

SOUTH AFRICA / JUDGMENT

Van Tonder N.O v Road Accident Fund (4032/2013) [2021] ZAGPPHC 382 (30 May 2021) [2021] ZAGPPHC 382

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela

CASE / FILE NUMBER

4032/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION

PRETORIA)

Case No: 4032/2013

REPORTABLE: YES

/ NO.

OF INTEREST TO OTHER

JUDGES: YES / NO.

REVISED.

DATE:30/05/2021

In

the matter of: Adv
 Van Tonder
 N.O.(M.
 P.
 Mofokeng)
 Plaintiff
 and
 Road
 Accident
 Fund
 Defendant

JUDGMENT

Maumela J.

1. In this case the Plaintiff, M. P. Mofokeng, approached this Court claiming general damages in the amount of R 800 000.00. He was a passenger in a motor vehicle on the 3rd of August 2009. At that time, he was 25 years old. At the time he litigated, he was about 36 years old.
2. The Defendant accepted liability to pay 100% of the Plaintiff's proven damages on the 15th of October 2014. In that regard, the Defendant has already compensated the Plaintiff for his loss of income/earning capacity.
3. It is pointed out that a closer scrutiny of the HPCSA report provides clarity on the extent of the seriousness of the sequelae sustained you to the resultant brain injury, while on the other hand, Dr. H.J Edeling's report is informative concerning the nature or rather the degree of the injury, which in his report is described as brain injury. The phrase "at least moderate" is not defined in Dr. H.J Edeling's report, and that omission necessitates the intervention of this Court to decide on the proper meaning of the phrase.
4. It is pointed out that Dr. H.J Edeling's opinion is founded on the Plaintiff's subjective version of the events after the accident. The Defendant argues that this version which was provided by the Plaintiff cannot constitute prima facie facts upon which an objective expert's opinion can be formulated. On page 18 of Dr. H.J Edeling's report, it is recorded that this version was founded on the Plaintiff's own recollection of the events after the accident. In that regard, Plaintiff recollected that he lost consciousness at the scene of the accident and was left with only a fragmented recollection of the subsequent events. This is the material information required for a determination on the degree or extent of severity of the brain injuries, that is, whether the injury is mild, moderate, severe or serious.

5. According to the initial 'duration of coma method' of classification, individuals with mild brain injury regain consciousness in less than half an hour and individuals with moderate brain injuries regain consciousness after more than half an hour.[1] It was submitted that in the absence of the hospital records[2] and the brain scans within the appropriate time window of 2 to 5 days after the accident attesting to the duration of the Plaintiff's

unconsciousness after the accident, the Plaintiff cannot provide the prima facie facts upon which a proper expert opinion can be formulated on the period of his unconsciousness if any after the accident.

6. According to the initial duration of coma method of classification, individuals with mild brain injury regain consciousness in less than half an hour and individuals with moderate brain injuries regain it in more than half an hour. The Defendant argues that the Plaintiff who was in physical and emotional distress after the accident, cannot be expected to recall events as they happened almost 6 years after the accident, when taking into regard the date of assessment written on the report by Dr. H.J Edeling. The state is the 3rd of November 2009. The Defendant contends that any opinion based on such a report will be based on mere speculation.
7. It is trite that courts can only rely on the facts that have been verified. In the case of *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa*[3]; See also *Michael & another v Linksfield Park Clinic (Pty) Ltd & Another*[4] paragraphs 34-40; *CFRoad Accident Fund v S M*[5], at paragraph 2: the SCA held that: "[T]he court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not, then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima facie basis, then the court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert, the threshold will be satisfied."
8. This Court can be in a better position to rely on the expert's opinion only if they are founded on the probable facts which weigh much to the greater possibility. The Defendant submits that in the event where the Court disregards the expert report of Dr. H.J Edeling, the Plaintiff will qualify for less in terms of general damages and as will appear below, in the region of mild brain injuries. This is so because the HPCSA report which is admitted by the Defendant does not describe the degree or nature of

the brain injury, except its sequelae, leaving everyone wondering about the degree or nature of the brain injury.

9. The hospital records contradict Dr. H.J Edeling's finding regarding the degree or nature of the Plaintiff's brain injury. In the records, it is noted that the Plaintiff had GCS (Glasgow Coma Scale), level of 15/15, recorded on arrival at hospital more than 2 hours after the accident. This is consistent with a mild primary diffuse (concussive) brain injury by the initial GCS method of classification.[6] It is recorded, shortly thereafter that the Plaintiff was declared fit and discharged to go home. There were no further neurological observations found, which is the missing information which would provide a proper foundation or rather prima facie facts for Dr. H.J Edeling to formulate his opinion.
10. The Defendant submits that at the least, the phrase refers to the word "minimum", which suggests that the Plaintiff's injuries should be regarded as mild-moderate brain injury as against moderate-severe brain injury. The Defendant's view is premised on the fact that the minimum moderate brain injury is closer to the mild brain injury than the severe brain injury. The Defendant submits further, that the other expert's report in the Plaintiff's case should not be given due consideration as they mainly depended on Dr. H.J Edeling's opinion which was not founded on the prima facie facts upon which a proper and reliable opinion can be formulated.
11. The Defendant submits that the issue of the sequelae from the injuries sustained needs to be understood against the background provided above. It views that the Plaintiff the general sequelae of the scars which the Plaintiff suffered cannot embarrass him overly as they did not appear on his face and can be easily covered with clothes. It also argues that the mental fatigue, inattentiveness, difficulty with the retrieval of memories, impairment of logical reasoning and disinterest in driving shall not impact his life seriously. Defendant submits that the Plaintiff can deal with all the sequelae through proper medical treatment.
12. It is trite law that in considering general damages, one is concerned with the consequences of the injuries which cannot be calculated with certainty in terms of the number or the figures. The Defendant argues that this Court has a vast judicial discretion to exercise after consideration of the relevant facts. The Defendant raises the point that the reports tendered by the Plaintiff are very stale, so much so that they may mislead the Court. The said reports date back over more than the 2 year period that is conceived to be the normal years up to which reports written by expert can still be considered to be reliable.[7]
13. In the case of NG vs Road Accident Fund,[8] reliance on an expert's opinion that was stale was abandoned because of the risks that come with the reports in that they may mislead the Court regarding the real sequelae from the injuries sustained. The date of the 26th of July 2012 is recorded as the date of assessment on the first page of each report. The report by Dr. Kaplan shows the date of 26 July

2012. This is almost seven years before. The report by Dr. Cathy Angus's, a clinical psychologist, was dated the 14th March 2012, which is 7 (seven) years before. His second report is dated the 19th of January 2015 which is almost 4 years before. The report by Dr. Anton H. Van den Bout, an Orthopedic surgeon, is dated the 20th of October 2015 which is almost 4 (four) years before the time of consideration.
14. The report by Dr. H.J. Edeling, (Neurosurgeon), is dated the 03rd of November 2015. This is almost 4 (four) years later Dr. Leon, a (Psychiatrist) on the 5th of July 2016, was almost 3 (three) years before, Dr Liezel Vander Merwe (ophthalmologist) on the 27th of January 2016, which is almost 3 (three) years. The report by Ida-Marie Hattingh, (speech/language pathologist and Audiologist), is dated the 11th of May 2015 which is almost 4 (four) years later and that of Rialette Gous, (speech/language pathologist and Audiologist), on the 21th of May 2015 which was almost 4 (four) years before the determination of the sequelae. It is apparent that all the reports are notably stale, having been off time by periods ranging from 3, 4 to 7 years.
15. The Defendant raises the point that to date, there is no report from any radiologist submitted by the Plaintiff to prove any fracture that he may have sustained if any. It states that this is suggestive of the point that Dr. Kaplan's recommendation was ignored, at best by the Plaintiff, and for reasons not known. Seemingly, instead of upholding Dr. Kaplan's recommendation on the basis of which the Plaintiff was supposed to undergo the same x-ray processes, the Plaintiff ignored that and opted for another expert opinion by Dr. H.J Edeling of the same medical territory or jurisdiction and who for unknown reasons did not recommend the X-ray process.
16. The whole of the Plaintiff's case pertaining to the injuries and their respective sequelae comprise of the above facts. The Defendant questions how the Plaintiff arrived at an amount of R 800 000-00 given the lack of proof of fractures and serious injuries capable of taking long-term effects on the life of the Plaintiff. The injuries sustained can be best analyzed in the light of the reports from the HPCSA and Dr. Edeling where it concerns the issue of brain injury.
17. As indicated before, on page 18 of Dr. H.J Edeling's report, there is a record noted which was drawn from the Plaintiff's own recollection of the events after the accident that he lost consciousness at the scene of the accident and he only had a fragmented recollections of the subsequent events. For the court to be able to determine the degree of the brain injuries in terms of whether they were mild, moderate, severe or serious, it has to rely on this material information required also for purposes of determining the extent of the relevant sequelae.
18. The Defendant contends that their reports compiled by Dr. H.J. Edeling ought to be disregarded based on the fact that they have gone stale and therefore cannot be considered to be founded on prima facie facts in which the court can rely. It emphasizes that it will be better to rely on reports by expert's opinion which are founded on the probable facts which represent greater possibility. If the court were to disregard the report by Dr. H.J. Edeling,

that was a result in the Plaintiff qualifying for general damages at a lesser amount than what was claimed.

19. The Defendant points out that in the event where the Court disregards the expert report by Dr. H.J Edeling, the Plaintiff will qualify for a lesser amount to be paid as general damages. That is demonstrated below in submissions pertaining to mild brain injuries. This is so because the HPCSA report which is admitted by the Defendant does not describe the degree or nature of the brain injury suggested in the report by Dr. H.J. Edeling. As such, questions still remain unanswered regarding the degree or nature of the brain injury.
20. This is compounded by the fact that the hospital records reveal a contrary scenario as compared to the findings by Dr. H.J Edeling which are contained in his finding regarding the degree or nature of the Plaintiff's brain injury. In the records, it is noted that the Plaintiff had GCS (Glasgow Coma Scale) at the level of 15/15 which was recorded on arrival at hospital. That was more than 2 hours after the accident. The Defendant points out that this is consistent with a mild primary diffuse (concussive) brain injury derived from the initial GCS method of classification.
21. The phrase "at least moderate" was not defined by the expert in his report and now it is for the Court to arrive at the proper meaning to it. The Defendant argues that a proper definition of the phrase "at least moderate" would indeed be determinative of whether the brain injuries are of a particular degree or not. In the amended pages of the particulars of claim dated the 12th of October 2019, it is recorded that the Plaintiff sustained the following injuries: 20.1. A head injury with brain injury; 20.2. A fracture to the cranium; 20.3. A deep scalp laceration; 20.4. Multiple soft tissue injuries over the body and 20.5. A contusion to the chest.
22. At the same time, after the Defendant rejected the general damages, it appears from the (HPCSA) report dated the 29th of July 2019, in which the Plaintiff's injuries were recorded as follows: 21.1. Head injury; 21.2. Multiple abrasions; 21.3. Contusions; and 21.4. Lower back injury.
23. It is recorded in the letter that the Plaintiff's soft tissue injuries will have all healed well before 29 July 2019 although there is no absolute certainty about that. It was also noted that the Plaintiff had a traumatic brain injury with the cognitive defects/communication difficulties which were noted as serious. Amongst others, the HPCSA on its general approach report which is material for the adjudication of the issues at hand, does not find that the Plaintiff sustained a fracture to the cranium. This issue is one that required further scrutiny.
24. The Defendant also points out that it appears from Dr. H.J. Edeling's report that Dr. Kaplan, the first appointed neurosurgeon for the Plaintiff who has diagnosed the Plaintiff's head and brain injuries and filled the RAF form has recommended that investigation by the skull x-ray should clarify whether there was a depressed skull fracture or not. The point made in Dr. Kaplan's

recommendation was ignored at best by the Plaintiff and for unknown

reasons.

25. The Defendant points out that in the report of the second appointed Neurosurgeon, Dr. H.J Edeling, dated 04th of November 2015 that the fracture was not confirmed. According to Dr. H.J Edeling, the Plaintiff sustained the following injuries: 24.1. Multiple abrasions and soft tissues injuries, notably left shoulder, left chest and left thigh; 24.2. Head injury with left parietal deep scalp abrasion; and 24.3. Traumatic brain injury of at least moderate degree.
26. The Plaintiff did not undergo an x-ray. As a result, he cannot prove sufficiently that he sustained any fracture to his head as a result of the accident. At the same time, proof of the injuries sustained constitutes a major basis of the claim brought by the Plaintiff. It is for that reason that the Defendant questions how the Plaintiff arrived at the amount of R 800 000-00 as compensation that should be paid without having proved the fractures he claims through the technology involving

x-ray.

27. The Defendant does not dispute that the Plaintiff suffered general sequelae of the scars but it contends that such scars cannot be highly embarrassing to the Plaintiff because they do not appear on his face and therefore can be easily covered with clothes. It submits that the mental fatigue, inattentiveness,

difficulty with the retrieval of memories, impairment of logical reasoning and disinterest in driving, all make for the sequelae that were caused by the accident. However, it is contended that the Plaintiff can cope with them with proper medical treatment.

28. It is undisputable that the reports submitted on behalf of the Plaintiff are so stale that they may mislead the Court. As will appear, they are all far from 2 years, which is conceived to be the normal years for the reliable expert reports. It is for the Court to take all relevant factors into consideration in arriving at a decision in the amount to be awarded.
29. It is also trite law that while courts are free to exercise their discretion, in awarding damages for injuries sustained, they have to rely on precedents as guidelines. As such, previous awards only serve as a guideline. The Court should in the exercise of its discretion take into consideration the guideline on how to approach the issue at hand as held in *De Jongh V Du Pisanie* No[9] at Paragraph [65] at 477D – G where it was held: “The effect of the aforementioned perceptible tendency towards higher awards for general damages is again, however, not capable of being determined with mathematical precision. It is not certain precisely when the tendency began and when it will end. It has quite possibly span class come to an end already. An award from the past to which a court refers could therefore have been made after taking the tendency into account. If the earlier decision which serves as a standard had been made after having regard to the tendency towards higher awards, the allowance of a further increase in awards can hardly be justified on the grounds of the same

considerations without any additional reason. In addition, then said tendency clearly does not require the multiplication of earlier awards by a predetermined or determinable factor. In the end the tendency is only one of the considerations that the court is justified in taking into account when it, in the exercise of its discretion, refers to awards, especially in older cases, as a guideline.”

30. In the case of Hurter v Road Accident Fund and Another[10], the Plaintiff seeks general damages in the amount of R500,000. Hurter, a 20-year-old with a brain injury more severe to the current

Plaintiff's as well as lacerations to the lower lip and facial fracturing was awarded R500,000 in 2010.

31. In the unreported judgment in Van der Linde v Road Accident Fund, an unreported judgment of Modiba J[11], R380, 000 was awarded to the Plaintiff in respect of general damages for a permanent spine injury at C5/6 and for psychological trauma after taking into account several comparable authorities at paragraph 44 of the judgment where awards ranging between R310,000 and R331,000 were made in the 2018 Rand value, hence the higher award. Unlike the Plaintiffs in the compared authorities, Van der Linde had psychological sequelae.
32. In M.N vs Road Accident Fund[12], handed down by MODIBA, J on the 21 February 2019, at para 27, the Plaintiff who sustained a mildly severe traumatic brain injury as assessed at casualty level, with a mildly severe outcome diagnosis brain injury with the majority of any intellectual challenges being accounted for on psychiatric grounds rather than by organic brain injury and the psychological challenges, which are due to the accident, which may remain entrenched despite treatment was awarded an amount of R370,000 as an appropriate award for general damages.
33. The Defendant submits that the degree of the Plaintiff's brain injuries should be considered to be mild in light of what stands written on the HPCSA report. Consequently, the Defendant submits that a fair and reasonable compensation should be determined based on the above factors. Therefore, the Defendant submits that in this case, what would be a fair and reasonable compensation for the Plaintiff's general damages would be at an amount between R350 000.00 and R500 000.00, having taken the totality of the Plaintiff's case into consideration.COSTS.
34. The general principle concerning costs is that the losing party in the matter carries the costs of the successful party except in the case of exceptional cases. The Defendant views that in this case none of the parties should carry the cost of the other for purposes of the 8th of October 2016. It is trite that the Court has a discretion with regard to the payment of costs. The Defendant suggests that the costs awarded should be on a party and party scale.

35. At the end, the Court has a huge discretion to decide the issue of costs and that is to be only if it was appraised of all the relevant facts of the particular case to warrant the particular costs. It is submitted that the costs should be in a party and party scale and for each party to carry each cost for the date of the 16th September 2019 as the postponement on that day was at the instance of the Court and not the parties.
36. The Plaintiff requested a cost order which is different from what is suggested by the Defendant. The Defendant proposes that the order be to the effect that each party pays its own cost for purposes of the 8th of October 2019.
37. It is not disputed that Plaintiff was involved in an accident which he sustained injuries. It is only the extent of the injuries sustained that is in dispute. In that regard it would be useful to rely on the medical reports by a variety of health care practitioners that were submitted. However, in this case, many of the said reports were way out of time, so much so that they could not provide proper guidance for the benefit of a determination of a reasonable compensation in favor of the Plaintiff.
38. In the absence of medical reports that are in time and therefore reliable, it is for the Court to exercise its discretion, taking the injuries sustained by the Plaintiff as well as all facts into consideration. The Court also has to consider the long-term effects of the accident on the Plaintiff.
39. Having considered all of the factors stated above, the Court makes the following order:

ORDER.

40.1. The Defendant is ordered to pay to the Plaintiff, acting in his representative capacity on behalf of Mahlele Paulos Mofokeng, born on [...], (hereinafter referred to as "the Plaintiff"), in respect of general damages, the amount of R 480 000-00 ("the capital amount"). Payment of the capital amount shall be paid within 60 (sixty) days of the date of this order.

40.2. Payment of the capital amount is to be made into the following account:-

Account Name : Edeling Van Niekerk Incorporated

Bank

: Nedbank

Branch

: Business Westrand

Account number : [...]

Branch code : 128605

40.3. Should the Defendant fail to effect payment of the capital amount within 60 (sixty) days of the date of this order, the Defendant shall become liable for interest a tempore morae on the capital amount at a rate of 10% per annum from 14 (fourteen) days from date of this order to date of final payment;

39.4. In order to ensure that the monies awarded to the Plaintiff are suitably protected, as contemplated by the relevant experts, the attorneys for the Plaintiff, Edeling Van Niekerk Incorporated of Block A, Clearview Office Park, Wilhelmina Avenue, Constantia Kloof, Roodepoort are ordered to effect payment of the Plaintiff's capital to the Mahlehe Paulos Mofokeng Trust Duly Registered Under Number [...] on 23 July 2019.

39.5. The Plaintiff's attorneys shall be entitled to payment, from the aforesaid funds held by them for the benefit of the Plaintiff, of their fees in accordance with paragraph 39.6 herein below.

39.6. The Defendant pays the Plaintiff's taxed or agreed party and party costs on the High Court Scale which costs inter alia will include the following: 39.6.1. The costs of 16 September 2019 and 8 October 2019;

39.6.2. The Costs of Senior-Junior Counsel; 39.6.3. The costs of travel and accommodation of the Plaintiff in attending court for trial; 39.6.4. The costs of the curator ad litem.

39.7. It is recorded that all and any contingency fee agreements entered into between the Plaintiff and Edeling van Niekerk Inc. where previously declared invalid.

39.8. The attorney of record is entitled to its taxed or agreed reasonable attorney and own client fees, in the event of the latter, the appointed trustee and/or Master of the High Court may insist on the fees to be taxed.

T.A. Maumela. Judge of the High Court of South Africa.

[1]. See subparagraph 9.6.1.1.1 of Dr. H.J Edeling report, page 20.

[2] See subparagraph 9.6.1.1.1 of Dr. H.J Edeling report, page 20. .

[2] See subparagraph 9.6.1.1.1 of Dr. H.J Edeling report, page 20.

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[3]. ZASCA 2012 (1) SA 58 (SCA) paras 25-27.

[4]. 2001 (3) SA 1188 (SCA).

[5]. (1270/2018) [2019] ZASCA 103 (22 August 2019).

[6]. See subparagraph 9.4.1 of the expert report, page 19.

[7]. See Paragraphs 9.7 and 9.8 of Dr. Edeling's report, on page 24; and paragraph 5, Dr. Angus' report, on page 59. Plaintiff

they will report.

[8]. Unreported case number: CASE NO: 13/30599 handed by the Honourable INGRID OPPERMAN J at para 42.

[9]. 2005 (5) SA 457 (SCA).

[10]. (367/07) [2010] ZAECPEHC 5 (2 February 2010)

[11]. Handed down on 29 June 2018, Case number 19860/2016

[12]. The unreported case number: 49332/2017

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