

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

Case no: 4361/2018

In the matter between:

TEBOHO BEN SELESO

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 22 FEBRUARY 2022

DELIVERED ON: 25 FEBRUARY 2022

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 11:00 on 25 February 2022.

[1] The plaintiff instituted an action against the defendant as a result of bodily injuries sustained in a motor vehicle collision on 30 September 2017. On the day of this trial the merits were settled on the basis that the defendant is to pay 100% of the plaintiff's proven or agreed damages.

[2] The defendant further agreed to pay an amount of R 414 588.65 (Four Hundred and fourteen Thousand Five Hundred and Eighty-Eight Rands and Sixty-five cents) to the plaintiff for past and future loss of earnings and undertook to provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of future medical expenses.

[3] In these proceedings this court is only called upon to adjudicate the claim in respect of general damages.

[4] The following background information is relevant: In order to prove its damages, the plaintiff relied on the expert reports of Drs D Hoffman, a plastic, reconstructive and cosmetic surgeon; JP Marin, an orthopaedic surgeon. Both doctors also completed the RAF 4 Forms in respect of the injuries sustained by the plaintiff.

[5] It is common cause that according to the narrative test the plaintiff sustained serious injuries. He was diagnosed with cervical spine fracture as well as a tibia plateau fracture. On 13 October 2017, he underwent cervical 1 and cervical posterior fusion and bone graft. On 17 October 2017 and on 20 October 2017 he underwent C1-C2 posterior fusion and fusion of the C1/2 respectively. On 8 November 2017 he again underwent an open and internal fixation of the left tibia plateau.

[6] The radiology report from Burger Radiologists dated 6 September 2019 incorporated in the report of Dr Marin reveal the following:

“Cervical spine

- *Prominent mid and lower cervical spondylosis pathology with disc space and anterior degenerative spurs as well as neuro central osteophytosis.*
- *Evidence of previous C1-C2 posterior element injury with fixation of C1 and C2 posterior elements with wiring.*
- *Distortion of C1-C2 articulation with impression of probable previous base of dens fracture also present with subsequent modulation deformity.*
- *At the levels of spondylosis there is a neuro-central osteophytosis with biforaminal narrowing at C4-C5, C5-C6 and C6-C7 levels.c*

Lumber spine

- *Some early anterior degenerative spurring at the upper lumbar spine.*
- *No high grade wedge compression injury or bone destruction or sign of spondylosis or spondylolisthesis.”*

[7] According to the reports accepted in evidence, following the accident the plaintiff experiences neck pains and has developed headaches on the cervical spine. He experiences stiffness and cramps on the neck. Lifting heavy objects is a challenge as it is now difficult with the pain. On the lumbar spine area, it is reported that he experiences pain and further that the pain becomes exacerbated by cold weather.

[8] In the particulars of claim the plaintiff sues for a global amount of R1 050 000.00. The plaintiff alleges in the particulars of claim that:

“In terms of section 17(1)(a) of the Act, the Defendant is responsible to deal with all claims resulting from injuries sustained as a result of the negligent and unlawful driving of a motor vehicle.”

The particulars of claim in this matter are badly drawn and the necessary allegations have not been pleaded in terms of the rules.

[9] Uniform Rule 18(10) provides as follows:

‘A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of- (i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do); (ii) the enjoyment of amenities of life (giving

particulars); and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.’

[10] What is apparent from the settled issues considered with the disputed issue is that the plaintiff claims damages under different headings, *to wit*, future medical expenses, past and future loss of earnings and general damages hence.

[11] The summons does not disclose the amount the general damages are being claimed. The particulars of claim fall way below what is envisaged by Rule 18(10). The plaintiff failed to plead the nature and the extent of the injuries, the pain and suffering, loss of amenities, the disfigurement and so on. The particulars of claim were not drafted in such a way as would enable the defendant to assess the quantum claimed. It is difficult to understand why the defendant did not except to these particulars of claim.

[12] In an attempt to bring sanity to these particulars of claim, it is submitted in Heads of Argument of the plaintiff that he claims R500 549. 00 for loss of earnings and R800 000 for general damages. This would bring the amount claimed to be R1 300 549.00. This amount is clearly far above what is being claimed in the summons. The plaintiff did not seek to amend the particulars of claim. This court cannot grant relief beyond that which has been claimed and proven.

[13] It is settled that when considering general damages, a court has a wide discretion to award what it considers to be fair and adequate compensation for the injured party.¹ The court in *Marunga*² put it as follows:

“This Court has repeatedly stated that in cases in which the question permanent disability and loss of amenities of life arises a trial Court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the

¹ RAF v Marunga 2003(5) SA 164(SCA) at 169 E-F.

² Para 23.

injured party.” of general damages comprising pain and suffering, disfigurement,

[14] Both Counsels informed me that they had been unable to find any comparable awards comprising the injury of the cervical spine, the lumber spine and the knee injuries. It has to be borne in mind that the comparable awards only serve as a guide. The remarks in *Protea Assurance Co Ltd v Lamb*³ are instructive in which the following was said:

“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 factors which are considered to be relevant in the assessment of 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.”

[15] It is clear that the plaintiff still experiences headaches in his everyday life. He has scarring which is permanent. Before the collision he had no visible scars. Now that he has permanent scars this would invariable affect his self-esteem. The tibial plateau fracture was operated resulting in a 14cm long scar. The sequelae of the injuries have been set out in the radiology report as indicated above. The plaintiff is a shoemaker by trade and has to sit or stand for long hours in the performance of his duties. He has to obviously also bend for long hours when repairing shoes. He has now developed some form of degeneration on both the cervical and lumber spine areas.

³ 1971(1) SA 530 (A) at 536A.

[16] Having considered all the factors in this case, the past awards in broad and general terms, I am of the considered view that an amount R580 000.00 will be appropriate as compensation for general damages herein. I make this order:

ORDER

1. The defendant to pay the plaintiff the sum of R 994 588.65 in respect of:
 - a) Loss of earnings R414 588.65;
 - b) General damages R580 000.00;
2. The defendant to furnish the plaintiff with an undertaking in terms of s17(4)(a) of Act 56 of 1996 for future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supply of goods of medical or non-medical nature to the plaintiff and after the costs have been incurred and upon submission thereof) arising out of the injuries sustained in the collision which occurred on 18 September 2017.
3. The defendant to pay the plaintiff's agreed or taxed costs which shall include, but not limited to the following:
 - 3.1 The fees of Counsel
 - 3.2 The reasonable qualifying costs of the following experts:
 - 3.2.1 Dr Marin, an orthopaedic surgeon;
 - 3.2.2 Dr Hoffman, Plastic and Reconstructive Cosmetic surgeon;
 - 3.2.3 Ms Lindelwa Grootboom, Psychologist;
 - 3.2.4 Ms Rita van Biljon, Occupational Therapist;
 - 3.2.5 Dr AC Strydom, Industrial Psychologist;
 - 3.2.6 Mr Sauer, actuary.

P.E. MOLITSOANE, J

On Behalf of the Plaintiff:

Instructed by:

Adv Cross

VZLR

Bloemfontein

On Behalf of the Defendant:

Instructed by:

Ms. C Bornman

The State Attorney

Bloemfontein