

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

CASE NO: 38854/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 16 October 2024

In the matter between:

BALOYI: NYIKO ZANE

PLAINTIFF

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA DEFENDANT

JUDGMENT

ALLY AJ

[1] This matter comes before this Court as an action for damages arising out of the injuries sustained by the Plaintiff on 1 July 2016 whilst the Plaintiff was a passenger of train owned and/or operated by the Defendant. The merits of the action having been finalised by this Court before my brother Macume J who found that the Defendant is 100% [one hundred percent] liable for the Plaintiff's proven damages.

[2] The hearing proceeded by the Plaintiff being called to testify in respect of his damages suffered as a result of the injuries sustained.

[3] After the testimony of the Plaintiff had been concluded, Plaintiff's Counsel called an Occupational Therapist by the name of Mary Portia Shokoane. The witness was sworn in and before hearing testimony, Defendant's Counsel objected to Ms Shokoane's testimony on the basis that the witness was not the author of the report that the Plaintiff intended to hand up to the Court. Defendant's Counsel submitted that the testimony of the Ms Shokoane amounted to hearsay evidence and on this basis was inadmissible.

[4] Counsel for the Plaintiff submitted that it would be shown that Ms Shokoane was indeed the author of the report and was also part of the Joint Minute signed by Occupational Therapists.

[5] After hearing submissions regarding the testimony of Ms Shokoane and pointing out to Plaintiff's Counsel that the report is signed by a certain Ms Phophi Jessica Mudau and no valid reason has been submitted why this person cannot testify, Counsel for the Plaintiff was requested to take instructions regarding the way forward in respect of the trial.

[6] After an adjournment, Counsel for the Plaintiff made certain submissions regarding the need to postpone or that submissions could be made regarding general damages. In particular, on the aspect of general damages, Plaintiff's Counsel submitted that the pre-trial minute signed by the parties provides that the parties agree as to the extent of the injuries of the Plaintiff as well as the sequelae¹.

[7] When this point was brought to the attention of Defendant's Counsel, he was unable to convince the Court that the Defendant should not be held to what was agreed in the pre-trial minute² and the Court ruled that based on the pre-trial minute, submissions could be made in respect of the amount that the Court should award for general damages.

¹ Caselines: Section 009 pages 59-60

² MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizinga & Ano 2010 (4) SA 122 (SCA)

[8] The Court adjourned to the next day to hear argument on the amount to be awarded for general damages.

[9] Plaintiff's Counsel submitted that a fair and reasonable amount to award in respect of general damages in this case is between R550 000-00 and R800 000-00. Defendant's Counsel submitted that the amount of between R200 000-00 and R300 000-00 would be a fair and reasonable amount.

[10] It is trite that the awarding of an amount for general damages is within the discretion of the Court based on the evidence before it as well as considering comparable case law. It must be stated, however, that no two cases are alike and that comparable cases merely serve as a guide for the Court³.

[11] The Joint Minute of the Orthopaedic Surgeons reflects that the Plaintiff suffered a left ankle grade III compound fracture.

[12] Defendant's Counsel submitted that should be cautious in awarding an amount for general damages and that one must be mindful of over-compensating. Defendant's Counsel submitted that a fair and reasonable amount for general damages would be between R200 000-00 [two hundred thousand rand] and R300 000-00 [three hundred thousand rand] as indicated above.

[13] Plaintiff's Counsel on the other hand argued for a much higher amount to be awarded and a fair and reasonable amount would be between R550 000-00 [five hundred and fifty thousand rand] and R800 000-00 [eight hundred thousand rand] as stated above.

[14] Having regard to the submissions of Counsel and the comparable cases as well as the caution outlined in the **Protea Assurance case**⁴, I am of the view that a fair and reasonable amount for general damages is an amount of R500 000-00 [five hundred thousand rand].

³ Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A) @ 535H – 536B

⁴ supra

[15] In respect of the costs of this action, there is no reason to deviate from the norm of the costs follow the result. Accordingly, the Defendant is liable for the costs of the Plaintiff. It is my view, however, that all the expert reports dealing with the loss of earnings or earning capacity should not be awarded at this stage and should be dealt with at the time this head of damage is finalised.

[16] Plaintiff's Counsel prepared a Draft Order which excludes the amount for general damages which has now been inserted but has included expert reports that have been excluded in this judgment and accordingly have been excluded in the Draft Order.

[17] Accordingly, the following Order shall issue:

a). The Court Order marked "X" is made an order of Court

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **16 October 2024**.

Date of virtual hearing: 7 and 8 November 2023

Date of judgment: 16 October 2024

Appearances:

Attorneys for the Plaintiff	:	Z & Z Ngogodo Attorneys Inc Chepape@ngolawjhb.co.za
Counsel for the Plaintiff	:	Adv. F. Matika
Attorneys for the Respondent	:	Jerry Nkeli & Associates Attorneys Refiloe@jerryinkelilaw.co.za