IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL482/2021

In the matter between:

SANDISIWE KOJANA **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT

STRETCH J.:

[1] This matter was set down before me on 25 November 2021 on the default judgment roll. When the matter was first called I was requested to stand it down as the plaintiff's counsel was not in court. When the matter resumed I recorded that there was no appearance for the defendant. Thereafter the plaintiff's counsel advised me that he would be calling the plaintiff in pursuit of general damages for injuries which she had suffered in a motor vehicle accident.

[2] The plaintiff's evidence in chief was brief. She said that on 3 July 2018 she was travelling on the N2 motorway between Cambridge and Hemingways Hotel. She was involved in an accident and taken to hospital because she had sustained injuries. She described the sequelae of the accident as follows:

> 'I broke my upper right thigh and my lower thigh and I fractured my left ankle. And I got an injury on the right-hand side of my head. ... I had an operation on my right thigh because it was broken. ... I was hospitalised for two weeks. ... I work at the hotel so most of the day I sit so my left ankle gets swollen and it gets difficult to walk after a long shift. And I can't sit for long periods of time. And there are certain duties that I can no longer do like walkabouts because I can't walk long distances. And even when I sleep at night I need to take pain tablets because the pain is constantly there on my left ankle. ... I was 21 weeks pregnant. ... It affected me because I thought I was going to lose my baby. And I was not aware of how I was supposed to take care of a baby because I was on crutches when I gave birth. And I could not walk by myself. ... .. There were duties that were taken away from me which is the walkabouts. ... So now I do the office work and sometimes I need to stand at reception and work at reception because I have no disability that states that I am disabled. I have to work because – and then that's where the pain starts after the shift.'

[3] It was only thereafter that counsel asked her how the accident came about. This account too, was brief. She said the following:

> 'I was driving to work and a car in from of me with a trailer, a bakkie, made a U-turn without indicating on the freeway, on the N2. That's how the accident happened.'

[4] As I result of questioning from the court it transpired that she had been driving in the fast lane behind the insured vehicle, which was towing a trailer. She went on to say the following:

> 'Yes, and then the vehicle suddenly made a U-turn. … To its right. The fast lane is on the right-hand side so it made a U-turn in the right patch where there's grass. And then it left the trailer in the road. … And then I collided into the trailer. … The trailer was left on the road yes.'

[5] I asked the plaintiff whether she could not have avoided the collision by veering towards her left. She said that she had tried. She was not examined in chief any further. She was merely asked how she felt about the conduct of the insured driver, and how much money she was claiming. I was accordingly constrained to question her further to obtain clarification. She said that the insured driver admitted that he was in the wrong, that the foetus she was carrying was not injured, and that her income and her earning potential were not affected as a result of the injuries which she had sustained, until the intervention of the Covid 19 pandemic, when her working hours were reduced because of the duties she was no longer able to perform.

[6] Her legal representative thereafter briefly submitted that the quantum of her claim for general damages was reasonable and that he was relying on the principle set forth in the unreported judgment of *Mbolo v Road Accident Fund* CA 283/2011, but that he had not updated the damages. In response to this court's questions he stated that the general damages in that case were less than R500 000,00. He did not have a copy of the unreported judgment with him, but provided the citation as 'ZAECGHC 24, 9th June 2011,' stating that the plaintiff in that matter also suffered an ankle injury. In response to a direct question he first intimated that the plaintiff in that matter had been awarded R500 000,00 in general damages. He then added that it was less than R500 000,00, but was unable to say how much less, adding that he would find out.

[7] He submitted that the plaintiff was only claiming R482 000,00 for general damages, and that "quantum will be determined later". He was unable to address me on why the issue of damages should be dealt with in a piecemeal fashion, save to say that those were his instructions. I once again stood the matter down in order for counsel to prepare himself for productive engagement on the issue, and to afford him the opportunity to obtain a copy of the case which he was purportedly relying on.

[8] When the matter was re-called for the third time, it was contended on the plaintiff's behalf that she was only pressing for general damages, as a report on loss of income had not been forthcoming. When I asked counsel whether this approach was in line with that taken by the full court of this Division in *Maqhutyana and Another v RAF*[1] counsel conceded that it was not, but then clarified that he was not sure which judgment I was referring to. He referred to the medical practitioner's serious injury assessment report (the RAF4 form) before me, evaluating the plaintiff's total combined long term whole person impairment at 14 per cent. I stood the matter down for the third time for counsel to familiarise himself with the principles set forth in *Maqhutyana* and to address me after the long adjournment. I did this in particular because counsel had also been briefed in another Road Accident Fund ("the Fund") matter which was also standing down, and in which matter he also intended seeking relief in respect of liability as well as general damages.

[9] When the matter was mentioned for the fourth time, counsel referred me to *Maqhutyana* paragraph 123 which reads as follows:

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[1] CA 17/2020 [2021] ZAECMHC 30 (17 August 2021)

> 'If the Fund has made an offer to a third party in respect of general damages, can this offer stand as proof that the Fund has accepted that the third party's injury has been correctly assessed as serious? In my view it would not be an unreasonable inference to draw in all the circumstances that in such a scenario the relevant jurisdictional fact for the court to adjudicate a claim for general damages in a default judgment application has been established, otherwise a court should leave the resolve of this aspect of the plaintiff's claim where it belongs, namely in the administrative realm, reserving the right of the plaintiff to pursue it in court again at the appropriate time.'

[10] Hartle J's footnote to this passage says the following:

> 'It needs to be emphasized that the fact that the Fund has not filed a notice to defend should not entitle a plaintiff to claim default judgment in respect of his/her claim for general damages unless the plaintiff can make the essential allegation that the Fund has in fact accepted the injury to be a serious one.'

[11] Counsel before me further contended that because the Fund had "made an offer" in the matter before me (which I had not previously been made aware of) I was at liberty to infer that the Fund had accepted that the plaintiff's injury had been correctly assessed as serious. In this respect it was added that an offer had been made as recently as 16 November [2021] but that "they stated that because of apportionment they will give us half of what we claimed in general damages".

[12] I advised counsel that I would disabuse my mind from what had just been submitted to me with respect to the quantum of general damages, and sought confirmation of his undertaking from the bar that the Fund had in fact made an offer in settlement of general damages, as envisaged at paragraph 123 of *Maqhutyana.* Counsel once again gave this court the undertaking that the offer had been in respect of general damages, but was unable to address me on the Fund's attitude in respect of the balance claimed.

[13] Counsel thereafter, persisting with the relief sought from the bar, referred me to another unreported judgment (of which a copy was also not at hand), contending that in that case the award for general damages was adjusted to R482 000,000 in respect of a four-year old who had sustained an ankle injury. It was on that note that I was constrained to reserve judgment, not only due to the lateness of the hour, but because I had to take time to find the unreported judgments referred to.

[14] In the course of my preparation of this judgment, I made three undisclosed discoveries. The first was that the plaintiff had delivered a checklist reflecting that she intended seeking judgment on liability only. This was on 22 October 2021. The second was that on the same day, the defendant also delivered a request for default judgment on liability seeking judgment in the following terms:

a. That the issues relating to liability are hereby separated from those issues relating to quantum in terms of Rule 33(4) of the Uniform Rules of Court.
b. The defendant be held liable for the agreed damages arising from the accident which occurred on 3 July 2018 along the N2 Highway, Cambridge, East London.
c. That the issue of quantum be postponed for later determination.
d. That the defendant pays the costs of the application for default judgment on liability.

The third was that the document which counsel purportedly relied on to support his contention that the Fund had impliedly accepted the plaintiff's serious injury assessment, and which was only placed on the court file during the course of argument, is a letter drafted on the letterhead of the plaintiff's attorneys, which was emailed to the Fund on 16 November 2021, and which reads as follows:

'We confirm receipt of offer dated 16 November 2021.

> We wish to advise that our client was not 50% negligent for the accident that occurred along the N2 Highway, Cambridge, East London. The accident was solely caused by the negligent driving of Mr S Njokweni, who made a u-turn on the freeway. The accident report is annexed hereto for easy reference.
>
> You are kindly requested to advise us as to why there is 50% apportionment in the offer. The offer dated 16 November 2021 is the same offer that is dated 17 December 2020 which was rejected by our client. The offer and the letter rejecting the offer is annexed hereto for easy reference.[2] You are therefore requested to revise this offer and revert back to us as soon as possible as this matter has been set-down for hearing on **25 November 2021** to avoid incurring further costs.'

[15] The upshot of this is likewise threefold: Firstly, the issue of general damages is not before me, and should not have been argued. The effect of arguing general damages, when notice has been given that relief would be sought on the issue of liability only, is to steal a march on the Fund. The fact that the Fund rarely if ever pleads or makes a court appearance these days, is, to my mind irrelevant. A litigant cannot be seen to ask for, and be awarded, over and above that which is reflected in his/her notice. The reason is obvious. The litigant to whom notice has been given, is entitled to make an informed decision as to whether to abandon or pursue opposition to the relief sought (at any stage), based on accurate foreknowledge of the nature and extent of that relief.

[16] Secondly, an apportionment offer does not necessarily accurately and finally determine the quantum of general damages. The Apportionment of Damages Act 34 of 1956 contemplates a *determination* of the *liability* of more than one wrongdoer, and the *apportionment* of that *liability* between them or amongst them in a single action. That is why a defendant may, for example,

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[2] The offer dated 17 December 2020, the letter rejecting it and the offer dated 16 November 2021 were not handed up by counsel.

request apportionment of damages based on the contributory negligence of the plaintiff.[3]

[17] Thirdly, in the light of the fact that the Fund was notified that the trial would proceed on the issue of liability only, it is not certain whether the offer was only in respect of negligence, or with respect to the quantum of damages as well. If it was only in respect of negligence, this court cannot infer that the Fund has had sight of and has considered the serious injury report. I say this because there is no evidence before me to suggest that the serious injury report was served on the Fund. Acknowledgment of receipt of an index does not necessarily mean that the Fund received the entire bundle which has made its way into the court file. The plaintiff's letter rejecting the Fund's apportionment offer, predates the Fund's acknowledgment of receipt of the index by three days in any event.

[18] It is for all these reasons that this court is not inclined to make an award for general damages. On the other hand, the Fund was given notice of the relief the plaintiff intended seeking at the hearing of the matter, and that the plaintiff would be called to give evidence. Her evidence, although not a model of clarity, stands unchallenged. I am satisfied that she has demonstrated that the insured driver's negligence was the sole cause of the collision, and that the Fund is accordingly 100 per cent liable for the proven or agreed damages which the plaintiff sustained, flowing from the collision, as reflected in the plaintiff's request for default judgment on liability.

ORDER:

a. The issues relating to liability are separated from those relating to quantum in terms of rule 33(4) of the Uniform Rules of Court.

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[3] See the leading case of *ABSA Brokers (Pty) Ltd v RMB Financial Services* 2009 (6) SA 549 (SCA).

b. The defendant is held liable to compensate the plaintiff for 100 per cent of the plaintiff's proven or agreed damages arising from the collision which occurred on 3 July 2018 on the N2 motorway, Cambridge, East London, during which collision the plaintiff sustained injuries.
c. The issue of quantum is postponed *sine die.*
d. The defendant is ordered to pay the costs of this application.

pp. J.

I.T. STRETCH
JUDGE OF THE HIGH COURT

Date heard: *25 November 2021*

Date handed down by way of electronic mail to the plaintiff's attorneys and to the RAF: *8 February 2022*

Counsel for the plaintiff/applicant:

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Email plcmaseti@live.com. Reference PLCM/msb/MEL 4142 (A)

For the respondent/defendant: no appearance.

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