

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
|-----|----------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **2nd November 2021** Signature: 

CASE NO: 19958/2014

DATE: 2nd NOVEMBER 2021

In the matter between:

TSHONGOLO, CHUMANI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Coram: Adams J

Heard: 28 October 2021 – The ‘virtual hearing’ of this matter – the trial – was conducted as a videoconference on *Microsoft Teams*.

Delivered: 2 November 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H30 on 2 November 2021.

Summary: Damages – application for default judgment – bodily injuries – determination of quantum in an application for default judgment based on

undisputed facts – court still has a duty to ensure that just and fair compensation awarded – court must use available evidence to determine quantum –

ORDER

Judgment by default is granted in favour of the plaintiff against the defendant for: -

- (a) Payment of the sum of R3 080 226.
 - (b) The defendant shall pay the aforesaid amount of R3 080 226 into the trust account of the plaintiff's attorneys, the details whereof are as follows:
Name of Account: N T Mdlalose Incorporated Trust Account; Bank: Nedbank; Branch Code: 198765; Account no: 1003372570.
 - (c) The defendant shall furnish the plaintiff with a 100% undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996 ('the Act'), to pay the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries she sustained in the motor vehicle collision on the 5 September 2009, after such costs have been incurred and upon proof thereof.
 - (d) Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports and joint minutes obtained by the plaintiff, and the qualifying fees and court attendance fees of her expert witnesses (if any).
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JUDGMENT

Adams J:

[1]. On the 5th of September 2009 the plaintiff, whilst travelling as a passenger in a sedan motor vehicle, was injured when the said vehicle was involved in a single vehicle collision along the Golden Highway near Zakariyya Park. The driver of the vehicle reportedly lost control over the vehicle, which caused it to overturn

and to 'roll'. The plaintiff was fourteen years old then, her date of birth being 8 April 1995, which makes her twenty-six years old at present.

[2]. In this action the plaintiff claims from the Road Accident Fund ('the Fund') delictual damages arising from the bodily injuries she sustained in the collision. The Fund accepted, a long time ago, liability for the plaintiff's damages to be proven, leaving only the quantum of the plaintiff's claim in dispute at the stage when the matter was set down for trial on the 28th of October 2021. On this date there was no appearance on behalf of the Fund, whose defence had been struck out by Order of this Court dated the 12th of May 2021.

[3]. The matter therefore came before me on 28 October 2021 as an application for judgment by default in terms of Uniform Rule of Court 39(1), which provides as follows:

'(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.'

[4]. In support of the said application, the plaintiff relied on the evidence of her expert witnesses, which evidence was presented in the form of affidavits by these expert witnesses, which simply verified and confirmed under oath the contents of these reports. The evidence relied upon as contained in the expert reports also contained hearsay evidence as the reports and the opinions expressed therein to a certain extent were based on what was reported to these experts mainly by the plaintiff and other persons. In my view, I can and should rely on this evidence and I do so on the basis of the provisions of s 3 of the Law of Evidence Amendment Act, Act 45 of 1988.

[5]. The relevant facts in this matter, as gleaned from the evidence led during the hearing of the application for default judgment, are as set out in the paragraphs which follow.

[6]. After the accident, the plaintiff was not rendered unconscious. She was transported by ambulance to Chris Hani Baragwanath Academic Hospital

(‘CHBAH’), where it was established, according to the said Hospital records and clinical notes, that she had sustained the following injuries: a head injury and abrasions on the face; and a fracture of the right clavicle. The hospital admitted her for observation and pain management. She was thereafter hospitalized and, according to the hospital records, was finally discharged on 08 September 2009. She was therefore hospitalized for a period of approximately three days. She underwent follow ups at the same hospital, including a further procedure during which excess fluids were drained from a hematoma of the head.

[7]. Before the accident, the plaintiff was a relatively healthy teenager and she had never been involved in any other accident. At the time of accident, she was doing grade seven and up to that point she had passed each year, since starting school in grade 1 during 2003. After the accident, she failed grade ten twice and thereafter enrolled at an FET College, where she also did not do so well.

[8]. Her current complaints are that she experiences occipital headaches almost on a daily basis. These radiate to the neck. She also experiences right shoulder pains induced by lifting heavy objects. She also complains of lower back pains induced by inclement weather or prolonged sitting. She reported to her medico-legal experts that she is forgetful and her academic performance deteriorated after the accident.

[9]. According to her Specialist Neurosurgeon, the plaintiff, on clinical examination, was observed to be of average intelligence. She paid attention well during the interview, and sustained it throughout. The Neurosurgeon could not identify obvious abnormalities on bedside screening test, and, as regards her emotional state, her affect was adequate and appropriate. The Neurosurgeon noted that the plaintiff had sustained a direct injury to the face, but did not suffer a loss of consciousness. Importantly, it was concluded by the Neurosurgeon that, based on the available Information, the plaintiff had sustained a very mild head injury, as well as a fracture of the right clavicle and a soft tissue injury to the thoracolumbar spine. She had no neurophysical impairments.

[10]. The plaintiff also reported to the Neurosurgeon that that she is forgetful and that her academic performance deteriorated after the accident. This is usually

not expected from the type of head injury she sustained. It is however known that some psychological factors including chronic pain disorder can contribute to cognitive difficulties. He therefore advised that she underwent detailed neuropsychological evaluation by the clinical psychologist.

[11]. The orthopedic surgeon assessed the plaintiff's Whole Person Impairment ('WPI') at 5%. He was however of the opinion that the plaintiff's injuries were of a serious nature on the basis of the 'narrative test' and that it qualifies her for general damages.

[12]. By far the plaintiff's main complaint relates to her neurocognitive and neuropsychological deficits, which she attributes to the injuries sustained by her in the accident. Despite the fact that, according to her Neurosurgeon (Dr Segwapa), the plaintiff suffered what he described as 'a very mild head injury', she contends that the neuropsychological fallout is of such a serious nature that she will no longer be able to attain her pre-morbid scholastic, educational, career and income potential. Before the accident, she could and probably would have attained, so she submits, matric plus a post-matric diploma, which would have enabled her to earn an income at a level way in excess of what she presently can earn and will earn in the future.

[13]. This argument on behalf of the plaintiff is based in the main on the report by the Clinical Psychologist, Ms Hlesiphi Matlou. The relevant extract from the report of Ms Matlou reads as follows: -

'Ms Tshongolo reports a history of having passed all her school grades prior to the accident. She subsequently failed grade 10 twice and proceeded to an FET College. Her scholastic history prior to the accident suggests a fairly average range of pre-morbid functioning. Her family history points to her three siblings as having reached matric, which suggests that there was a favourable genetic predisposition for her to also reach this level of education. It also suggests that her pre-morbid intellectual functioning was likely in the average range. Although not previously assessed, an average level of intellectual functioning will be assumed as the pre-morbid level of functioning, for purposes of this report.

... ..

The Neurosurgeon noted that she sustained a very mild head injury. Ms Tshongolo's results, as per the findings of this assessment, point to areas of neurocognitive deficits, especially in concentration, attention and working memory. Given the assumption of a fairly average level of pre-morbid functioning, it is the opinion here that this reflects a deviation from her pre-morbid functioning and points to a lapse between her pre-morbid and post-morbid functioning in these areas. It also points to Ms Tshongolo as having suffered underlying neurocognitive sequelae / fallout as a result of the accident in question. It is worth noting that Ms Tshongolo had managed to pass up until the year of the accident and subsequently repeated Grade 10 twice, post-accident. Although the demand on complex and executive cognitive functions in these higher grades is more, her pre-morbid history of having passed prior grades means that she stood a chance of passing these higher grades, but this probability would have been diminished and compromised by the occurrence of the accident. Given the nature of her head injury [mild head injury], it is likely that the decline in her scholastic functioning was due to the combined and overlapping impact of the emotional trauma of the accident, the head injury and residual physiological pain and symptoms.

... ..

Ms Tshongolo has already experienced some loss in her scholastic functioning and output, as a result of the accident; as she failed the grades that came after the accident. This decline in scholastic performance was highly likely due to; but not limited to; the combined effects of the head injury, emotional distress related to the trauma of the accident and physical residual pain and symptoms [such as her headaches, shoulder pain and backache]. Therefore, the writer recommends an evaluation by an Educational Psychologist for comment on her educational prospects and remediation thereof.

... ..

Ms Tshongolo will not likely be able to return to her pre-accident levels of mental functioning if the cognitive deficits persist and the physical pain either continues at the current level or intensifies.

Ms Tshongolo will likely struggle to find employment in the open labour due to neuropsychological (anxiety, mood disturbance), neurocognitive and neuro-physical (orthopaedic injuries) deficits.'

[14]. With this background, I now proceed to deal with the quantification of the plaintiff's claim under the different heads of damages.

Future Hospital, Medical and Related Expenses

[15]. There was more than adequate evidence before me that, as a result of the injuries sustained by the plaintiff in the accident, including the orthopaedic injury to the right shoulder, she would require future hospital and medical treatment. The details and particulars of such hospitalization and treatment are contained in the medico-legal expert reports by the plaintiff's expert witnesses.

[16]. This head of damages should be dealt with on the basis of a statutory undertaking to be provided by the Fund to the plaintiff in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 ('the Act'), and I therefore intend granting an order to that effect.

Past and future Loss of Earnings / Loss of Income Earning Capacity

[17]. The plaintiff's past and future loss of income has been actuarially calculated and the bases of such calculations, which are elaborated upon in the paragraphs which follow, appear to accord generally with the facts and the probabilities in the matter.

[18]. It is assumed, on the basis of the reports by the plaintiff's Neuropsychologist, her Educational Psychologist and her Industrial Psychologist, that, had the accident not occurred, the plaintiff would have gone on to complete her matric and to attain a National Diploma, which, in turn, would have enabled her to earn income at the level of a person with a National Diploma qualification. Now that the accident has happened, it is assumed that the plaintiff at present earns or is able to earn R5000 per month (R60 000 per annum), to increase gradually and reach her career ceiling at age 42.5 years old, earning R130 000 per month, which equates to about R10 800 per month.

[19]. As already indicated, I am of the view that these postulations accord with the facts and the realities in the matter, subject to this *caveat*. If regard is had to the plaintiff's family background and what has been achieved in particular by her older siblings, it has to be accepted that pre-morbid she is being pitched at an extremely high level. Additionally, there are no records relating to per scholastic performance predating the accident in question. All we know is that prior to the

accident she passed grades 1 to 7, but we have no indication of the level at which she was performing. So, whilst it can be assumed, based on the psychometric tests, that she was of average intelligence prior the accident, it cannot be said with any measure of confidence how she performed scholastically prior to the accident.

[20]. These concerns can and should be addressed by applying higher contingencies to the pre-morbid projected income. My view is that at the very least the contingency to be applied should be at least double the usual contingencies applied. One should also not lose sight of the extremely high unemployment rate in the country, especially amongst young people and university graduates.

[21]. Conversely, the plaintiff is pitched post-morbid at a very low level with the application of higher than usual contingencies. My view is that no contingencies should be applied to the post-morbid projected income for the simple reason that she may very well perform and earn at a level higher than where she is pitched.

[22]. Disregarding the accident, her earnings are taken as R198 000 per annum as at commencement of her employment on 1 July 2016 to increase to R565 000 at age 42.5 years of age during 2037. This would then result in the plaintiff's past loss of earnings being calculated thus: R563 533 – R253 366.60 (45% contingency deduction) = R309 943.15.

[23]. As for the future loss of income, the above assumptions and its application result in future projected pre-morbid earnings, before the application of general and other contingencies, of R8 604 892 and post-morbid earnings of R2 463 408. For the reasons mentioned above, notably the fact that the plaintiff is pitched at an extremely high income earning level, contingencies of 45% should therefore be applied to the future pre-morbid projected income. As regards the post morbid income, I think that 0% contingencies should be applied.

[24]. The calculations would therefore be as follows as regards the pre-morbid future income: R8 604 892 – R3 872 201 (45% contingency) = R4 732 691. And the post-morbid projected, applying a 0% contingency, is R2 462 408. That, in turn, results in the following calculations in respect of the plaintiff's future loss of

income: R4 732 691 (pre-morbid income) – R2 462 408 (post-morbid income) = R2 270 283.

[25]. That means that the plaintiff's total loss of income (past and future) is R309 943 + R2 270 283 = R2 580 226. This is the total amount, which I intend awarding to the plaintiff as representing her loss of income.

General Damages

[26]. I now turn to deal with the quantum of the general damages suffered by the plaintiff. In that regard, I am satisfied that the plaintiff's injuries are serious and that she qualifies for general damages. There can be little doubt about this. And although the Fund has never formally accepted liability for the plaintiff's general damages, it similarly has never disputed liability for such damages. Moreover, in compliance with the Act and the regulations promulgated thereunder, the plaintiff had lodged with the Fund a Form RAF 4 by her General Practitioner, Dr Aubrey N Mogotsi, who assessed the plaintiff's WPI at 25%, but indicated that the plaintiff's injuries qualify as serious injuries in terms of the 'narrative test' in that her injuries resulted in a 'serious long-term impairment or loss of body function'.

[27]. Mr Luvuno, who appeared on behalf of the plaintiff, suggested that a sum of R500 000 should be awarded to the plaintiff for her general damages. For comparative purposes, he referred me to a number of cases.

[28]. So, for example, I was referred to *Makapula v RAF*¹, in which the claimant was a five year old boy, who had sustained a mild brain injury, resulting in neurocognitive deficits, hyperactivity disorder, memory dysfunction, uncooperative and aggressive behaviour, poor executive functioning and school performance. The award for general damages made in that matter, updated to current values, was R517 000.

[29]. In *Modan v RAF*² the plaintiff's minor child sustained a concussive brain injury, a fractured nasal bone, and a soft tissue injury to the forehead with scalp

¹ *Makapula v RAF* 2010 (6) QOD B3-B48 (ECM).

² *Modan v RAF* (14435/2009) [2011] ZAGPJHC 192.

hematoma. The neurocognitive and neuropsychological sequelae comprised of attention and concentration difficulties, headaches, behavioral and emotional difficulties. The child's academic performance was affected as was the child's future level of earnings. He was awarded R574 000 in current monetary value terms. And in *MTA obo MK v RAF*³ an eight year old minor child had sustained a mild concussive brain injury, visible laceration on forehead and hematoma of the forehead. He presented with symptoms of a depressive disorder and persistent post-traumatic stress disorder were present. The court considered the physical injuries, as well as loss of amenities of life as a result of depression, and was of the view that R400 000 would be fair and just compensation for the child's general damages. This amount presently equates to R448 345.33.

[30]. Ms Tshongolo's physical difficulties affect her amenities to the extent that she is losing leisure aspects of her life. Her functional capacity has also been adversely affected by the accident. Ms Tshongolo is currently unemployed. It is anticipated that the cumulative impact of her physical, neurocognitive and emotional difficulties will have a negative effect on her employment prospects and opportunities and on her ability to maintain her employment opportunities.

[31]. The award in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded. I have summarised the injuries and *sequelae* of the patient herein before.

[32]. In making an award under this head of damages, I have had regard to the award as well as the comments by the SCA in the matter of *De Jongh v Du Pisanie*⁴, in which matter an amount of R250 000 was awarded in respect of general damages for a head injury which led to brain damage which, in my view, was far more severe than the injury sustained by the patient *in casu*. Updated to 2021 this award translates into about R722 000. The plaintiff in *De Jongh* sustained a head injury consisting of extensive fragmented fractures of the frontal skull extending into the orbits (eye sockets) and the zygomatic arches (cheek

³ *MTA obo MK v RAF* (4484/16) (2018) ZAGPJHC (18 June 2018)

⁴ *De Jongh v Du Pisanie* 2005(5) SA 457 (SCA)

bones), as well as the jaw, causing extradural haematoma which led to unconsciousness and which had to be surgically removed.

[33]. Importantly, in this matter the SCA, quoting Holmes J, also pointed out the following fundamental principle relative to the award of general damages:

‘The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour *largesse* from the horn of plenty at the defendant’s expense.’

[34]. *De Jongh* is also authority for the view that the evaluation of brain damaged persons depend more on how they actually handle their daily lives rather than how they perform on psychometric tests. See paragraph [21] of the judgment.

[35]. Also in: *Hurter v RAF*⁵, the plaintiff suffered extensive facial fracturing as well a severe diffuse axonal injury to her brain, which included a brain contusion and fracture of the base of the skull. She only regained consciousness fully about ten days after the accident. As a result of the severe traumatic brain injury, the plaintiff was left with significant cognitive, socio-emotional and socio-behavioural difficulties. She had *inter alia* become irresponsible and indifferent; she uses inappropriate language and was often confrontational, aggressive and inappropriate when interacting with others. Hurter, a twenty-year-old female student was awarded R500 000 during 2010. Updated to 2021 this award translates into an amount in excess R950 000.

[36]. *In casu* the plaintiff suffered orthopaedic injuries, coupled with a very mild head injury, with complications and neuropsychological fallouts, which have had a devastating effect on her activities of daily living and on her occupation. I have dealt with those issues *supra*. Importantly, the complications which resulted from the head injury are such that the plaintiff does not function at her pre-morbid level from an intellectual and an occupational point of view. Far from it – she is finding life difficult.

⁵ *Hurter v RAF* 2010 (6A4) QOD 12 (ECD) – 2nd February 2010.

[37]. I therefore consider an amount of R500 000 to be fair and adequate compensation to the plaintiff in respect of her general damages.

Conclusion

[38]. The amounts to be awarded to the plaintiff as damages are therefore the following: R2 580 226 for her past and future loss of income; and R500 000 in respect of her general damages = Total amount to be awarded: R3 080 226.

[39]. In respect of the future hospital, medical and related expenses, as already indicated, I intend directing the Fund to furnish the plaintiff with a statutory undertaking in respect of such costs.

Costs

[40]. The general rule in matters of costs is that the successful party should be given his or her costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*⁶.

[41]. I can think of no reason why I should deviate from this general rule. Accordingly, I intend awarding costs in favour of the plaintiff against the defendant.

Order

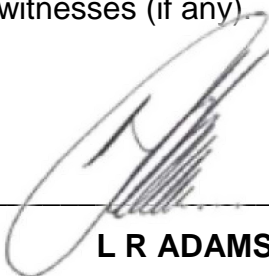
Accordingly, judgment by default is granted in favour of the plaintiff against the defendant for: -

- (a) Payment of the sum of R3 080 226.
- (b) The defendant shall pay the aforesaid amount of R3 080 226 into the trust account of the plaintiff's attorneys, the details whereof are as follows: Name of Account: N T Mdlalose Incorporated Trust Account; Bank: Nedbank; Branch Code: 198765; Account no: 1003372570.
- (c) The defendant shall furnish the plaintiff with a 100% undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996 ('the Act'), to pay the costs of future accommodation of the plaintiff in a hospital or

⁶ *Myers v Abramson* 1951(3) SA 438 (C) at 455

nursing home, or treatment of or rendering of a service or supplying of goods to him, arising out of the injuries she sustained in the motor vehicle collision on the 5 September 2009, after such costs have been incurred and upon proof thereof.

- (d) Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports and joint minutes obtained by the plaintiff, and the qualifying fees and court attendance fees of her expert witnesses (if any).



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	28 th October 2021 – the trial of this matter proceeded as a ‘virtual hearing’ in a videoconferences on <i>Microsoft Teams</i> .
JUDGMENT DATE:	2 nd November 2021 – judgment handed down electronically
FOR THE PLAINTIFF:	Advocate Jabu Luvuno
INSTRUCTED BY:	N T Mdlalose Attorneys, Parkwood, Johannesburg
FOR THE DEFENDANT:	No appearance
INSTRUCTED BY:	No appearance