



REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

|                                         |
|-----------------------------------------|
| (1) REPORTABLE : YES / NO               |
| (2) INTERESTED TO THE JUDGES : YES / NO |
| (3) REVISED                             |
| 26/6/17<br>DATE                         |
| SIGNATURE                               |

CASE NO: 2391/2015

In the matter between:

**MPATI MAMMA JUDITH**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**MOKGOHLOA DJP**

1. The plaintiff who was 25 years old at the time, sustained severe bodily injuries in a motor vehicle accident which occurred in Matlala Road, Polokwane on 1 March 2014. The accident occurred when the driver of the vehicle in which the plaintiff was a passenger, lost control of the vehicle, hit the bridge and overturned. As a result of the injuries sustained in the collision, the plaintiff suffered damages and instituted action against the defendant for the recovery of such damages.



2. At the commencement of the trial, I was informed that the defendant conceded the merits and acknowledged that it was liable to compensate the plaintiff for such damages as the plaintiff was able to establish that she has suffered in consequence of the injuries which she sustained in the collision. In addition, the defendant furnished the plaintiff with an undertaking in terms of s17 (4) (a) of the Road Accident Fund Act<sup>1</sup> in respect of the plaintiff's future medical treatment and the costs of the appointment of a carer. In the circumstances, what remains to be determined is the plaintiff's claim for loss of earning capacity, both past and future, and general damages.
3. The plaintiff alleges that he has suffered injuries to her face and left ankle as a result of the accident. She complained about:
  - pain on the left ankle;
  - intermittent swelling of the ankle;
  - she cannot run;
  - she is not coping at the gym; and
  - she experiences discomfort with chewing.
4. The defendant has admitted that the plaintiff sustained all these injuries and the sequelae too.
5. I was handed a bundle of medico-legal reports and I was advised that all these reports were admitted by the defendant. The admission, I was advised, entails an admission of the correctness of the conclusion arrived at and the opinions expressed in these reports.
6. These reports set out the nature, extent and degree of severity of the various injuries and their sequelae. In this regard I was referred to the reports of Dr Ramushu, an orthopaedic surgeon; Dr I Malipfani, a radiologist; Dr Mazwi, a neurosurgeon; Mrs Edzisani Sodi, a clinical psychologist; Dr Mabongo, a maxilla – facial and dental surgeon, Ms Patronella Radzuma, an

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<sup>1</sup> 56 of 1996



occupational therapist; Prof M Tshifularo, an ear, nose and throat specialist; and Mr Herbert Smith, an industrial psychologist.

### **Loss of earning capacity**

7. It is common cause that the plaintiff passed a Grade 12 and has a diploma in bookkeeping. At the time of the accident she was working as a supervisor in a debt collecting company in Polokwane. When the company closed down in Polokwane relocating to Gauteng, the plaintiff was retrenched. This was due to her continuous sick leave. She was not favourably considered and was not kept on as an employee
8. Dr Malepfani consulted with the plaintiff on 17 July 2015 and completed the RAF 4 form. He diagnosed her with a right ankle soft tissue injury and facial disfigurement. He noted that her right ankle was still swollen and had a mildly reduced range of movement. Dr Malepfani calculated the plaintiff's WPI at 8%. On 20 February 2017 the orthopaedic surgeon calculated her combined WPI at 11% and noted that the plaintiff qualifies for general damages.
9. On 17 February 2017 the plaintiff consulted with Dr Mazwai a neurosurgeon who noted the plaintiff's injuries as: head injury, left forehead laceration, mandible fracture, right ankle fracture, upper hip laceration and left facial abrasions. Noting these injuries, Dr Mazwai concluded that the plaintiff has severe disturbances in employability; significant permanent residual memory disturbances; and severe difficulty with concentration.
10. On 20 February 2017 the plaintiff consulted with an occupational therapist Ms P Radzuma who after noting her injuries and assessing her concluded that:

*"She presented with poor physical endurance with physical repetitive work that is within sheltered employment throughout the evaluation. Her performance in standardized*



*physical assessments falls within sheltered employment and open labour market rate and she reaches this with reasonable accommodation in the form of regular rest breaks and this makes her less competitive in the open labour market rate.*

*She is suited for sedentary work and light work with reasonable accommodation. Her injury was in 2014/03/01, she has reached the MMI and it is opinion that her condition is likely to improve for her to reach a competitive score in various physical assessments, her condition is likely to worsen as she ages”.*

11. According to Ms Radzuma, even though the plaintiff is qualified as a bookkeeper, she was not able to secure related employment as a manager after the accident. This was due to her having difficulty meeting the demands of her work which was sedentary with some elements of light work.
12. On 2 March 2017 the plaintiff consulted with an industrial psychologist Mr H Smith. After referring to other expert reports, Mr Smith concluded that the plaintiff's likelihood to find alternative employment which will suit her compromised condition is nil. He further concluded that the plaintiff's likelihood to find employment in the open labour market in her condition is equally nil. According to Mr Smith, the plaintiff is considered to be unemployable.
13. Mr Smith referred to the plaintiff's work history and in particular that she was retrenched on 30 September 2016. He therefore stated that the plaintiff suffered loss of earnings from 1 October 2016 until her retirement age of 65.
14. Based on Mr Smith's conclusions, the actuary calculated the plaintiff's loss of earnings to R1 574 500-00 without contingency deduction



## Contingencies

15. As stated earlier, the defendant does not dispute the plaintiff's injuries and sequelae thereof. However, Mr Maphela, for the defendant, argued that there is a possibility that the plaintiff can do administrative work. He therefore submitted that a higher contingencies of 40% on future loss of earning should be applied.
16. Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount or specific claim<sup>2</sup>. Contingencies include any possible relevant future event which might cause damage or part thereof or which may otherwise influence the extent of the plaintiff's damage.
17. Colman J provided a useful exposition of the approach to be adopted by the court in *Burger v Union National South British Insurance Co*<sup>3</sup> as follows:

*"A related aspect of the technique of assessing damages in this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 per cent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very*

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<sup>2</sup> *De Jongh v Gunter* 1975 (4) SA 78 (W) at 80F

<sup>3</sup> 1975 (4) SA 72 (W) at 75 D-F



*satisfactory way of dealing with such difficulties, but no better way exists under our procedure."*

18. But the difficulty with this approach was appreciated by Margo J in *Goodall v President Insurance Cc Ltd*<sup>4</sup> when he stated:

*"In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office."*

19. Ms Radzuma, the occupational therapist reported that:

*"Her work as a manager as a dept collection company was sedentary work which is productivity based and she struggled to meet the demands of her work post injury and when the company was downsizing and closing smaller branches, effective employees were absorbed and the rest retrenched.*

*She was a manager and yet she was not absorbed when the company downsized and this correlates with her report that she was not meeting the demands of her work post injury.*

*Her overall performance falls within open labour market rate and her performance in the individual tests falls within sheltered employment and protected employment rate. Her performance indicates that she is suited for purely sedentary work with limited physical demands."*

20. The industrial psychologist reported that from his perspective, the plaintiff is considered unemployable.

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<sup>4</sup> 1978 (1) SA 389 (W) at 392 H – 393 A



21. Weighing up all the evidence in the expert reports, I am satisfied that the plaintiff's earning capacity in an injured stage has indeed been affected. In my view an appropriate and reasonable contingency of 25% should be applied on plaintiff's future loss of earnings and 5% on past loss of earnings.

### **General damages**

22. The plaintiff was taken to hospital with the following injuries: head injury, left forehead laceration, upper lip laceration, left facial abrasions, right ankle fracture, and mandible fracture. According to the records, she had a brief loss of consciousness and amnesia and her GCS was 15/15 in keeping with a mild head injury. A plaster of paris was applied on her right ankle and lacerations were sutured. She was discharged the next day.
23. She has a left forehead disfiguring scar, a significant permanent residual memory disturbances and has difficulty with concentration. She still experiences pains on her jaw and right ankle, and suffers from chronic headaches.
24. Mr Mashabela, for the plaintiff, submitted that an award of R700 000-00 represents a fair quantification of the plaintiff's claim for general damages. He submitted that an award of this amount would be in keeping with awards made in similar cases where the plaintiffs sustained similar injuries to those sustained by the plaintiff herein. On the other hand, Mr Maphela for the defendant, submitted that an award of R400 000-00 would be appropriate. I was referred to a number of decide cases. I found the following comparable cases more illuminating and helpful in my assessment of the plaintiff's general damages.
25. In *Seme v Road Accident Fund*<sup>5</sup> a 36 year old male was awarded R1 million in general damages (R1, 642 million in 2017). He sustained severe head and brain injury, fractures of the maxilla and multiple loss of teeth, bilateral pulmonary contusion, fractures of the right tibia and

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<sup>5</sup> 2008 (5A4) QOD 33 (D)



fibula, compound fracture of the left knee, multiple scalp and facial lacerations, dislocation of the right elbow as well as the lumbar spine and pelvis. Plaintiff was found to be permanently disabled and wheelchair bound.

26. In *Abrahams v Road Accident Fund*<sup>6</sup>, a 41 year old male suffered a badly communicated fracture of the right proximal femur; fracture of the right distal fibula and patella, fracture of the right medial malleolus, severe soft tissue injuries to the left hand; secretion in the chest and a mild concussive traumatic head injury; shortening of the right lower limb with need to wear an assistive device. He was awarded general damages of R663 000-00 (in 2017 terms).
27. The courts have repeatedly stated that the exercise of assessing and awarding damages for fatal and bodily injuries is less exact and in arbitrio iudicis<sup>7</sup>. As Watermeyer JA (as he then was) aptly put it in *Sandler v Wholesale Coal Supplies Ltd*<sup>8</sup>:

*"In considering that question it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. 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".*

28. That still remains the legal position. In determining a fair compensation, the courts have regard to a number of factors which, as with awards in comparable cases, inflation and changes in the value of money are problems arising from collateral benefit. It is clear from the abovementioned cases that the plaintiffs suffered serious injuries to varying degrees. The sequelae and

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<sup>6</sup> 204 (7J2) QOD 1 (ECP)

<sup>7</sup> *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A)

<sup>8</sup> 1941 ad 194 AT 199



aftermaths of their injuries also differ in a marked degree. Of equal importance is the difference in their age and gender. Be that as it may, all of them suffered disability, loss of amenities of life, enduring pain and suffering and discomfort although to varying degrees. To the extent that guidance may be derived from comparable cases, I have given careful consideration to them.

29. On consideration on all the facts of the present matter and awards previously made in similar matters I have concluded that an award in the amount of R450 000-00 would present a fair compensation.

30. I therefore find the plaintiff's proven damages to be:

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|------|------------------|---------------|
| 29.1 | Loss of earnings | R1 187 715.00 |
|------|------------------|---------------|

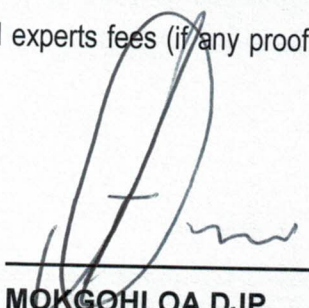
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| 28.2 | General damages | R 450.000.00 |
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R1 637.715.00

**31. In the premises, I make the following order:**

1. The defendant shall pay the plaintiff the sum of R1 637 715.00
2. The defendant is ordered to pay the cost of the suit, including costs of counsel for preparation, travelling time, accommodation (if any) and appearance, and the defendant is also ordered to pay the reasonable taxable preparation, reservation and experts fees (if any proof thereof) as well as the costs of obtaining the reports of the experts.



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**MOKGOTHOLOA DJP**



## **REPRESENTATIONS**

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|------------------------------|--------------------------------------|
| 1. For the Plaintiff         | : Mr Mashabela                       |
| Instructed by                | : Mashabela Attorneys Inc            |
|                              |                                      |
| 2. Counsel for the defendant | : Mr Maphelela                       |
| Instructed by                | : Mathobo, Rambau & Sigogo Attorneys |
|                              |                                      |
| 3. Date of hearing           | : 18 May 2017                        |
|                              |                                      |
| 4. Date handed down          | : 26 June 2017                       |