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

Case Number: 07136/2013

Date of Hearing: 29 & 30 October 2024

Date of Judgment: 3 February 2025

- REPORTABLE: NO
 - OF INTEREST TO OTHER JUDGES: NO
 - REVISED: YES
- 3 February 2025

LIVHUWANI VUMA

In the matter between:

Adv FF DOCRATI NO in her capacity as Curator ad litem obo TRUSHA CHESNEY NAIDOO	Plaintiff
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and

ROAD	ACCIDENT	FUND
Defendant		

JUDGMENT

INTRODUCTION

[1] On 16 July 2009 at approximately 15h30 and on Athol Road, Highlands North, Johannesburg, a collision occurred between motor vehicle with registration numbers T[...] 5[...] G[...] being driven by Helena Petronela Huvers (“the first insured driver”)

and motor vehicle with registration numbers N[...] 8[...] G[...] being driven by Kaylin Naidoo (“the second insured driver”).

[2] Trusha Chesney Naidoo (“the plaintiff / Trusha”) was a passenger in the motor vehicle being driven by the second insured driver at the time of the collision.

[3] The plaintiff instituted action for damages against the Road Accident Fund (“RAF”) in terms of s17(1)(a) of the RAF Act 56 of 1996, as amended, as the statutory insurer. In paragraph 9 of the plaintiff’s 2015 amended particulars of claim the plaintiff claimed damages in respect of:

3.1	Past hospital and medical expenses	R110 000.00
3.2	Estimated future medical expenses	Undertaking
3.3	Future loss of income inclusive of Future loss of employability	R6,590,827.00
3.4.	General damages	R700 000.00
TOTAL		R7,400,827.00

BACKGROUND

[4] On 29 October 2024 the plaintiff filed a notice in terms of rule 28(10) of the Uniform Rules of Court (“URC”) amending the quantum claimed in 2015 in respect of the general damages to an amount of R1 6000 000.00. The defendant opposed the proposed amendment. I reserved judgment in respect hereof.

[5] Prior to the matter serving before me on 29 and 30 October 2024, the defendant had conceded liability. All the heads of damages bar the general damages had already been expedited one or another. On 13 December 2016 Trusha was awarded the sum of R6,300,436.00 for Past and future loss of earnings. On 25 June 2020 His Lordship Wanless AJ set aside and substituted the decision of the Health Professions Council of South Africa (“HPCSA”) and declared Trusha’s injuries to be serious, further declaring that Trusha is entitled to general damages.

[6] ISSUE FOR DETERMINATION

In light of paragraph 5 above, the only issue remaining for determination by this court is the quantum in respect of the general damages.

PRELIMINARY ISSUES

[7] Ms D Goodenough appeared for the plaintiff and Mr T Ngomana for the defendant.

[8] At the commencement of the trial, *i.e.*, on the very morning of the trial, the defendant's counsel raised two *in limine* issues namely:

- a. That the declarator made by the review court (Wanless AJ) on 25 June 2020 in terms of which the court set aside and substituted the decision of the HPCSA and declared Trusha's injuries as being serious and further that Trusha's is entitled to general damages was *ultra vires*. In light of the binding and final nature of the HPCSA's decision/s, the review court ought to have, it was argued, limited itself to only the setting aside of the HPCSA's decision and referred the matter back to the HPCSA for the matter to be heard *de novo* or reconsideration; and
- b. On the basis of the submission in paragraph 6.a above, the defendant thus argued that this court lacks jurisdiction to hear this matter and that it ought therefore to refer the matter back to the HPCSA for reconsideration. It was further submitted that the reason why the defendant withdrew its notice to oppose the plaintiff's 2020 application for the review of the HPCSA's decision was due to its apprehension that the review court would limit itself only to the reviewing and setting aside of the HPCSA's decision whilst simultaneously ordering the reconsideration of the impugned ruling by the HPCSA. It was submitted that this court must in the premises order the removal of this matter from the roll pending the rescission application by the defendant. To this end, the defendant tendered the wasted costs.

[9] In resisting the defendant's *in limine* issues, the plaintiff's counsel raised multiple points; that, firstly, the defendant withdrew its notice to oppose the plaintiff's 2020 review application, this despite the plaintiff's Notice of Motion including a

paragraph seeking the review court to substitute the HPCSA's decision with its own. Hence the review court substituted the HPCSA's ruling having found the existence of exceptional circumstances entitling it to do so. Secondly, the HPCSA had equally withdrawn its notice to oppose the review application accompanying its withdrawal notice with a notice to abide by the review court's decision.

[10] The plaintiff further argued that the defendant was acting *mala fides* in light of the fact that it also admitted the issue of the general damages in the pre-trial minute signed on 7 February 2023. She also submitted that even when the plaintiff applied for the matter to be declared trial ready for the allocation of a trial date, the defendant did not oppose same nor raise the issue of remitting the issue to the HPCSA for reconsideration. She submitted that in the absence of the defendant not having withdrawn its admission in the pre-trial minute in regard to the plaintiff's entitlement to the general damages, the defendant is bound by its admission. She further argued that the defendant was simply intent, to the plaintiff's prejudice, on wasting the court's time with its frivolous preliminaries, further submitting that if this court was with her on her submissions, it therefore stands to reason that its jurisdiction to hear their matter was above board. She asked for the dismissal of the defendant's points *in limine* with costs on a punitive scale.

[11] On their end the plaintiff brought an application in terms of rule 28(10) of the Uniform Rules Of Court ("URC") to amend the claimed general damages amount to be increased from R700 000.00 (SEVEN HUNDRED THOUSAND RAND) to R 1 600 000.00 (ONE MILLION SIX HUNDRED THOUSAND RAND), arguing that the defendant will not suffer any prejudice considering that it had not made any offer to the plaintiff hitherto. Rule 28(10) allows for an amendment at any stage before judgment. The defendant opposed the proposed amendment, arguing that the defendant stands to suffer prejudice and further that the application was defective in that it was, *inter alia*, not compliant with rule 28(1) of the URC. Even before the defendant had noted its objection to the proposed amendment, the plaintiff had already effected the amendment by uploading the amended pages onto Caselines at 09:15, the defendant added. The plaintiff apologised for the uploading and committed to removing the uploaded amended pages there and then. The plaintiff ought to accordingly withdraw its proposed application and bring a substantive one

given the substantial amount sought by the proposed increment, the defendant further argued.

[12] In regard to the defendant's *in limine* points, I considered them and found them to be a total waste of the court's time, having taken into account of course, *inter alia*, the age of Wanless AJ's review judgment, almost four years at the time of the hearing of the *in casu* trial. It is common cause that when moving this application before me the defendant had not even filed their papers yet to challenge the now impugned review judgment. Accordingly I dismissed the application with costs on a punitive scale against the defendant.

[13] As regards the plaintiff's proposed amendment application, I reserved my judgment as already stated in paragraph 4 above.

EXPERT REPORTS

[14] Both the plaintiff and the defendant had filed their expert reports in 2015 and 2016 respectively.

THE PROCEEDINGS

[15] To establish a causal link between the accident and the injuries sustained by the plaintiff and the sequelae thereof and for purposes of the plaintiff's general damages claim, the plaintiff argued her entire case placing by reliance on the judgment by the honourable Windel J ("Windel J"). She argued that this is so in view of the fact that the defendant did not defend the said case in which her expert witnesses (the plaintiff's) also testified and their medico-legal reports were accepted as evidence by Windel J. For the record the said hearing involved head of damages not serving before this court. The plaintiff thus argued that to the extent that the said expert evidence remains unchallenged, it must therefore prevail and be binding upon this court. She argued that it is in line with this apprehension that she dispensed with the requirement to bring an application in terms of rule 38(2) of the Uniform Rules of Court in terms of which a request to a court to allow evidence to be presented in the form of an affidavit or to read a witness's affidavit during a trial is made. She submitted that it is for the above reasons that she will be placing reliance

on the findings by Windel J in her case since her experts evidence remains uncontroverted. The reverse of this apprehension, plaintiff argued, means that the defendant cannot rely on and/or use its own experts reports since there was, *inter alia*, no affidavits by the said experts in respect of their reports nor such experts being present/available in court to testify *viva voce*.

[16] The defendant objected to the plaintiff's suggested approach and view, arguing that in fact the plaintiff was imposing the Windel J judgment upon this court, arguing further that in the absence of rule 38(2) application before this court, the plaintiff's witnesses, experts and all, must give evidence before this court so as to afford this court to make its own judgment call regarding the evidence to be relied on by the parties. Rather, the defendant further argued, the plaintiff should have let Windel J adjudicate over the issue of the general damages instead.

[17] Having considered the submissions by both counsel and the evidence that served before Windel J as presented by the plaintiff and accordingly accepted as such by Windel J, I came to the conclusion that the said evidence, to the extent of its relevance in so far as the general damages claim is concerned, is accepted as evidence before this court. With this appreciation, I resultantly deal with the relevant expert reports hereinafter.

[18] The plaintiff's experts are the following:

[19] **Dr E. Schnaid (Orthopaedic surgeon)**

19.1. Dr E. Schnaid stated the following:

19.1.1 That according to the plaintiff herself she was involved in a motor vehicle accident whilst being a passenger in a motor vehicle that collided with another motor vehicle. She was transported to Linksfield Clinic by an ambulance and hospitalised for approximately three days.

19.1.2. She had sustained:

- a. Fractured right radius and ulna;
- b. Soft tissue injury of the cervical spine;
- c. Soft tissue injury of the lumbar spine; and

- d. Head injury with loss of consciousness for a few minutes.

19.1.3 Treatment received:

- a. X-rays;
- b. Cervical collar given to immobilise the cervical spine;
- c. Analgesics;
- d. Open reduction internal fixation of the right radius and immobilisation of forearm; and
- e. 2010 removal of the fixation.

19.1.4. He stated the plaintiff's status at the time of her examination on 7 April 2014 as follows:

She had pain in the cervical spine with radiation into right shoulders with pain in the lumbar spine and the right forearm as well as headaches. The pain is weather related. She couldn't walk long distances or sit or stand for long periods or run. She couldn't climb stairs and cannot lift or carry heavy objects. She was depressed and experienced pins and needles in the right hand.

19.1.5. Amenities:

Prior to the accident, she used to swim. This she no longer does. She can manage daily household chores, although with difficulties.

19.1.6. On examining the plaintiff, the Doctor noted:

The Head, Neck & Cervical spine to be intact. The carotid pulses are palpable. On examination of the cervical spine, the plaintiff was noted to have a 30 degrees restriction of all the cervical movements with pain that has persisted since the accident in 2009. Her cervical symptoms will persist despite treatment.

Forearms/ Elbows/Hands/Wrists

10cm anterior surgical scar on the right radius. 30 degrees supination and a 30 degrees pronation deficit of forearm.

Lumbar spine

The plaintiff was unable to touch her toes. All lumbar movements are restricted to 30 degrees. Bilateral straight leg raising 45 degrees. Decreased sensation in the left thigh. In late middle age, nerve impingement and instability may develop requiring a lumbar fusion

19.1.7. Pain, suffering, amenities and permanent damage:

- Re Pain and suffering, the pain the plaintiff endured was severe. She still experiences pain in the cervical spine, lumbar spine and right forearm with associated headaches.
- Re Amenities, these have been negatively affected. She can manage household chores although with difficulty, all ambulatory as well as manual functions will be restricted.

19.1.8. The Doctor's summary is that the plaintiff sustained multiple injuries in a motor vehicle accident in 2009. The plaintiff now has pain in the cervical spine radiating into right shoulders, lumbar spine and right forearm with associated headaches. A poor outcome from the suggested treatment can be anticipated. There is a serious long term impairment with a loss of body function.

19.1.9. Lastly the Doctor notes that he agrees with Dr R.F Scott's X-Rays' findings.

[20] **Mr Chris Sampson (Clinical Psychologist/ Neuropsychologist)**

20.1 Mr Chris Sampson noted the following:

- 20.1.1. That Trusha complained of post-concussive headaches, associated dizziness, nausea, visual impairment, forgetfulness, emotional reactivity and that in light therefore post-traumatic stress disorder would be expected to have a further negative impact on her coping.

20.1.2. Psychologically and psychiatrically, Trusha is left more vulnerable than before the accident. She presented with a number of neuro-behavioural and psycho-emotional symptoms which included but not limited to somatic concerns, mood changes, personality changes, apathy, reduced tolerance frustration, chronic fatigue, decreased motivation and drive, irritability, lack of enthusiasm, and a detached disinterested attitude. In addition from test observation poor self-monitoring, poor self-regulation, low task perseverance and decreased ability to inhibit impulsivity were also evident. All of the aforementioned symptoms were suggestive of psycho-organic changes brought about by the head injury.

20.1.3. He noted that the neurosurgeon, Dr Segwapa, has diagnosed a mild concussive injury. However, he (Mr Sampson) notes that the current research by the Centre for Disease Control ("CDC") in Ontario states that there are a distressing number of cases which are not consistent with the popular held expectation that all individuals with mild head injuries recover. *"..Many people with mild traumatic brain injury ("MTBI") have difficulty returning to activities and may be unable to return to work for many weeks or months..."*.

[21] **Dr Conrad Visser (Psychiatrist)**

21.1 Dr Conrad Visser stated that his addendum report is drawn from the psychological report prepared by Ms Maluleke on behalf of the defendant and the neuropsychological assessment report drawn up by Mr Chris Sampson, Trusha's clinical psychologist.

21.2 Accordingly, he noted the following:

21.2.1. That Trusha suffered the following injuries in the accident: Fractured distal right radius and ulna; soft tissue injuries of the cervical and lumbar spines; and that Trusha's account is consistent with the occurrence of mild concussive head injury.

21.2.2 That Trusha was a psychologically vulnerable individual before the accident, although overt pathology had not manifested. The emotional and behavioural disturbances in keeping with Borderline Personality emerged following the psychological trauma of the accident and her responses to physical injury, like the loss of her ability as a swimmer. Although a different stressor might have precipitated her psychopathology at any time following the accident, in her unique case, the index accident- and its consequences- has proven to be that precipitant. At the time of her examination in 2016, her emotional and behavioural disturbances were serious.

[22] **Ms Anoett Rossouw (Occupational Therapist)**

22.1 Ms Anoett Rossouw stated that she examined Trusha on 13 May 2014 and based her examination on the medico-legal report of Dr Schnaid, the orthopaedic surgeon and the RAF1 form. From her examination, she posited the following:

22.1.1. In regard to the headache:

- Symptoms reported: Occipital frontal headaches aggravated with involvement in sedentary postures or activities.
- Diagnosis: Neck pathology (by Dr Schnaid)
- Clinical findings: 1. Tight para-spinal spasm is palpated at the neck with trigger points at C2 and C5.
2. Pronation and supination is limited in the mid to end ranges.
- Functional: 1. Neck pain or headache was not reported or elicited on the day of the evaluation.
2. Considering the clinical findings and spasm, it is likely that she experiences muscle-skeletal pain and tension headaches as reported to be aggravated with tolerating static postures.

22.1.2. In regard to the right arm:

- Symptoms reported: Cramping, stiffness and pain aggravated with involvement in activity and cold weather.
- Diagnosis: Restricted pronation and supination.
- Clinical findings: 1. Right arm: 9cm surgical scar on the radial area of the right arm and a 9cm surgical incision scar on the dorsal ulna area.
2. Pro and supination is limited in the mid to end range.
3. No atrophy or swelling is measured.
4. Grip strength of the right dominant hand is expected to be stronger and is slightly diminished and below the norm ranges at both hands.
- Functional: 1. Pain at the right arm was not elicited or reported when tolerating consecutive writing for 12 minutes.
2. Pain was elicited during light to medium load lifting and carry to affect her at the right elbow to a level 8/10 indicated...
3. She has functional dexterity and hand function but mild pain at the right wrist is reported when tolerating intermittent dexterous tasks after 15 minutes at a level of 3/10 indicated.
4. The impact of limited range of motion of professional swimming could be addressed and commented on further by a Biokineticist.

22.1.3. In regard to the lower back:

- Symptoms reported: Lumbar pain aggravated with bending or long standing or sitting. with involvement in activity and cold weather.
- Diagnosis: Lumbar pathology by Dr Schnaid.

- Functional: Pain is reported to affect her more on the right. Pain is specified to be on the right thoraco-lumbar upon arrival at a mid-level of 3/10. Pain aggravates to a level of 7/10 when tolerating stooping for light physical work. During dynamic lifting and carrying pain at a level of 6/10.

22.1.4. In regard to the right knee:

- Symptoms reported: Mechanical aggravation of pain.
- Diagnosis: Deferred to the Orthopaedic Surgeon.
- Functional: 1. Mechanical knee pain is elicited and reported during squatting to a level of 6/10.
2. She compensates with increased weight on the left leg during repetitive squatting.

22.1.5. In regard to the Psychosocial: Trusha reported symptoms of anxiety and depression that seems to be related to the accident under review. Ms Rossouw deferred to the Clinical psychologist.

22.1.6. In regard to the Cognitive/Neurological:

- Symptoms reported: Difficulty with memory.
- Diagnosis: Deferred to the Neurosurgeon and Clinical Psychologist specialising in Neurology.
- Clinical findings: She has a functional physical neurological ability.
- Functional: Functional ability demonstrated to meet open labour standards for basic administrative task with adequate memory.

22.1.7. In regard to life amenities:

- Trusha was involved in an accident and sustained a concussive head injury as well as injury to the spine, dominant right hand and right knee that resulted in persisting pain and functional limitations.

- She was a competitive swimmer at the time and due to the injury to the right arm was unable to continue at the pre-morbid level and she eventually gave up despite several attempts to resume participation in the sport. She feels it caused disruption to her future and professional swimming career. It is conceivable that with the limited range of motion at the arm that her strokes would be affected. It should be commented on further by a sport specialist.

- She experiences persisting mechanical spinal pain, headaches and limited ability to care for her toddler due to the pain. She is not responsible for strenuous domestic tasks that she avoids and also experiences functional limitations. She is likely to depend on some assistance for as long as symptoms persist.

- She experienced significant emotional psychosocial suffering due to the sequelae of the impairment and functional limitations experienced. She had failed suicide attempts. Ms Rossouw defers this aspect to a clinical psychologist. The quality and enjoyment of life is compromised and affected by the sequelae of the injuries sustained in the accident.

[23] **Ms Rosalind Macnab (Educational Psychologist)**

23.1 Ms Macnab stated the following:

23.1.1. That whereas Trusha's pre-accident intellectual ability was probably one of high average ability, her post-accident profile reveals areas of neuro-cognitive deficits which will inevitably thwart her future academic progress. Her deficits as outlined by the educational and neuropsychological assessments will inevitably result in her inability to manage post-matric studies. To date she has attempted to complete a diploma in travel and

tourism but was unable to complete her studies. As a result, her occupational potential has significantly been impacted.

- 23.1.2 There is no history of learning problems or mental illness in the family.
- 23.1.3. Pre-morbidly, Trusha had never suffered a head injury nor lost consciousness and there was no history of febrile convulsions, brain-related diseases or epileptic seizures.
- 23.1.4. Post-accident, Trusha had been hospitalised after a suicide attempt in her Grade 12 year (2012). She was admitted to Lenmed Clinic in Lenasia after an overdose. She remained there for a week and was prescribed anti-depressant medication as well as sleeping pills. She reported that she was prescribed a month's supply of anti-depressants and when they were finished she did not renew the prescription. Trusha reported that this was her third suicide attempt.

[24] **Dr L.F. Segwapa (Neurosurgeon)**

24.1 Dr Sekwapa stated that:

- 24.1.1. Pre-accident, Trusha enjoyed a healthy physical life. Her accident-related injuries are:
 - a. Head injury
 - She sustained a mild concussive head injury as confirmed by reported transient period of amnesia and the fact that she was experiencing headaches , which implies there was a cranial impact.
 - b. Spinal injury
 - She sustained soft tissue injuries to the cervical and lumbar spine.
 - c. Skeletal injury
 - She also suffered fracture of the right radius and ulna-opinion deferred to the orthopaedic surgeon.

24.1.2. Post-accident, Trusha has no neuro-physical impairments. Her post-accident status is the following:

a. Neuropsychological

She has neurocognitive impairments and depressive disorder with suicidal ideations.

b. Future complications

The risk of developing epilepsy is currently the same as that of the normal population.

c. Future medical treatment

- She will require further management of the headaches, which require analgesics.
- The cervical spine disease can be managed conservatively with analgesics and physiotherapy. There is a 5% chance that surgical intervention in the form of fusion amongst others will be required in the future.
- The lumbar spine disease can be managed conservatively with analgesics and physiotherapy. There is a 5% chance that surgical intervention (which includes among others discectomy and instrumentation with fusion) will be indicated in the future.

d. Pain and suffering

- Trusha suffered acute pain for 2 weeks after the accident.
She has suffered chronic pain to date.
- She is suffering from post-concussion headaches. It is well documented in the neurosurgical literature, Dr Segwapa states, that $\pm 80\%$ of patients suffering from post-concussion headaches recover within 2-3 years. However $\pm 20\%$ of patients remain with the chronic symptoms.

e. Amenities of life

She lost amenities of normal living since being involved in the accident.

THE PLAINTIFF'S LIST OF AUTHORITIES

[25] These are some of the authorities relied on by the plaintiff:

1. **M v Road Accident Fund (514/2019) [2024] ZANCHC 21 (8 March 2024)**

The 2024 valuation awarded is R1 200 000.00 for general damages to a minor boy who had suffered mild to moderate head injury; headaches; aggression; personality disorder change; memory loss; neurocognitive and neuropsychological problems; permanent brain injury; broken left leg; back injury; hearing loss and vertigo.

2. **Tyabazeka v Road Accident Fund (CA 72/2022) [2023] ZAECMKHC 48 (25 April 2023) (Full bench Appeal)**

The 2024 valuation awarded is R1 441 000.00 for general damages to a 17 year old girl who was in Grade 12 at the time of the accident who had suffered a skull fracture; moderate TBI; orthopaedic injuries; nerve damage; bad scarring; PTSD; psychiatric injury; anxiety disorder; major depression; pain; and left drop writ.

3. **Masemola v Road Accident Fund [2023] ZAGPPHC 553; 17336/2017 (2 July 2023)**

The 2024 valuation awarded is R1 248 000.00 for general damages to a 36 year old woman who has suffered a mild TBI; broken leg; both shoulders injured; post traumatic osteo-arthritis; facial scarring; major depressive disorder; PTSD; headaches. No neurocognitive problems suffered; She could still work although in need of an early retirement.

4. **Kuku v Road Accident Fund (232/2015) [2023] ZAFSHC 314 (11 August 2023)**

The 2024 valuation of the award is R1 470.000.00. The plaintiff, a 36 machine operator, had suffered a head injury; unconscious for 3 days; PTA; blurred left eye vision; headaches; cannot be left alone at home; scarring on the head and face.

5. **Mahachi v Road Accident Fund (20748/2013) [2018] ZAGPPHC 405 (25 May 2018)**

The 2024 valuation of the award is R1 391 850.00. The plaintiff, a 31 year old woman, had sustained a severe head injury; facial scarring; psychological trauma; headaches; degenerative changes in knee joint. She as still employable post-accident although to a lesser expression. She suffered from depression.

THE DEFENDANT'S LIST OF AUTHORITIES

[26] The defendant relied on the following past awards:

1. **Sithole v Road Accident Fund [2023] ZAGPPHC 252; 35916/18 (27 March 2023)**

The plaintiff was awarded R750 000.00 for general damages. She had sustained a brain injury (GCS 13/15); severe injury to the right arm; rigid and distended stomach; severe body pain; soft tissue injury to the neck; and shock and psychological trauma.

2. **Kaduku Prince v Road Accident Fund NGHC Case number 83408/2014 March 2017**

The 2024 valuation awarded is R 914 727.27 for general damages. The plaintiff had suffered a left tibia and fibula fracture and a head injury with a laceration of the scalp. An open reduction and internal fixation with tibial nails was done for the left tibia fracture. He was treated medically for the head injury and the scalp laceration was sutured. He was kept in hospital for a month. The neurosurgeon reports that the plaintiff sustained blunt head trauma, evidenced by multiple scars on his scalp. He lost consciousness at the accident scene. On arrival at the hospital he was semi-conscious with a Glasgow coma scale of 12/15 to 13/15 which improved to 15/15 the following day after treatment. CT brain showed mild brain oedema.

3. **Abrahams v Road Accident Fund Case number: 1531/2010 (ECLD) 29 May 2012**

The 2024 valuation awarded is R 811 888.11 for general damages.

The plaintiff, a 41 year old male, suffered a badly comminuted fracture of the femur; fracture of the fibula and patella; fracture of the right malleolus; severe soft tissue injury of the hand and a mild concussive head injury. He underwent surgery of an open and internal fixation of the femoral fracture, an open reduction of the patella fracture with fixation; an open reduction and internal fixation of the malleolus. Subsequent surgeries for the removal of the fixatives at the patella and a revision of the non-union of the fibula malleolar fracture were performed. The right limb was shortened with the need for an assistive device. Osteoarthritis was present in the left knee and there was limitation of range of motion in the right hip, knee and ankle.

4. **Donough v Road Accident Fund (8962/06) [2010] ZAGPJHC 100 (5 November 2010)**

The 2024 valuation awarded is R 651 683.00 for general damages.

The plaintiff, a 30 year old woman sustained a head injury causing her fatigue, headaches, visual impairment, impairment of cognitive mental function; depression; emotional difficulties of a permanent nature; a knee injury causing her pain which became aggravated in extreme weather.

THE PLAINTIFF'S SUBMISSIONS

[27] It is submitted on behalf of the plaintiff that the past awards referred to by the defendant are not comparable to Trusha's case whose overall profile of sequelae is significantly worse than the plaintiffs cited by the defendant. It was argued that an award in the sum of R1,300 000.00 would represent a fair compensation to Trusha.

[28] The plaintiff argues that unlike Trusha, not a single one of the claimants/plaintiffs mentioned in the defendant's past awards:

- 28.1. Was placed under curatorship;
- 28.2. Tried to commit suicide several times or at all;
- 28.3. Is permanently unemployable;
- 28.4. Has displayed violent outbursts on a number of occasions;

- 28.5. Has behavioural problems;
- 28.6. Suffers with features of post-traumatic accident-related borderline personality disorder;
- 28.7. Was robbed of a passionately held dream for the future; or
- 28.8. Suffers from social withdrawal.

[29] The plaintiff further submitted that despite the defendant's objections, Windel J had found in her judgment that the plaintiff's injuries were severe.

[30] In regard to the defendant's argument that the plaintiff's parents divorce contributed to her sequelae, plaintiff's counsel contended that the defendant ought then to have pleaded and proved this factor, which it did not. Even Dr Visser, *i.e.*, the plaintiff's psychiatrist, her evidence which was not challenged was that the plaintiff's life changed after the accident. She further argued what is trite is that you take your victim as you find them.

[31] In regard to the general costs, she submitted that a punitive costs award against the defendant would be appropriate for the following reasons:

- a. The defendant failed to make an offer even after the plaintiff sending almost 62 (SIXTY TWO) emails.
- b. The defendant failed to respond to a special pre-trial conference as per practice directive, resulting in there being no joint practice note filed by the parties flowing from the special pre-trial conference which ought to have been held.
- c. The defendant did not file any practice note.
- d. The defendant did not file any Heads of argument.
- e. The defendant's disingenuous and *mala fides* attempt to withdraw its formal admissions in the pre-trial minute of 2023.

- f. The defendant's attempt to secure a postponement by raising points *in limine* impugning the review court's invocation of PAJA ("Promotion of Administrative Justice Act") to substitute the HPCSA tribunal decision.
- g. The defendant spent considerable time arguing that the plaintiff ought to have submitted rule 38(2) application, despite having admitted in the pre-trial minutes that the plaintiff's injuries and the sequelae are as stated in the Windel J judgment. Furthermore, the evidence and factual findings in the Windel J judgment during the trial were unchallenged.

THE DEFENDANT'S SUBMISSIONS

[32] The defendant argued that the authorities relied on by the plaintiff are not comparable in respect of both the age and the sequelae. Trusha's orthopaedic injury had healed. In regard to the plaintiff's emotional difficulties, her parents' divorce should also be factored in as being contributory to her emotional/psychological condition. Furthermore, the injuries and the sequelae suffered by the plaintiffs in the authorities cited by the plaintiff *in casu* are far severe in comparison. He cited the matters **Tyabazeka**, **Masemola**, **Mahachi** and **Kuku** as examples. He further submitted that the plaintiffs who sustained injuries and sequelae similar to the plaintiff herein received a far lesser award than the one sought by Trusha whose injuries and sequelae thereof were lesser.

[33] In respect of costs, the defendant submitted that the costs be awarded on the normal scale of party and party since the plaintiff does not have an automatic right entitling her to an offer.

THE PLAINTIFF'S APPLICATION FOR AN AMENDMENT OF QUANTUM IN RESPECT OF THE GENERAL DAMAGES CLAIM

[34] It is common cause that on the morning of the trial herein the plaintiff brought an application for the amendment of her R700 000.00 claimed quantum for general damages, thereby seeking an increase to the proposed R1 600 000.00. The defendant opposed the application, citing prejudice on the part of the defendant

given, *inter alia*, the truncated time period by the plaintiff. Having considered the facts and the submissions made by both parties, and the fact that the defendant had never at any stage made an offer to the plaintiff, I find that the defendant will not suffer any prejudice where this court to grant the proposed amendment. In fact, in my considered view, it is in fact the plaintiff who will largely suffer prejudice if the proposed amendment was not granted given what exactly was argued by the plaintiff that sight ought to be had of the CPI factor from the date the summons was issued, *i.e.*, 2013, to date. The protracted time lapse without a doubt affected the value of the rand. Accordingly, the proposed amendment application is granted and for practical reasons, hereby effected.

ANALYSIS

[35] On the conspectus of the evidence before me, I am satisfied that Trusha sustained the following injuries: fractured distal right radius and ulna; soft tissue injuries of the cervical and lumbar spine. As per Dr Conrad Visser, in addition to the other experts, I find that Trusha's account is consistent with the occurrence of mild concussive head injury. What needs to be determined by this court the award that represents fairness and reasonableness, taking into account the Trusha's injuries and the sequelae thereof *vis-à-vis* the comparable authorities. It is trite that general damages are often determined by comparing cases under scrutiny and those previously decided. It is generally accepted that previously decided cases are never similar and that their purpose stops at comparing them to the current.

[36] In **Pitt v Economic Insurance Company Ltd (D) 287 E-F 1957 (3) SA 284** it was held that the compensation "*must be fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense*"

[37] In **Protea Insurance Co. v Lamb 1971 (1) SA 530 (SCA)**, the court held that:

"In assessing general damages for bodily injuries, the process of comparison with comparable cases does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation, nor should the process be allowed to dominate the inquiry as to become a fetter

upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance in a general way towards assisting the Court in arriving at such an award which is not substantially out of general accord with previous awards in broadly similar cases, regard had to all the factors which are considered to be relevant in the assessment of general 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 ."

[38] As was held by the Supreme Court of Appeal ("SCA") in the matter of **Road Accident Fund v Marunga [2003] (5) SA 164 (SCA) para 23**, for the court to award general damages which comprise of pain and suffering; disfigurement; permanent disability and loss of amenities, it has to exercise a wide discretion in what it considers to be fair and reasonable to compensate the plaintiff.

[39] Having had regard to the cases relied on by both parties and their respective submissions for and/or against same, particularly in regard to the injuries sustained by the plaintiff and their sequelae, I am satisfied that an amount of R850 000.00 (EIGHT HUNDRED AND FIFTY THOUSAND RAND) for general damages would be a fair and reasonable award under the circumstances.

[40] In view of the fact that this court found in favour of the plaintiff, in line with the trite approach that costs should follow the result except in exceptional circumstances which I find none in existence in this matter, the plaintiff is entitled to costs. Next for consideration is the issue regarding what costs scale this court should award considering that the issue of costs is entirely in the court's discretion. Having considered the submissions by both counsel and the totality of the evidence before me, I am satisfied that an appropriate costs order in this matter would be one of party and party scale . The reason for same is that the court order to be made herein permits payment by the defendant for the 60-odd emails sent to the defendant by the plaintiff seeking settlement offers to no avail. Furthermore, the court already sanctioned the defendant in regard to its attempt to stall the trial herein by impugning

the 2020 review order/judgment as it awarded a punitive costs order against the defendant.

[41] In so far as what costs scale the *curator ad litem* should be awarded, the plaintiff seeks the said costs on scale C while the defendant asks that such costs be awarded on scale B. The defendant's argument is that it is in fact the trial advocate who does/did all the primary work in preparation for trial and not the curator, especially since there is only one Head of damages for determination before this court. I am accordingly persuaded by the defendant's argument.

[42] In the result, I make the following order:

ORDER

1. The plaintiff's application for leave to amend her particulars of claim by deleting the amount of R700 000.00 claimed for general damages and substituting it with the figure of R1 600 000.00 is hereby granted.
2. The defendant is directed to pay the plaintiff's costs incurred on 29 October 2024 in respect of arguing the defendant's application for a postponement on an attorney and client scale.
3. In respect of the claim for general damages for Chesney Naidoo, an adult female with identity number 9[...] (hereinafter referred to as "Trusha"), arising from the motor vehicle collision which occurred on 16 July 2009, the defendant is directed to pay the plaintiff on behalf of Trusha the sum of **R 850 000.00 (EIGHT HUNDRED AND FIFTY THOUSAND RAND)**.
4. The capital amount in the sum of **R 850 000.00 (EIGHT HUNDRED AND FIFTY THOUSAND RAND)** shall be paid into the trust account of Plaintiff's attorneys of record, Wadee and Wadee Attorneys, within 180 (*one hundred and eighty*) days of the date hereof, whose details are as follows:-

Name of Account:	Wadee & Wadee Attorneys Trust Account
Bank:	First National Bank
Branch Code:	2[...]

Account No: 6[...]

5. In the event that the Defendant fails to pay the full capital amount within 180 (*One Hundred and Eighty*) days hereof as stipulated in para 3 above, then in that event, the Defendant shall be liable for interest at the prevailing legal rate on the capital amount or any part still owing, a *tempore mora* from 15 (fifteen) days after this Court Order, to date of final payment.
6. The Plaintiff's attorney, Wadee & Wadee Attorneys, shall be entitled to deduct from the aforesaid capital amount, their total approved disbursements and fees for professional services rendered, as approved by the trustees of the Trusha Chesney Naidoo Trust, which fees shall be approved by the Trustees within 14 days of presentation of the attorney and client bill to the Trust.
7. After deduction of the Plaintiff's attorney's disbursements and fees, the remaining amount of the award for general damages, shall be paid within 5 (five) days into the bank account operated by the Trusha Chesney Naidoo Trust for the sole benefit of TRUSHA.
8. In addition to the costs order specified in paragraph 2 above, the Defendant is directed to pay the Plaintiff's costs of the action to date on the scale as between party and party which costs shall include but not be limited to, *inter alia*:
 - 8.1. the plaintiff's attorney costs of this action;
 - 8.2. all preparation costs including the 62 (sixty-two) settlement proposals forwarded to the defendant herein;
 - 8.3. all appearance fees on trial up to and including 30 October 2024;
 - 8.4. the costs consequent upon the employment of counsel on Scale C;
 - 8.5. the fees of the Curator ad litem on Scale B.
9. The aforesaid costs are to be paid by the Defendant directly into the trust account of the Plaintiffs' Attorney, Wadee and Wadee Attorneys as

specified in paragraph 2 above and who shall then within 5 days thereof, pay the amount so received to the bank account operated by the Trusha Chesney Naidoo Trust, for the sole benefit of Trusha.

10. The Defendant is directed to make payment of the taxed and/or agreed costs within 180 (*one hundred and eighty*) days of agreement or taxation, as applicable.
11. In the event that the Defendant fails to pay the full amount owing in respect of the agreed and/or taxed costs specified in paragraph 2, 5, 8 and 10 above, then in that event, the Defendant shall be liable for interest at the prevailing legal rate on the full amount owing or any part thereof, a *tempore mora* from 15 (fifteen) days hereof to date of final payment.

LIVHUWANI VUMA

ACTING JUDGE OF THE HIGH COURT
SOUTH GAUTENG LOCAL DIVISION

APPEARANCES:

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Instructed by: RAF State Attorney - Johannesburg

Date of Hearing: 29 & 30 October 2024

Date of Judgment: 3 February 2025