IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A137/2018
(1) Reportable: **No.**
(2) Of interest to other judges: **No**
(3) Revised.
DATE: **31 July 2023**
SIGNATURE:

In the matter between:

R[...] S[...] M[...] Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

Munzhelele J (Van der Schyff and Millar JJ concurring)

Introduction

[1] The appellant was injured in a motor vehicle collision that took place on 22 October 2016, along R101 adjacent to Diesel garage in Bela-Bela. In the collision, the appellant suffered bodily injuries which included an above knee amputation of her right leg.

[2] A claim was lodged with respondent. Thereafter, action was instituted.

Due to the respondent's failure to appear and contest the action, it proceeded by default. The court *a quo,* on 11 February 2021, awarded *inter alia,* an amount of R900 000.00 (nine hundred thousand rand) as general damages.

[3] Subsequently, the appellant applied for leave to appeal the award and in particular the quantum of general damages. The present appeal is with the leave of the court *a quo.*

[4] The appellant asserts that the court *a quo* erred in its determination of the quantum of general damages. It was argued that in determining the quantum of damages as it had, the court *a quo* failed to consider a head, brain and psychiatric injury, shoulder injury, and impairment of the appellant's ability for self-care and the activities of daily living, besides the orthopaedic injuries that had been considered in the making of the award.

[5] I will return to the issue of the award of general damages later. The issues that I shall commence evaluating on are those brought forth in the course of the appeal proceedings. It is apposite to mention that in the appeal proceedings the respondent adopted the same supine approach that it had in the action and did not participate at all.

Power of attorney not filed and RAF1 medical report not completed

[6] During the appeal hearing, the court raised the issue that the power of attorney had not been filed on Case Lines. In response, counsel requested permission to proceed with the appeal and to subsequently file the power of attorney together with an affidavit explaining the reasons for its late filing. Furthermore, the court drew to the attention of counsel that the RAF1 medical report had not been completed. Counsel then sought permission to submit an affidavit explaining the reasons for the incomplete medical report.

Consequently, an affidavit was later filed, elucidating the reasons for the non-completion of the RAF1 medical report and the late filling of the power of attorney.

[7] Insofar as the absence of a power of attorney is concerned, the appellant, in her affidavit, indicated that the signature and filing of the power of attorney had been inadvertent. This had been rectified immediately, it had been brought to her attention and nothing need be said further on this aspect save that the late filing of the power of attorney is condoned.

[8] In regard to the completion of the RAF1 medical report, the appellant stated in her affidavit that the claim was initially prepared and submitted by the representatives of the Road Accident Fund (RAF) during her hospitalization at George Mukhari Hospital. The designated RAF official had stamped the section of the report where the attending medical doctor was required to provide information. The appellant affixed her signature to the form, and the RAF official duly affixed their stamp beside her signature, as well as on each individual page of the document. Subsequently, the hospital records were attached to the claim form, and the complete claim was submitted to the RAF.

[9] It is imperative to ensure the comprehensive completion of the RAF1 medical report and refrain from leaving the medical section blank. Section 24(2)(a) of the Road Accident Fund Act [1] ('the Act') and the relevant legal precedents have established the mandatory nature of completing the medical report. As such a substantial compliance with the completion requirements is deemed satisfactory.

[10] In *Road Accident Fund v Busuku*[2] the Supreme Court of Appeal found, in circumstances like those in the present matter, that the furnishing of the hospital records when filing the claim amounted to substantial compliance with section 24. In the present matter, besides the fact that the RAF itself assumed the responsibility for the submission of the claim on behalf of the appellant,[3] the hospital records in any event accompanied the claim. Accordingly, the claim as originally submitted complied substantially with the provisions of the Act.[4]

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[1] 56 of 1996.
[2] 2020 ZASCA 158 (1 December 2020).
[3] And would in those circumstances be liable at common law for damages for breach of a duty of care that it had undertaken in respect of the appellant in the event that there was no compliance substantial or otherwise with s 24 of the Act.
[4] See *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA) at para 18, the court held that: *"in*

***Background of the* case**

[11] When the matter came before the court a *quo,* liability had already been accepted by the RAF and there was an acknowledgement that the injuries sustained by the appellant in the collision were to be regarded as serious. Accordingly, the appellant's entitlement to claim an award of general damages was not in issue before the court a *quo.*

[12] When the collision occurred and the injuries sustained, the appellant was a 45-year-old self-employed vendor, selling vegetables from her residence. Due to the collision related injuries and their *sequelae,* the appellant was unable to resume employment. The appellant has however, since 2000, and due to her suffering from epilepsy and being HIV positive, been receiving a government disability grant.

[13] Counsel contends that the court *a quo* failed to duly consider the appellant's profound depression, post-traumatic stress disorder, and somatoform pain disorder resulting from her head injuries and above-the-knee amputation when awarding general damages. As a result, the appellant now seeks the setting aside of the court a *quo's* order and requests that the appeal court assess the claim and make its own award for general damages.

The findings of the court a quo

[14] The court a *quo* found on the evidence, that the appellant did not experience a head or brain injury of any severity for which there were *sequelae.* Instead, the court a *quo* focused on the trauma caused by the amputation, scarring, consequent disability, and their *sequelae.*

[15] It was argued that the court a *quo* erred in its finding that there was no

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interpreting the provisions of the Act, courts are enjoined to bear in mind that the primary purpose and objectives of this legislation is to give the widest possible protection and compensation to claimants. Caution though is emphasized that as the Fund relies entirely on the fiscus for its funding, it should be protected against illegitimate and fraudulent claims. It is clear that the act exists for the exclusive benefit and protection of the victim and not for the benefit or protection of the negligent or unlawfully acting driver or owner of a vehicle."

head or brain injury with *sequelae.* It was also argued that, in any event, even if it was accepted that the court a *quo* had been correct in its finding that there was no head or brain injury with *sequelae,* there was a significant disparity between the court a *quo's* awarded general damages and the damages that should have been awarded.

[16] General damages, as a form of compensation, are awarded to individuals as a *solatium* for the pain, suffering, disfigurement, disability, and loss of amenities of life in consequence of the injuries sustained. The amount of such award is eminently a matter of the exercise of a discretion by the court a *quo.*

[17] Interference with the exercise of a court's discretion in awarding general damages is typically a more difficult task than with other heads of damages. Consequently, an appeal court will only intervene with the discretion of the court *a quo* in very limited circumstances. In *Attorney-General, Eastern Cape v Blom and Others,*[5] the Supreme Court of Appeal held:

"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."*

Discussion

Head injury

[18] In relation to the head injury alleged to have caused somatoform pain in the appellant, the court *a quo* addressed this and found that no such head injury had occurred. In order for the appellant to assert that there was a head injury, it was necessary to establish in evidence that it occurred.

[19] There were three different versions in regard to the alleged head injury. Firstly, the appellant claimed not to have suffered a head injury when she

[5] 1988 **(4)** SA 645 (A) at 670D-F.

consulted the clinical psychologist. Secondly, counsel argued during the hearing that the appellant had experienced a mild traumatic brain injury. Thirdly, the neurosurgeon when completing the RAF4 form stated that the appellant had suffered a moderate to severe brain injury. However, when he compiled his medico-legal report, he referred to the appellant's injury as a mild traumatic brain injury. There were no radiological investigations such as MRI or CT scans done and so the opinion of the neurosurgeon stands in contrast to the version of the appellant.

[20] These three conflicting versions were presented to the court a *quo* as evidence of head injury. It is the appellant who bears the burden of proving the injuries sustained in the collision.

[21] The existence of these three contradictory versions made it all but impossible for the court a *quo* to find as a probability that the appellant in fact did suffer a head injury with *sequelae.* In light of the appellant's claim that she did not suffer a head injury, neither the argument by counsel nor the opinion of the neurosurgeon could be of any assistance in deciding this issue. In this regard, see *Road Accident Fund v SM* [6] in which it was held that:

·[T]he Court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not, then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima facie basis, then the Court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the expert's reasoning and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion can reasonably be held on the basis of the facts and the chain of reasoning of the expert, the threshold will be satisfied."

[6] (1270/2018) [2019] ZASCA 103 (22 August 2019) para 2. See also *Bee v Road Accident Fund* 2018 4 SA 366 (SCA) para 22 who affirmed the decision taken in the case of *Road Accident Appeal Tribunal & others v Gouws & Another* [2018] 1 ALL SA 701 (SCA) *at* para. 33, where it was said: *'Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion.'*

[22] In the present matter, the appellant had pre-existing conditions which contributed to the compromise of her central nervous system for almost 30 years before the collision. There was evidence that the appellant suffered seizures and mental illness before the collision. There was no evidence led to establish that the appellant's mental state worsened, not in consequence of the natural progression of her pre-existing conditions, but in consequence of the injuries sustained in the collision. For this reason, even though there was psychiatric evidence of a mental disorder, it is not possible, on the probabilities, to attribute this solely or even partially, to the injuries sustained in the collision.[7] Accordingly, in my view, the court a *quo* was correct in finding that there was no evidence of a head injury.

The appellant's potential ability to walk again

[23] The evidence of the Orthopaedic Surgeon, was that once the appellant underwent surgery and rehabilitation, she *'will walk again'.* The appellant's counsel argued that the court *a quo* in making the finding that the appellant could possibly regain the ability to walk, was a misdirection. There was however no evidence to the contrary and in the circumstances the court *a quo* was correct in accepting the evidence of the Orthopaedic Surgeon on this aspect.

Revision of the scars

[24] The Plastic Surgeon's evidence was that there were six scars which could be revised. There was no evidence to the contrary and the court a *quo* was correct in accepting the evidence of the Plastic Surgeon.

Is the appeal court entitled to interfere with the award made by the court a quo based on the ground of substantial variation?

[25] The appellant's counsel argued that the appellant should have been awarded an amount exceeding R900 000,00 having regard to all the injuries and

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[7] *Nonyane v Road Accident Fund* (3126/2016) [2017] ZAGPPHC 706 (10 November 2017) that: *"The tendency to think that our courts capitulate* lo *every evidence or report of an expert is wrong and has to be dispelled and discouraged. Each case has to be determined on its merits. That responsibility for evaluation of the reliability of facts and or evidence lies in the domain of the courts contrary to belief of those participating in the court proceedings." {my emphasis].*

their *sequelae.*

[26] The issue to be considered is whether a striking disparity exists between the amount awarded by the court a *quo* and the amount that ought to have been awarded. In *Protea Assurance Co Ltd v Lamb*[8], it was held that:

> *'It is settled Jaw that the trial Judge has a large discretion to award what he in the circumstances considers to be a fair and adequate compensation to theinjured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a "substantial variation" or as it is sometimes called a "striking disparity" between what the trial Court awards and what this Court considers ought to have been awarded.'*

[27] If it is found that there is a striking disparity, then this court must give consideration to a more appropriate award.

[28] The appellant's counsel argued that a more appropriate award of general damages in the circumstances of the present matter is R2 000 000,00 (two million rand). It is apparent from the judgment of the court *a quo* that the award of R900 000,00 was arrived at after careful consideration of the injuries found to have been sustained by the appellant.

[29] We were referred to the following cases:

[29.1] *Mnguni v Road Accident Fund* [9] wherein the plaintiff suffered a severe brain injury and an amputation of the right lower leg. In that case, the award for general damages was R700 000.00 in 2010. The circumstances in this case differ in that in the present matter, the appellant did was found not to have suffered any head or brain injury.

[29.2] *Mthetwa v Road Accident Fund* [10] wherein the plaintiff suffered an above knee of the left leg and upper arm amputations. In that case, the award for general

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[8] 1971 (1) SA 530 (A) at 534H-535A.
[9] 2010 (6E2) QOD 1 (GSJ) (case no 810/2005).
[10] 2012 (6E2) (case no 15751/2 010).

damages was R800 000.00 in 2010. Similarly, the injuries in the present case differ in that the appellant only suffered an amputation of a single limb.

[30] The assessment of general damages awards through reference to awards made in prior cases poses a challenge. It is essential to analyse the specific circumstances of each case comprehensively, as direct comparability between cases is usually limited. Although previous awards can serve as a helpful reference for what other courts have deemed appropriate, their significance is restricted to that purpose alone.[11]

[31] The two cases to which we were referred, although not entirely analogous to the present matter, do offer some assistance in considering the appropriateness of the award made by the court a *quo.* The award must mitigate the appellant's suffering, loss of amenities, and overall disability she has and will endure. In *Sigournay v Gillbanks*[12] *'the opinion* was *expressed that regard should be given to general idea of the* sort *of figure which by experience* is *regarded* as *reasonable in the circumstances of* a *particular* case".

[32] The injuries found to have been suffered by the appellant and relevant for consideration by the court a *quo* were the orthopaedic injuries and their *seque/ae.* These included:

[32.1] Right above knee amputation.

[32.2] Fracture of the distal femur on the right side associated with a femoral injury.

[32.3] Fracture of the left tibial plateau.

[32.4] Fracture of the left distal tibial shaft.

[32.5] Fracture of the left humerus shaft.

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[11] See *Minister* of *Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at para 17 and also *Protea Assurance Co Ltd v Lamb1* 971 (1) SA 530 at (A) 535H-536B.
[12] 1960 (2) SA 552 (AD) at 556.

[32.6] Visible scars on the left shoulder, left distal thigh and distal leg and on the amputated area of the right thigh.

[33] On consideration of the injuries that the court a *quo* found the appellant to have suffered, the award of R900 000.00 for general damages is neither 'striking disparate' nor a 'substantial variation' from what is an appropriate award in the circumstances. There is no basis for this court to interfere with the award for general damages and in the circumstances, the appeal must fail.

Costs

[34] The Constitutional Court held as follows in *Affordable Medicines Trust and Others v Minister of Health and Others*[13]*:*

'The award of costs is *a matter which* is *within the discretion of the Court. It* is a *discretion that must be exercised judicially having regard to all the relevant considerations." The Appellate Division stated this general principle* as *follows in Norwich Union Fire Insurance Society Ltd v Tutt: 1960 (4) SA 851 (AD).*

[T]he basic principle is that the Court has a *discretion, to be exercised judicially upon* a *consideration of the facts of each case, and in essence it is* a *question of fairness to both sides'.*

The appellant is an individual excising her right to challenge the high court's decision. The RAF did not oppose this matter, consequently, the appellant. despite being unsuccessful in her appeal, will not be liable to pay costs to RAF. Thus, the court shall make no costs order against the appellant.'

[35] Since the respondent played no part in the proceedings before the court a *quo* or in the proceedings before this court, it has incurred no costs. It is in the circumstances appropriate that there is no order made as to costs.

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[13] 2006 (3) SA 247 (CC) paragraph 138 at 296H-297A.

Order

[36] In the circumstances, I propose the following order:

[36.1] The appeal is dismissed.

[36.2] There is no order as to costs.

M MUNZHELELE
JUDGE OF THE HIGH COURT, PRETORIA

I AGREE AND IT IS SO ORDERED.

VAN DER SCHYFF
JUDGE OF THE HIGH COURT, PRETORIA
I AGREE.

A MILLAR
JUDGE OF THE HIGH COURT, PRETORIA

HEARD ON:	**19 APRIL 2023**
JUDGMENT DELIVERED ON:	**31 JULY 2023**
COUNSEL FOR APPLICANT:	**ADV. J O WILLIAMS SC**
	ADV. F MATIKA
INSTRUCTED BY:	**B DLOVA INC**
REFERENCE:	**MR. B DLOVA**

FOR THE RESPONDENT:	**NO APPEARANCE**