



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

2022-12-02

DATE

SIGNATURE

Case Number: A96/2021

In the matter between:

A.M.E. MERTZ

Appellant

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

POTTERILL J

Introduction

- [1] The appellant instituted an action against the respondent for damages suffered as a result of a motor vehicle collision which occurred on 28 December 2015, near Kenhardt, Northern Cape which had left her a quadriplegic. The action was not defended. The appellant sought leave to appeal the judgment and order of Makhoba J of the 25th of September 2020. Leave was granted to the full bench of this Division. The appellant sought that the order of the court *a quo* be set aside. The appellant is appealing against the specific finding and the order granted by the court *a quo* in respect of the appellant's claim for non-patrimonial loss (general damages) as a result of the injuries.

The issues to be decided

- [2] The issues for determination in this appeal are: can the court on appeal interfere with the discretion exercised by the court *a quo*; whether the court *a quo* committed an irregularity not affording counsel for the appellant an opportunity to debate or address the issue of general damages; whether the court *a quo* lacked the jurisdiction to make any award in respect of general damage because the jurisdictional facts necessary to qualify the appellant's injuries as a "serious injury" had not been established; and whether the court *a quo* erred in finding that the award of R2 500 000.00 in respect of general damages represented fair and justifiable compensation.

Background to default proceedings

- [3] The matter was conducted on the Teams Virtual Platform on the 8th of September 2020. The court *a quo* was informed that the respondent [RAF] was not represented and, that the legal representative had withdrawn from the matter. Counsel requested to proceed with the matter and referred the court to an affidavit which indicated that various attempts were made to engage with the respondent to ensure its representation at trial to no avail. On request of the court, the claims handler, Ms. Le Roux, represented RAF. Ms. Le Roux

confirmed that the issue of merits had been disposed of. She had perused the heads of argument uploaded on the CaseLines system by the appellant and was in agreement with the amounts reflected therein as being representative of the current legal position, but that she could not agree thereto as the amounts were above her mandate.

The hearing

[4] Before the court were the expert reports of:

- 4.1 Mr. Deon Rademeyer – Mobility Consultant, report dated 31 August 2020;
- 4.2 Menachem Mazabow – Clinical Psychologist, report dated 30 August 2020;
- 4.3 Dr. D.A. Birrell – Orthopaedic Surgeon, report dated 31 August 2020;
- 4.4 Dr. K. Truter – Clinical Psychologist, report dated 31 August 2020;
- 4.5 Dr. J.J. du Plessis – Neurosurgeon;
- 4.6 Dr. Z.F. Annandale – Plastic – and Reconstructive Surgeon, report dated 28 August 2020;
- 4.7 Dr. I.J. van Heerden – Urologist, report dated 1 September 2020;
- 4.8 Dr. A.P.J. Botha – Specialist Physician, report dated 28 August 2020;
- 4.9 Tracey Holstshausen – Occupational Therapist;
- 4.10 Pip Jackson – Physiotherapist, report dated 31 August 2020;
- 4.11 D.A. Shevel – Psychiatrist;
- 4.12 Esmé Noble – Industrial Psychologist, report dated 2 September 2020;
and
- 4.13 Gregory Whittaker – Actuary, report dated 31 August 2020.

In terms of Rule 38(2) the expert reports were ordered to constitute evidence adduced at the trial.

[5] The Judge indicated that he had not read the papers and the appellant's comprehensive heads of argument and undertook to, if he felt the need to make an order adverse to the award of damages in the heads of argument, he would afford counsel an opportunity to debate the issue before handing down judgment.

[6] The court *a quo*, without affording counsel for the appellant an opportunity to address it, reduced the amount for general damages from R3 million to R2.5 million. The *ratio* for this order is captured in one paragraph [10]:

“In this matter before taking into account other decided matters and the case I was referred to by counsel for the plaintiff, I am of the view that the amount for general damages that is fair is R2.5 million.”

Can the Court of Appeal interfere with the discretion exercised by the Court

[7] The court *a quo* had exercised a discretion in granting the award for general damages. A discretion is however not unfettered and must be exercised judicially upon consideration of the facts of each case.

“The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order.”¹

¹ *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-F

- [8] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras [83] and [85]-[87] the Court found that:

“[85] A discretion in the true sense is found where the lower court has a wider range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is ‘true’ in that the lower court has an election of which option it will apply and any option can never said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permission options ...

[87] ... In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own discretion without first having to find that the court of instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court’s power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in a loose sense, it must be guarded.”

- [9] I can thus cautiously interfere with the loose discretion as exercised by the Court *a quo*.

Was there adherence to the *audi alteram partem* principle?

- [10] Did the Court in not affording the plaintiff’s counsel to address it constitute an irregularity. The answer is simply; it did. The trite principle of *audi alteram*

partem was not adhered to. Affording counsel an opportunity to address the court, especially where herein it was so requested, is an entrenched basic rule of litigation that was breached. It is a fundamental principle that every litigant should be given a fair opportunity of addressing the court. A basic rule of fairness demands that a person who will be adversely affected by a decision shall be granted a hearing before he or she suffers detriment.

- [11] This court finds that it was required of the court *a quo* to act in accordance with the principles of natural justice or procedural fairness. The fundamental rule in any hearing is for the court to hear a person before adverse decisions against them are taken. It is also important to emphasise that the principles of natural justice are founded upon fundamental fairness and the inter-related concept of good administration. The *audi alteram partem* rule is more than a mere procedural norm; it constitutes a fundamental system of justice.
- [12] This irregularity resulted in prejudice of a lower amount awarded for general damages. This court can thus interfere with the exercise of the court *a quo*'s discretion.
- [13] It must also be remarked that if the evidence is rejected, it is required of a Judge to give reasons as to why he or she came to a certain result. This judgment did not at all reference on what basis or case law the court *a quo* came to a different conclusion. In *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) par [12] the following is relevant:

“There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by

furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.”

Did the Court have the jurisdiction to adjudicate the general damages?

- [14] On appeal this was a new ground raised on behalf of the respondent. In essence it was argued that the respondent had either rejected the appellant's claim for general damages already in its pleadings, alternatively that reports were never accepted or rejected by the respondent prior to the commencement of the hearing.
- [15] The Road Accident Fund Amendment Act, 19 of 2005, amended section 17(1) of the Act by introducing limitations on the respondent's liability for general damages. Non-pecuniary loss was now limited to *“Compensation for a serious injury as contemplated in sub-section a(A) of the Act and would only be paid by means of a lump sum.”* Section 17(1)(A) is regulated by Regulation 3² setting out the prescribed method of assessing a serious injury.
- [16] A third party wishing to claim general damages must obtain a Serious Injury Assessment Report from a medical practitioner. Regulation 1 defines this

² Government Gazette 21 July 2007

report as a duly completed RAF4 form. The Road Accident Fund can reject the third party RAF4 form if it is not satisfied that the injuries were correctly assessed.

- [17] In *Road Accident Fund v Duma and Three Similar Cases* 2013 (6) SA 9 (SCA) at par [13] it was found that the courts do not have the discretion to decide whether an injury is serious or not, only the RAF has that discretion.

- [18] Pursuant to this decision Regulation 3(3)(A) was promulgated providing that the RAF must within 90 days *“from the date on which the Serious Injury Assessment Report was sent by registered mail or delivered by hand to the Respondent, accept or reject the Serious Injury Assessment Report or direct that the third party submit himself or herself to a further assessment.”* In *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA) at par [36] the Court found that this amendment had confirmed that the assessment of serious injuries is not a judicial function, but an administrative function. Furthermore, that general damages may only be awarded if injuries have been assessed as such. Regulation 3(c) provides that RAF shall only be obliged to compensate a third party for such non-pecuniary loss if the plaintiff’s claim is supported by a serious injury assessment report and the Fund is satisfied that the injury was correctly assessed as serious.

- [19] Regulation 3(d)(i) requires from the Fund if not satisfied that the injury was correctly assessed to reject the serious assessment report and furnish the third party with reasons for the rejection or direct at the cost of the third party to submit himself or herself for a further assessment to ascertain whether the injury is serious.

- [20] The Regulations do not expressly provide that the Fund must in writing accept the serious assessment report.

Could it be found that RAF did indeed accept that the plaintiff had suffered a serious injury?

- [21] RAF's argument that is raised a special plea of non-compliance with Regulation 3 and that the plea served as a rejection of the serious injury assessment is untenable. A special plea cannot be raised as a matter of course; no serious assessment or expert reports had been served or filed by the appellant to which a special plea could be raised. The special plea was served on the appellant on 14 March 2018 with the expert reports containing the serious injury assessments only served from 6 September 2018 onwards.
- [22] On behalf of RAF it was argued that the court must draw the inference from the pre-trial conferences held on 28 August 2018 and 30 May 2019 wherein RAF reserved its right to refer the appellant's claim in respect of general damages to the Health Professions Council of South Africa [the HPCSA] as that the injury was not admitted as being severe.
- [23] The appellant and the representative held three pre-trial conferences. At the first pre-trial no expert notices had been filed by the appellant and RAF recorded that it reserved its right to refer the plaintiff's serious injury assessment to the HPCSA.
- [24] At the second pre-trial the appellant had filed expert reports that embodied serious injury assessments by Dr. Mazabow (Neuropsychologist), D.A. Birrell (Orthopaedic Surgeon), Dr. K. Truter (Clinical Psychologist), Dr. Z. Annandale (Plastic- and Reconstructive Surgeon), Dr. J.J. du Plessis (Neurosurgeon) and Dr. D.A. Shevel (Psychiatrist). The reports were filed from the 6th of September 2018 onwards.

At this pre-trial RAF was requested to admit the serious injury within a specified time period, failing it would be deemed that it admitted the contents of the reports. RAF struck out this provision that the reports would be deemed to be admitted and noted that the issue would be revisited at the next pre-trial conference. It also reserved its right to have the serious injury assessments referred to the HSPC.

- [25] At the third pre-trial RAF was represented by an attorney, Mr. Ndlovu. He was again asked to admit the expert reports that included the serious assessment reports. Paragraph 6.2.5 reads as follows:

“Defendant is requested to indicate exactly which findings in the Plaintiff’s expert reports it disputes.”

Defendant’s reply: *“The Defendant shall revert by close of business on 15 January 2020, failing which it shall be accepted that the findings in the Plaintiff’s expert reports are deemed to be admitted.”*

- [26] The third and final pre-trial did not, as the other two pre-trials did, contain the provision that RAF reserves its right to have the issue of the Serious Injury Assessment of the appellant referred to the HPCSA.
- [27] At trial thus the content of the expert reports and the serious injury reports were admitted, because the deeming provision was alive. The RAF had not reverted by 15 January 2020. The question is whether from this common cause fact the court can conclude that RAF accepted the serious injury reports. Put simply, can the conduct of RAF in this matter lead to an inference of acceptance of the serious injury reports.

- [28] I am aware of the Full Court judgment of *Adv Knoetze obo NB Malinga and Another v Road Accident Fund* case number 77537/2018 and 54997/2020³ wherein it was “*declared that plaintiffs in actions against the Road Accident Fund are not entitled to pursue the adjudication of non-pecuniary damages in absence of either the Road Accident Fund having accepted the injuries in question as Constitution [sic] serious injury as contemplated in Section 17(1A) of the Road Accident Fund Act 56 of 1996 or serious injury by the appeal tribunal contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008 (as amended).*” However, this is no more than a re-statement of what the Supreme Court of Appeal had decided in the Duma-matter.
- [29] Regulation 3 does not expressly require the RAF to in writing accept the injuries as serious, whereas it expressly provide that reasons for rejection must be in writing. The RAF is the decision-maker pertaining to accepting or rejecting the injury as serious. There is no doubt that in general where the RAF had offered an amount as compensation for general damages, without expressly informing the third party that the injury was serious, an implied acceptance constitutes that the injury was serious.⁴ Similarly, an admission that injuries are serious, contained in a pre-trial minute is an acceptance of the injuries as serious. Admissions made in a pre-trial hold the party admitting same bound thereto.⁵
- [30] In this matter the injuries are deemed to be accepted by the RAF as it did not revert to the appellant by 15 January 2020 and therefore all serious injury reports were admitted. This is supported by the third pre-trial wherein the RAF did not reserve its right, as in the previous two pre-trials, to have the issue of the serious injury assessment of the appellant referred to the HPCSA. But, more importantly, Ms. Le Roux indicated that she had no objection to the amounts claimed and that she had recommended that these figures be paid to

³ [2022] ZAGPPHC 819 (2 November 2022)

⁴ *Chetty v Road Accident Fund* case number A91/21, unreported matter, Gauteng Pretoria

⁵ *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga & Another* (169/09) [2010] ZASCA 65; 2010 (4) SA 122 (SCA)

the appellant, but could not sign-off, but had to escalate the amount upwards for a senior signature. It was placed on record that all the issues were canvassed in the appellant's heads of argument had to be adjudicated on by the court *a quo*. The general damages was part and parcel of those issues, which was a concession that the injuries were accepted as being serious.

- [31] The defence of lack of jurisdiction of the court is dismissed; the court *a quo* could adjudicate the award of general damages.

What amount for general damages would be fair to the RAF and the appellant?

- [32] The RAF did not deny that the appellant had sustained significant injuries in the motor vehicle accident and the sequelae had a devastating effect on the life of the appellant. What was argued was that the willpower and mind-set of the appellant to not give up, had the consequence of significant improvement; thus the appellant had mitigated her loss deserving of only R2.5 million as ordered by the court *a quo*.

The injuries and the sequelae in this matter are relevant:

- She has abrasions on her shoulders and arms bilaterally;
- She was diagnosed with a C5/C6 bilateral facet dislocation and fracture of the right C5 lamina, L1 wedge compression fracture;
- She was entrapped in the vehicle for approximately 6 hours;
- She had a fracture of the cervical vertebrae;
- She has been left a tetraplegic;
- She had acute respiratory failure;
- She had a dislocation of the cervical vertebra;
- She sustained concussion and edema of the cervical spinal cord;
- She sustained a fracture of the lumbar vertebra;
- An unspecified injury of the abdomen, lower back and pelvis;

- She has abnormal sensation in the upper extremity and no sensation in the lower extremities;
- She was transferred to Bloemfontein Medi-Clinic on 29 December 2015;
- On the 29th of December 2015 she had an anterior cervical disk excision and fusion for the C5/C6 fracture;
- The hospital inserted a skyline plate and screws;
- A bone graft from the right iliac crest was performed;
- She was incubated until the 2nd of January 2016 in the ICU Unit;
- On the 3rd of January 2016 she had surgery when the tracheostomy and dressings were changed on both arms;
- She was transferred from the ICU Unit on the 7th of January 2016;
- She had a nasogastric tube in place;
- She received three blood transfusion;
- On the 17th of January 2016 the tracheostomy was removed and her speaking trachea inserted;
- Pre-accident she exercised at the local gym to mainly aerobics 5 days per week, participated in mountain biking, played golf, jogged and did motorcycling and swimming;
- She was in good health prior to the accident;
- She lived with her sister for 6 weeks after discharge and required assistance with the changing of nappies, bed washing, dressing, pressure relief and basically all activities of living tasks. After six weeks she went back to Hartebeespoort to live in her own house where her daughter resigned her job to take of her;
- She has gradually increased her task independence with physiotherapy and occupational therapy;
- She is currently independent with toiletries, transfers, washing and dressing, grooming and has a bowel regime. She uses a bladder catheter;
- She currently requires assistance with transport, cooking and domestic chores;
- She frequently has urinary tract infections;
- She fell in 2017 and again in 2018 and injured her right shoulder;

- She has been left with C5/C6 quadriplegia which includes the following complaints:
 - Decreased sensation from the chest downwards;
 - Muscle weakness and decreased motor function in the upper limbs and lower limbs specifically find hand co-ordination tasks;
 - Bladder sensation is in-tact, but she has no bladder control;
 - She has no bowel sensation, but follows a bowel regime using ducolax on a daily basis;
 - She has nerve pain in her hands and legs;
 - She has difficulty sustaining attention for long periods of time. She has been left with a prominent tracheostomy scar approximately 6cm in length;
 - She has a well-healed anterior neck scar on the right of approximately 6cm;
 - She has a conglomeration of abrasion scars on the left upper arm area stretching up to the shoulder of about 18cm x 5cm;
 - She has a number of abrasion wound scars just below the left elbow;
 - She develops pressure sores from time-to-time especially in the sacral area;
 - She has a loss of rotation on her neck of approximately 30 %;
 - Her right hand is in a fully flexed position of the fingers. Flexing the wrist opens up the fingers. However, she has no control and she does not use the hand for any useful function;
 - Her left hand has considerable spasticity of the wrist, but she can use the left hand for her computer;
 - She uses the index finger with her wrist flexed;
 - The middle, ring and little finger are not used at all;
 - She can hold a spoon in her left hand;
 - She has developed deep vein thrombosis in the left leg.

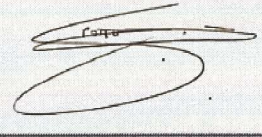
- [33] The appellant is depressed, suicidal and suffers from post-traumatic stress syndrome. She has gained 20 kg, is no longer sexually active and she suffers from severe neck pain which is aggravated by movement. The appellant's life expectancy was not affected. The court *a quo* found that the appellant was unemployable, a finding not appealed by the RAF. She can dress herself slowly. She can turn herself at night. She has a supra pubic indwelling catheter and she will most probably have this form of support for the rest of her life. She has spasms and discomfort and will have a higher rate of neurogenic bladder and urinary tract infections. She has permanent severe scarring.
- [34] The experts all agreed and the court found her unemployable. The fact that she first worked from home and then three days a week at the office is an accolade, not a factor to diminish her claim especially in view of the unemployable finding and award given therefor. The argument was that her remarkable recovery has impacted on her loss of amenities of life. Dr. Du Plessis describes her as being partially quadriplegic. This is because she insists to stand and attempts to walk, but she falls and this conduct of her is not recommended by the experts. She can change her position at night, because she utilises the grab rails on her bed to change her position at night.
- [35] Much was made of the fact that she can dress herself, use a microwave and can transfer from her wheelchair to a recliner chair in the lounge. She does this despite the experts agreeing, and RAF accepting, that she needs an electric wheelchair and will need one permanently.
- [36] The RAF accepts the expert reports that she will need a full-time, live-in domestic worker and a full-time care-giver. The argument is that then her life will improve. The argument is simply brutal; the appellant needs two people for her to live her life; this is not an improved life.

- [37] We do not know what factors the court *a quo* took into account or did not take into account; the court is silent thereon. But, there is a striking disparity between what was sought by the appellant and what was granted by the court *a quo*.
- [38] The value of the compensation must be reasonable and adequate to compensate the third party. A court must also consider comparative awards and it must be fair to both parties. Once again, we do not know what comparative awards the court *a quo* took cognisance of. It is noteworthy that counsel on behalf of RAF did not refer to a single comparative award, but only criticised the comparative awards relied on by the appellant.
- [39] The appellant referred to *Joko v Road Accident Fund* 2016 (7A2) QOD 1 (WCC) and *Morake v Road Accident Fund* 2018 (7AZ) QOD 9 (GSJ) and relied on the awards, but in these matters there was no permanent scarring and therefore the amount awarded should in this matter be higher. The appellant also relied on two further similar awards, all in the region of R2.9 million, but there was no scarring.
- [40] I am satisfied that R3.5 million is fair and reasonable compensation for the loss of her life amenities. She was rendered unemployable although she insisted to work, needs an electric wheelchair and two persons to cater to her needs. Those factors alone, let alone the scarring, not being the active outdoor person she was, not sexually active and depressed, requires compensation befitting.
- [41] I accordingly make the following order:

1. The appeal is upheld with costs, including the costs of senior counsel;

2. The defendant shall pay the total sum of R7 706 488.80 (Seven million seven hundred and six thousand four hundred and eighty-eight Rand and eighty cents) to the plaintiff's attorneys, Adams & Adams in settlement of the plaintiff's action, which amount is calculated as follows:

2.1 Past medical expenses:	R1 437 006.80
2.2 Past- and future loss of earnings and earning capacity:	R2 769 482.00
2.3 General damages:	R3 500 000.00
TOTAL:	R7 706 488.80



S. POTTERILL

JUDGE OF THE HIGH COURT

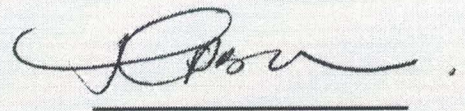
I agree



L.M. MOLOPA

JUDGE OF THE HIGH COURT

I agree



T.P. BOKAKO

ACTING JUDGE OF THE HIGH COURT

CASE NO: A96/2021

HEARD ON: 3 August 2022

FOR THE APPELLANT: ADV. B. BOOT SC

INSTRUCTED BY: Adams & Adams

FOR THE RESPONDENT: ADV. T. PILLAY

ADV. C.M. RIP

INSTRUCTED BY: Malatji & Co Attorneys

DATE OF JUDGMENT: 2 December 2022