

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

**CASE NO. CA 72/2022
NOT REPORTABLE**

In the matter between:

ASISIPHO PINKIE TYABAZEKA Appellant

and

ROAD ACCIDENT FUND Respondent

FULL BENCH APPEAL JUDGMENT

HARTLE J

[1] The appellant, with the leave of the Supreme Court of appeal granted on petition, appeals against the portion of the judgment and order of the trial court relating to the quantification of a general damages award in a MVA action. The judgment was delivered on 8 October 2021 in the Gqeberha High Court.

[2] The primary complaint is that the award resulted in under compensation and was substantially off the mark having regard to the nature of the serious injuries and *sequelae* suffered by the appellant. It was submitted that the trial court failed to apply its discretion judicially in that it ostensibly omitted to take into account *all* of the appellant's injuries and their *sequelae* (this indicated by the absence of any mention in the judgment, of a skull fracture or moderate traumatic brain injury which had been sustained by her), that it had underemphasized the complications arising from this injury despite compelling evidence having being tendered at the trial as to the neuropsychological impact to the appellant thereby, and that it had ostensibly

ignored comparable awards commensurate with the appellant's peculiar whole person impaired injury profile in getting to an appropriate quantum award.

[3] The respondent ("The Fund") did not oppose the appeal.

[4] Whilst waiting to cross a road the appellant, a grade 12 scholar at the time, suffered a horrific motor vehicle accident when she was pulled under a passing motor vehicle (a truck with a long trailer transporting wood pallets) by a hook protruding from it which caught on to her jersey. She was dragged for a short distance along the tar surface of the road by the motor vehicle. When she was finally disentangled from the truck, it rode over her back.

[5] Her pleaded injuries, confirmed by the evidence given at the trial and the admitted records and reports, included a skull fracture, a moderate traumatic brain injury, a fracture of the left humerus, a fracture of the tibial spine of the right knee, a left shoulder injury, abrasions over her forehead and temporal lobe, a neuropraxia injury to her left radial nerve and a valgus injury to her right knee with an associated meniscal injury.

[6] The trial court noted that the physical injuries had had a debilitating effect on her, not only by the scarring of her left upper arm which caused her embarrassment, but also inhibited her ability to walk long distances, stand for periods of time, sleep on her injured side, kneel, perform fine motor functions and skills or to deal on a more basic level with domestic tasks, which by the time of trial included caring for her baby.

[7] Whilst not including the head injury suffered by the appellant in the list of injuries suffered by her, the trial court yet acknowledged the evidence of Mr. Mark Eaton, clinical psychologist, given at the trial, that the appellant had suffered a "psychiatric injury and in particular post-traumatic stress disorder, a generalized anxiety disorder, major depressive disorder and personality disorders". It further emphasized that "in respect of personality disorders the plaintiff clearly as a result of the accident, sustained a detectible psychiatric injury. The court referenced Mr. Eaton's evidence that the acquired disorder would, in combination with cognitive

fallouts and chronic pain, “have resulted in significantly deleterious effects on the plaintiff’s personal, social, academic and future occupational function”.

[8] It was especially clarified in the testimony before the court by Mr. Eaton that the appellant’s depressed skull fracture had initially been missed in the medical records but the belated discovery of information confirming the injury and his engagement with her as to its impact could have left the trial court in no doubt that the significant abnormal psychological *sequelae* was what had capitulated her injury profile to a serious injury applying the Narrative test referred to in section 17 (1A) of the Road Accident Fund Act, No. 56 of 1966 (“RAFA”), read together with the relevant regulations promulgated under section 26 thereof (“The Regulations”).¹

[9] According to two final revised RAF 4 serious injury assessment reports, one prepared by Dr. PA Olivier and the other by Dr. PR de Bruin, both orthopedic surgeons,² Dr. Olivier found the appellant to be 28% whole person impaired (“WPI”),³ whilst Dr. de Bruin found her to be 26% whole person impaired.⁴

[10] Dr. Olivier it seems had revised his initial assessment evidently to include a reference to the appellant having the additional psychological *sequelae* according to the report of Mr. Eaton, who evaluated the appellant after he had filed his first RAF 4 assessment report.⁵

¹ GNR.770 of 21 July 2008 (Government Gazette No.31249) as amended by Notice R.347 (Government Gazette 36452 dated 15 May 2013).

² Both surgeons were acting in their capacity as “medical practitioners” undertaking the assessment in terms of section 17 (1A) of the RAFA read together with paragraphs 3 (1)(a) and (b)(ii) and (iii), (iv) and 3 (a) – (c) of the Regulations.

³ This figure was based on a combination of the scores for the appellant’s various injuries as per the “AMA Guides” (American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 6th Edition) read together with the Narrative test.

⁴ See footnote 3 above.

⁵ The initial assessment of the appellant took place on 13 February 2018 but Dr. Olivier’s RAF4 report was revised on 23 June 2021 to refer to additional documentation at his disposal, including the medico legal reports of Dr. de Bruin, orthopaedic surgeon, Mark Eaton, clinical psychologist, Letitia Strauss, occupational therapist, and Charles Apostolis, plastic and reconstructive surgeon.

[11] Dr. Olivier felt compelled to point out that the latter assessment in his view had had a significant impact on the WPI rating concerning the appellant, necessitating the filing of the amended RAF 4 form, to which he added the following paragraph:

“The client was evaluated by Mark Eaton, clinical psychologist. Based on the assessment, the accident resulted in long-term psychological sequelae. The client sustained a depressed skull fracture which was associated with a moderate traumatic brain injury. The client developed severe emotional reactions due to the trauma. She was diagnosed with generalised anxiety disorder as well as chronic major depressive disorder. The client has reached the maximum medical improvement period. Based on the assessment, the psychological sequelae resulted in a significantly deleterious effects on a personal, social, academic and future occupational functioning. Her amenities were significantly affected by the road traffic accident. Based on the assessment by Mark Eaton, the accident resulted in a GAF score of 41-50, which equals 15% WPI. Paragraph 5.3 of the Narrative test is applicable.”

[12] Dr. de Bruin also revised his RAF 4 report for the same reason to give recognition to the psychological *sequelae* suffered by the appellant.

[13] Ultimately the recommendation made by both Doctors Olivier and de Bruin is that the appellant qualified for general damages under paragraph 5.1 (serious long-term impairment or loss of a body function), paragraph 5.2 (permanent serious disfigurement) and paragraph 5.3 (severe long term mental or severe long-term behavioural disturbance or disorder) of the Narrative Test.

[14] We were referred in the exhibits bundle forming part of the appeal record, to an email communication written by the claims handler, Mr. Sonwabo Thibane, to the appellant’s attorneys dated 29 July 2021, in which he confirmed as follows:

“We accept seriousness and we issue (an) undertaking (in terms) thereof and concede merits. (W)e are still considering quantum”.

[15] Implicit in this is that the Fund accepted on the basis of the assessments undertaken in accordance with the relevant provisions of the RAFA and the Regulations, that the appellant's combined injuries had been correctly assessed as serious in terms of the method provided for in the Regulations.⁶ The fact that the orthopaedic surgeons expressed views about the appellant's head injury and its *sequelae* is neither here nor there because they were acting as "medical practitioners" undertaking the assessments within the meaning of the Regulations when they completed the RAF 4 forms on behalf of the appellant.⁷

[16] The acceptance of the "seriousness" (sic) would have established the jurisdictional basis for the trial court to have concerned itself with the appellant's claim for general damages at the trial⁸ after the offers made by the Fund in respect of her remaining heads of damages were rejected by her.⁹

[17] The Fund tendered a section 17 (4) undertaking concerning the appellant's future medical and hospital expenses. The action proceeded to trial on the remaining issues pertaining to quantum, namely past loss of income, future loss of income and general damages.

⁶ See Regulation 3 (3) (c).

⁷ See definition of "medical practitioner" in para 1, read together with para 3 (1)(iv) – (vi), of the Regulations.

⁸ *Road Accident Fund v Duma* (672/2014P) [2019] ZAKZPHC 15 (1 March 2019) at [19]; *Road Accident Fund v Faria* [2014] 4 All SA 168 (SCA) at para [35]; *Road Accident Fund v Lebeko* (802/11) [2012] ZASCA 159 (15 November 2012); *Maqhutyana & Another v Road Accident Fund* (CA 17/2020) [2021] ZAECHMC 30 (17 August 2021).

⁹ It appears from the appeal record that an offer was made and rejected on 3 August 2021. The matter stood down for an increased offer which was not forthcoming. The matter was thereupon postponed to 1 September 2021 for the leading of evidence by affidavit and further postponed on that date to 6 October 2023 when the trial commenced. It is expected that once that the Fund accepts the seriousness of the injury that it will make an offer for general damages. This is the import of section 17 (1A) (a) of the RAFA read with Regulation 3 (3) (c). (See also *Manukha v RAF* 285/2016 [2017] ZASCA 21 (24 March 2017) at para [22]). Although the recent dispensation concerning serious injuries and the Fund's obligation to compensate a claimant after the prescribed method has been employed envisaged that this process would be an administrative one in order to limit unnecessary costs of litigation to the Fund (I deal with this subject quite extensively in *Maqhutyana*, *Supra*), there is no obligation on a plaintiff to accept the offer of statutory compensation if he/she considers it to be unreasonable.

[18] During the pre-trial procedures the Fund recorded its admission that the appellant had suffered a serious injury and that she had therefore met the threshold to claim general damages. It further conceded the content of the RAF4 assessment reports as well as practically all of the medico legal reports prepared by the experts engaged by the appellant. It accepted the opinions expressed therein as well as the factual information relied on by each expert in reaching their conclusions.¹⁰ Causality was never an issue, not unsurprisingly since the acceptance of a serious injury profile according to the Narrative test envisages a whole person impairment as *a result of* the recognized and accepted injuries.¹¹

[19] On 19 August 2021, the appellant delivered a short supplementary expert report in respect of Dr. de Bruin as well as his revised RAF 4 report to repeat the significance of the psychological *sequelae* of the appellant's head injury. These reports should not have occasioned any surprise, neither would they have introduced new considerations as both are dated 25 May 2021. Although they were not among the admitted reports outlined in the parties' trial list of Admissions/Issues dated 4 August 2021, they preceded the Fund's acceptance of the seriousness of the appellant's injuries and speak to the doctor's earlier request to have accorded a 10% WPI factor to the AMA ratings for the separate injury based essentially upon Mr. Eaton's psychological assessment of the appellant, underpinning his revised total whole person impairment rating of her ultimately at 26%.

[20] The only report not admitted was that of the industrial psychologist, Dr. Michelle Nobre, which is not relevant for present purposes except to highlight from it

¹⁰ For the effect of such agreement see *Ncama v RAF* (3854/2012) [2014] ZAECPHC 74 (4 November 2014) which confirms that it is permissible to hand in the reports on such a basis without the need for additional affidavits attesting the contents. Indeed, in my view the accepted serious injury whole person impairment profile should suffice as a basis for a court to consider a suitable lump sum award and should, in order to curtail litigation costs, involve a "paper review" as it were by the court of the features of the specific injury profile as outlined in the RAF 4 form(s) and related medical reports.

¹¹ See in this regard the article by Nicolette Koch "How to qualify for general damages under the RAF Amendment Act under the Narrative Test option to qualify for general damages". *De Rebus*, November 2010.

her confirmation that the appellant's dream of pursuing her career of choice was irretrievably and agonizingly dashed as a result of the injury profile sustained by her.¹²

[21] The Fund also admitted the contents of the hospital records pertaining to the appellant's injuries which, *inter alia*, confirmed the moderate brain injury and skull fracture which had initially been left out of the reckoning in the serious injury assessment process.

[22] The Fund then bowed out and the trial court determined the remaining issues by way of default.¹³ The parties specifically agreed on 4 August 2021 upon how the further conduct of the matter would ensue:

“ISSUES:

- 7.1 The Honourable Court is to determine the following issues, by way of default and in the absence of Defendant being legally represented and by way of the evidence, in terms of a virtual hearing, admitted reports and affidavits placed before the Court by Plaintiff only, namely:
- 7.2 The quantification of Plaintiff's claim for general damages.
- 7.3 The quantification of Plaintiff's claim for past and future loss of income and/or loss of earning capacity.”¹⁴

[23] Apart from the reports and affidavits placed before the court, Mr. Eaton's testimony was, in conjunction with the content of his medico-legal report, that the appellant had sustained a skull fracture with moderate traumatic brain injury and that she had developed severe emotional reactions due to the trauma. In particular, she

¹² The import of the loss to the plaintiff, not in pecuniary terms, but as an amenity of life, speaks for itself.

¹³ The appellant's attorneys continued to serve pleadings on the Fund per sheriff after their legal representatives withdrew from acting. It is also clear that the appellant's legal representatives continued to engage with them by way of correspondence after their withdrawal throughout the conduct of the matter until its conclusion.

¹⁴ This is an extract from the parties' "Admission/Issues" recorded on 4 August 2021.

had perceived the incident as quite horrific and assumed that, in that instant, she would die.

[24] He diagnosed her with a generalized anxiety disorder as well as chronic major depressive disorder. He reported that the neuropsychological assessment results had shown that her premorbid intellectual functioning was in the average range but that she had acquired significant deficits that rendered her prone to below average to borderline functioning in non-verbal reasoning tasks.

[25] He opined further that the brain injury sustained by her in the collision was the reason why she was not able to pass matric (despite her repeated efforts to write the exam). In his view the damage was significant because of the nature and severity of the various physical injuries suffered by her.

[26] He added that the appellant was still suffering with ongoing pain and mobility restrictions and limitations due to her orthopaedic injuries as well as cognitive deficits and emotional disorders due to the depressed skull fracture and traumatic brain injury.

[27] Dr. de Bruin's admitted medico-legal report, as confirmed by affidavit, records that she underwent surgery to her arm on 18 August 2016 when a plate and screws were inserted to stabilize the fracture.

[28] Her right knee was placed in a brace.

[29] She received physiotherapy and occupational therapy.

[30] Her radial nerve injury led to a left drop wrist.

[31] Clinical examination revealed an unsightly scar over most of her left upper arm, a pulling sensation in her right knee during squatting and kneeling movements, slight swelling on the right knee in the form of an effusion, a loss of sensation over the dorsum of her left hand and reduced power in her left wrist.

[32] Ms. Laetitia Strauss, occupational therapist, performed an assessment of the appellant's injuries and found decreased muscle strength in her left arm, wrist, hand and wrist radial nerve injury, weakness in her right hip and right knee extensions with her right knee trembling during testing. Her physical and mobility impairments included ongoing pain in her left upper arm and right knee, impaired muscle strength of her left upper and right lower limbs, diminished sensation over the dorsal aspect of her left hand, unsightly scar on her left upper arm, decreased physical endurance, particularly in her right leg, impaired ability to lift, carry, pull and push items, increased difficulty with overhead work, increased difficulty with prolonged standing and walking, inability to run, severely impaired balance as a result of the impaired weight bearing ability of a right lower limb, some difficulty in respect of bed mobility, impaired ability to kneel, squat and crawl, and a right sided limp when tired.

[33] Dr. C Apostolis, plastic surgeon, found the appellant's scarring over her left arm to constitute a serious disfigurement.

[34] The appellant, 23 years old at the time of her testimony (she was 17 years when the collision occurred), herself testified that she had a 10-month-old baby and was unable to perform the majority of "care" tasks in respect of her child. She relies heavily on her mother to care for her baby. She lamented being unable to bathe, dress, feed or play with her baby due to her inability to use her left arm. She explained that she was unable to take her baby to the clinic because she is unable to walk far distances due to her knee injury. She added that she feels vulnerable as is unable to run and essentially only has one fully working arm. Her memory had been impaired to the extent that she cannot even recall her own identity number. Her hopes and ambitions to pass matric and achieve all the things she had wanted to do, further her studies, get a decent paying job, and improve her family's financial position, have been dashed. She feels sad a lot of the time. She is self-conscious by her scarring. Her physical injuries still pain in cold weather and limit carefree movement. She spent a considerable period being hospitalized for her injuries, was bed bound and essentially isolated from her family. The accident happened in a critical year of her young life when she was on the brink of completing her last year of school and looking forward to notching up tertiary education. She was devastated

that she was unable to write her final exam. Recalling her trauma caused her to be tearful on numerous occasions during her evidence.

[35] Appellant's counsel referred the trial court to the following comparable awards:

35.1 In *Mngomezulu v RAF*,¹⁵ the plaintiff sustained compound right tibia-fibular fractures, a closed chest injury with lung contusion, a 30-centimetre laceration on the right thigh and a post-traumatic organic brain syndrome. The plaintiff had reported the following *sequelae*: pain and weakness in the right leg when walking, mild memory difficulty, difficulty sustaining concentration, distractibility, had become impatient and irritable, mood swings of depressive phases, poor self-image or feelings of uselessness, disturbed sleep pattern with mid cycle insomnia, daytime fatigue, increase in rage, anxiety, diminished enjoyment of life and concerns about the future. The court had awarded R600 000.00 in respect of the plaintiff's general damages in 2011, equating to a present-day value of R1 106 000.00. At the time of the trial court's judgment, the value of the award was R984 000.00.¹⁶

35.2 In *Smit v RAF*,¹⁷ the plaintiff was a 27-year-old gardener who sustained a moderate to severe organic brain syndrome with post-traumatic associated frontal lobe symptomology and post-traumatic epilepsy, and fracture of the femur. He had significant difficulties with concentration, impulsivity, distractibility and reduced drive and endurance. He displayed marked diffuse neuropsychological deficits and difficulties with strong frontal lobe involvement. The femur fracture was treated by open reduction and internal fixation. He had difficulty standing for more than an hour and walking for longer than half an hour. He was unable to work as a gardener. The court awarded general damages of R650

¹⁵ 2012 (6A4) QOD 95(GSJ)

¹⁶ These values (and those in the next three sub-paragraphs) are in accordance with Koch's Quantum Yearbooks for each respective year.

¹⁷ 2013 (6A4) QOD 188 (GNP)

000.00. The present-day value of that award is R1 135 000.00. (R1 009 000.00 as at the date of the trial court's judgment.)

35.3 In *Raupert v RAF*,¹⁸ the plaintiff was a 20-year-old female photography student employed as a casual shop assistant. She sustained a head injury consisting of extensive skull fracture with bilateral low contusions. She demonstrated the direct effects of her brain injury mainly in terms of executive difficulties which prevented the effective use of her measured intellect, resulting in anxiety and depression with a marked reduction in self-confidence. She experienced memory problems, especially short-term memory loss and severe headaches. She was unlikely to reach her premorbid potential in the workplace and was likely to have problems in her interpersonal domain. The court awarded R750 000.00 in 2011 equating to a present-day value of R1 382 000.00. (R1 230 000.00 in 2021.)

35.4 In *Anthony v RAF*,¹⁹ the plaintiff was a 22-year-old female law student who sustained a moderately severe traumatic brain injury with subtle neurophysiological difficulties, orbital fracture, multiple facial lacerations and open wounds, bruising to the upper arm, broken teeth, a burst palate, severe scarring and disfigurement. Prior to the accident, she had above average intellectual capability which allowed for a good foundation for tertiary studies. Post-accident, the educational psychologist found that whilst her intellectual functioning remained in the average range, settled difficulties remained which it was found may compromise her productivity both at university and in the workplace, such as variable attention and concentration, impulsivity, proneness to careless errors, increased irritability, social withdrawal, reduced self-confidence. Her scarring included a surgical-trans coronal scar with loss of hair bearing skin, widened vertical scar of the forehead, widened scar of the left eyebrow and a scar of the left upper lip. She

¹⁸ 2011 (1) SA 452 (E)

¹⁹ (27454/ 2013) [2017] ZAGPHC 161

was awarded general damages of R1 600 000.00 with a present-day value of R2 127 000.00 and a value of R1 800 000.00 in 2021.

[36] The trial court remarked during the proceedings that the circumstances in *Mngomezulu* were markedly similar to the appellant's, although acknowledging counsel's comment as to the "profound loss" that she was suffering. Counsel had also submitted that the whole person impairment in *Raupert* was similar to her injury profile, albeit that the plaintiff's head injury in that matter was more severe. However, as counsel pointed out, the plaintiff in *Raupert* still had the full use of her limbs, unlike the appellant. There was the further dimension to it all that the appellant had full insight into her deficits. Notwithstanding these examples, which established a pattern of awards similar to her whole person impairment injury profile, when it came to determining an appropriate award, the trial court settled upon the amount of R750 000.00 as purportedly representing fair compensation for her injuries and *sequelae*, disfigurement, and loss of amenities of life.²⁰

[37] Apart from the omission of any reference to the head injury suffered by her in the judgment (the psychological *sequelae* was otherwise recognized), one is left to speculate why the court estimated this amount to be appropriate. The award is self-evidently a paltry one compared to the comparable ones that counsel had held up to it as providing a guide as to what might constitute suitable compensation for the appellant in all the circumstances.

[38] The sum total of the court's reasons for awarding the compensation which it did for the appellant's non-pecuniary loss arising from the accident are repeated below:

"[25] All that remains is to determine an amount in respect of general damages.

²⁰ Counsel had argued at trial that a fair and realistic award at the time would have been in the sum of R1 400 000.00.

- [26] Mr Frost (who appeared with Ms Westerdale for the plaintiff) referred me to various decisions²¹ which, it was contended, are comparable at least to a significant extent to the injury sustained by the plaintiff.
- [27] It was further submitted that an amount of R1 400 000.00 would be appropriate in respect of Plaintiff's claim for general damages.
- [28] Ultimately, one must exercise a discretion based on the particular facts at hand in determining a suitable amount which is commensurate with the injuries sustained and the after effects of such injuries.
- [29] There is no doubt that the Plaintiff suffered, and will continue to suffer for an extended period of time,²² impediments in her daily life, psychological as well as physical.
- [30] I have considered all the factors and in particular those advanced by counsel on behalf of the plaintiff and I conclude that a suitable amount for general damages would be the sum of R 750 000,00."

[39] It is a trite principle that an assessment of the amount of damages is a matter of estimation and a trial court has a wide discretion to award what it in the circumstances considers to be fair and adequate compensation to the injured party for his or her bodily injuries and their *sequelae*. In *Ncama*,²³ Eksteen J helpfully summarised the approach to be adopted in determining general damages in motor vehicle actions as follows:

"[25] In determining general damages the court is called upon to exercise a broad discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered, including their nature, permanence, severity and the impact on her lifestyle. In ***Sandler v Wholesale Coal Suppliers Limited*** 1941 AD 194 at 199 Watermeyer JA stated:

²¹ The court in a footnote recorded that it was unnecessary to refer to each of these authorities referred to by counsel. The implication thereby is that the court was however aware of their import.

²² The period was considered "extended" due to the appellant's young age.

²³ *Supra* at [25] – [26]

“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 upon the judge's view of what is fair in all the circumstances of the case.”

I agree with this general approach.

[26] There is no hard and fast rule of general application requiring the court to consider past awards as they are seldom on all fours with the facts of the case under consideration. Nevertheless, the court will generally be guided by awards previously made in comparable cases and will be alive to the tendency for awards to be higher in recent years than has previously been the case. In considering previous awards it is appropriate to have regard to the depreciating value of money due to the ravages of inflation. It would however be inappropriate to escalate such awards by a slavish application of the consumer price index. (See for example **AA Onderlinge Assuransie Assosiasie Bpk v Sodoms** 1980 (3) SA 134 (A).)”

[40] Because the outcome is a product of estimation and discretion, an appeal court is generally slow to interfere with the award of a trial court and cannot simply substitute its own for that of the court being appealed from. Interference on such a basis against an exercise of discretion is possible only if a discretion was not judicially exercised.

[41] Further, interference is only justified once it is concluded that there has been an irregularity or misdirection or where no sound basis exists for the award or where there is a substantial variation or striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made.

[42] For reasons that escape me it appears that the trial court may have missed the overall import of the serious injury whole person impairment profile accepted by the Fund. Otherwise, it is difficult to fathom why, if it had taken into consideration all the factors and particularly those advanced by counsel regarding the comparable awards, it missed the mark quite substantially in my view, and limited the award as it

did. Perhaps the court's gauge of what it ought to have been awarded was influenced by the figure apparently endorsed on the list of admissions by the claims handler for each head of damages.²⁴ Or perhaps it was because in a minute of the parties' pre-trial conference dated 8 February 2019 (preceding Mr. Eaton's supplementation of her injury profile) the appellant had coincidentally asked the Fund to agree that her general damages fairly amounted to R800 000.00. The trial court, in the reasons furnished in its judgment in respect of the appellant's failed application for leave to appeal against the award, was evidently not convinced that it had committed any misdirection or irregularity, yet at the same time did not amplify its reasons for granting the more limited award. Without any point of reference, it is difficult to support the approach it adopted.

[43] In the circumstances I consider that this court is at large to interfere on appeal and consider afresh the amount of damages awarded by the trial court.

[44] Having regard to the comparable awards relied upon by counsel again in this court, in my view an amount of R1 200 000.00²⁵ as general damages would have been imminently fair and realistic *at the time of valuation* given the profound loss of amenities suffered by the appellant, the loss of her youth and career prospects, her permanent disfigurement, limited use of her left arm, *sequelae* of the head injury as well as her retained insight in respect of her losses. The appellant is a young woman and the course of her life has been forever altered by the unfortunate and devastating collision. In the premises it is, I believe, appropriate to substitute the award for general damages accordingly.

²⁴ Ideally it would have been helpful to know what the Fund considered to be fair compensation from its perspective and vast experience of studying injury profiles. This court was however not privy to these endorsements.

²⁵ According to the inflation tool calculator for the South African Rand freely available on <https://www.inflationtool.com> to calculate the time value of money based on historical inflation and consumer price index values, the default calculation for an award of R1 200 000.00 in 2021 would in the current year equate to R1 343 171.25. Counsel argued, both on appeal and before the trial court, that an award of R1 400 000.00 represented fair compensation. I deal below with the further submissions sought from them in this respect.

[45] As for the issue of costs, it was not in contention at the trial that it was necessary for the appellant to be reimbursed for the costs of second counsel. The same consideration should be extended to her in the present appeal.

[46] Before concluding, it is a matter of great concern to us that Ms. Teko appeared on the morning of the trial having been instructed at the last minute by the Fund to “oppose” the appeal. Counsel informed us in chambers that the Respondent had the day before prepared an application for a postponement of the matter, but Ms. Teko’s instructions by the morning were that the Fund would not be persisting with such an exercise. This notwithstanding, when the matter was called in court, she again repeated that she held instructions to “oppose” the appeal, although how she was going to do that she conceded she could not say in the absence even of having been briefed with a full set of papers. Ultimately however she noted that she would remain in attendance under the auspices of a watching brief.

[47] She did not, nor could she have, inputted the issue of whether the trial court’s limited award of general damages should be confirmed, or the appeal upheld.

[48] The trial court also happened to remark that it was unsettling that the Fund did not appear in actions in which it was cited as defendant. Evidently the present action had been the fifth one on the day when the trial commenced where the Fund had made itself conspicuous by its absence.²⁶ Mr. Frost on behalf of the appellant bemoaned the Fund’s tendency to maintain its absence at trial, forcing a plaintiff to go to court on his/her own and requiring the court to hear evidence and decide matters for it.

²⁶ The court referred to this unacceptable practice in its judgment delivered in the separate matter of *Van Niekerk v RAF* (2922/2019) [2021] ZAECPHC 66 (8 October 2021) which was heard on the same day as the present matter. The fact that the actions proceed by way of default causes considerable difficulty where there is no consensus as to medical evidence or necessary admissions made to curtail proceedings. The courts are further notably inconsistent regarding when they will accept evidence on affidavit and when they will insist on oral evidence, often even if joint minutes of experts are available.

[49] He also lamented the fact that the Fund could not have been bothered to admit the report of Dr. Nobre without any reasonable basis therefor, ultimately forcing the appellant to lead her evidence under circumstances where at the trial there was no challenge to her report whatsoever. Likewise, it had been necessary to call Mr. Eaton both to give a context to the appellant's supplementation of her case to bring her injuries within the ambit of the Narrative Test and to highlight the seriousness of the injury, especially since Dr. Nobre in her report had essentially relied on Mr. Eaton's assessment. It was further plain from an affidavit put up by the appellant's attorneys what a logistical nightmare it had been to serve additional and/or supplementary reports, a notice of intention to amend, court orders and notices of set down on the Fund *via* the sheriff's office, coupled with the absence of any meaningful input from it after its attorney's withdrew, from which point they simply failed to make any further settlement proposals in the matter.

[50] It therefore struck me as odd that the Fund would brief an advocate to appear at the appeal (and incur unnecessary costs thereby) whereas it had failed to participate meaningfully at trial especially to limit the costs of the litigation in the first place.²⁷ This court would not be the first to criticise it for its wanton waste of public funds.

[51] It was envisaged that costs of litigation would be minimized and public expenditure by the Fund drastically contained by the new method introduced for the Fund to administratively assess whether injuries meet the threshold of seriousness and thereupon to make reasonable offers in respect of the desired statutory compensation without resort to litigation where possible.²⁸ The Fund in my view subverts that objective when their claim handlers or appointed legal representatives fail to put their heads and skill in the game.

[52] There is one final issue that bears discussing.

²⁷ A prudent approach would have required it to engage meaningfully, especially regarding an appropriate tender for general damages on the premise of the WPI rating for the plaintiff's peculiar injury profile.

²⁸ See *Maqhutyana & Another v Road Accident Supra* at [95] as well as footnotes 23, 32, 34 and 74.

[53] We called upon counsel to make additional submissions regarding whether the value of the award should be in the year 2021's terms (when the order of the trial court was made) or in present day currency terms and then, from what date interest should run.

[54] Counsel firstly argued against this court having regard to 2021 values, except for obvious comparison purposes. They drew attention to an excerpt from *SA Eagle Insurance Co Ltd v Hartley*²⁹ in support of their submission that when assessing comparable awards, adjustments should be made to the monetary value of those awards so that they are reflected in present day currency values in order to recognize the ravages of inflation. Thus, so they submitted, it would be incorrect to attempt to assess the general damages which ought to have been awarded in 2021 when the valuation of general damages is under consideration by the court in 2023.

[55] Counsel submitted that they could not refer us to any authority or case law in support of appeal courts using currency values of the past. On the contrary, so they submitted, even in instances where a court sitting on appeal has reduced an award on the basis of it having been too generous, it had regard to the purchasing power of the currency at the time of coming to its decision.

[56] In this respect, counsel referred to two examples in which present day values were awarded on appeal, the first in *Minister of Police v Dlwathi*,³⁰ and the second in *Mpondo v RAF*.³¹ In the latter matter (without any apparent discussion about the specific concerns raised by us in the present matter) it is indeed apparent that a full bench of this division considered the present day values of comparable general damage awards rather than the value of the awards at the time the trial court delivered its order being appealed against, which was on 19 May 2005. The court increased the appellant's general damages from R350 000.00 to R550 000.00 by setting aside the paragraph in the order of the trial court and replacing it with an order that "the defendant shall pay the plaintiff the sum of R550 000.00 in respect of

²⁹ 1990 (4) SA 833 (A) at 841 D – E.

³⁰ (20604/14) [2016] ZASCA 6 (2 March 2016) at pars 13 and 17

³¹ (CA283/2011) [2011] ZAECHC 24 (9 June 2011) at pars 24 – 26.

general damages". In confirmation of the present-day value being used by the appeal court in *Mpondo*³² counsel attached a copy of the relevant page from *The Quantum Yearbook 2023*³³ where the Mpondo award is listed as being R550 000.00 in 2011, that being the year in which the appeal was upheld.

[57] As for our query concerning interest on the award, counsel pointed out that the usual practice for appellate courts is to retain the date on which the court of first instance handed down judgment as the date on which the judgment debt of that court is due and payable. That this is the practice was confirmed by the Constitutional court recently in *Paulsen v Slip Knot Investments 777 Limited*,³⁴ having regard to an earlier decision in *Occupiers of Saratoga Avenue v Johannesburg Metropolitan Municipality*³⁵ in which the principle in *General Accident Versekeringsmaatskappy Suid Afrika Bpk v Bailey*³⁶ (the *Bailey* principle) was endorsed.

[58] In accordance with this principle a judgment debt is payable on the day upon which the trial court hands down its judgment, irrespective of whether the judgment is substituted on appeal. Where an appeal against a judgment succeeds and the amount of the judgment debt is thereby altered, it is not tantamount to a "new judgment". It is an amended judgment *which the trial court should have given*,³⁷ and such judgment is of force and effect retrospectively to the date of the trial court's judgment.³⁸

[59] Counsel noted that the relief sought in the present appeal is the usual "set aside and replace" type of order, that, as was observed in *Occupiers of Saratoga Avenue* merely corrects the order of the trial court which is best equipped to deal

³² *Supra*

³³ The Quantum Yearbook 2023 by Robert Koch

³⁴ 2015 (3) SA 479 (CC) at [96]

³⁵ 2012 (9) BCLR 95 1 (C) at 7 - 8

³⁶ 1988 (4) SA 353 (A) at 358 H – I

³⁷ *Occupiers of Saratoga Avenue, Supra*, at [7].

³⁸ *Bailey, Supra*, at 358H & 359H.

with the execution and enforcement of its own orders.³⁹ Accordingly, so they submitted, interest should run from the date of judgment in the trial court, as opposed to the date of the order of the appeal court.

[60] I accept that that is the correct approach, although in orders made under the RAF Act there is a subtle difference in that the act provides for interest at the prescribed legal rate to commence running 14 days from the date of judgment.⁴⁰

[61] The appellant cannot however in my view have it both ways: in other words, an award expressed in the value of money in the present year that notionally takes into account the ravages of inflation since 8 October 2021, plus interest on the adjusted amount calculated from the date of the substituted judgment debt (this in accordance with the *Bailey* principle), because that interest in itself is intended to prospectively address the ravages of inflation having regard to any delay in payment, including, in my view an appeal interposing.⁴¹

[62] Whilst it is so, as is indicated in *SA Eagle Insurance Co Ltd v Hartley*,⁴² that awards representing non-economic losses not susceptible of measurement in money (in other words general damages) must be reckoned at the time of their valuation (that is at trial) with due regard to the purchasing power of the Rand at the time of deciding that award, exactly to compensate for variations in the Rand's purchasing power between demand/summons and trial, once the award has been made it takes on the form of a "judgment debt". The exercise of the appeal court however (where that award is challenged on appeal) is to determine whether the trial court properly compared "comparables," keeping the 2021 currency values at the forefront of its

³⁹ *Supra* at [9]. The reason for enforcing the orders in the original court is said to be logical and practical.

⁴⁰ Section 17 (3)(a) of the RAF Act provides that no interest calculated on the amount of any compensation which a court awards to any third party shall be payable unless 14 days have elapsed from the date of the court's order.

⁴¹ See in this regard generally the approach adopted in *Drake Flemmer & Orsmond Inc and another v Gajjar* NO [2018] 1 All SA 344 (SCA). As was stated in that matter at par [57], the legal rate of interest is unlikely to under-compensate a plaintiff (appellant) as it is set at a relatively high level.

⁴²

determination. Therefore, the admonishment in *Hartley* that: “(s)uch a valuation must obviously be made in terms of currency values *as they are at the time of valuation*, and not in terms of the values of an earlier time⁴³ applies as a principle to the trial court determining the non-monetary loss for the first time.

[63] In conclusion, the very exercise upon appeal is to determine what the trial court ought to have found was an appropriate award of general damages in 2021 respecting the value of the rand at the time of trial, but, if that order is amended, whether upwards or downwards, to apply the *Bailey* principle in substitution of the impugned order.

[64] I am mindful that the Fund made no input with regard to the later submissions made by counsel and I do not intend to create any hard and fast principle concerning the rate and date from when interest must run pursuant to an order on appeal substituting an award made under the provisions of the RAF Act.⁴⁴ The Fund may also have its own views, predicated on the peculiar nature of the statutory compensation it must pay with limited public funds, regarding whether and how interim variations of the purchasing power of the rand ought to be addressed in scenarios like the present, which it should be encouraged to properly ventilate in an appropriate case. For present purposes however and having regard especially to the relatively short duration of the appeal process, I believe that this court is entitled to give effect to its own view as to what is just.⁴⁵

[65] In the premises, I issue the following order:

1. The appeal is upheld with costs, such costs to include the cost of two counsel, where so employed.
2. The judgment/order of the trial court is substituted in paragraph [31.2] thereof with the following sub-paragraph in its place: “In the amount of R1 200 000.00 in respect of the plaintiff’s claim for general damages”.

⁴³ *Supra* at 841 B - F

⁴⁴ What is clear from the provisions of section 17 (3) (a) of the RAF Act is that the recovery of pre-judgment interest is certainly precluded.

⁴⁵Section 2A (5) of the Prescribed Rate of Interest Act, No 55 of 1975.

3. Interest on the award is to be computed, in terms of section 17 (3)(a) of the Road Accident Fund Act, No. 56 of 1966, from a date 14 days after 8 October 2021, to date of payment.

B HARTLE
JUDGE OF THE HIGH COURT

I AGREE,

M JOLWANA
JUDGE OF THE HIGH COURT

I AGREE,

L RUSI
JUDGE OF THE HIGH COURT

DATE OF APPEAL:13 March 2023

DATE OF JUDGMENT:25 April 2023

Appearances:

For the Appellant:
instructed by

Mr. A Frost & Mrs B Westerdale
Boqwana Burns Inc.,
c/o N N Dullabh Attorneys,
Grahamstown
(ref. Mr Dullabh).

For the Respondent (on a watching brief only):
instructed by

Ms. A Teko
State Attorney,
Gqeberha
(ref. O Phillips).