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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 232/2015

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

KUKU, MABOROKU ALICE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 10 MARCH 2023

CORAM: JONASE AJ

The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 11 AUGUST 2023. The date and time for hand-down is deemed to be 11 AUGUST 2023 at 11h00.

Introduction

[1] On 19 January 2015, the plaintiff issued a summons against the defendant arising out of a motor vehicle accident that took place on or about 24 August 2012.

The facts

[2] Plaintiff alleges that on or about 24 August 2012 at Botshabelo, a motor collision occurred, and the plaintiff was a passenger in a motor vehicle with registration number DJM [...] driven by the insured driver. The collision was caused by the sole negligence of the insured driver.

[3] As the results of the said collision plaintiff sustained the following bodily injuries;

- a) Skull fracture
- b) Left external haemorrhage.
- c) Facial bones fracture
- d) Cervical vertebrae 3 fracture

[4] Plaintiff received treatment at Universitas Hospital Complex, Bloemfontein and a medical report was prepared by one Dr Francois Van Niekerk. It would appear that plaintiff was hospitalised during the medical treatment and would undergo further medical treatment in future. Plaintiff was unable to work as efficiently as she did prior to the accident. Plaintiff experienced pain and suffering and will experience future pain and suffering due to the injuries she sustained.

[5] At the time of the said accident, plaintiff was 28 years old. It appears that the other issues were settled between the parties and the only outstanding issue is the quantification of the general damages. Plaintiff in her amended particulars of claim, sues for an amount of R 2 500 000-00 for general damages framed as pain, suffering and loss of amenities of life.

[6] The parties agreed that they will not lead any oral evidence but will address the court and make submissions based on the relevant medical reports duly filed of record.

[7] When this matter was heard, plaintiff was 36 years old. It was submitted that plaintiff, at the time of the accident, was employed as a machine operator at a plastic producing factory. She was taken to hospital and remained unconscious for 3 (three) days. Plaintiff could not remember what happened to herself. She was in pains with head injuries, facial bones fracture and left external haemorrhage. She regularly visited the doctor and remained unemployed as the results of the accident. Her left

eye is blurry and she experiences constant head aches. As the results thereof she cannot be left alone at home. Another person must be there to take care of the plaintiff.

Expert evidence

[8] Plaintiff relies on the orthopaedic report dated 14 March 2016 by Dr JF Ziervogel. The said report refers to the injuries sustained as contained in the medical report. It records present complaints as;

a) HEAD: She gets attacks of the head on a daily basis. It feels as if the head ache is filling the whole of her head. It is a continuous headache. She takes Brufen for the headache. Sometimes the headache is accompanied by a disturbance of a vision of the left eye. Sometimes the pain feels as if it goes behind the eye and sometimes it is in frontal area. Sometimes she experiences vertigo before the headache starts. Sometimes the headache makes her nauseous. She feels sleepy when the headache abates.

b) NECK: She indicates the point of most pain in the neck in the mid cervical area. It is worse when she lies down and better when she moves around. Her neck does not feel stiff. The pain is confined to the neck. Sneezing aggravates the pain. She does not get any paraesthesia. Her arms and hands do not feel weak.

c) Examination of the head: there is a scar on the head that stretches from the frontal area in an arc across the frontal part to the above left ear. The front part of the scar is drawn in. It is tender. The pupils are equal in size and they react normally and symmetrically to the light. She has no nystagmus. The muscles of expression react normally and symmetrically to commands.

d) Examination of the neck: She carries her head to the front. She indicates the point of most pain at the base of the neck and on the left side in the muscles. There is tenderness when pressing in the middle line at the level of the C3 and C4 levels. The tone of the muscle appears to be normal.

e) The activities she cannot do anymore: She is very forgetful. She cannot carry heavy things anymore and she cannot bend anymore.

f) Conclusion: The patient sustained serious injuries which were treated. From the orthopaedic point of view the normal life expectancy is not adversely affected by the injuries, A neurosurgeon may have a different opinion.

[9] The Neurosugeon report is compiled by Dr Jaap Earle on 3 December 2014. On injuries the following is noted;

a) She had head injury with multiple facial fractures including fractures of the left orbit and the zygoma treated conservatively. She had fractured the anterior of the body of the third cervical vertebra but there was no neurological deficit from this source. She had developed a brain injury with a depressed fracture in the left posterior temporal region with underlying confusion and a diffuse component.

b) He did not see the scan but Glasgow Coma Scale on arrival in the Universitas hospital was given as 15/15 I.e. on the day of the accident. One would guess from this that she suffered no other injuries than a mild traumatic brain injury which means that in the longer run she could probably make a good recovery from whatever happened. As it was developed a complication of an extradural haematoma of 19mm thickness combined with a subdural haemorrhage and although this was expeditiously and quickly dealt with by craniotomy it is very likely to get long term intellectual or cognitive deficits with an increased risk of post-traumatic epilepsy.

c) In conclusion: the young woman suffered what could have been even a mild traumatic primary brain injury but certainly aggravated by the effects at the extradural haematic to be regarded as a direct complication. This was dealt with timeously but I do believe that there are some less obvious changes in her personality which makes it difficult for her to return to work and this must be assessed. The neck must also be treated. She has no problems from the facial fractures which were effectively treated conservatively.

[10] The Defendant submitted and conceded that no expert reports on its side were filed but will rely on the plaintiff's expert reports. Defendant submitted that the WPI is 0% but the latest WPI submitted by the memo after the HPCSA has declared the injury "as Serious".

Legal Principles

[11] Section 17(1) Act *inter alia* provides that Fund shall, –

'be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury ... caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury ... is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum'.

[12] *Legodi v Road Accident Fund*¹ the court stated the following:

"[50] General damages include a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy, and loss of life amenities.

[51] The case of *Hendricks v President Insurance*^[4] and the authors *Visser and Potgieter Skadevergoedingsreg* (2003) 97 provide that the nature of the general damages to be awarded make quantifying the award a complex task. This is because of the personal, non-pecuniary, and subjective nature of these interests, which make it difficult to quantify, but remains recoverable.^[5]

¹ (50948/17) [2021] ZAGPPHC 566 (2 September 2021)

[52] To qualify as a serious injury three steps must be undertaken by the medical practitioner. Firstly, to apply the non-serious injury criteria list; secondly, the methodology is contained in the *American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guide)*; and thirdly, the methodology as set out in the narrative test. In this matter, the plaintiff crossed the threshold of meeting the requirements of "serious damages" by the expert reports.

[53] The plaintiff in the *De Jongh*^[6] matter sustained a head injury consisting of extensive fragmented fractures of the frontal skull extending into the orbits (eye sockets) and the zygomatic arches -cheekbones, as well as the jaw, causing extradural haematoma which led to unconsciousness and which had to be surgically removed. Importantly, in this matter the SCA, quoting Holmes J, also pointed out the following fundamental principle relative to the award of general damages:

"that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn of plenty at the defendants' expense."

[54] In *Mashigo v Road Accident Fund*^[7] Mr. Justice Davis summarises the well-known approach to general damages and the use of previous comparable awards as follows:

"[10] A claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability, and loss of amenities of life and attaching a monetary value thereto. The exercise is, by its very nature; both difficult and discretionary with wide-ranging permutations. As will be illustrated herein later, it is very difficult if not impossible to find a case on all four with the one to be decided. The oft-quoted case of Southern Insurance Association v Bailey NO 1984 (1) SA 98 AD confirmed that even the Supreme Court of Appeal had difficulties in laying down rules as to how

*the problem of an award for general damages should be approached. The accepted approach is the "flexible one" described in Sandler v Wholesale Coal Suppliers Ltd **1941 AD 194** at 199, namely: the submissions were "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case".*

*[11] Of course, awards in cases that show at least some similarities or comparisons are useful guides, taking into account the current value of such awards to accommodate the decreasing value of money. See inter alia: SA Eagle Insurance Co v Hartley **[1990] ZASCA 106; 1990 (4) SA 833** (A) at 841 D and the practical work of The Quantum Yearbook by Robert J Koch which includes tables of general damages awards annually updated to cater for inflation.*

*[12] In respect of the issue of comparable cases and the guidance provided thereby, the Supreme Court of Appeal has stated in Protea Assurance co Ltd v Lamb **1971 SA 530** at 536 A - B: "Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration".*

[55] The court in these cases has discretion. However, this discretion is not restrained by a relentless tariff drawn from previous similar awards. When assessing such damages the factors must be considered in totality. Naturally,

courts are assisted by sufficiently comparable case law which can be used as a yardstick to assist the court in arriving at an appropriate award.

[56] Counsel referred me to several comparable cases enlisted below. However, each case must be adjudicated on its own merits within the overarching maxim of *stare decisis*. In the case Van Heerden J in *Dikeni v Road Accident Fund* [8] stated

“Although these cases have been of assistance, it is trite law that each case must be adjudicated upon on its own merits and no one case is factually the same as another..... previous awards only offer guidance in the assessment of general damages.”

[10] Counsel for the plaintiff argued that the plaintiff is entitled to a fair and reasonable compensation. Plaintiff claimed an amount of R2 500 000-00 in respect of general damages. Counsel referred to the case of *Mxolisi Mngani v Road Accident Fund*² the principle of law has been recited in *Legodi* judgment above. It is important also to note the long-standing principle that counsel referred to in the case of *Mair v General Accident Fire and Life Assurance Corporation*³, the learned Judge of Appeal stated as follows;

“In cases of this nature, it seems to me that the most important feature to consider is the long-term effect of the injuries suffered by the person in question, that is to say, the permanent disability and the loss of amenities which arise from that permanent disability. This regard much depends on the trial court’s impression of the disability suffered by the person concerned where he trial court has had the advantage of seeing the person concerned, watching his walk and of assessing the degree of agility which he exhibits , notwithstanding his disability.”

² Case number: 09/2008 dated 21 January 2010 (ECM)

³ 1970 (3) SA 25 (RAD) AT 29-30 A

[11] Counsel for the plaintiff further referred to comparable case law as a guide for consideration in order for this court to come to appropriate amount to be awarded to plaintiff as follows;

a) *BV v Road Accident Fund 2021 (8A4) QOD 5 (FB)* the plaintiff sustained a traumatic brain injury with also neck and back injuries. He was left with serious neurological deficits and his condition was diagnosed as not only permanent but is likely to deteriorate due to frontal lobe injuries. Plaintiff suffers from behavioural and emotional disorders and presented with severe impairments in memory and concentration and his cognitive abilities were severely impaired. In addition to the aforesaid he suffers from constant back pain complains of headaches and neck pain. He has lost his ability to do things he enjoyed doing before the accident and will never be able to work again. This court awarded a sum of R 1 100 000-00 in 2020 which is by estimation translated to an amount of R 1 200 000-00 in today's monetary value.

b) *WV v Road Accident Fund 2019 (7A4) QOD 113 (FB)* the plaintiff sustained a traumatic brain injury with the base of the skull fracture and pons bleed, mandible fracture, right lower leg, tibia and fibula fractures. He went to theatre for an open reduction and internal fixation of his right tibia/fibula fractures, he complained of headaches and has behavioural and emotional disorders (aggressive, forgetful, depressed, isolates himself and foul language). He complains of his right eye having double vision, his jaws hurt when he chews, he struggles with soft food as well. He experiences pain and discomfort in the right knee joint and lower right leg. He walks with painful gait, he cannot walk unaided and using a walking stick. The plaintiff is permanently disabled with significant mental and physical impairment. He will need constant supervision and his career, social and family life is destroyed . This court awarded general damages in the amount of R 2 100 000- 00 in 2019 which is by estimation translated to an amount of R 2 150 000-00 in today's monetary value.

c) *Mngani v Road Accident Fund* above, wherein the plaintiff sustained brain damage, laceration on the occipital area of the skull, injury on the lumbar

and pelvis, fracture on the humerus the brain damage caused serious behavioural problems and coupled with neurocognitive deficits and intellectual impairment. Plaintiff was deprived of vocational and employment opportunities. That court awarded R 458 385-00 in 2010 which is by estimation translated to an amount of R 800 000-00 in today's monetary value.

d) *Pietersen obo JST v Road Accident Fund* 2012 (6A4) QOD 88 (GSJ) a child sustained a significant brain injury resulting in seizures and cognitive deficits, inability to pass grade 12 in the mainstream academic environment and a vulnerable candidate in the open labour market. Experts agreed that he ought to be placed in a school for learners with special educational needs. His future earning capacity was compromised. That court awarded an amount of R 750 000-00 in 2021, which is by estimation translated to an amount of R 1 250 000-00 in today's monetary value.

e) *Minnie NO v Road Accident Fund* 2012 (6A4) QOD 82 (GSJ) a 5-year-old girl sustained a severe head injury with serious degloving injuries requiring repeated surgery and causing a permanent and extensive disfigurement. Neurocognitive deficits associated with poor memory and language difficulties. Special schooling required. Functionally unemployable in the future and limited to work in a sympathetic or sheltered environment. That court awarded an amount of R 800 000-00 in 2010 which is by estimation translated to an amount of R 1 400 000-00 in today's monetary value.

[12] Counsel for plaintiff argued that taking the above cases and numerous others (not mentioned) into account, he is of the opinion that an amount of R 2 500 000-00 would constitute a fair and reasonable amount in respect of the plaintiffs claim for general damages in this matter. As such he will move for prayers 1,2,3 and 4 of the particulars of claim.

[13] It was argued on behalf of the defendant that the following comparable case law be considered for an appropriate order as follows:

a) *Schutte v Road Accident Fund* (378/2009) [2019] ZANCHC 8 (8 March 2019) plaintiff, who at the time was 20 years old, sustained certain bodily injuries as a result of a motor vehicle accident which occurred on 6 March 2004. He suffered from severe headaches; his personality had changed in that he had become aggressive and rude. He suffered from memory and concentration impairment. His career prospects have been limited and his ability to learn new skills have been compromised. There was apportionment of 50%. General damages were awarded in the amount of R 350 000-00.

b) *Malangabe v Road Accident Fund* (49658/2018) [2022] ZAGPPHC 156 (15 March 2022) Regarding the award of general damages the court found that the amount of R400 000 is appropriate. The court found this matter distinguishable from those the court was urged by counsel to consider. The matter of *Ngubeni v Road Accident Fund* 2017 (7A4) QOD 68 (GJ) concerned a 13-year-old boy who suffered mild to moderate brain injury and orthopaedic injuries. The brain injury is comparable to that of the plaintiff in this matter, being a mild traumatic brain injury. Apart from the age, the injuries and/or their *sequelae* in *Ngubeni* exceed in effect those of the plaintiff in this matter. The matter of *Vukeya v Road Accident Fund* 2014 (7B4) QOD 1 (GNP) concerned a claimant whose age (i.e. 43-year-old woman) correspond with the plaintiff (who was 45 years old at the time of the trial) in this matter. But the injuries and their *sequelae* in *Vukeya* slightly differ with those in this matter, especially the chronic headaches and depression.

c) *Ngubeni v Road Accident Fund* (18275/2015) [2016] ZAGPJHC 349 (24 November 2016) the uncontested evidence is that 13 years old suffered a mild to moderate brain injury and orthopaedic injuries. Although described as mild, the *sequelae* of the brain injury were of a moderate to severe nature. The orthopaedic injuries have resulted in the minor child not being able to play soccer or ride his bicycle anymore. The medico-legal reports and joint minutes clearly spells out the problems and difficulties the minor child will experience in future and what he had been through since the accident. An award of R600 000,00 for general damages will be fair and reasonable. The defendant, in this matter, argued that the said amount is estimated at R 800 000-00 in today's monetary value.

d) *Thozamile v Road Accident Fund* (3022/2020) [2022] ZAFSHC 307 (31 October 2022) the plaintiff sustained severe traumatic brain injury and was treated following head injury. The Plaintiff mainly suffered from headaches, memory problems, mood disorder, difficulty eating, lumbar spine pain and left leg pain. The deceased was 55 years old at the time of the collision and 58 years old, at the time of his demise (after *litis contestatio*), an amount of R650 000.00 is a fair and reasonable award for the non-pecuniary loss suffered by the claimant, as a result of the injuries sustained ad it's sequelae.

e) *Makupula v Road Accident Fund* (1635/07) [2010] ZAECMHC 17 (8 April 2010). The minor child was five years old when he was struck by a slow moving motor vehicle on 11 June 2007. Due to post concussional syndrome that developed from brain injury the child suffered headaches every 1 to 2 days in a week; but these headaches resolved within 18 months after the accident. The court awarded an amount of R 300 000-00 for general damages. The defendant, in this matter; argued that the said amount is estimated at R 550 000-00 in today's monetary value.

[14] The defendant, in this matter, never filed its own expert reports but relied upon plaintiff's expert reports. It also indicated that such reports are old and the defendant

indicated that it tenders an amount of R 650 000-00 as a fair and reasonable award for general damages herein.

[15] I have considered the comparative law stated above and found that the injuries sustained by the plaintiff were either mild or severe in comparison to the other cases indicated. I am of the view that the just and equitable award to be granted in this matter is R1 400 000-00.

[16] In the circumstances, I make the following order:

ORDER

1. The Defendant shall pay the Plaintiff the capital amount of R R1 400 000-00 (One Million Four Hundred Rand) for general damages

2. Payment will be made directly to the Trust account of the Plaintiff's attorneys of record details of which are as follows:

LENGAU ATTORNEYS TRUST ACCOUNT
FNB, BRANDWAG, BLOEMFONTEIN
ACCOUNT NO: 6[...]
BRANCH CODE: 230 534

3. Interest a *tempore morae* shall be calculated in accordance with the prescribed rate of interest Act 55 of 1975, read with Section 17(3) (a) of the Road Accident Fund Act 56 of 1996, 180 (one hundred and eighty) days from the date of this Order.

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, such Costs shall include the costs of the Counsel and reasonable preparation fees.

5.

5.1. The party and party costs, as agreed or taxed, shall be paid by Defendant directly into the Trust account of Lengau attorneys for the benefit of Plaintiff.

S.S. JONASE, AJ

On behalf of the Plaintiff: Adv. VM MOROBANE
Instructed by: LENGAU Attorneys
BLOEMFONTEIN

On behalf of the Defendant: Ms M BOOYSEN
Instructed by: STATE Attorney
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