REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

11/12/12
DATE

SIGNATURE

CASE NO: 24142/2011

11/12/2012

In the matter between:

T P MALLELA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] The plaintiff instituted action against the defendant for damages in the amount of R800 000 as a result of bodily

injuries she sustained in a motor vehicle collision on 19 October 2007.

[2] At the hearing of the case I was informed that the merits have been settled and that the defendant accepted full liability for the damages sustained by the plaintiff and undertook to provide the plaintiff with a certificate in terms of section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996, as amended, in respect of future medical costs.

[3] The parties agreed also that the claim for future loss of income/earning capacity and the claim for general damages should be dealt with under one head of damages, namely general damages. The parties were in agreement that the plaintiff must be awarded the general damages but they were not in agreement in regard to the *sequelae* of the injuries sustained by the plaintiff. They are therefore before this court for the quantification of the said damages.

[4] It was agreed further that evidence should not be led in respect of *quantum* but that the parties' respective counsel

should address the court only in regard to the *sequelae* of the injuries. In order to assist the court it was agreed that only the plaintiff would tender evidence in regard to the *sequelae* of her injuries. Two medico-legal reports solicited by the plaintiff, namely the expert reports by Dr Birrell, the orthopaedic surgeon and Dr Hele Roos the occupational therapist, were admitted into the record as evidence as well. The defendant's counsel confirmed that the contents thereof were not in dispute.

THE PLAINTIFF'S EVIDENCE

[5] The plaintiff's evidence was to the effect that at the time of the collision she was sitting as a passenger at the back of the motor vehicle concerned, with no seatbelts. During the collision she hit her head. She first bumped against the person sitting next to her and went forwards and backwards. She as a result suffered neck and shoulder injuries. Immediately after the collision she felt pain on her neck and head. She had a bump (protrusion) on her forehead the size of a small tin of Zambuk ointment (R5 coin).

[6] She was taken to the Tshwane Hospital by ambulance. At the hospital she was treated and discharged. She was given Brufen and Ponado tablets. According to her she was not properly examined. She was only checked for fractures. A soft collar neck brace was prescribed for her but she was not given the brace.

[7] The next day she experienced a terrible pain. She could not carry her baby who was four months old then. She could also not bathe her and had to ask for assistance. She was not able to bend. She could not do her house chores of fetching water, washing clothes and cleaning the house.

[8] Presently she suffers from constant headache and takes pain medication regularly. She cannot concentrate on her work because of the pain. She still cannot carry heavy things or carry her child for long periods. She stays in a four roomed house and has to fetch water for household needs from a tap outside. She uses a 20l bucket to draw the water. She cannot cope with that but gets assistance from her elder daughter and husband.

[9] Although she was not properly heeled she returned to work two days after the collision as she could not stay home without an income. At the time of the collision she was employed as a cashier at the Brooklyn Ster Kinekor and had been so employed for three years. Her work then entailed serving popcorn, drinks and tickets to the clients. She also counted cash for the float to make sure it balances. She continued to work as a cashier even after the collision until 2010 when she was promoted to a controller. She had applied for the controller job and even went for an interview. She was the only candidate for the interview. As a controller she works with cash and stock. Her job entails receiving stock and carrying it from the storeroom to the kiosks. In the morning she gives the cashiers stock and at the end of the day she returns the stock to the storeroom. The stock she has to carry are heavy things like: 25kg seeds for popcorn, 20l soda syrup, 5l of natural base for slush puppy and sweats. Her job also entails giving the cashiers floats, doing spot checks and cash ups. She works six days for eight hours and rests on the seventh day. On this day she normally rests whereas in the past she would clean the house or visit her home in Dennilton or Polokwane. Now it

takes longer for her to clean the house. Since the collision she is forgetful. She used to be a good worker, however, she no longer considers herself as such, now she has limitations which she attributes to the collision. If it were not for the collision she could now be a complex manager. She cannot be promoted now because she can no longer exert herself.

[10] She no longer takes part in sports. She used to play netball and soccer. She regularly participated whenever there were matches between the different cinemas.

[11] She went to a physiotherapist who checked her for fitness and she continuously uses pain killers which she buys over the counter to minimise the pain. She also went to the clinic though she does not remember how many times she went, for the pain.

[12] At the end of the plaintiff's evidence, her counsel handed in the two medico-legal reports which were admitted respectively into the record as exhibit "A" the report of the

orthopaedic surgeon, and exhibit "B" the report of the occupational therapist.

REPORT OF THE ORTHOPAEDIC SURGEON

[13] According to the report of the orthopaedic surgeon, the plaintiff sustained the following injuries: a small *haemotoma* on the right of the forehead and soft tissue injuries of the neck. These injuries were confirmed by the MMF 1 form and the plaintiff. She received Brufen and Panado tablets as analgestics for treatment. She was also prescribed a soft neck collar, which she was not given, and received a voltaren injection.

[14] At the time the plaintiff went to consult with the orthopaedic surgeon, approximately two years after the collision, she complained of pain at the base of her neck posteriorly when she looks up suddenly. She still could not carry the 20l water container on her head as before the collision. She used to carry this from an external tap to her house, a distance of between 300m and 400m. The neck pain radiates down to

the area between her shoulder blades. She also experiences frontal headaches since the collision.

[15] In the opinion of the orthopaedic surgeon, in order for the plaintiff to alleviate the residual complaint of the chronic neck pain, she must in future apply neck-saving measures such as assuming the correct posture, do the correct isometric exercises, and not carry anything heavy on the head. As regards the amenities, hobbies and sport, there would have been a disruption of the plaintiff's normal activities such as doing her usual household chores, for a period of a few weeks. She also sustained a loss of work capacity of 3% as a result of the collision. The plaintiff has a 3% to 4% chance of requiring cervical surgery as a result of the collision.

REPORT OF THE OCCUPATIONAL THERAPIST

[16] The report of the occupational therapist confirmed the injuries sustained and treatment received by the plaintiff.

[17] At the time the plaintiff consulted with the therapist, which was almost five years after the collision, she still complained

of headaches associated with neck pain during the day. She experiences pain in her neck whenever she works or carries her baby on her back. She experiences pain on her shoulders and her back is sore when she picks up her daughter. She is no longer as effective and strong as before and struggles to carry heavy items, especially when carrying water and wood. She tires very easily now at work and has to depend on the medication to keep going. Her concentration level is now very low. She easily forgets details and routine work. She has to keep notes in order to remind herself.

[19] She previously used to play netball and she can no longer do so. She does no longer take part in church activities.

[20] After conducting various tests on the plaintiff, the therapist's prognosis is that the neck injury sustained by the plaintiff during the collision has apparently been made worse by heavy activities which have presented itself in symptoms of chronic headaches and neck pain. This has impacted on her self-esteem and confidence. Her work tempo has decreased to such a state that it now impacts negatively on her work.

Although she is able to do her work, she however, has to compensate for work that requires her to lift heavy objects. The degeneration of her neck will also affect her career negatively.

ARGUMENT BY THE PARTIES' COUNSEL

[21] It is the submission by the plaintiff's counsel that the plaintiff has always been a person who excels in her work and should therefore not be disadvantaged as a result of the injuries sustained in the collision. She now has to exert herself in her work in order to perform and should be compensated for that. According to him an amount of R200 000 should be awarded to the plaintiff.

[22] He referred me to judgments which I should consider in awarding damages, namely, **VAN VUUREN v RAF** 2009 C & H Bundle Vol 6 C3/1, where a 61 year old female doing home baking and home nursing suffered soft tissue injury of the back neck and back and wore a neck collar for two weeks was awarded an amount of R120 000 which translates currently to R139 000. According to him the

plaintiff is much younger, is working and may have to stop working earlier.

DEYSEL RIANA v ROAD ACCIDENT FUND 2483/2009 where it was stated that in awarding damages a court should take into account the fact that a person has to put extra effort to do his or her job. In this instance, plaintiff's counsel contended that in order for the plaintiff to be promoted she has to put extra effort.

[23] The defendant's counsel, on the other hand, argued that the plaintiff's injuries were not debilitating because she only went once or twice for medical attention. The x-rays ordered by Dr Birrell did not show any abnormality. Dr Birrell also examined her and found the neck movements within normal limits.

[24] He conceded that the defendant is prepared to pay for the pain which Dr Birrell confirmed that she is still experiencing but contended that the plaintiff must also alleviate her pain by applying neck saving measures as recommended by Dr Birrell. According to him, it was not necessary for the plaintiff to go for cervical surgery as conservative treatment

has been recommended.

[25] In his view, the injuries and *sequelae* of the plaintiff are not apparent and the expert witnesses are of the opinion that the plaintiff's condition will not deteriorate and if she followed the recommended treatment she will fully recover. He opined that it was not Bizos AJ's intention in **DEYSEL** -case above that a claimant who puts extra effort when performing his oe her work should be compensated by a higher award.

[26] He referred me to the judgment in **MEYER v SHIELD** 1976 (3) C & M 606 where the plaintiff was a nurse, who three and half years after the collision was still suffering pain and was awarded an amount of R4 000 which translate currently to R32 000. According to counsel, nurses spent long hours standing and moving patients around; and **SOUTHGATE v RAF** 2001 C & B Vol 5 AFC wherein the plaintiff suffered a mild whiplash injury of the neck and was awarded R37 000 at the current rate. He submitted that of the two cases, **MEYER**'s case was more severe than the current case and that R100 000 will there be appropriate if awarded in this instance.

EVALUATION OF EVIDENCE

[27] The plaintiff in her particulars of claim claimed a global amount for pain, suffering, loss of amenities of life and disfigurement for general damages.

[28] It is common cause in this instance that the plaintiff sustained a small *haematoma* to the right of the forehead and soft tissue injuries of the neck. She received a voltaren injection, Panado and Bruffen tablets at the hospital. This treatment confirms that she experienced pain and headache. It is therefore evident that the plaintiff did experience pain and suffering at the time of the accident. She also continued to experience the pain even after the accident. This is so because when she visited the experts for examination she presented with constant headache, neck and shoulder pain. It is also undisputed that the plaintiff continues to suffer constant headaches, neck and shoulder pain. Dr Roos has confirmed that the pain has manifested into chronic headache, neck and shoulder pain.

[29] It is also undisputed that the plaintiff suffered loss of amenities of life resulting from the loss of previous leisure pursuits. The plaintiff played netball and soccer before the collision she can no longer do so. Dr Roos has also confirmed as much that there has been loss of amenities of life because of the mildly diminished home management efficiency. She can no longer carry the 25l of water, clean the house or carry the baby for a long time. Her general enjoyment of life has as a result diminished.

[30] The award of general damages is by no means an easy task. There is no basic formula for the assessment of this kind of damages. To arrive at a fair and just amount both objective and subjective factors may have to be taken into account. The facts of each particular case must be looked at as a whole. A court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. See **TOBANI v MINISTER OF CORRECTIONAL SERVICES NO** [2000] 2 All SA 318 (SE) at 326e and **MINISTER OF SAFETY & SECURITY v SEYMOUR** 2006 (6) SA 320 (SCA) at para [17].

[31] I am however satisfied that, in the circumstances of this case, the plaintiff has been able to prove that she has experienced pain and suffering and continues to suffer same. She has also proved the effect the pain has on her career. In order for her to keep her work or to be promoted in future she will have to put in extra effort. She has also suffered loss of amenities of life.

[32] I am also mindful of the fact that, as argued by the defendant's counsel, the pain suffered by the plaintiff is not debilitating because she is able to continue with her work and with the assistance of her family at home she can carry out some of her chores. I however, do not agree with his submission that it was not Bizos AJ's intention in the **DEYSEL**-case above, that a higher amount should be awarded for the extra effort put by the plaintiff to maintain her employment. At para 49 the learned judge stated the following:

> "In light of this, I believe that the claim for general damages *in casu* of R200 000 when not considering the career-related pain and suffering that I have identified, would otherwise have been

> excessive. However, if one is to accept that the extra amount of effort required to maintain the plaintiff's current career level manifests not as loss of income but instead as pain and suffering in addition to that already alleged by the plaintiff, then I find that the plaintiff's claim for general damages is not excessive."

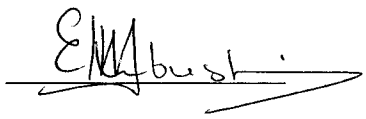
[33] I am thus in respectful agreement with this statement by Bizos AJ. The plaintiff's claim for general damages must include the career-related pain and suffering and a higher amount must therefore be awarded. Consequently, I find that an amount of R150 000 is in the circumstances of this case, a fair, just and reasonable amount for compensation.

[34] I make the following order –

The draft order handed in court marked with an "X" and initialled by myself, with prayer 1. amended to read as follows:

> the defendant is ordered to pay to the plaintiff the sum of R150 000 which payment is to be effected into the trust account of Podbielski Mhlambi (Carletonville) Inc, Nedbank, Western Gauteng Branch code 187 505, Account number 5 278.

is made an order of the court.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE	**: 30 OCTOBER 2012**
DATE OF JUDGMENT	**: 11 DECEMBER 2012**
PLAINTIFF'S COUNSEL	**: ADV L. SCHOLTZ**
PLAINTIFF'S ATTORNEY	**: KRITZINGER ATTORNEYS**
DEFENDANT'S COUNSEL	**: ADV I.W. MAKHUBO**
DEFENDANT'S ATTORNEY	**: MOTHLE JOOMA SABDIA ATTORNEYS**

"X"
Em

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KRITZINGER PROKUREURS
012 430 4646

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA) Kubushi Em

BEFORE HIS LORDSHIP THE HONOURABLE ~~DEPUTY~~ JUDGE ~~PRESIDENT VAN DER MERWE~~ ON ~~30 OCTOBER 2012~~ 11/12/2012

CASE NUMBER: 24142/2011

In the matter between:

PLAINTIFF

THAPELO PRECILLA MALLELA

And

ROAD ACCIDENT FUND **DEFENDANT**

DRAFT ORDER

Having heard counsel on behalf of the parties:

IT IS ORDERED THAT:

1. The Defendant is ordered to pay to the Plaintiff the sum of R 150 000-00 which payment is to be effected into the trust account of Podbielski Mhlambi (Carletonville) Inc, Nedbank,Western Gauteng Branch code 187 505, Account number 5 278; Em

2. 2.1 The Defendant will not be liable for any interest on this payment on condition that payment be made timeously.

   2.2 In the event of the Defendant not making this payment timeously the Defendant will pay interest at the rate of 15.5% per annum on the amount then outstanding as provided for in Section 17(3) (a) of the Road Accident Fund Act, Act 56 of 1996.

Em