

SOUTH AFRICA / JUDGMENT

Tibakae v Road Accident Fund (13813/2018) [2020] ZAGPPHC 59 (4 March 2020) [2020] ZAGPPHC 59

COURT

North Gauteng High Court, Pretoria

BEFORE

Mdalana-Mayisela

CASE / FILE NUMBER

13813/2018

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION
(PRETORIA)
(1)
REPORTABLE: NO
(2)
OF
INTEREST
TO
OTHER

JUDGES:

NO
(3)
REVISED.
CASE
NO: 13813/2018
4/3/2020
In the matter

between: TIBAKAE
 ALEXANDER
 Plaintiff
 and
 THE
 ROAD ACCIDENT FUND
 Defendant

JUDGMENT

Mdalana-Mayisela J,

1. The Plaintiff has instituted the action for delictual damages resulting from the motor vehicle collision ("the collision") which occurred on 27 May 2017. The plaintiff was a pedestrian at the time of the collision. The defendant has agreed to compensate the plaintiff 90% of the proven delictual damages resulting from the collision.
2. The defendant further gave a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, limited to 90% of the future medical and related expenses of the plaintiff. In as far as the plaintiffs claim for the past and future loss of earnings and earning capacity is concerned, the parties agreed that the plaintiff shall be awarded an amount of R1, 401,106, 68. (One million four hundred and one thousand one hundred and six rand sixty eight cents).
3. The only head of damages for determination by this court is the issue of general damages. By agreement between the parties this determination should be based on the expert medico-legal reports inclusive of joint minutes. As a consequence no oral evidence was led.
4. The injuries sustained by the plaintiff as a result of the collision and the sequelae thereof are common cause between the parties. The treatment received by the plaintiff and his future treatment is also common cause between the parties. The parties agree that the plaintiff is entitled to be awarded general damages and further that he is unemployable in the open labour market. There is no agreement between the parties on the amount to be awarded for general damages.
5. The parties' orthopaedic surgeons Dr Khumbirai and Dr Khan agreed that the plaintiff sustained multiple facial fractures; and open fracture of the right tibia and fibula. The plaintiff's neurosurgeon, Dr Sekgwapa opined that the plaintiff sustained a direct trauma to the head causing bilateral epidural hematoma, subdural hemotoma, subarachnoid hemorrhage and multiple brain contusions. His hospital admission GCS was 6/15 and three days later it remained 12/15. Dr Sekgwapa opined that these are features of a severe traumatic brain injury with multifocal brain damage. The plaintiff's ophthalmologist, Dr Maphenduka concluded that the plaintiff sustained blow out fracture of the right orbit with entrapment of the right inferior rectus muscle.

6. The plaintiff as a result of the injuries sustained from the collision suffers from the chronic post-concussion headaches localised to the frontal region. He has poor vision of the right eye and experience diplopia which interfere with his daily function. He suffers from chronic pain of the right shoulder, right knee and right leg which is aggravated by prolonged standing, walking, lifting of heavy weights and cold weather. The orthopaedic experts in their clinical examination found that the plaintiff has a noticeable muscle wasting in the right shoulder girdle muscles; he walks with a slight limp on the right side after long distance walking; there is tenderness over the right acromioclavicular joint and supraclavicular region; and fracture on the side of the right leg. The risk of developing epilepsy has increased to 8%. He has right hemiparesis. The plaintiff's clinical psychologist, Dr Katjene opined that the plaintiff presented with depressive symptoms; and post traumatic anxiety with emotional and psychological implications.
7. The orthopaedic surgeons agreed that the fracture of the right tibia and fibula has united with intramedullary nail and locking screws in situ. They agreed that the plaintiff will undergo a surgery in the future for the removal of the internal fixation of the right leg. The ophthalmologist opined that the plaintiff will need surgery to correct the oculomotor synkinesis.
8. I turn now to the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life. Dr Khan concluded that as far as orthopaedic injuries are concerned the plaintiff has recovered well and future conservative treatment and surgery will improve his condition further. Dr Kumbirai qualified the plaintiff under narrative test for general damages for serious long- term impairment, permanent serious disfigurement and severe long term mental or severe long term behavioural disturbances or disorder. Dr Sekgwapa gave the plaintiff a WPI of 19% and qualified him for general damages under narrative test for severe long-term mental or severe long-term behavioural disturbance or disorder.
9. It is settled law that the trial court has a large discretion to award what it in the circumstances considers to be a fair and adequate compensation to the injured party for the sequelae of his injuries. In considering a fair award for general damages the court, in *De Jongh vs Du Pisani* 2004 (2) ALL SA 565 [SCA], 2005(5) SA 457 (SCA), said the following :

"The plaintiff is entitled to a fair compensation for his loss and the amount of such compensation must, however, also be fair towards the defendant. The court must avoid a human tendency to over compensate".
10. The legal representatives of the parties referred to various case law in making submissions on the amount that should be awarded as general damages. Counsel for plaintiff submitted that an amount of R1.2 to R1.3 million should be awarded and Counsel for defendant submitted that an amount of R1 million is appropriate for general damages.

11. In assessing general damages for bodily injuries, the process of comparison with comparable cases does not take the form of a meticulous examination of awards made in other cases in order to fit the amount of compensation nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases regard being had to all the factors which are considered to be relevant in the assessment of general damages (*Protea Assurance Co Ltd vs Lamb* 1971 (1) SA 530 AD at 535H- 536A). I have considered the case law referred to by the parties. In the case law referred to by Counsel for defendant the injuries and sequelae were less severe than in the present matter. The case law referred to by Counsel for plaintiff, the injuries and sequelae were more severe compared to the present case.
12. Having considered all the relevant circumstances of this matter, in particular the nature and the seriousness of the injuries, the sequelae thereof, in particular the partial paralysis on the right side, the increased percentage of epilepsy, the prognosis and future treatment and his relative youth, I am of the view that an amount of R1,2 million less 10% liability apportionment would be a fair and adequate award for general damages.

13. I accordingly make the following order:

13.1 The defendant shall pay the total sum of R2.481,106.68 to the plaintiff's Attorneys, Sivu Shongwe Attorneys' trust account in settlement of the plaintiff's action, which amount is calculated as follows :

Past and future loss of earnings or earning capacity R1, 401, 106. 68

General damages

R1,080 000.00

together with interest calculated at the legal rate from a date fourteen (14) days after the date of judgment to the date of payment;

13.2 The defendant shall furnish the plaintiff with an undertaking in terms of the provisions of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 to pay to the plaintiff the costs of future accommodation in a hospital or nursing home or the treatment of or rendering of a service to or the supply of goods to the plaintiff, as a result of the injuries sustained by him in the collision which occurred on 27 May 2017, and the sequelae thereof, limited to 90%1 after such costs have been incurred and upon proof thereof.

13.2 The defendant shall pay the plaintiff's costs of suit together with interest thereon calculated at the legal rate from a date fourteen(14) days after allocator to the date of payment, such costs to include but not limited to the following experts:

13.2.1 Dr L F Sekgwapa

13.2.2 Dr Katjene Mathews

13.2.3 Mrs S Katjene

13.2.4 Ms K Montwedi

13.2.5 Poneso Consulting (Actuary)

MMP MDALANA-MAYISELA

JUDGE OF THE HIGH

COURT OF SOUTH AFRICA

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