

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]**

[Not Reportable]

CASE NO: 1306/13

Heard on: 14/08/19

Delivered on: 22/08/19

In the matter between:

PHUMEZA MTIKI

Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH

Defendant

JUDGMENT

NHLANGULELA DJP

[1] The motor vehicle in which the plaintiff was involved on 01 January 2010 has left her with a residual deformity which is described as kyphosis from T8-T11 of her spinal cord. That the cause of this injury was due to medical negligence on the part of the defendant's treating doctors is no longer in

dispute, the defendant having conceded only on 20 February 2019, at the door of this Court, that it is liable to compensate the plaintiff for damages as aforesaid. What now remains for determination by the court is the issue of the amount of damages to be paid.

[2] The issue of future medical expenses for the treatment of plaintiff's spinal cord had been agreed at R350 000,00.

[3] The Court having exercised its oversight duty was satisfied that the concession of liability and the agreement already reached with regard to the future medical cost of addressing the plaintiff's residual deformity was predicated on the correct legal bases. There will be no need to revisit such bases in this judgment.

[4] The issue which calls for determination by the Court pertains to the general damages. The Court has to decide which of the R400 000,00 or R200 000,00 as suggested by the parties respectively is a reasonable amount to be awarded for the injuries sustained by the plaintiff.

[5] The court saddled with a duty to assess general damages must exercise its own discretion –*Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199. Previous awards made by other courts in similar situations as that obtaining in the present matter must be taken into account, but without a comparative analysis thereof being used to hamstring the exercise of the court's discretion – *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (AD) at 535H-536A. Recognition has to be given to the fact that awards being made in recent times have been progressively higher than they were in the past owing to the value placed on individual freedoms and opportunity and rising standards of living – *RAF v Marunga* 2003 (5) SA 164 (SCA) at 170F-G. But the court must ensure that the award that it finally makes is not tantamount to an enrichment Scheme serving only to prejudice most defendants who are already confronted with the ever increasing vulnerabilities of the country's weak economy.

[6] In this case on 01 January 2010 the plaintiff was a passenger in a motor vehicle that was involved in an accident. As a result she sustained head injury and multiple fractures of her thoracic spine. She was admitted in Canzibe Hospital. The X-ray of her skull was reported as normal. And there were no sequelae from the head injury. The X-ray of the spine was assessed as showing kyphosis. But the plaintiff was merely given analgesics and anti-inflammatories and discharged on the following day. The backache persisted for about a year that required the plaintiff to visit the hospital continuously. The hospital clinic was unable to diagnose the seriousness of the injuries. The interventions that followed in 2013 revealed that the chronic pain that the plaintiff was suffering from was caused by fractures of D7-D11, with a marked wedge of D9. Although those fractures had healed, there was a residual kyphotic deformity of 45 degrees with an associated scoliotic deformity with lateral translation of the vertebrae. To correct this would require an osteotomy of the spine and an associated fusion at the cost of approximately R400 000,00.

[7] The plaintiff's condition is aggravated by physical inactivity such as collecting fire-wood or carrying water on her head. She was forced to leave school ever since her involvement in the motor vehicle accident in 2010.

[8] Both parties drew my attention to a variety of cases dealing with damages awarded in the past, but the majority of which bear little similarities to the case at hand. I mention one case of *Guy Ambrose v The Road Accident Fund* case no. 225/09 dated 01 June 2010 (ECHP) which I regard as being situated much closer to the merits of this case. In that case Mr Ambrose was awarded general damages in the sum of R200 000,00 for back injuries, having sustained a compression fracture of the 12th thoracic vertebra (T12) and a bilateral facet joint at the T12/L1. The conversion of R200 000,00 in 2018 by 1,518 factor per R1 of the award would give a value of approximately R303 600,00. Under our depressed economic conditions the CPI would not have grown by any significant rate in 2019.

[9] In the light of the facts of this case and the available guidelines as derived from the case of *Ambrose*, I am of the view that a sum of R350 000,00

is the appropriate general damages to be awarded in favour of the plaintiff. To that figure must be added the agreed R350 000,00 for special damages. The costs of suite will follow the result.

[10] In the result the following order shall issue:

1. The defendant is to pay to the plaintiff the sum of R700 000,00 (seven hundred thousand rand) for damages, as a result of the negligent treatment of the plaintiff by the defendant's employees at the Canzibe Hospital, on the 1 January 2010.
2. The defendant is to pay the aforesaid sum within sixty (60) days of this order, failing which the defendant shall pay interest on the aforesaid sum until date of final payment.
3. The defendant is to pay the plaintiff's agreed or taxed High Court costs as between party and party, such costs to include, but not limited to the travelling, accommodation and preparation costs of the plaintiff's counsel.
4. The plaintiff shall allow the defendant sixty (60) days to make payment of the taxed costs.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the plaintiff : Adv. S.Y. Malunga

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