

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

Case No.: 99303/15

11/7/2018

In the matter between:

SC MORRIS

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Senyatsi AJ

INTRODUCTION

- [1] The merits of this case have been settled on the basis that the Defendant shall pay 100% of the Plaintiff's proven damages.
- [2] The parties have not been able to agree on the quantum of damages and this court has been asked to determine same. The quantum of damages were argued on the 14 June 2018 and judgment was reserved.

BACKGROUND

- [3] The Plaintiff sustained the following injuries:-

- a) Right distal femur fracture (non-union);
- b) Non-union of the right femur distal two-thirds one-third junction with displacement of the distal fragment laterally. This injury has left the Plaintiff with a shortening by 2 cm of the right leg;
- c) Abrasions to the forehead, nose and chin;
- d) Fractured and damaged teeth;
- e) The unsightly scars, and disfigurements. According to Dr Pienaar's report, the Plaintiff will retain considerable scarring which will not lend itself to any further surgical reconstructive surgery, led to a permanent serious disfigurement;
- f) Severe symptom of depression with avert agitated mood and, according to Dr Pienaar's report, also severe past-traumatic anxiety which impedes her mobility significantly which results in absenteeism at work.

[4] The Plaintiff received treatment for her injuries and despite that, she complains of pain in the right hip; pain in the right knee; pain in the right ankle; pain over the fractured area in the right leg; pain in the left wrist, pain on the right lower jaw and temporomandibular on the right, problems with her broken teeth; inability to drive due to pain experienced and disruptions in her sleeping patterns.

[5] At the time of the accident, the Plaintiff was 45 years of age. She obtained her grade 12 without university exemption. The Plaintiff built up a broad skilled base through the on-job training and action learning. According to the Industrial Psychologist, Rene Van Zyl, the Plaintiff furthermore completed various courses at Thomson NETg.

[6] The Plaintiff has had a steady career history and was employed in January 2010 as a Marketing Manager at Jeppe College of Commerce and Computer Studies and she functioned in the latter capacity until she was promoted to Senior Administrator in January 2011 and this was the position she occupied at the time of the accident.

[7] At the time of both assessments by the Occupational Therapists, Ms A Greeff, and S. Moagi, the Plaintiff was employed as a Receptionist at Jeppe College. Both Occupational Therapists agree on the following:-

- 7.1 The Plaintiff has not retained the physical capacity and is not regarded suited to occupation inclusive of and exceeding constant light physical strength and tasks requiring high impact, dynamic lower limb and/or whole body range of motion, agility and stamina;
- 7.2 The Plaintiff did not fully retain the physical capacity for her pre-accident occupation and/or her work held post-accident in question as a receptionist and/or lecturer;
- 7.3 The Plaintiff will likely further experience loss of productivity and income post-recommended surgery and recuperation period being away from work, especially when considering previous experience post-accident in question;
- 7.4 The Plaintiff will always find herself reliant on the use of reasonable accommodations, application of biomechanical postering principles and economic executions;

[8] With regards to the pre-morbid career scenario, both Industrial Psychologists; R Van Zyl and C Nel agree that:-

- 8.1 The Plaintiff would probably have remained functioning as a Senior Administrator or in a position with a similar complexity level within the general sector of the South African Labour Market;
- 8.2 The Plaintiff had probably reached her career pinnacle and her earnings would have grown with CPI adjustments until retirement. They both noted the financial difficulties experienced by Jeppe College of Commerce and Computer Studies and the impact thereof on the Plaintiff is pre-morbid career prospects at the college. They both agree that the Plaintiff would, however, have been in a better position to have secured alternative employment if she was not insolvent in the accident.

[9] With regards to post-morbid scenario, both Industrial Psychologists agree that:-

- 9.1 The Plaintiff has been significantly compromised due to her injuries sustained and the *sequelae* thereof;

- 9.2 The Orthopaedic Surgeon, Dr E. Mennen, is of the opinion that the Plaintiff is no longer suited to her pre-morbid work duties;
- 9.3 The Plaintiff will probably remain functioning in her current capacity as receptionist/lecturer at Jeppe College of Commercial Studies for as long as she can sustain her employment;
- 9.4 It is noted that Jeppe College is experiencing financial difficulties, and should the Plaintiff find herself having to secure alternative employment, she will struggle to do so and probably remain unemployed ;
- 9.5 The Industrial Psychologists agree that a significantly higher post-morbid contingency deduction should be applied when compared to the pre- morbid contingency deduction.

[10] The actuarial report compiled by AC Strydom has applied the following contingencies:-

- 10.1 Past pre-morbid income 5%;
- 10.2 Past post-morbid 5%;
- 10.3 Future pre-morbid income 10%;
- 10.4 Future post-morbid income 40%;

[11] Mr Van der Merwe, argued on behalf of the Plaintiff that after the application of the contingencies, the following quantum was calculated:-

11.1 Past loss	R149 528.00
11.2 Future loss	<u>R780 289.00</u>
Total loss	<u>R929 817.00</u>

[12] Mr Ngwane, on behalf of the Defendant conceded that the injuries were not disputed and that much depended on contingencies to be applied.

[13] Mr Ngwane furthermore, argued that the experts reports were premised on the assertion that the Plaintiff was not capable of remedial steps to surgically

deal with her injuries and that if one had been subjected to physiotherapist, she would have been told of the recovery. He was not, when challenged by Court that the Defendant was also able to have the Plaintiff undergo physiotherapist evaluation and treatment, able to provide any explanation for failure by the Defendant to refer the Plaintiff to physiotherapist. He conceded that the Defendant was indeed at liberty to refer the Plaintiff for physiotherapist assessment.

- [14] He argued on behalf of the defendant that the contingencies to be applied for pre-morbid should be 10% and post-morbid should be 30% and that the contingencies are based on the calculation done by the actuary on behalf of the Defendant, G.W. Jacobson's report.
- [15] As a consequence of G.W. Jacobson's report, an amount of R450 000.00 should be awarded for Joss.
- [16] The issue for determination is what quantum should be awarded to the Plaintiff in respect of loss of earnings capacity and the general damages.
- [17] The general principle applicable to the assessment of damages for loss of earnings capacity is that the Plaintiff must prove that the reduction in earning capacity gives rise to pecuniary loss.¹ In *Prinsloo v RAF*² in dealing with this principle, Chetty J stated as follows:-

"A person's all-round capacity to earn money consists, *inter alia*, of an individual's talent, skill, including his/her present position and plans for the future and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A Court has to construct and compare two hypothetical models of the Plaintiff's earning after the date on which he/she sustained the injury. In casu, the Court must calculate, on the one hand, the total present monetary value of all that the Plaintiff would have been capable of bringing into her patrimony had she not been injured, and on the other, the total present monetary value of all that the Plaintiff would be able to bring into her Patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is

¹ See *Rudman v RAF* 2003 (2) SA 234 (SCA) 241H-242B

² 2009 (5) SA 406 (SE)

the extent of the patrimonial loss. At the same time, the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this would be nil."

- [18] On the aspect of contingencies, Nicholas JA in *Southern Insurance Association v Bailey N.O.*³ stated the following:-

"In the case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informal guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis."

- [19] Both counsels have provided me, at my request, with several authorities to determine what award should be made. The underlying principle in such attempt to determine the award, is that each case must be considered on its own merits and that comparison of previous awards serves as a guidance. In *Protea Assurance Co Ltd v Lamb*⁴, Potgieter JA held that:-

"It should be emphasised, however, that this process of comparison does not take any 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 so to dominate the enquiry to become a fetter upon the Court's general discretion in such matters"

- [20] It is trite that the amount to be awarded still lies in the Court's discretion which it should exercise judiciously and the Court will use the amounts awarded in similar cases only as a guideline to exercise its discretion.⁵

- [21] In the *Road Accident Fund v Marunga*⁶ the Supreme Court of Appeal confirmed the *dictum* of Broom DJP in *Wright v Multilateral Motor Vehicle Accident Fund*⁷ where it was set out:

³ 1984 (1) SA 98 AD at pl14 C - D

⁴ 1971 (1) SA 530 AD at 535H-536A; See also *Union and National Insurance Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 3010-E; *Santam Insurance Co Ltd v Paget* 1981 (2) SA 621 (ZA)

⁵ See *T.M. Kgopyane v RAF* (unreported) Case number 43235/2014, Gauteng, Pretoria

⁶ 2003 (5) SA 164 (SCA) 170F-G

⁷ 1997 NOP-Corbett and Honey: The Quantum of Damages in Bodily and Facial Injury Cases Vol 4 at E3-31

"I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in the society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most countries"

[22] I now turn to deal with what loss of earning capacity did the Plaintiff suffer. In so doing, I am fully aware that I am plunging into the unknown but have taken into account the following:-

- 22.1 The Plaintiff is no longer suited to continue as a Senior Administrator in her present job and has had to take a junior role of a receptionist;
- 22.2 She will be at the disadvantage with the fully healthy and able-bodied persons should she be retrenched by Jeppe College and will most likely not be employable,
- 22.3 The actuarial calculations done by the actuaries on behalf of both parties.

[23] After having considered the contingencies for past pre-morbid income and future pre-morbid and future post-morbid income, I am of the view that the award to be made should be as follows:-

23.1	Past loss	-	R130 500-00
23.2	Future loss	-	<u>R690 000-00</u>
	Total		<u>R820 500-00</u>

[24] I now turn to deal with general damages.

[25] This Court was referred to a case of *Roe v The Road Accident Fund*⁸ where the Plaintiff sustained a commuted fracture of the right femoral shaft, commuted fracture of the right tibia and fibular, fracture of the right patella, fracture of the left humerus shaft injury to the right foot and upper tooth fractures. In that matter, the Court awarded the Plaintiff R650 000 in respect

of damages which translates into R1 007 386-86 in 2018 terms. There is, however, a distinction between the injuries sustained by the Plaintiff in that case and the injuries sustained by the Plaintiff in the present case. In the present case, the fractures are not multiple as in that case.

- [26] I was also referred to the case of *Khumalo v The Road Accident Fund*,⁹ where the Plaintiff sustained a fracture to upper tibia and fractured to the neck of the left tibia. The Court awarded the Plaintiff an amount of R400 000 in 2006 for general damages which translates to approximately R827 293-84 in 2018 terms.
- [27] The Court was furthermore referred to the case of *M. Meso v The Road Accident Fund*¹⁰ in which the Plaintiff sustained pelvic fracture injuries. Her pelvis was unstable and she suffered from constant pain, around the pelvic area. The Court awarded an amount of R680 000 in 2018 terms.
- [28] In the case of *T.M Kgobyane v The Road Accident Fund*,¹¹ which I was also referred to the Plaintiff sustained a pelvic fracture and bladder injury as well as soft tissue injuries and developed depression. The Court awarded R600 000 in 2016 which amounts to R672 086 in 2018 terms.
- [29] I was also referred to a case of *Adams (SP) v Road Accident Fund*¹² where the Plaintiff had a fracture of shaft of left femur, which was surgically fixed and stabilised by means of an intra-medullary locking nail. The arbitrator awarded R50 000 for general damages.
- [30] In the case of *Grobbelaar v Road Accident Fund*,¹³ which I was also referred to, the Plaintiff sustained fracture of the left femur and left patella. The Plaintiff underwent an operation with pins and screws inserted in his leg. The Court awarded R300 000 for general damages of which the Defendant was liable to pay 70% of the Plaintiff's proven damages.
- [31] In the case of *Phasha v Road Accident Fund*¹⁴ the Plaintiff sustained head injuries with loss of consciousness and amnesia, scalped lacerations,

⁸ 2010 JDR 0445(GSJ)

⁹ 2006 JDR 0289 (W)

¹⁰ (Unreported) case number 59156/2016, Gauteng Division, Pretoria.

¹¹ 43235/2014[2016] ZAGPPH 872 (22 September 2016).

¹² Arbitration Forum: Case Number AF001/9/287 decided on 17 March 2004.

¹³ 2015 (7E3) QOD 1 (GNP)

¹⁴ 2012 JDR 2110 (GNP)

abrasions on both hands and compound fractures of the left tibia and fibula. The Plaintiff claimed R600 000 for general damages and was awarded R400 000 for general damages.

- [32] In *Mazilana v Road Accident Fund*,¹⁵ the Plaintiff sustained closed segmental fracture of shaft of right femur and fracture of medial malleolus of right ankle injuries. The femur was stabilised with locking nail, but due to discovery of fracture line extending to the lesser trochanter, the internal fixation was not considered sufficiently stable and claimant was treated post-operatively in a Thomas splint with skeletal traction by means of a Denham pin through the proximal tibia. The medico-legal examinations revealed established rotational and ambulatory mal-union of femur with 4cm shortening of right leg which had, in tum, caused severe mechanical backache and activation of asymptomatic pre- existing degenerative changes in the spinal column. The award for general damages was R175 000-00.
- [33] The injuries sustained by the Plaintiff have already been spelt out. Having considered all the injuries sustained by the Plaintiff in this case and the pain that she endured, I am of the view that the amount to be awarded for general damages should be R675 000-00.

ORDER

- [34] After having heard counsel for the Plaintiff, it is ORDERED THAT:
- 34.1 The merits have been settled on the basis that the Defendant shall pay 100% of the Plaintiff's proven damages;
 - 34.2 The Defendant shall pay to Plaintiff the sum of R1 495 500-00 (One million four hundred and ninety five thousand five hundred rand) in respect of General Damages, past and future loss of earnings / earning capacity;
 - 34.3 In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10% per annum, calculated from 15th calendar day after the date of this Order to date of payment;
 - 34.4 The Defendant shall furnish the Plaintiff with an undertaking in terms

¹⁵ Arbitration Forum: Case No. AF001/3/669 Date of award: 5th February 2004.

of Section 17(4)(a) of Act 56 of 1996 for payment of the 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 resulting the injuries. Sustained by the Plaintiff in the motor vehicle accident that occurred on 15th of September 2014, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof;

[34.5] The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto that:-

34.5.1 In the event that the costs are not agreed:

- 34.5.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
- 34.5.1.2 The Plaintiff shall allow the Defendant 14 (Fourteen) Court days from date of allocatur to make payment of the taxed costs;
- 34.5.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10% per annum on the taxed or agreed costs from date of allocatur to date of final payment;

34.5.2 Such costs shall include but not limited to:-

- 34.5.2.1 The costs incurred obtaining payment of the amounts mentioned in paragraphs 34.2 and 34.5 above;
- 34.5.2.2 The costs of and consequent to the employment of counsel, including counsel's charges in respect of his full day fee for 27 November 2017 and 14 June 2018, as well as reasonable preparation;
- 34.5.2.3 The costs of all medico-legal, radiological,

actuarial, accident reconstruction, pathologist and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Dependant and / or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles, including, but not limited to the following:

- 34.5.2.3.1 Dr E Mennen - Orthopaedic surgeon;
 - 34.5.2.3.2 Dr WA Minnaar - Dentist;
 - 34.5.2.3.3 Dr JPM Pienaar - Plastic & Reconstructive Surgeon;
 - 34.5.2.3.4 Dr Annalie Pauw - Clinical Psychologist;
 - 34.5.2.3.5 Anneke Greeff- Occupational Therapist;
 - 34.5.2.3.6 Renee Van Zyl - Industrial Psychologist;
 - 34.5.2.3.7 T Doubell - Actuary
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- 34.5.2.4 The reasonable costs incurred by and on behalf of the Plaintiff's in, as well as the costs consequent. to attending the medico-legal examinations of both parties.
 - 34.5.2.5 The costs consequent to the Plaintiff's trial bundles and witness bundles;
 - 34.5.2.6 The costs of holding all pre-trial conferences as well as round-table meetings between the legal representatives for both the Plaintiff and the Defendant, including counsel's charges in respect thereof;
 - 34.5.2.7 The cost of and consequent to compiling all minutes in respect of pre-trial conferences;
 - 34.5.2.8 The reasonable travelling costs of the Plaintiff,

who is hereby declared a necessary witness;

- 34.6 The amounts referred to above will be paid to the Plaintiff's attorneys, Spruyt Incorporated by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number : [...]

Branch code : Hatfield (011545)

REF : SD2264

- 34.7 There is no contingency fee agreement between the Plaintiff and Spruyt Incorporation Attorneys.

M.L. SENYATSI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of Hearing: 14 June 2018
Date of Judgment: 12 July 2018

FOR THE PLAINTIFF : ADV. F. VAN DER MERWE
INSTRUCTED BY : SPRUYT INCORPORATED (PRETORIA)
FOR THE DEFENCE : ADV. S. NGWANE
INSTRUCTED : BY DIALE MOGASHOA ATTORNEYS
(PRETORIA)