (GCS) was recorded as 14/15”.

[25] He also stated in his report that:

“...she was always healthy prior to the accident”.

“She had no visible scarring or other problems”.

“She experienced no difficulties at work or at home”.

“The patient is a 31 (thirty-one) year old married female. She finds the multiple scars troublesome as it is very visible and unsightly”.

“She still suffers from residual symptoms related to her orthopaedic injuries”.

[26] He went further to say that:

“She now presents with a 6.0cm long oblique scar over the forehead. The scar is visible and conspicuous”.

“She now presents with a 1.0cm x 5mm wide scar below the chin”.

“She now presents with an 8.0cm wide area with multiple abrasion scars over the left side of the neck”.

“She sustained abrasions of the left arm”.

“She now presents with an 18.0cm x 7cm wide area with multiple abrasion scars over the left forearm”.

“She sustained a fracture of the right femur”.

“She now presents with a 9.5cm x 3.0cm wide surgical scar over the right greater trochanter”.

“There is an area that has not healed completely over the superior aspect”.

“She now presents with a 3.0cm x 1.0cm wide actively draining fistula over the posterior aspect of the right thigh”.

*“There seems to be a neglected osteomyelitis (*infection in the bone) with chronic scarring”.*

“She now presents with a 5.0cm x 3.0cm wide scar over the lateral aspect of the right knee”.

“There are 2 actively draining fistulas present”.

[27] He stated the following on page 19 of his report:

“It is my opinion that the patient’s scarring is amenable to improvement with treatment but will always be

present”.

“The patient’s scarring will always be visible”.

“It is therefore permanent”.

MEDICO-LEGAL REPORT: RITA VAN BILJON – OCCUPATIONAL THERAPIST:

[28] Rita van Biljon gave a report dated 24 July 2021 and stated the following in her report:

“Based on the assessment results, the plaintiff meets the physical requirements of sedentary demand work”.

“She returned to work and was accommodated to a certain degree. She was unable to successfully complete her trade tests due to the

debilitating nature of her right leg injury and her contract was therefore not renewed”.

[29] She stated further in her report:

“The plaintiff meets the physical demands of sedentary work that allows her to stand and walk occasionally. The limitations she presents

within standing walking further restrict her tolerance to perform forward bending or elevated work as these abilities is interdependent

on her ability to stand for prolonged periods”.

“The plaintiff, therefore, presents with the current physical abilities to perform sedentary work safely. Based on the assessment results she meets the weight handling demands of sedentary work of lifting loads occasionally during the day”.

“...the plaintiff would most likely rely on frequent rest periods and benefit from work and ergonomic adaptations. I, therefore, concur that the plaintiff will have to be accommodated in a sedentary environment”.

“Her search for an appropriate employment is therefore limited...”

MEDICO-LEGAL REPORT: BEN MOODIE – INDUSTRIAL PSYCHOLOGIST:

[30] Ben Moodie gave a report dated 27 October 2021 and stated that:

“All of the aforesaid might play a role in her work speed and productivity as she will try her utmost best not to re-injure herself and to limit the pain she experiences. This means that once she enters the open labour market, she will already be classified as slow and this will have a definite effect on her career and promotional possibilities when compared to her uninjured peers”. “...it can be anticipated that she will progress slower than her peers which means that she might reach her ultimate career ceiling 2 to 3 years later and also plateau 1 to 2 Patterson levels lower”.

“In this regard, due to the current unemployment rate, one can accept that she would have difficulty securing permanent employment for the first 1 – 2 years. During this period, she could secure intermittent piece jobs, earning between R1 000 and R2 500 per month. Thereafter, she could enter the labour market on Paterson level A1[lower quartile] earning only the stated basic salaries plus a 13th cheque for approximately 4-6 years before she.....”

[31] The plaintiff qualifies for general damages as indicated in the reports by Dr Oelofse and Dr Hoffmann.

[32] The severity of the injuries, the sequelae of injuries and the devastating effects such injuries have on the plaintiff are reiterated as set out above.

[33] The Respondent however argued that the Orthopaedic Surgeon per page 8 of his report noted that with regards to the head injury is at present no current complaints. He also reports that plaintiff has no complaints of the bilateral arm injury or the chest.

[34] Respondent concedes that at present the main problem is the right hip, upper leg and the knee.

THE LAW:

[35] When considering general damages, a court has a wide discretion to award what it considers to be a fair and adequate compensation for the injured party[1]

[36] In considering the amount to be awarded for general damages it is acceptable to have regard to awards issued in comparative cases, although it is immediately recognized that it is hardly possible to find a case or cases that are on all fours with a particular set of facts.

[37] Ultimately, in determining general damages a broad discretion is exercised by the court based on what it considers fair and adequate compensation. The nature, severity and permanency of the injuries sustained, together with pain and suffering, disfigurement, permanent disability and the effect thereof on the person's lifestyle are aspects to be considered.

[38] It is apparent that there is a dearth of recent judgments dealing with similar injuries.

[39] In *Smit v Padongelukkefonds*, [2] and *Mgudlwa v Road Accident Fund*, [3] R300 000.00 was awarded to a 34-year-old plaintiff which is equal to a present-day value of R540 900.00. That plaintiff suffered from fractures to the femur and tibia causing the left leg to be 5 cm shorter than the other leg due to deformity of the proximal end of the femur. Surgery in the form of a total knee replacement and realignment of the femur was anticipated.

[40] In *Ncama v RAF 2015 (7E3) QOD 7 (ECP Eksteen J*, awarded R500 000.00 to a female cleaner in November

2014. The present-day value of the award is R737 500.00. The plaintiff sustained a fracture of her right femur causing an open reduction and internal fixation to be performed where after she acquired crutches to ambulate. She also sustained a skull fracture, a neck injury and soft tissue injuries to her pelvic ring and sacroiliac joints. It was predicted that there was a 30% chance that a fusion at C5/6 will be required.

[41] In *Abrahams v RAF 2014 (J2-1) QOD 7 (ECP) Eksteen J* awarded R500 000.00 to A 41-year, old spray painter. The present-day value of the award is also R737 500.00. Although the judgment is found in segment J, it is apparent that the plaintiff did not really suffer multiple injuries. The Court found that the head injury complained of was really minimal and no cognizance was taken thereof in considering the amount to be awarded for general damages. In that case the plaintiff sustained a badly comminuted fracture of the right proximal femur as well as fractures of the right distal fibula, patella and medial malleolus. Open reductions were performed on all three areas with internal fixation. The lower right

leg was shortened and the plaintiff had to wear an assistive device. I submit that the injuries in this case, as in the case of Smit supra, are not too dissimilar to that of the plaintiff in casu and can be duly considered in adjudicating the plaintiff's claim.

- [42] In *Ndaba v RAF* 2011 (6E3) QOD 14 (ECB) R300 000.00 was awarded to a female informal hawker who was 42-years old at the time of the injury. This is equal to a present-day value of R547 500.00. This plaintiff sustained\ multiple orthopaedic injuries including a pelvic fracture, and fractures to the right femur and tibia as well as a left knee injury. Open reductions and fixation were performed on the hip joint, femur and tibia. Injuries to her shoulder and hip might require hip and shoulder replacement over time. The plaintiff was bound to have a knee replacement in future due to degenerative changes. The plaintiff also suffered a ruptured bladder. The court held that she could no longer trade as a hawker. Although the injuries differ from those in casu, the judgment cannot be excluded as a yardstick.
- [43] In *RAF v Marunga* [4]the Supreme Court of Appeal reduced the award made by the trial court in 2001 for general damages to R175 000.00. The present- day value is R 466 900. The plaintiff was 19 years old when he was injured. He sustained a fractured femur, soft tissue injuries and bruises.

An open reduction and fixation were performed on the femur and he initially spent five months in hospital recuperating. Thereafter he ambulated with crutches. He was readmitted four years later for removal of the plate and screws when it was

discovered that there was a mal-union of the femur. His left leg was 3,5 cm shorter than the right leg. Corrective surgery was required although the left leg would never revert to its pre-collision length.

The SCA held in paragraph [29] that the plaintiff spent his life in and out of hospitals for several years "... at a time when he ought to have been in the full bloom of youth".

- [44] In the case of *Litseo v RAF*[5] (2 May 2019 in the FS High Court) awarded R700 000 to a 47year old lady who worked as an informal trader-After the accident she could not work as a hawker anymore. She cannot sit or stand for long periods and when she seated needs to elevate her legs to avoid swelling. Her injuries were to her right upper leg and knee, the right lower leg and ankle, and the left knee and lower leg. (Present- day value for that amount is R763 000 see Quantum yearbook 2022 by Robert Koch)
- [45] In *Hall v Road accident Fund* 2013(6J2) QOD 126 (SGJ) 2013: R700 000 was awarded in 2013. In 2022 it amounts to present -day value R1 090 600. A 39-year-old male sales manager sustained a fracture of the left humerus, fractured ribs on the left side, a concussive head injury of moderate degree, a left 6th cranial nerve lesion, soft tissue spinal injuries of the neck and back and various abrasions. He spent five days in ICU. Plaintiff was an exceptional world-class cyclist and a highly motivated, successful business person pre-accident. Post-accident he is a substantially changed person with continuous physical complaints. He lost

confidence in himself to such an extent that any future employment will most probably be precarious and problematic although he is not completely unemployable. He is reliant on a sympathetic employer and has to be micro-managed at home and at work. Plaintiff has ongoing symptoms of an organic brain syndrome (mild) post-traumatic with features of depressive illness which require long-term intermittent psychiatric treatment as well as psychotherapy.

His occupational functioning was adversely affected. He lacks the motivation to perform duties and is unable to deal with any stressful

situation. Several medical procedures on his left shoulder will have to be performed in the future, including a total shoulder

replacement. Plaintiff would probably be compelled to retire from even a sedentary occupation within the next ten years.

Obviously, all these injuries mentioned above are dissimilar to those in casu, but the judgment serves as a good guideline.

[46] Nevertheless, awards have increased over time, a fact well recognized in *Wright v Multilateral Motor Vehicle Accidents Fund*,^[6] wherein Broom DJP stated that:

“When having regard to previous awards one must recognize that there is a tendency for awards to now be higher than in the past.”

[47] Additionally, South African courts have emphasized that comparable cases offer some guidance in assisting a court to arrive at its award but should not be viewed as an absolute standard. This principle was affirmed by Potgieter JA in *Protea Assurance Co Ltd v Lamb*,^[7] wherein he stated that a comparison of the plaintiff's general damages with that of previous awards need not take the form of a meticulous examination of awards made in previous cases in order to fix an amount of compensation and nor should the process be allowed to dominate the enquiry so as to fetter the general discretion of the court.

[48] This court, therefore, has a wide discretion in awarding general damages and while awards similar in law and fact provide a guide, the court certainly may award an amount of general damages that are higher than those given historically.

[49] Indeed, this court is alive to the dictum in *Road Accident Fund v Marunga*, supra that a modern approach should be infused into the process of assessing damages in a case such as the instant one. In terms of this approach, the court is enjoined to consider individual freedom of opportunity, rising standards of living, and the recognition that past awards have been significantly lower than those made in other countries.

ORDER:

[50] Therefore, I make the following order:

1. The Defendant shall pay the sum of R700 000.00 in respect of general damages.

AS BOONZAAIER AJ

On behalf of Plaintiff

: Adv CG Cross

Instructed by

Du Plooy

Attorneys

BLOEMFONTEIN

On behalf of Defendant Ms

Mkwanazi

State Attorneys

1. RAF v Marunga 2005 (5) SA 164 (SCA) at 169 E-F.

[2]

(2003), Corbett and Honey, Quantum of Damages (“QOD”), Vol V at E3 -11

[3]

(2010), QOD, Vol VI at E3 – 1.

[4] 2003

(5) SA 65 (SCA)

[5] (5637/2016)

[2019] ZAFSHC 52

[6] 1997(4) QOD e 3-31(N)

[7] 1971

(1) SA 530 (A) at 536.

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