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IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

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(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

CASE NO: 30118/2011

DATE: 19 FEBRUARY 2014

IN THE MATTER BETWEEN

POPIE SOPHIE MSIZA

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOGOTSI, AJ

Introduction

- [1] This is a claim for general damages arising out of a motor car collision. The only issue for determination by this court is *quantum* of damages to be awarded to the plaintiff.
- [2] The plaintiff is Popie Sophie Msiza a female born on 4 May 1949 and residing at house no 4[...] W[...] "B", S[...], M[...].
- [3] The defendant is Road Accident Fund a juristic person with full legal personality created in terms of section 2(2) of the Road Accident Fund Act 56 of 1996 with its principal place of business at 17th Floor, Sanlam Building, 252 Andries Street, Pretoria, Gauteng.

Background

- [4] Ms Msiza was a passenger in the insured bus with registration letters and numbers T[...] GP which collided with a truck bearing registration letters and numbers X[...] GP. The accident occurred on 26 November 2009 at approximately 18:00pm along Moloto public road near Cullinan. The driver of a bus, in which plaintiff was a passenger, was trying to avoid a collision with another bus which had stopped on the same lane, he swerved into a lane meant for oncoming vehicles and collided with the truck coming from the opposite direction. The bus rolled over and burst into flames.

[5] As a result of the said accident, the plaintiff sustained bodily injuries the nature and extent of which are as follows:

- 5.1 fracture of the right humerus;
- 5.2 left femur fracture – later on plaintiff's leg had to be amputated above the knee;
- 5.3 laceration on the scalp (wounds sutured);
- 5.4 there was an impression of secondary degenerative changes in the hip and knee joint which was not probably age related;
- 5.5 she is unable to walk because of the amputated limb. She does not have prosthesis because her stump is short. She uses a walking frame to mobilize.

[6] The parties' counsel are in agreement about injuries sustained by the plaintiff. They, however, differ when it comes to the *sequelae* of the injuries and the *quantum*.

[7] A further agreement was reached between the parties that medico-legal reports be handed in as evidence without formal proof thereof and the court was asked to accept the correctness of such reports.

Plaintiff's expert reports

[8] • Serious injury assessment form by Dr Mogaru dated 23 August 2011;

- the medico-legal report by Dr Johan van der Westhuizen (orthopaedic surgeon)
- physiotherapy injury assessment report completed by Ms T H Komane on 23 August 2011;
- the medico-legal report by Prof Henk Steyn (industrial psychologist) dated 8 November 2011;
- the medico-legal report by Dr Adelaide Pasha (occupational therapist) dated 7 March 2012;
- assessors report by Assessors Eugene & Associates dated 29 March 2012;
- actuarial report by Robert J Koch (actuaries) dated 4 October 2013;
- medico-legal report by Dr Liza Prinsloo (clinical psychologist) dated 31 August 2012.

Defendant's expert reports

- [9] • Medico-legal report by Dr G J H Swart (orthopaedic surgeon) dated 9 September 2013;
- medico-legal report by Dr B A Okoli (neuro-surgeon) dated 26 September 2013;
 - medico-legal report by Dr Linda Krause (industrial psychologist) dated 31 October 2013.

- [10] The orthopaedic surgeons are agreed that the plaintiff's right humerus shows a deformity of the mid-shaft region. The elbow presents with a full range of

movement, which is not painful. Before amputation the left femur had sinus draining which was suggestive of chronic infection. She had arthritic changes in the hip and knee which could not be correlated to the injuries sustained at the time of the accident. They are further agreed that Ms Msiza will not be capable of engaging in hard physical work rendering her possibly permanently disabled, taking into account that she is probably reaching retirement age in approximately four years. Furthermore the plaintiff's life expectancy has not been reduced.

[11] The occupational therapist Dr A Pasha indicated that Ms Msiza found it difficult to comply fully with most of the demands of everyday activities which involve standing, walking as well as lifting and carrying light to medium objects. Use of an appropriate fitting prosthesis could have beneficial effect. The plaintiff is 62 years old, she has never attended school and had previously worked as a farm labourer and domestic worker. No one in her family received any form of formal education. The plaintiff's level of education and orthopaedic injuries she suffered brought a significant restriction in capacity for an occupation post-accident.

[12] The industrial psychologists agree that Ms Msiza finds it difficult to come to terms with the serious injuries in the accident and her resultant unemployment. The plaintiff's chances of obtaining and sustaining formal market employment had always been an unlikely scenario because of her illiteracy. She receives a government pension grant of R1 500,00 per month. Before the accident plaintiff reportedly did crafting of mats, bracelets and necklaces and earned an income of

R600,00 per month. She has now lost the ability to perform any form of work as indicated by the orthopaedic surgeon.

- [13] The clinical psychologist Dr Liza Prinsloo says Ms Msiza's lack of formal education is likely to have influenced the results obtained on neuro-psychological testing making it very difficult to interpret any low scores obtained. As a result, it was considered not appropriate to complete a battery of neuro-psychological tests.

Pain and suffering

- [14] Dr Johan van der Westhuizen said the plaintiff did not mention any sport or recreation. She should be able to take care of herself although all her daily activities will be limited.

- [15] She endured severe and acute pain for approximately 7-14 days after the accident. Furthermore she experienced quite severe pain for a long period due to combination of fractures on the left femur and right humerus which made mobilization very difficult. She had a prolonged period of sub-acute pain because of her osteomyelitis and re-operations. She has chronic pain in her right shoulder and post traumatic headaches.

- [16] Her facial scars and her right upper arm are disfiguring, it also involves underlying supporting skeletal structure and this is said to be a 10% WPI. Impairment has been rated using 6th edition of AMA guide CW5 MSCHZF. She

has difficulties with her memory and mood but cognitively she is able to assume her usual roles and this is a 10% WPI.

[17] Headache is of moderate disability with a 4% WPI.

She has proximal above knee amputation of the left thigh and this was found to be 100% lower extremity impairment which equates to 40% whole person's impairment.

[18] The combined values were found by Dr B A Okoli (neuro-surgeon) to be 40%, 10%, 10% and 4% which is 53%.

Medical costs

[19] According to Dr John van der Westhuizen the medical costs already undergone are justified.

Future medical costs

Ms Msiza is going to require a continued conservative treatment program, which may be outlined as follows:

- (a) physiotherapy – R10 000,00
- (b) visits to general practitioners and medication – R3 000,00 per year for approximately five years
- (c) admissions, etc – R100 000,00

Headaches can be controlled with analgesics at a cost of R5 000,00 per annum.

She needs psychotherapy for her mood disorder.

- [20] Her longevity will not be affected but she will need assistance to manage her affairs.

General damages

- [21] Adv Chimbuti for the plaintiff argued that Ms Msiza should be awarded R900 000,00 in general damages. Adv Mashaba for the defendant argued that a reasonable amount should be R507 000,00. The court was referred to the following cases by counsel for the plaintiff: *RAF v Marunga* 2003 5 SA 164 (SCA) which introduced a modernized process of thought when determining general damages and that is updating of values found in general damages to contemporary times and present values; case no 2090/07 *Bovungana v RAF* where the plaintiff was struck by the insured motor vehicle while walking on the pavement next to the road. Both legs of the plaintiff were amputated above the knees. The court awarded damages in the amount of R750 000,00, the current value being R799 000,00.

- [22] Adv Mashaba referred the court to *Gallons v RAF* 2009 5 E2-29 and *Van Deventer v Premier of Gauteng* 2004 5 QOD E2-1 (T) (Corbett & Buchanan *Quantum of Damages* vol 5) E2-1 77. Adv Mashaba argued that the cases

referred to by Adv Chimbuti are not relevant because they refer to plaintiffs who were much younger than Ms Msiza and they also do refer to double amputees.

[23] The court also looked at *Ehlers v South African Railway and Harbours* 1959 (QOD250E) where the plaintiff was a girl of 7 years of age and an award of R14 000,00, currently R875 000,00, was granted.

[24] *Ndlovu v Swaziland Royal Insurance Co* 1989 (4E2) QOB1 (SWI) where the plaintiff was 25 years old and both legs were amputated above the knee and the court awarded R80 000,00, currently R395 000,00.

[25] In the case of *August v Guardian National Insurance Co Ltd* 1990 (4E2) 13 (C) the plaintiff sustained injuries in a motor collision and underwent amputation of the leg above the knee. The knee stump was badly mutilated as a result of the injury and a skin graft was effected over the stump. The court awarded R60 000,00 in respect of damages, currently R259 000,00.

[26] In the exercise of its discretion with regard to the appropriate amount that is to be awarded as general damages the court has to be fair and reasonable to both parties. Whilst the plaintiff must be sufficiently and properly compensated for the injuries he/she has suffered in the accident, the defendant should not be unnecessarily burdened with an inordinately high award despite the recent

tendency by the courts to pitch the awards higher than in the past. *De Jongh v Du Pisanie NO* [2004] All SA 565 (SCA).

- [27] Past awards serve no more than to give some indication as to what sort of awards are appropriate on the facts of a particular case. In striving to determine a fair amount for general damages the court should be guided by the broadest general considerations on an amount which is considered to be fair in all circumstances of the case. *Bay Passenger Transport Ltd v Franzen* 1975 1 SA 269 (A) at 274.

- [28] Case no 2894/2013 *K K Machomalotsa v RAF* – As is trite, the court can only make calculated estimation based on different aspects including the plaintiff's social economic background, his or her level of intelligence as seen from his or her educational achievements and any other relevant factor that may be of assistance to come to a just decision.

- [29] The case before me is not a dire matter where plaintiff will rely on others to feed, clothe and nurse. The injuries sustained by the plaintiff are comparable but not identical or similar to those of other plaintiffs in other cases.

- [30] The court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. There is no hard and fast rule of general application requiring a court to consider past awards.

[31] I do not agree that the amounts suggested by the parties' counsel are reasonable.

My considered view is that a fair and reasonable sum that can help to ameliorate the plaintiff's unfortunate position is R700 000,00 and I accordingly make the following order:

1. The defendant shall pay the plaintiff the sum of R700 000,00.
2. Costs granted on a scale of party and party.

D D MOGOTSI
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA