

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2004/1897

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 05 September 2024

SIGNATURE

In the matter between:

NGALO MOJALEFA JAMES

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NHARMURAVATE AJ

Introduction

- [1] This is a third party claim where the Plaintiff had sued the Road Accident Fund who is the Defendant herein for an accident that took place on the 3rd of February 1999.

- [2] This matter is Defended by the Road Accident. All other heads of damages have been settled between the parties. The only issue remaining is that of general damages.
- [3] The Plaintiff is arguing for the payment of R800 000.00 whereas the Defendant is arguing for an amount of R600 000.00. Both parties filed heads of argument in this regard .The Plaintiff also moved a rule 38(2) for the expert reports to be considered on affidavit which was granted by this court .

BACKGROUND FACTS

- [4] In or around the 3rd of February 1999 near Ontdekkers Road at Newlands the Plaintiff was involved in a motor vehicle accident. The Plaintiff at the time was a passenger in a motor vehicle driven by Mr. J Luus with registration number K[...]. Their vehicle collided with an unidentified vehicle on the date.
- [5] It is as a result of this accident that the Plaintiff sustained a severe head injury with brain contusions and multiple facial lacerations. In light of these injuries the Plaintiff attended several experts who were appointed by the Defendant at the time.
- [6] The Neurosurgeon, Dr Y Osman is the primary expert relating to head injuries opined that:

“It is apparent from the history obtained and the clinical examination of the patient and the available clinical records that this patient had sustained a rather severe brain injury. The patient had been rendered unconscious at the scene of the accident. He required intubation by the paramedics at the scene of the accident. A brain scan done showed subarachnoid hemorrhage, focal contortion in the basal ganglia and some oedema.

The patient was in ICU and extubated himself. That he was restless he had to be restrained a number of times and for a number of days he pulled out his

catheter and he also pulled out the condom catheter and the balloon inflated and inflicted an injury to his urethra, he also wet his bed.

This patient had a rather prolonged period of post traumatic amnesia. He believes that he was discharged six months after the injury. He is vague and his history is not consistent. At one stage he reported that he has no wife and no children. At another stage he reported that he has one child. On the basis of the available information, it is my opinion that the patient had sustained an extremely severe brain injury which has resulted in significant long term neuropsychological, neural behavioral and cognitive problems the patient has no insight into his injuries. (own emphasis)

In my opinion this patient is not employable in the open labour market”

- [7] This report and findings by Doctor Osman were also supported by the Clinical Neuropsychologist- Digby Ormond Brown who assessed the Plaintiff and compiled a report on the 5th of November 2018. He also opined as follows that:

“Mr Ngalo sustained an exceptionally severe traumatic brain injury as discussed in detail in my original report. The evidence in that regard is absolutely rock solid and should be common cause in this matter. (own emphasis)

- [8] The Clinical Neuropsychologist appointed by the Plaintiff reiterated the opinion shared by the Defendant’s expert Dr Osman a Neurosurgeon who interviewed the patient at least twice and compiled his second report on the 4th of April 2018. They both agree that the Plaintiff suffered a severe head injury.

Expert evidence

- [9] It is trite law that where experts agree, issues become common cause meaning all parties are *ad idem* as there are no differences. In the matter of **S v Gouws**¹

¹ 1967(4) SA 527 (EC) 528D

it was held that: *“the prime function of expert seems to me to be to guide the court to a correct decision on conditions found within his specialised field ...”*

[10] The Defendant’s own expert agreed that the Plaintiff sustained a severe head injury. Exceptional circumstances need to exist for a party to repudiate agreements made by their experts. It has been pronounced in several matters that expert or opinion evidence is admissible when the court can receive appreciable help from that witness on that particular issue². That will be when *“by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of facts. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion but the help of an expert would be very useful...”*³

[11] In the matter of Cooper the court went further to state that the nature of the expert opinion represents his reasoned conclusion which is based on certain facts or data which are either common cause or established by his own evidence of an expert opinion represented by his reasoned conclusion based on certain facts or data, which are either common cause, or established by the own evidence or that of some other competent witness.

[12] In my opinion, I am therefore satisfied that the Plaintiff at the time sustained a severe brain injury which rendered him mentally incapacitated as opined by the experts in the matter.

ANALYSIS OF THE MATTER

[13] The Plaintiff in this matter has since demised sometime in November 2023 after the close of pleadings. The Defendant is liable to compensate him through his late estate. The Plaintiff regard being had to the heading of general damages argued that an award of R800 000.00 is reasonable. He relied on various cases considering the injuries sustained by the deceased.

² Wigmore on the principles of evidence and tradition VOL VII para 1923

³ Coopers South Africa Pty Ltd v DGFS MBH 1976 (3) SA 589 AD AT 616H

[14] One of the cases highlighted was that of **Rademan v Road Accident fund**⁴ where the court awarded an amount of R 800 000.00. This case also relied on **Mngomezulu v Road Accident Fund** where the claimant was an administrative clerk who sustained a moderate head injury, classified as diffuse moderate to severe traumatic brain injury that has led to neuro-cognitive difficulties and neuro- behavioral problems. He also had a compound tibia fracture, closed chest injury with long contusion. Mr Sewpersath for the Plaintiff argued that injuries in Rademan and Mongomezulu were almost similar to those suffered by the Plaintiff if not more. There the court awarded an amount which was valued around R885 000.00 which he currently valued at 1000 000.00.

[15] The award of general damages is within the court's discretion. The court is required to exercise a wide discretion in order to make out what is a fair and reasonable award that will adequately compensate the claimant for the pain and suffering and loss of amenities, having regard to all the relevant facts and circumstances connected with him or her, as well as the nature of the injuries sustained, the possible permanence thereof, the severity and the impact on the claimant's lifestyle⁵.

[16] Mr. Ngomana for the Defendant in rebuttal argued that the Plaintiff claimed an amount of R800,000.00 in respect of general damages and that therefore his claim is limited to that amount. He further submitted that the reports relied upon were all stale dating back to 2018 and 2019, his view was that an appropriate award in this matter since the Plaintiff is deceased is R600 000.00. He contended that the cases relied on were not equivalent to the cases relied on by the Plaintiff.

[17] The Defendant in support of its argument relied on Du Bois⁶ wherein the court held that *"the award to be made would have benefited the claimant during her*

⁴ (88060/2015) [2019] ZAGPPHC 451 (1 September 2019)

⁵ 2003 (5E8) QOD 1 (AF)

⁶ Du Bois v Motor vehicle accident fund 2016 (5) SA 240 (GJ)

lifetime and it would have been used to alleviate her lot in life or bring pleasure or consolation. Further, the fact that the award to be made for the claimant's suffering, will ultimately devolve on her heirs, influences this court on the conservative side of what it should award the plaintiff for the claimant's pain and suffering. It is trite that the award of general damages must be fair to both Plaintiff and the Defendant." In the Du Bois matter, similar to this matter, the deceased was 55 years old at the time of the collision and 58 years old at the time of his demise. Similar to this case, it appears that the deceased was never married and that the cause of death was natural causes.

[18] The Defendant argued that compensation for general damages should be limited to the duration of time between the date of the injury up to the date of the claimant's demise. In support of his contention Mr Ngomana relied on the matter of **Radebe v Hough**⁷, wherein the court held that the amount awarded depends on the extent of pain and suffering caused by the delict and further that the pain can only exist only in so far as it is experienced.

[19] My view on the matter is that the argument raised by the Defendant is flawed in that their very own report speaks of a severe head injury which cannot be denied. The fact that the reports are stale does not assist in this matter as the Defendants could have also caused addendums to be done on their report/s or even appoint new experts before the death of the deceased. It is a very opportunistic argument to make when Dr Osman, the Defendant's own Neurosurgeon compiled his report for the second time in 2018 and that nothing had changed as per his opinion. It is my view that nothing much would have changed regard being had to the mental status of the deceased.

[20] In my view, the Plaintiff passed away in November 2023 whereas the accident occurred in 1999 when the deceased was 41 years old. The Defendant had at least 24 years to at least try and settle the claim of the deceased before his demise. The deceased endured pain and suffering for at least 24 years before his demise. The case relied on by the Defendant, the claimant there had

⁷ 1949 (1) SA 380 (A) AT 285

endured pain and suffering for at least 5 ½ years before his demise.

[21] The core function of the Defendant is to compensate the deceased and not to make a consideration of the claimant's suffering based on how long he/she lived with that specific injury before their demise. Even if this court were to agree with the Defendants approach of specifically looking at the number of years the Plaintiff suffered before his demise, the deceased spent 24 years with a severe head injury which caused him to be severely incapacitated mentally in such a manner that he was not employable in the open labour market.

[22] The injuries sustained by the Plaintiff are almost similar to Torres v Road Accident Fund from Corbett & Honey Vol 6A4-I, wherein the Plaintiff suffered a severe diffuse brain injury and soft tissue injuries to the neck, face and chin in a motor vehicle accident. The head injury resulted in significant neurocognitive and neuro-behavioural deficits associated with concentration, working memory, impulse control and abstract reasoning. It also resulted in depression and adjustment disorder. An award of R600 000.000 was granted which is currently valued at an amount of R1050 000.00.

[23] It is my view that the maximum amount claimed of R800 000.00 is fair and reasonable under the circumstances⁸.

THE SUBSTITUTION

[24] The deceased was substituted by Seiso George Ngalo who was appointed through a letter of authority dated the 10th of May 2024. The letter of authority only reflects furniture (movable) to the value of R 5 000.00 (five thousand). The court then made an inquiry as to why the Master was not informed of the claim the deceased had against the Road Accident Fund as the value thereof exceeds R250 000.00. There was no clear answer from the Plaintiff's Counsel.

⁸ In Protea Assurance Co Ltd v Lamb SA (1) 530 (A) at para 534H -535A, it was held that:

'It is settled law that the trial Judge has a large discretion to award what he in the circumstances considers to be a fair and adequate compensation to the injured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a "substantial variation" or as it is sometimes called a "striking disparity" between what the trial Court awards and what this Court considers ought to have been awarded.'

[25] It is my view that, in terms of the letters of authority the substituted person does not have authority to continue and/or settle or received the said funds without being appointed as the executor of the deceased's estate. Seiso George Ngalo is only the Matser's representative who is only authorized to deal with the deceased furniture valued at R5 000.00.(five thousand)

[26] The Plaintiff's Counsel then submitted that there was a *curator ad litem* in the matter who can be substituted and continue until finalisation of the matter. The *curator at litem* was appointed by Honorable Wepener J on the 12th of March 2013 and he was bestowed the following powers:

"2.1 To rectify any step taken on behalf of M J Ngalo.

2.2 To complete and sign the necessary claim forms to be submitted to the Road Accident Fund, to draft and or obtain the necessary documents to be used as unexcused to the said claim forms to take all necessary to take all reasonable necessary steps to obtain information required and to instruct attorneys.

2.3 To incur all expenses reasonably necessary to complete the set forms.

2.4 To institute action & all documents pertaining to the institution and prosecution thereof .

2.5 To seek legal advice and to instruct attorneys and council for the purposes of litigation.

2.6 To conclude and or rectify any fee agreement with attorneys.

2.7 To settle the matter if so advised subject to the approval of this honourable court.

2.8 To pay their reasonably necessary disbursements including the fees of the attorneys council and expert witnesses.

2.9 To incur all expenses reasonably necessary to carry out investigation and to institute and prosecute the action.

2.10 To report to end approach this honorable court for the appointment of a curator broadly and or the creation of a trust....

[27] In my view Advocate Michael Fisher was only appointed as *curator ad litem* to Mojalefa James Ngalo. Further, the duties bestowed on him do not extend

beyond the grave. The court order would have reflected as such if that was the case. Therefore, the *curator ad litem*'s duties in this regard ceased upon the death of the Plaintiff. Mr Seiso Ngalo in my view is not empowered to perform the duties of an executor without the authority from the Master.

[28] Curator *ad litem* has no power over the person or property of the person whom he or she is appointed to represent and his or her authority extends no further than the proceedings to which his or her appointment relates⁹. The curator *ad litem* is responsible only to the court for the proper discharge of his or her functions for the patient appointed to in this regard the deceased¹⁰.

[29] The value of the deceased's claim as contained in the combined summons exceeds the maximum amount of R250 000.00 for an appointment of a Master's Representative in terms of section 18(3) of the Administration of Estates Act 66 of 1965. Appropriate steps should have been taken by the deceased's legal representatives to ensure that Mr Seiso George Ngalo is appointed as an executor in the deceased estate and that he is substituted accordingly to proceed with the deceased claim against the Defendant.

[30] Having found that the *curator ad litem* is barred from proceeding with the deceased claim upon death of the deceased, and that Mr Seiso Ngalo was not properly appointed by the Master as the executor of the deceased's estate. I am however mindful that this is an old matter concerning an accident that occurred in 1999. A total period of 25 years has since lapsed from the date of accident. Even Mr Seiso Ngalo who was appointed as a Masters Representative is also of an advanced age, 61 years old. Our Constitution implores courts when adjudicating on matters to ensure that they protect the rights enshrined in the Bill of Rights and to ensure that decisions made are in the interest of justice, especially the elderly and disabled.

[31] I have considered that dismissing the claim on the basis of no *locus standi*

⁹ F du Bois (ed) *Wille's Principles of South African Law* 9th ed (Cape Town: Juta),

¹⁰ *Ex Parte Campher* 1951(3) SA 248 (C).

based on a lack of letters of executorship from the Master is not in the interest of justice as it will have an effect of causing further delays taking into account the length of time required for one to obtain another trial date. The issue relating to the quantification of general damages has already been argued before me and I have already made a determination that an amount of R800 000.00 is a fair and reasonable compensation for the deceased's general damages. Setting the matter down again will result in wasting already strained resources in arguing issues that have already been ventilated.

[32] In light of the fact that the matter is very old and there was an attempt in complying with the law by the Masters Representative albeit deficient, it is my view that this matter be finalised with specific directive for Mr Seiso Ngalo to upgrade his letter of authority to letters of executorship before payment of capital can be made by the Defendant.

[33] This court is prepared to award general damages pending the appointment of an executor of the deceased estate.

[34] In the result I make the following order that:

1. The Defendant is liable to pay an amount of R800 000.00 in respect of the Plaintiff's claim for general damages.
2. Mr Ngalo is directed to apply for the letters of executorship from the Master of the High Court in respect of the deceased's estate of MJ Ngalo.
3. The payment of the amount of R800 000.00 referred to in paragraph 1 shall be payable once Mr Seisi Ngalo obtains the said letters of executorship and submits the said letters of executorship to the Defendant.
4. The Defendant shall pay the costs on party and party scale with Counsels fees on scale B.

**NHARMURAVATE AJ
JUDGE OF HIGH COURT
JOHANNESBURG**

For the Applicant: Adv Sewpersath

Instructed by:

For the Respondents: Mr Ngomana

Instructed by: The State Attorney: Johannesburg

Argument took place on 5 June 2024

Date of judgment: 05 September 2024