

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

CASE NO: 92060/16

In the matter between:

NOMPUMELELO ULANDA MALAZA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NEUKIRCHER J;

1. On 6 January 2016 the plaintiff was a passenger in a motor vehicle. The driver lost control and the vehicle rolled over several times and stopped on its roof. The plaintiff had a brief period where she cannot remember what happened, but she recalls that people came to turn the vehicle back on its wheels and she was then taken out of the vehicle. She experienced a lot of chest pain and when ambulance arrived she was taken to Linmed Hospital.
2. Upon examination, it appeared that she suffered a) a cervical spine injury¹ b) a chest injury² and c) a thoracic spine injury³. She was treated conservatively and discharged with pain tablets.
3. After approximately 4 days she returned to Linmed Hospital as her pain was

¹ Of which there are no current complaints

² Of which there are no current complaints

³ According to the Neurosurgeon, Dr Okolf, she also suffered a head injury,

severe. A CT scan discovered spinal fractures and so she was admitted to Arwyp Hospital for 4-5 days and then discharged with a brace.

4. In September 2017 the plaintiff sustained a gunshot injury to the left leg and has to use a crutch to **walk**.
5. As a result of her injuries:
 - 5.1 she has become forgetful;
 - 5.2 she gets headaches almost every day and pain tablets do not always alleviate the pain;
 - 5.3 she has intermittent pain and the lower rib cage bilaterally;
 - 5.4 she has daily pain on her thoracic spine - lifting weights or bending down gives her pain; household work is painful and when she walks for long her pain increases.
6. At the time of the accident the plaintiff was 27 years old (she is now 31) and was employed as an intern at Ekurhuleni Municipality where she was on a 3-year contract from September 2013 - September 2016 and earned R2 500 per month. At present she is a loan consultant at Barko Financial Services. She's been employed there since her previous contract ended in 2016. Her present employment entails that she must travel to various areas and walk around to recruit new and potential clients for loans. If someone is interested in applying for a loan they then accompany her back to the office to complete the necessary documentation and if the approval is granted, she captures the client's information onto the system. She also has to track down clients who have skipped their installments which sometimes entails her having to travel to their work or home to collect the money. She also markets products to clients.
7. According to the reports, the plaintiff's work requires her to walk and stand for prolonged periods and she also has to sit for extended periods. She complained of:
 - 7.1 constant and chronic back pain;
 - 7.2 problems with concentration and memory which result in her taking longer to complete tasks and she also makes mistakes.
8. The plaintiff earns a basic salary of R3 500,00 plus commission and between

October 2018 and March 2019 earned an average monthly salary of R 7 266,12. According to the branch manager, the plaintiffs commission has decreased over the past few months. She noted that the plaintiff struggles with pain which is sometimes so severe that she battles to stand, she makes mistakes, loses focus on what she's doing and she's off work regularly due to the back pain. She also confirmed that there are no lighter duty posts available for the plaintiff to be accommodated into.

9. It does however appear that the plaintiffs employer is sympathetic to her situation. On the reports that are before me, there is no evidence that the plaintiff is in danger of losing her employment. The company's age of retirement is 65 years.
10. The two issues to be decided in this matter are:
 - 10.1 the quantum of general damages to be awarded to plaintiff; and
 - 10.2 the contingencies to be applied in respect of the plaintiffs loss of earnings.

General damages

11. Mr Leopeng (for plaintiff) submitted that at present the plaintiff is sympathetically employed and that If she loses her employment she may not cope with any other occupation which requires prolonged standing, walking, lifting and working in a bending position as it aggravates her symptoms. She will thus find it difficult to secure alternative employment⁴.
12. Mr Loepeng has pointed out that his experts⁵ have diagnosed a mild traumatic head injury together with a thoracic spine injury and that the neurosurgeon puts the possibility of surgery at 5%-10% whereas the orthopedic surgeon says "she has a definite possibility for surgery (in her total lifespan)".
13. However, as Mr Phiri (for defendant) pointed out, the plaintiff's only restricted activity is running and the plaintiff will be able to undertake light work. He has submitted that the plaintiff's experts are agreed that the compression fractures

⁴ Per the opinion of the occupational therapist

⁵ The psychologist, the orthopedic surgeon and neurosurgeon.

of the thoracic spine have healed and plaintiff is left with chronic back pain and kyphosis. The treatment recommended is conservative.

14. He submits that the psychologist holds the view that the plaintiff has considerable tension and anxiety and needs psychotherapy to address the accident-related pain, discomfort and emotional distress.
15. The plaintiff's industrial psychologist is of the view that she would have reached her career ceiling at the age of between 50 and 53 earning 1 to 2 Paterson levels lower than what she would have earned pre-accident.
16. Taking all the above into account, Mr Leopeng submits that a fair and reasonable amount for general damages is R650 000,00. He bases his argument on two unreported decisions of **Kannenberg v RAF**⁶ and **Mkhonta v RAF**⁷.
17. In **Kannenberg**, the plaintiff sustained the following injuries: lacerations to the left ear; a compression fracture of the L1 lumbar spine, type II clavicle fracture of the left side and psychological fall-out, depression, anxiety and PTSD.
18. As a result of his injuries:
 - 18.1 the left L1 compression fracture measured 45% and the total loss of anterior body height measured 30%;
 - 18.2 there was a concerning non-union of the left clavicle, resulting in a distal fragment of approximately 1.5cm in very close proximity to the AC joint;
 - 18.3 the plaintiff had an impairment of back movements, with tenderness localizing in the thoraco-lumbar junction with muscle spasms;
 - 18.4 the plaintiff's left upper arm exhibited atrophy of 3cm;
 - 18.5 the plaintiff had a 15% loss of work capacity but would be able to continue working in a light physical or administrative capacity;
 - 18.6 the plaintiff had significant lumbar pain which may be aggravated by his emotional mood and psychological state;
 - 18.7 the plaintiff suffered from PTSD, panic attacks, anxiety, depression,

⁶ Case no 45549/19 (20/8/2018) GP

⁷ Case no 20703/12 (29/3/2018) GP

over- use of alcohol and cannabis and a general state of unhappiness and despair which had led to a loss of socialization and significant difficulty with sleeping.

19. An award of R625 000 general damages was made⁸.
20. In **Mkhonta**, an award of R950 000⁹ was made where plaintiff suffered the following injuries:
 - 20.1 an intra-articular fracture on the left wrist;
 - 20.2 an injury to the cervical spine, lumbar spine and left hand;
 - 20.3 an injury to the left crista iliaca;
 - 20.4 a minor concussive head injury.
21. As a result of his injuries, the plaintiff:
 - 21.1 had noticeable and unsightly scarring of the left forearm and right dorsal hand;
 - 21.2 had a 3cm scar over the forehead and suffered post traumatic headaches;
 - 21.3 suffered a post traumatic epilepsy complex partial, which was composed of episodic impairment of consciousness i.e. episodic memory impairment, recurrent episodes of bizarre behavior, recurrent episodes of speaking irrelevantly and recurrent episodes of amnesia;
 - 21.4 had moderately severe sensor neural hearing loss on the right and mixed hearing on the left;
 - 21.5 suffered from neuro-cognitive and neuro-psychological deficits.
22. Mr Phiri submits that, the factors of this case warranted an award of no more than R450 000,00. This submission is made given the awards made in **Shongwe v RAF**¹⁰ and **Vukeya v RAF**¹¹.
23. In **Shongwe v RAF** the plaintiff sustained a compression fracture of the T8

⁸ Based on a similar judgment of Ramolobeng v Lowveld Bus Services case no 29836/2009 (North Gauteng High Court)

⁹ Before contingencies were applied

¹⁰ 2015 7C4 QOD 1 GP

¹¹ 2014 7B4 QOD 1 GNP

thoracic vertebrae and contusions and lacerations on the head with loss of consciousness. She had shock and psychological trauma, pain in the spinal cord and was unable to walk or stand for lengthy periods of time and could not sit for long. She was awarded R300 000 (a present day award of R434 000).

24. In **Vukeya v RAF**, the plaintiff sustained a mild to moderate frontal lobe head injury and soft tissue injuries to the neck and lower back. She suffered from short term memory and personality impairment, chronic headaches and depression. She had a substantial risk of losing her employment and not being able to find alternative employment.
25. In the present matter, the plaintiff is able to do light to sedentary work. Her own experts state that with optimal intervention and pain management, it is anticipated that she will experience improved performance and functioning although she will still need to be accommodated.
26. In my view given her injuries and loss of enjoyment of life, pain and suffering and given the authorities quoted to guide this award, I am of the view that a fair and reasonable amount is the amount of R500 000,00.

Loss of earnings (contingencies)

27. Munro Forensic Actuaries has provided the calculation on loss of earnings. Their report is not in dispute. They have calculated the plaintiffs pre-morbid loss of earnings of R4 124 900,00
28. The parties are further agreed that a 15% contingency should be applied to this calculation which puts plaintiff pre-morbid loss at R3 506 165.00.
29. As the post-morbid contingencies: Mr Leopeng submits that this should be 60% which is in line with Weiner J's judgment in **De Melin v RAF**¹².
30. In **De Melin**, the plaintiff continued to be employed in the family business despite the fact that he'd suffered a significant head injury and as a result suffered on-going neurocognitive and psychological sequelae. The parties were agreed that the neurological damage was permanent and that the plaintiff was at the time sympathetically employed but unemployable in the

¹² Case no 2010/19802 (18/11/2013) GJ

open labour market. A post- morbid contingency of 60% was as a result of all the facts of that matter, applied.

31. In **Mkhonta v RAF** a contingency of 20% was applied and in **Kannenbergh**, 45% .
32. Mr Phiri submitted that given the fact that treatment is likely to contribute positively to plaintiffs physical and psychological wellbeing and given the facts of *Carstens v RAF*¹³, *Tobias v RAF*¹⁴ and *Titus v RAF*¹⁵ a contingency of 20% should be applied which would then put the plaintiff's loss of earnings at R824 980.00.
33. It is clear that the plaintiff is experiencing difficulties at work as a result of the *sequelae* of the accident and that her employer is, at present, accommodating her. She is thus undoubtedly in sympathetically employment. There is no indication that she will lose her employment but given her difficulties in walking, standing or even sitting for long that is always a risk. I also take cognizance of the fact that with optimal interventions and pain management, the plaintiff's quality of life may very well improve. I am thus of the view that a 30% contingency should be applied which puts the plaintiffs loss of earnings at an amount of R1 237 470.00.
34. Thus the quantum of damages awarded to the plaintiff is
 - 34.1 R500 000.00 in respect of general damages; and
 - 34.2 R1 237 470.00 in respect of future loss of earnings.
35. The parties have handed me an agreed to draft order (leaving the award open). I have completed it and will make that an order.

ORDER

The Draft Order marked "X" is made an order of court.

¹³ 2014 7F2 QOD 1

¹⁴ 2011 6B4 QOD 65

¹⁵ 5C and BE7-9 and In *Makuapane v RAF* case no 2012/12871 (10/4/2015) GJ. 25% post- morbid contingency was applied

NEUKIRCHER J

Date of hearing: 22 May 2019

Date of judgment: 29 May 2019

“X”

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE: 92060 / 2016

BEFORE THE HONOURABLE JUDGE NEUKIRCHER

PRETORIA, ON 29th DAY OF MAY 2019

In the matter between:

NOMPUMELELO ULANDA MALAZA

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

HAVING HEARD COUNSEL FOR BOTH PARTIES:

IT IS ORDERED

THAT :

1. The Defendant is liable for the Plaintiffs proven damages to the extent of 100% (one hundred percent).
- 2.

- 2.1 The Defendant shall pay the plaintiff the sum of **R1 737 470-00** (One Million seven hundred thirty seven thousand four hundred & seventy

rand) in respect of Quantum (General Damages and Loss of Earnings) on or before the 11th June 2019.

2.2 Interest shall be charged on the Judgment amount at the current prescribed rate per annum calculated 14 (fourteen) days from date of Judgment to date of payment.

2.3 The above amount shall be payable into the Attorney's Trust Account as follows: -

Name of Bank: Standard Bank

Account Holder: Godi Attorneys

Account Number: [...]

Branch Number: 010145

Type of Account: Trust Account

Branch Name: Van Der Walt Street (Pretoria)

2.4 The Defendant must furnish the Plaintiff with an Undertaking in terms of Section 17 (4) (a) in respect of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on the 06th January 2016.

2.5 The Defendant shall pay the Plaintiff taxed or agreed party and party costs, as well as, reasonable travelling costs incurred in prosecution of this matter, which shall include the following: -

2.5.1 The costs of Counsel

2.5.2 The costs of obtaining medico-legal reports, which include travelling, accommodation and substance fees as well as for the reservation and qualifying fees, if any, for all the experts that the Plaintiff has attended to, including the costs of the experts and witnesses, if any.

2.6 The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record.

2.7 The Plaintiff shall allow the Defendant 14 (fourteen) Court days to make payment of the taxed costs.

2.8 There is no contingency fee agreement signed between the Plaintiff and his Attorney.

BY THE COURT

REGISTRAR

COUNSEL FOR THE PLAINTIFF: ADVOCATE LEOPENG - 083 665 1466

ATTORNEY FOR THE DEFENDANT: ADVOCATE PHIRI-079 186 0575