

SOUTH AFRICA / JUDGMENT

Thozamile v Road Accident Fund (3022/2020) [2022] ZAFSHC 307 (31 October 2022) [2022] ZAFSHC 307

COURT

Free State High Court, Bloemfontein

BEFORE

Africa

CASE / FILE NUMBER

3022/2020

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FLYNOTES:

GENERAL DAMAGES – CLAIM OF HEIR

Motor

collision – General damages – Severe head injury –

Passing away 3 years and 7 months after accident

– Claim by

heir – Award in plaintiff's lifetime to bring

consolation to plaintiff for suffering –

Award to be on

conservative side when devolving on heirs.

IN

THE HIGH COURT OF SOUTH AFRICA.

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

Case

number: 3022/2020

In

the matter between: MAKHUBULO
 THOZAMILE
 Plaintiff
 and
 ROAD
 ACCIDENT FUND
 Defendant

CORAM: AFRICA, AJ
 HEARD
 ON: 7 SEPTEMBER 2022
 DELIVERED
 ON: This judgment was handed down electronically by
 circulation to the parties' legal representatives by email. The date
 and
 time for hand-down is deemed to have been at 15h00 on the 31st of
 October 2022.

JUDGMENT

- [1] Plaintiff ("the claimant") instituted an action against the defendant for personal injury damages arising out of a motor vehicle collision which took place on or about the 30th of March 2018, at or near Louis Road, 2010 Village, Thabong in Welkom. It is pleaded that the collision occurred when the unknown insured vehicle collided with the claimant who was a pedestrian at the time.
- [2] It is common cause that the claimant passed away on the 7th of November 2021 after the pleadings have closed. The claimant is represented by his son, who is the executor of the deceased estate and has substituted the claimant as plaintiff herein[1].
- [3] The issue of merits became settled, and same is apportioned 80% / 20%, in favour of the plaintiff. The only issue in dispute and for my determination, is the quantum of general damages, with the issue of loss of earnings and future medical expenses being abandoned.
- [4] Premised on plaintiff's expert reports ("Bundle 6"), it is submitted that R1 600 000 would be a fair and reasonable amount, in respect of general damages.
- [5] It is not in dispute that claimant was 55 years old at the time of the collision and 58 years old, at the time of his demise. Thus, a period of 3 years, 7 months and 7 days has lapsed from the date of collision to the date of death.
- [6] It is common cause that the defendant produced no medico legal reports and acceded 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.
- [7] In quantifying the general damages suffered, the court is referred to the following expert reports:

A. Doctor Kelly is a Specialist Neurosurgeon, who examined the plaintiff on the 27th of January 2021. He opined that the plaintiff sustained severe traumatic brain injury and was treated for the following injuries:

- Head injury-confused and disorientated GCS 13/15 on scene, improved to GCS 14/15 upon arrival at hospital with clear fluid leaking from the right ear. He remained confused and disorientated for approximately 2 weeks after the accident. CT brain is normal.
 - Blunt facial trauma with swollen forehead.
 - Blunt facial trauma with loss of two central maxillary incisors.
 - Soft tissue cervical spine injury, CT cervical spine is normal.
 - Soft tissue lumbar spine injury.
 - Left fibula fracture. X-ray left leg = fibula fracture, managed conservatively with a plaster of Paris.
- [8] Plaintiff was admitted for neuro-observations, not operated on and discharged on the 9th of April 2018. He was not ambulant on discharge and used crutches for a period of three months, post-accident. He was reviewed multiple times in the outpatient clinic at Bongani Hospital, but was never readmitted.
- [9] The main complaints alluded to by plaintiff, were headaches, memory problems, mood disorder, difficulty eating, lumbar spine pain and left leg pain.
- [10] The prognoses made, is that plaintiff is suffering from post-concussion headaches, with recovery estimation within 2 to 3 years, however, $\pm 20\%$ of patients remain with chronic symptoms. As the plaintiff was examined 3 years after the accident,

Dr Kelly opined that spontaneous resolution of these headaches can still occur.

- [11] Dr Kelly opined that the plaintiff suffered with acute pain for 12 weeks after the accident and suffered chronic pain to date.[2] Plaintiff's amenities of normal living were lost during the period of hospitalization. He could not perform any activities of daily living immediately after the accident and currently needs assistance with most, but not all activities of daily living. Plaintiff was no longer able to play soccer. Whole person impairment was assessed at 35%.
- [12] Doctor Bongobi is an Orthopaedic Surgeon, who examined the plaintiff on the 19th of February 2021 and opine that the examination done was limited to orthopaedic injuries. The plaintiff presented with complaints of headaches 3-4 times a week, relieved by analgesics.

Plaintiff had loss of front teeth, but did not consult a dental expert. Plaintiff also presented with lower back pain and stiffness

in the lumbar spine exacerbated by lifting of heavy objects and bending for a long period, with pain in inclement weather. Lastly,

plaintiff further presented with left knee and lower leg proximal leg pain and swelling exacerbated by standing and walking for a long period. Whole person impairment was assessed at 12%.

[13] Doctor Grootboom is a Clinical Psychologist, who examined the plaintiff on the 10th February 2021. Her findings are that plaintiff's neuropsychological test results revealed mild to significant neurocognitive outcomes. She referred to the report of doctor Kelly, which indicates that plaintiff sustained severe traumatic brain injury and noted that expected deficits from a severe TBI[3] include compromise in the areas of attention, memory, working memory, language and executive functioning, with reported functional cognitive limitations which include memory and concentration problems.

[14] Further, that plaintiff's neurocognitive outcomes are likely to be a combination of his premorbid functioning, exacerbated by severe head injury sequelae including his reported pain during the assessment. Ongoing pain is expected to play a significant role in difficulties with attention and concentration, memory and visual scanning.

[15] It was recommended that plaintiff attend 20 sessions of psychotherapy to address accident related symptoms of adjustment difficulties,

situational anxiety and major depressive disorder.

LEGAL PRINCIPLES

[16] 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, as enunciated in the case of AA Mutual Insurance Association Ltd v Maqula [4]•

[17] In the case of Protea Insurance Company v Lamb [5], 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 [6];

"... 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. "

CASES REFERRED TO BY THE PLAINTIFF

[18] In the matter of Dlamini v Road Accident Fund [7] , plaintiff was a 37 year old male involved in a motor vehicle collision. The plaintiff sustained a head injury. The Plaintiff has made good recovery but was still symptomatic with neuropsychological sequelae consistent with

head injury of that nature. The psychometric testing confirmed that his neuro-cognitive function has been seriously impaired by the accident. No meaningful improvement can reasonably be expected of the plaintiff. The plaintiff sustained a severe head injury and a fracture of the maxilla and teeth. He is left with neuropsychological sequelae because of the head injury. The Experts agreed that although the plaintiff has not developed post traumatic seizures, he now has an increased risk of developing seizures. The plaintiff's test results showed that his neuro-cognitive functioning has been seriously impaired by the accident. He is experiencing inner stress and finds it difficult to control his impulses especially aggression and irritation. He has difficulty in expressing himself and finding the right words. The court awarded Dlamini R850 000, in 2012, which is R1 320 109. 87 in 2021.[8]

- [19] In the matter of Coetzee N.O. obo Komane v Road Accident Fund [9], the plaintiff sustained a severe traumatic brain injury, as she had post traumatic amnesia for about two weeks. She also had base skull fractures around the eye with a bad cosmetic-outcome of the facial scars. She also has features of Post Traumatic Psychosis (catatonia) and mental regression. She had a fracture of the nasal bone and lacrimal bone and cribriform plate. The plaintiff has 15% chance of developing epilepsy from the traumatic brain injury.[10]
- [20] Plaintiff submits that these two cases are more similar to the one in casu and therefore this court should not deviate from them. Further that plaintiff has been affected by the severe head injury and the sequelae both physically and psychologically, with 10% chance of epilepsy. It is submitted that R1 6000 000.00 is a reasonable and fair considering the sequelae and comparable case law.[11]
- [21] Defendant submits that the facts pertaining to the injury and sequelae in the matter of Dlamini (supra), is closer to the facts in the present matter, but distinguishable, in that Dlamini was a 37- year old male at the time of the collision, (18 years younger than the deceased at the time of the collision) and would Dlamini therefore have had to live much longer with the injuries and sequelae thereof, than the deceased herein. It is therefore submitted that having regard to the age of Dlamini, a similar award would not be appropriate.

LEGAL PRINCIPLE REGARDING DECEASED CLAIM

- [22] Plaintiff referred this court to the case of Nkala and Others v Harmony Gold Mining Company Limited-time and Others [12], where plaintiff sued for general damages but who has died, and who would, but for his/her death, be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action notwithstanding his/her death. The person who would have been liable for the general damages if the death of a plaintiff had not ensued remains liable for the said general damages notwithstanding the death of the plaintiff so harmed. Such action shall be for the benefit of the estate of the person whose death had been so caused.[13]

- [23] It is submitted that a fair and reasonable amount should be awarded to the plaintiff's executor, it being the same amount the court would have awarded to the plaintiff if he was still alive. The amount of R1 600 000.00, is submitted to be fair and reasonable under the circumstances.[14]
- [24] In deviation with the submissions made by the defendant in relation to the awarding of a fair and reasonable amount to the deceased estate, similar as if the plaintiff was still alive, defendant referred this court to the case of *Du Bois v Motor Vehicle Accident Fund* [15]. The court dealt with a claim for general damages by the estate of the deceased, who passed away 5 ½ years after she sustained the injuries. The court having evaluated the medical reports as well as the sequalae of her injuries, limited the calculation of damages to a period of 5½ years. The court stated that it further takes into consideration that it is logically and legally compensating the claimant, but in effect the claimant's two sons, her heirs, for the claimants five and a half years of pain and suffering, disability and her loss of amenities of life.
- [25] The court stated that in the normal course of events, this award would have benefitted the claimant and even though it could have been described as excessive and in the end could have accumulated during her lifetime, it would have been used to alleviate her lot in life or bring her pleasure or consolation. The court further stated that any award it made for the claimant's suffering ultimately devolves on her heirs. This factor influences the court on the conservative side of what it should award the plaintiff for the claimant's pain and suffering, etc. That the award it is about to make, does not emanate from first establishing what would have been awarded the claimant for general damages had she still lived till 57 or 58 years of age, that is 27 years from the date of the collision instead of the five years and six months therefrom, the court stated that it did not arrive at the award by dividing that amount by five because the claimant only lived approximately one fifth of the 27 years, but the award arrived at is what the court think is fair in all the circumstances of that case.[16]
- [26] This court's attention was drawn to the fact that what in essence was considered by the court in the matter of *Du Bois*, in arriving at an amount which it believed to be fair and reasonable in the circumstances were;
- a) Comparable rewards;
 - b) The period during which the claimant lived with her injuries and the sequalae thereof;
 - c) The fact that the award would have been used to alleviate her lot in life; and
 - d) That the award for her suffering now ultimately transferred to the heirs in her estate.

- [27] In arguing with reference to the aforesaid, the defendant submits that when combining the factors listed supra, and combining it with the period of 3 years, 7 months and 7 days, which the deceased lived with the injuries and the sequelae thereof post collision, the appropriate award to be made would be between R250 000.00 and R350 000.00, pre-apportionment of 20%.
- [28] The court in the Nkala matter [17] sought to make sense regarding the transmissibility of claims for damages (whether general or specific) to the heirs or the estate of the deceased. The court further stated that as far back as the period when the formulary system was in place, the Roman law allowed for the transmissibility of claims for or against heirs of a deceased litigant once the stage of *litis contestatio* had been reached and such transmissibility was not affected by the nature of the claim.
- [29] The matter of Nkala (supra) thus had to grapple with the issue of transmissibility of claims for damages, pre-*litis contestatio* whether or not instituted by way of class action or an individual plaintiff. To his end, the court stated:[18]

"In conclusion, we hold that the common law should be developed as follows:

1. A plaintiff who had commenced suing for general damages, but who has died, whether arising from harm caused by a wrongful act or omission of a person or otherwise, and whose claim has yet to reach the stage of *litis contestatio*, and who would but for his/her death be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action, notwithstanding his/her death; and,
 2. The person who would have been liable for the general damages if the death of a plaintiff had not ensued remains liable for the said general damages, notwithstanding the death of the plaintiff so harmed;
 3. Such action shall be for the benefit of the estate of the person whose death had been so caused: (my emphasis)
 4. A defendant who dies while an action against him has commenced for general damages arising from harm caused by his wrongful act or omission, and whose case has yet to reach the stage of *litis contestatio*, remains liable for the said general damages, notwithstanding his death, and the estate of the defendant shall continue to bear the liability, despite the death of the defendant."
- [30] This indeed has been the reasoning in other decided cases such as in the case of *Road Accident Fund v Mtati* [19] where the Supreme Court of Appeal endorsed the decision in *Jankowik* [20]. Thus, if *litis contestatio* had been reached at the time of the death of the deceased, then his claim for general damages had transmitted to his estate.
- [31] Premised on the above emphasis, plaintiff in the present matter argues that this court should award the same amount to plaintiff's

estate, as would have been the case, had plaintiff still be alive. The Nkala case, with respect, does not support the plaintiff's

approach to this matter.

[32] When the quantification of a claim for non-pecuniary loss is undertaken it is important to remember that the mere physical injury does not per se constitute non-patrimonial loss. As stated in *Sigournay v Gil/banks* [21] : "Injuries may leave after-effects and may cause mental anxiety but they are not themselves pain". The highly personal nature of pain and suffering is emphasised by the dicta in *Radebe v Hough* [22] that someone's social and financial status or his race cannot give an indication of his pain and suffering. The amount awarded for pain and suffering depends on the extent of pain and suffering caused by the delict, and nothing else. Pain can exist only in so far as it is actually experienced[23]. In light hereof a court is potentially in a very difficult position regarding the calculation and determination of an award for a claim for non-pecuniary damages when, as in the present case, where no viva voce evidence was led by the Plaintiff pertaining to the actual suffering of pain or loss of amenities. The court is basically obliged to revert solely to previous awards made in more or less similar matters when exercising its discretion since the Plaintiff's very personal experience of pain and suffering or loss of amenities of life cannot be discounted.

[33] Defendant argues that the court should be mindful that some of the ages of the victims in the comparable cases, were younger than the plaintiff, notwithstanding the fact that they suffered some kind of brain injury with sequelae. As indicated, this court only has the hearsay evidence of the experts who confirm what they have been informed of by the Plaintiff in that he mainly suffered from headaches, memory problems, mood disorder, difficulty eating, lumbar spine pain and left leg pain. Notwithstanding the fact that Defendant conceded and confirmed that the hearsay evidence contained in the expert reports may be taken into consideration for quantification purposes, the court is still left to wrestle with what is fair and reasonable, in the circumstances of this case.

[34] This court agrees that because of the highly personal nature of pain and suffering, pain can exist only in so far as it is actually experienced. This court thus accords with the reasoning as employed in the case of *Du Bois* that the award to be made would have benefitted the claimant during her lifetime and it would have been used to alleviate her lot in life or bring her pleasure or consolation. Further, the fact that the award to be made for the claimant's suffering, will ultimately devolve on her heirs,

influences this court on the conservative side of what it should award the plaintiff for the claimant's pain and suffering. It is trite that the award of general damages must be fair to both the plaintiff and the defendant[24].

[35] As stated, the deceased was 55 years old at the time of the collision and 58 years old, at the time of his demise. From the death certificate, it appears that the deceased was never married and that the cause of death was natural causes. There was no submission that the cause of death was as a direct result of the injuries sustained and its sequa/ae. Prior the

collision, the deceased was in good health and was his longevity not affected by the accident. The deceased never attended school, but he appeared to be of average intelligence. The deceased who resided in an informal settlement is survived by 1 child and 3 siblings. He was employed as a car washer at the Welkom Taxi Rank, at the time of the accident.

- [36] Dr Kelly opined that notwithstanding the main injuries complaint of being headaches, memory problems, mood disorder, difficulty eating, lumbar spine pain and left leg pain, the investigative findings shows that CT brain and cervical spine scans were normal, with a left leg fibula fracture. The plaintiff used crutches for a period of 3 months and was never readmitted. Dr Kelly remarked that that the deceased had a 10% chance of developing late onset post traumatic epilepsy, but his longevity has not been affected by the accident.
- [37] The life expectancy of the deceased, as opined by Dr Kelly, is reduced by immobility, incontinence result in urinary infections and septicaemia, swallowing difficulties, epilepsy degree of cognitive and intellectual damage, severe behavioural problems and chronic depression and suffered with chronic pain to date of report.

OTHER COMPARABLE CASES

- [38] In *MTA obo MK v RAF*[25] where an 8-year-old child sustained a mild concussive brain injury, visible laceration on the forehead and hematoma of the forehead. He presented with symptoms of a depressive disorder and persistent post- traumatic stress disorder was present. The court considered the physical injuries and loss of amenities of life as a result of depression and awarded R 400 000.00 as general damages which has a present-day value of R 475 559.98.
- [39] In *Nkosi v Road Accident Fund* [26] the plaintiff had lacerations on the head, a concussion, fractured ribs and hand fractures. The court awarded R 250 000.00 as general damages which has a present-day value of R 470 195.58.
- [40] In the case of *Makupula v Road Accident Fund* [27] a 5-year-old boy sustained a mild to moderate brain injury with neurocognitive deficits, hyperactivity disorder, memory dysfunction, uncooperative and aggressive behaviour, poor concentration, poor executive functioning and school performance. He also suffered broken teeth and injuries to the inside of his mouth. The court awarded R 300 000.00 as general damages which has a present-day value of R 542 065.68.
- [41] In the case of *Bikawuli v Road Accident Fund* (6B4) QOD, decided in 2010,[28] a 16-year-old boy suffered a moderate brain injury with cognitive fallout, memory impairment, behavioural changes, fatigue, headaches and dizziness. The court awarded R 135 000.00 as general damages which has a present-day value of R 243 929.55.
- [42] I also bear in mind, inter alia, what has often been quoted in our case law in *Sandler v Wholesale Coal Suppliers Ltd* [29]:

"(T)he law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case."

[43] This court in seeking guidance and applying the factors listed in the case of Du Bois (*supra*), looked at and read the decided comparable cases; taken into consideration that it is logically and legally compensating the claimant but in effect the claimant's one child; for the claimant's three years, 7 months and 7 days of pain and suffering, loss of amenities of life; the fact that in the normal course of events this award would have benefited the claimant and it would have been used to alleviate his lot in life or bring him pleasure or consolation; that any award this court makes for claimant's suffering ultimately devolves on his heirs, a factor influencing the court on the conservative side of what the court should award the plaintiff for the claimant's pain and suffering.

[44] I am mindful that merely following the trend to grant high awards slavishly does not take cognisance of the view of Holmes J in *Pitt v Economic Insurance Co Ltd* [30] that: "[T]he court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."

[45] In light of the circumstances of this case as set out above, the detailed expert reports and consideration of previous awards, I am of the view that an amount of R650 000.00 is a fair and reasonable award for the non-pecuniary loss suffered by the claimant, as a result of the injuries sustained *ad it's sequelae*.

ORDER

[46] Accordingly, the following is made:

1. The defendant is therefore ordered to pay the plaintiff an amount of R700 000.00 (seven hundred thousand rand), pre-apportionment, with costs, in respect of general damages.

AFRICA, AJ

Counsel on behalf of the Plaintiff:

Adv. Baloyi

Instructed by:

S.B. Seshibe Attorneys

Counsel on behalf of the Defendant: Adv. Gouws

Instructed by:

State Attorney

- [1] Annexure "X" Notice of Substitution.
- [2] 27 January 2021.
- [3] Traumatic brain injury.
- [4] 1978 (1) SA 805 (A).
- [5] 1971 (1) SA 530 (A) at 535H-536A.
- [6] at pages 534 to 536B.
- [7] (10/39907) [2012] ZAGPJHC 13 (21 February 2012).
- [8] Paragraph 6.3 of plaintiff's Heads of Argument.
- [9] (30699/15) [2020] ZAGPPHC 295 (26 June 2020).
- [10] Paragraph 6.4 of plaintiff's Heads of Argument -.
- [11] Paragraph 6.5 of plaintiff Heads of Argument.
- [12] 2016 (5) SA 240 (GJ).
- [13] Paragraph 7.1 of plaintiffs Heads of Argument.
- [14] Paragraph 8 of plaintiffs Heads of Argument.
- [15] 1992 (4) SA 368 (T).
- [16] Paragraph 6.1 to 6.3 of defendant's Heads of Argument.
- [17] Paragraph 176
- [18] Paragraph 220.
- [19] 2005 (6) SA 21)(SCA) at para [39]
- [20] Jankowiak and Another v Parity Insurance Co (Pty) Ltd 1963 (2) SA 286 (W) at 290D-E
- [21] 1960 (2) SA 552 (A) at 571.
- [22] 1949 (1) SA 380 (A) at 385.
- [23] Sigournay v Gillbanks, *supra*, 571.
- [24] De Jongh v Du Pisanie 2005 (5) SA 457 (SCA).
- [25] (4484/16) [2018] ZAGPJHC (18 June 2018).
- [26] (07/2195) [2009] ZAGPJHC 42 (24 April 2009).

[27] (1635/07) [2010] ZAECMHC 17 (8 April 2010).

[28] (6B4) QOD, decided in 2010.

[29] 1941 AD 194.

[30] 1957 (3) SA 284 (D) at 287E-F.

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