

REPUBLIC OF SOUTH AFRICA

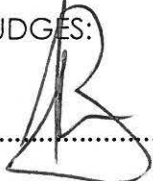


IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION

PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.
06 JUNE 2012
DATE


SIGNATURE

CASE NO: 46562/2016

In the matter between:

MODI ASLINA TSHIKILA

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDENT

JUDGEMENT

CEYLON, AJ

A. INTRODUCTION:

[1] This is a claim for delictual damages suffered as a result of injuries sustained by the Plaintiff arising from a motor vehicle accident which occurred on 26 November 2013 at Rustenburg Sunrise, North-West Province.

[2] The Plaintiff is an adult female pensioner, born on 04 July 1945 and residing at 870 Nadustria Bush Street, Masidela/Kathlehong, Gauteng Province. She was 68 years old, a passenger in a taxi minibus travelling from Johannesburg to Rustenburg at the time of the accident. The said vehicle, with registration numbers unknown to the Plaintiff overturned due thereto the driver lost control thereof.

[3] The merits were conceded by the Defendant, fully (100%) in favour of the Plaintiff. This is confirmed by way of offer of settlement dated 29 November 2019 [Plaintiff's Heads of Argument, pg 016-3, para 1 (h); Defendant's Offer of Settlement of Merits, pg 007-1 to 007-3].

[4] In terms of paragraph 8 of the particulars of her claim, the Plaintiff claimed for head injuries, fracture tibia and elbow injuries, resultant neuro-cognitive and behavioural deficits, disfigurement, hospitalisation and medical treatment, disability, loss of amenities of life, past and future medical expenses, future loss of earnings, earning capacity, loss of employment and/or employability and general damages.

[5] According to her Heads of Argument, the Plaintiff will only pursue the general damages, in the amount of R1 500 000-00, cost of action, costs of medical expert reports and a section 17 (4)(a) undertaking in terms of the RAF Act 56 of 1996 [para 11 (h) of the Heads on pg 016-3].

[6] It needs to be noted that the Plaintiff wisely accepted the advice not to pursue her claim for future loss of income as she was an unemployed pensioner at the time of the accident. This is common cause between the parties. Accordingly, the Plaintiff correctly contend that the only issue to be determined by this Court is the monetary amount for general damages that the Plaintiff may be entitled to as compensation.

[7] The judgment in this matter was reserved after hearing oral submissions by the Plaintiff counsel. He provided written Heads of Argument, for which this Court is grateful for. Said Counsel adduced the relevant evidence of the Plaintiff expert witnesses by way of affidavits filled on the record. It appears that none of the reports are contested.

[8] The Defendant and their representatives were absent on the hearing date, without any reasons provided for the absence, and no application for postponement

was made on said date. The Plaintiff requested the Court to proceed with default judgment in terms of the Uniform Rules of Court.

B. GENERAL DAMAGES:

[9] The Plaintiff's counsel relied on the reports of experts and case authority to support his submissions for general damages.

[10] It is common cause that the Plaintiff was a passenger in the taxi minibus that overturned, that she was unconscious for a time period of between 15 minutes and one and a half hours and woke up in the ambulance en route to hospital. She received emergency medical treatment and was further treated at the JS Tabane hospital. She was later transferred to Steve Biko hospital for further treatment and spend a period of almost one (1) month for the injuries sustained.

[11] The plaintiff led evidence of the following expert witnesses:

(a) RAF Form 1 and hospital records, prepared by Dr AJ Hovis. The said doctor reported right tibia fracture, right elbow soft tissue and head injuries, decreased hearing of the left ear and a painful neck.

(b) RAF Form 4, prepared by Dr A Mogosi (a general practitioner), who reported fracture of the right tibia and tibia as per X-ray report, head and right elbow injuries. The conclusion by Dr Mogosi was that Plaintiff suffers from Antalgic gait, uses crutches, generalised tenderness, impaired motion on the right knee and right elbow joints. The doctor further reported that the Plaintiff is staying alone and struggles with daily chores of selfcare, domestic and social activities. He also concluded that the Plaintiff impairment is 37% WPI.

(c) (i) RAF Form 4 and Narrative Test from Dr Kumbirai (Orthopedic Surgeon), who reported the following injuries: fracture of right tibia and fibula, right elbow injury, lower backaches and head injury. The surgeon could not confirm the nature of the head injuries, but referred the Plaintiff to a neurosurgeon for further evaluation.

(ii) the Plaintiff complains currently about painful right leg, exacerbated by prolonged standing, walking & lifting heavy objects, lower back pain exacerbated by prolonged sitting & standing, as well as sequelae of head injuries, which includes poor hearing, headaches, dizziness, poor and short-term memory and poor concentration.

(iii) clinical evaluation indicated 6cm scars to anterior knee, 2cm each measuring 1cm distal right of tibia, right antalgic gait, right elbow> Mal-United fracture of radial head and neck, post traumatic osteoarthritis of right elbow and tibia & fibula fracture with intermedullary nail in situ.

(iv) Dr Kumbira's opinion on general damages is the following:

- pain & suffering: the Plaintiff suffered acute pain for 2 weeks, which subsided over a 4 week period.
- Plaintiff continues to suffer the inconvenience and discomfort of the chronic pain from the right elbow and right tibia.
- prognosis and future morbidity: the Plaintiff sustained fractures of the right radial head that was missed on the initial evaluation. The fracture has mal-unite and the Plaintiff developed post traumatic osteoarthritis of the right elbow. Plaintiff will benefit from total elbow replacement to alleviate pain and improve the range of motion of the right joint.
- fracture of right tibia and fibula: these were treated by intramedullary nailing and the fracture has united with implants still in situ: the surgeon recommends that the nail and screws be removed to prevent them from acting as focus for sepsis should the Plaintiff become immunocompromised.
- loss of amenities of life: the Plaintiff will have problems in engaging normally in activities which requires prolonged standing, walking and lifting of heavy weights.
- whole person impairment: the expert found the Plaintiff whole person impairment to be 14% WPI and opined that considering all factors outlined in his report and the injuries sustained, it has resulted in a long term impairment or loss of body function.

(d) Neurosurgeon report by Dr Mazwi [Compiled 23 July 2020]: the expert conducted a general examination and deformities and scars and a neurological examination of the Plaintiff. He reported difficulty with concentration, memory disturbance and headaches.

With regards to pre-injury status, the expert reported that prior to the injury the Plaintiff was healthy with no history of neurological illnesses, she was born healthy with no congenital abnormalities, had no previous history of head or spinal injuries or mental retardation or mental illness and was never diagnosed with psychiatric illness before the accident.

The Plaintiff presented the following complaints to Dr Mazwi:

- post injury recurrent headaches, which occurs frequently on regular analgesia, difficulty with concentration, memory disturbances, pain on right leg, right knee deformities and scars. The neurological examination by the expert revealed the following:

- mental function: difficulty with concentration, poor memory, memory loss and poor recall.
- general damages: the expert reported the following damages resulting from the injuries sustained in the accident: head trauma, with loss of awareness and woke up in hospital, a brief loss of consciousness and amnesia for one day with moderate head injuries and significant long term mental disturbance. He found the Plaintiff whole person impairment to be 25% and made recommendations that the Plaintiff qualified for general damages under narrative test due to serious long term impairment or loss of body functions and permanent serious disfigurement.
- mental and physical impairment: the expert reported poor memory, difficult concentration and chronic post-concussive headaches.
- pain and suffering: acute headaches immediately post injury in the first week after the accident were reported, also chronic headaches that are persistent despite medical therapy as a direct result of the accident as well as right leg and back pains.
- loss of amenities of life: Dr Mazwi reported that amenities of normal living were lost during the hospitalisation period, activities of daily living and mental function have been affected and also due to headaches and permanent mental disturbance.

C. AUTHORITIES:

[12] The Plaintiff's counsel referred this Court to the following authorities:

(a) Manquinda MI v RAF (12465/2015)

It was contended that the Plaintiff in the above matter suffered several injuries including head injuries and has awarded R700 000 in respect of general damages in 2015 (an amount of R974 402-97 in 2022).

(b) Machachi v RAF (20784/2013)[2018] ZAGPPHC 405 (25 May 2018)

In the above matter, the Plaintiff sustained facial scarring, psychological trauma, head injuries and headaches, disfigurement, knee injuries and limitation of movement, poor concentration and energy levels, depression, self confidence and esteem problems. Award of R1.1 million made (translates to R1 306 935-80 in 2022).

(c) Masemola v RAF (53419/22014)[2017] ZAGPPHC 1202 (03 April 2017):

In this matter, the Plaintiff sustained tibia fracture, injuries to his left knee and scaring, amongst others. The Court awarded an amount of R850 000-00 in general damages in 2017 (R1 055 524-23 in 2022).

[13] The following authorities were also consulted by this Court for purposes of the claim:

(i) In Grimbeck NO v RAF (7145/2016)[2020] ZAGPPHC 279 (26 June 2020), the Plaintiff sustained fractures of the tibia and fibula, left and right knee injuries. The Plaintiff further presented with neurobehavioral problems, post-accident anxiety and poor self-esteem. The Plaintiff sustained lower back injuries to the extent that it prevented her from lifting and carrying heavy objects and her ability to stand or walk for prolonged periods of time has been compromised. She further suffered memory and concentration problems and became forgetful and struggles to focus for prolonged periods of time. Neuropsychological tests indicate that she had sustained deficits in all areas of cognitive functioning. In this case, an award of R400 000-00 was granted as fair and reasonable compensation in 2000 [translates into R442 246-57 in 2022].

(ii) In Mbokazi v Min of Police & Another (81278/15)[2020] ZAGPPHC 286 (10 June 2020), the Plaintiff suffered tibia and fibula injuries for which surgical procedures would have to be effected to prevent disability. The Plaintiff suffers from leg and knee pains, which resulted in restricted and painful standing, walking and lifting of heavy objects. The Court in this matter granted R400 000-00 compensation in respect of general damages (2020)[translates to R442 246-57 in 2020].

(iii) In Tshongolo v RAF (19958/2014)[2021] ZAGPJHC 29 (02 November 2021), the Plaintiff sustained mild head injuries, neurocognitive and neuropsychological deficits, headaches and physical pain as a result of the injuries sustained. An award of R500 000-00 was awarded in 2021 [that is R528 438-50 in 2022].

(iv) In Nsele v RAF (70447/2019)[2021] ZAGPPHC 455 (13 July 2021), the Plaintiff suffered loss of consciousness and woke up in hospital, was hospitalised for just over one (1) month. He sustained right leg fractures, head injuries and scaring. The Plaintiff is now struggling with walking and endure swelling and pain in the leg, difficulties in motor skills, and is physically and mentally slow according to the experts in that case. He further suffers memory and attention problems, neurocognitive deficits, depression and emotional problems. He is further constraint in his amenities of life as a result of his injuries. The Court awarded an amount of R1.1 million for general damages (2021), which translate to R1 162 564-71 in 2022.

(v) In considering an amount for general damages, and the comparable cases alluded to above, this Court also had regard to the SCA'S comments in De Jongh v Du Pisani, NO [(220/2003)[2004] as explained by Adams J in the Tshongolo decision *supra* where he stated that an amount of R250 000-00 was awarded for general

damages for a serious head injury consisting of extensive fragmented fractures of the skull extending into the eye sockets, cheek bones and jaw, causing extradural haematoma which led to unconsciousness and had to be surgically removed. In the said case the SCA stated that the evaluation of brain damaged persons depend more on how they actually handle their daily lives rather than how they perform on the psychometric tests (refer to para [21] of the judgment). The award translates into R623 270-03 in 2022.

(vi) Similarly in Hurter v RAF 2010 (6A4) QOD 12 (ECD) where the Plaintiff suffered severe brain injuries, unconsciousness for 10 days, significant cognitive, socio-emotional and behavioural difficulties and was left confrontational, aggressive and acted inappropriately when interacting with others, all due to the injuries she sustained. An award of R500 000-00 was made in 2010 and translates into R906 961-07 in 2022.

D. LEGAL PRINCIPLES:

[14] In determining general damages, it was held that the proper approach would be to take into account a broad spectrum of facts and circumstances. These include the nature of the injuries, the severity thereof and how it impacts on the quality of life of the Plaintiff [Hurter v RAF & Another, *supra*, at para 20]. The modern approach, which take into account the rising standards of living and the fact that past awards in our Courts were conservative as compared to that in other jurisdictions must also be taken into account. [RAF v Mosungu 2003 (5) SA 164 (SCA) at 170; Masemola, *supra*, at para 21].

[15] With regard to the compensation amount it was decided as follows:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure must necessarily be uncertain, depending on the judge's view of what is fair in all the circumstances of the case" [Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 199].

[16] In Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) at 287E-F it was held that *"the Court must take care to see that its award is fair to both sides – it must give just compensation to the Plaintiff, but it must not pour out largesse from the horn of plenty at the Defendant's expense"*.

[17] With regards to the discretion of our Courts to determine compensation awards it was held that *"It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae"* [AA Mutual Insurance Association v Maqula 1978 (1) SA 805 (A); Myburg v RAF (11131/2019)[2021] ZAGPPHC 202 (07 April 2021) at para 44].

[18] In De Jongh v Du Pisani No, supra, it was held that it is generally accepted that claims in respect of damages as a result of bodily injuries are quantified based upon comparable cases. The trial court has a wide discretion in considering all the facts and circumstances of the case in awarding what is considered to be fair and adequate compensation to the injured party. Our courts have acknowledged the existence of a tendency for awards to be higher than they were in the past. This is a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than in most other countries [Masoti v RAF (314/2015) ZANWHC at para 11 (unreported)]. It was further held that it is preferable not to consider each injury in isolation, but to consider all injuries sustained cumulatively (Masoti, supra, at para [11]).

[19] In Tshongolo, supra, it was further indicated that awards of previous comparable cases are but one of the factors which a court should take into account when considering the quantum of damages to be awarded.

E. CONCLUSION:

[20] Having considered the factors and circumstances in this matter cumulatively, and the case law cited, this Court is of the view that the injuries sustained by the Plaintiff is serious. No doubt that the Plaintiff will derive benefit from the treatment and processes the medical experts recommend in their reports, but these will afford limited relief and assistance. Most of the damage caused by the injuries will have a serious and lasting impact on her health, well-being and amenities of life.

[21] With regards to the amount of the awards referred to the case law above, it is not exactly the same in terms of several of the aspects (eg the nature and seriousness of the injuries, etc), but it provides sufficient guidance for this Court to make a determination on the quantum of damages.

[22] The awards in the authorities that the Plaintiff referred this Court to ranges between R974 000-00 and R1.3 million, whilst the authorities this Court consulted is between R442 246-57 and R1 162 564-71. The fact is, even the maximum award amount the Plaintiff's referred us to does not exceed R1.3 million.

[23] Taking into account all relevant facts, legal principles, the decrease in the value of money, awards made in comparable cases and the nature of the injuries sustained by the Plaintiff and the resultant sequelae, a just award for general damages is an amount as stated in the order herein-below.

F. COSTS:

[24] The general rule regarding costs is that the successful party will be entitled to their costs and this rule should not be departed from except where good grounds for such deviation exists [Myers v Abramson 1951 (3) SA 438 (c) at 455]. This Court could not find any such grounds to deviate from the general principle. Accordingly, this Court intends to award costs in favour of the Plaintiff.

G. ORDER:

In the result, default judgment is granted in favour of the Plaintiff against the Defendant as follows:

1. (a) the Defendant is ordered to pay an amount of R850 000-00 in respect of general damages to the Plaintiff.

(b) the said amount (R850 000-00) shall be paid into the trust account of the Plaintiff's Attorneys, with details as follows:

- Account holder - Chabeli Molatoli Inc
- Bank - First National Bank
- Account type - Trust Account
- Account number- 6272 040 9194
- Branch code - 250 655

(c) In the event of default of the above payment, interest shall accrue on such outstanding amount at the prescribed rate per annum, calculated from due date until date of payment;

2. that the Defendant shall provide the Plaintiff with an undertaking in terms of section 17 (4)(a) of the Road Accident Fund Act 56 of 1996, for the payment 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 goods to her arising from the injuries sustained by her in the motor vehicle accident on 26 November 2013 after such costs have been incurred and upon proof thereof;

3. (a) the Defendant is ordered to pay the Plaintiff's costs of suit on a party and party basis on the High Court scale, including costs of the Plaintiff's experts, including the qualifying costs of the experts whose notices were served on the Defendant;

(b) in the event that costs are not agreed between the parties, the Plaintiff will be entitled to serve a notice of taxation on the Defendant. The taxed costs will be

payable within fourteen (14) calendar days of date of taxation and shall likewise be paid into the above mentioned trust account of the Plaintiff's attorneys.



B CEYLON
ACTING JUDGE OF THE HIGH
COURT OF SA
GAUTENG DIVISION
PRETORIA

Hearing date:	07 March 2022
Judgment date:	06 June 2022
For the Plaintiff:	Mr C Molatoli
Instructed by:	Chabeli Molatoli Inc
	Pretoria
For the Defendant:	No Appearance
Instructed by:	No Appearance

