



24/10/17

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 18209/2015

In the matter between:

JUSTINE PRETORIUS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRAND AJ

- [1] The Plaintiff claims damages in delict from the Defendant arising from injuries she sustained as a passenger in a motor vehicle accident on 16 December 2011.
- [2] Liability was settled 100% in favour of the Plaintiff and the matter was set down for hearing on the issue of quantum only.
- [3] The Respondent further gave an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, so that, when the trial commenced before me, only past and future loss of earnings and general damages were still in issue.
- [4] By the end of the trial there was no longer any dispute on the quantum of loss of earnings (the Respondent disputed neither the actuarial report of the Plaintiff nor the proposed contingencies to be applied). The only issues

remaining in dispute were the quantum of general damages and, because of the manner in which the trial unfolded (more about this below), costs.

- [5] Although the Plaintiff had a witness at court to testify (I mention this only because it is relevant to the issue of costs) in the event no witnesses were called by either party and, counsel addressed me on the papers.

General damages

- [6] The approach to determining general damages is trite. As confirmed by the Appellate Division in *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (AD) at 119G-H, the flexible approach first articulated in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 still applies: 'The amount to be awarded as a compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the Judge's view of what is fair in all the circumstances of the case'. These circumstances obviously include the extent and severity of the pain and suffering, disfigurement, permanent disability and loss of amenities of life caused by a plaintiff's injuries and 'the function to be served by an award of damages' (*Southern Insurance Association Ltd* above, at 99H).
- [6] From the Plaintiff's particulars of claim it appears that she suffered a range of injuries in the accident: a brain injury; a skull-base fracture; a fracture of the left forearm; abrasions to the left shoulder; chest and lung injuries; a fracture of the left distal femur going into the knee (that turned septic and resulted in 13 post-accident surgical interventions); orthopaedic injuries to an ankle and heel; and multiple contusions, abrasions and other soft tissue injuries all over her body.
- [7] There is no dispute that these injuries were severe and have had permanently debilitating consequences for the Plaintiff on many levels and in many ways.
- [8] One needs turn only to the joint minutes prepared by some of the experts of the Plaintiff and the Defendant to see this.

- [9] The clinical psychologists, Ms E Tromp (Defendant) and Mr R Macfarlane (Plaintiff), while deferring to the final opinion of the neurosurgeons, agree that the Plaintiff suffered a severe to very severe traumatic brain injury leading to moderate to severe permanent residual neuropsychological impairment; that it is unsurprising that she been unemployed since the accident and is likely to remain unemployed; and that the accident has exerted a significant negative impact on her relationships and quality of life.
- [10] The orthopaedic surgeons, Dr AH Van den Bout (Plaintiff) and Dr J Sibanyoni (Defendant) agree that the Plaintiff suffered serious orthopaedic injuries leading to a serious long term impairment or loss of a body function; that the orthopaedic injuries caused significant pain and suffering, loss of amenities and disfigurement of the Plaintiff's body; and that she has suffered a severe loss of earning capacity and will have 'big difficulties' competing on the open labour market. Dr van den Bout added that the injury to her left leg will have severe consequences over time for her left hip and lower back, resulting in a working life shortened by 10 years; and that the Plaintiff's working life possibly ended with the accident.
- [11] The neurosurgeons, Dr CM Lewer-Allen (Plaintiff) and Dr AB Mazwi (Defendant) agree that the radiological evidence shows that the Plaintiff suffered extensive damage to the skull base and brain; that this resulted in a prolonged period of loss of consciousness, two months of amnesia and a further several months of confusion; and that she has suffered some degree of brain damage and has been left with neuropsychological impairments.
- [12] In addition to these joint opinions, it is instructive to consider the reports of those experts appointed by the Plaintiff for which the Defendant appointed no counterpart: a speech and language pathologist and audiologist (Dr O Guy); a psychiatrist (Dr L Grinker); and occupational therapist (Ms Alison Crosby); and an educational psychologist (Ms Brigitte-Leigh Purchase).
- [13] Dr Guy, the speech and language pathologist notes significantly impaired speech and general communication ability with an effect on the Plaintiff's ability to form and maintain friendships and her capacity to function in the workplace. These deficits are regarded as permanent.

- [14] Dr Grinker, the psychiatrist, reports that the Plaintiff's 'severe head injury' has caused 'ongoing symptoms of organic brain dysfunction including neurophysical, neuropsychological and neuropsychiatric sequelae'. While deferring to the relevant experts in these fields, he notes as far as neurophysical consequences go persistent headaches, diminished visual activity of the left eye and some strabismus. Neuropsychological consequences include that she has 'major memory difficulties, constantly losing and misplacing things' and has forgotten how to do things that she could do prior to the accident, such as dancing and playing the guitar; struggles with concentration for any length of time; has trouble understanding things; and struggles with speaking and writing, often saying or writing down the wrong word. Clinically this manifested in that she 'struggled to understand simple questions, ... was poorly oriented, ... displayed limited insight, her thought processes were slow and concrete, there was a degree of social disinhibition at times, [and] she often used incorrect words to express herself'. Neuropsychiatric sequelae include impulse dyscontrol (manifesting in irritability and short-temperedness) and phases of depression.
- [15] The occupational therapist, Ms Alison Crosbie (report prepared by Franja Burger) reports a range of functional restrictions (scarring, including the continuing sepsis in her left knee with a draining site, which affects her self-esteem, social interaction and the perceptions of prospective employers; decreased muscle strength and postural alignment; fine motor co-ordination and dexterity difficulties and visual difficulties); physical deficits (decreased range of movement, weight bearing, sitting tolerance and lifting ability; an inability to perform simple mobility tests; proprioceptive difficulties; and poor pinch grip strength); psychological deficits (irritability; impatience; verbal aggression; mood fluctuation; signs of depression; decreased self-esteem and motivation; and increased stress and anxiety); and cognitive deficits (memory, concentration and visual spatial problems).
- [16] What emerges from these reports is the following:
- [16.1] The immediate impact of the accident on the Plaintiff was severe – she suffered a range of severe head, orthopaedic and soft tissue injuries.

[16.2] The immediate consequences were also severe and prolonged - the Plaintiff was hospitalised for an extended period, she was unconscious for two months after the accident, disoriented and confused for much longer, and suffered a prolonged period of amnesia; she had to learn to walk again, after first walking with a frame.

[16.3] The accident had a range of permanent and semi-permanent physical consequences for her – her left knee is still septic, with a drain attached; she walks with a limp; she has significantly diminished physical and mental capacity.

[16.4] The accident also had a serious impact on her amenities of life. Because of the mood swings and depression caused by her injuries and her impaired speech her social life has diminished drastically – she has lost her circle of friends and even her family have in some instances grown distant from her. Her inability to concentrate for any length of time also affects her social relations and her ability to participate in leisure activities. She is able to live alone, with her daughter, but her mother must stay close to her to look after her. She is unable to drive herself around. She can no longer participate in the sporting and leisure activities such as dancing, that she enjoyed prior to the accident. She has no prospects for further study. She is disfigured due to scarring and the ongoing problem with her left knee.

[17] In short, the Plaintiff experienced severe pain and suffering and loss of amenities of life as a result of the injuries sustained in the accident.

[18] Ms Makopa, for the Plaintiff submitted that this entitled her to an amount of R1 800 000.00 for general damages. Mr Malatji, for the Defendant submitted instead a figure of R750 000.00.

[19] Both counsel referred me to a number of similar cases to motivate their proffered amount. Mindful of the warning issued in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325B that '[t]he assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty' and that, although previous cases '... are a useful

guide to what other courts have considered to be appropriate ... they have no higher value than that', I turn to these cases for general guidance.

- [20] On the higher end of the scale Ms Makopa referred me to *Dlamini v Road Accident Fund* unreported, (59188/13) [2015] ZAGPPHC 646 (3 September 2015) (*Dlamini*); *Megalane v Road Accident Fund* [2007] 3 All SA 531 (W) (*Megalane*); *Mnguni v Road Accident Fund* 2006 6 QOD E2-1 (GSJ) (*Mnguni*); and *Road Accident Fund v Marunga* [2003] 2 All SA 148 (SCA) (*Marunga*).
- [21] In *Dlamini* the plaintiff suffered a serious traumatic brain injury, a mandible fracture and facial injuries. The consequences of particularly the brain injury were severe. He is unemployable, unable to fulfil the role of husband and father, unable to cope with household duties or do sport, socially isolated due to his inability to follow conversations and unable to take care of his own affairs. An amount of R1 350 000.00 was awarded in 2015 (not inflation adjusted).
- [22] In *Megalane* the plaintiff, an 11 year old boy at the time of his accident suffered a head injury that caused severe neurological impairments and permanent disfigurement. The consequences were so severe that he had to be placed in a nursing home. An amount of R1 000 000.00 was awarded in 2006, which translates to R1 961 000.00 in 2017.
- [23] In *Mnguni* the plaintiff, 39 years old, sustained a severe head injury and an injury to his right leg that resulted in the lower leg being amputated. As a result of the head injury he suffered headaches and neck pain, as well memory, concentration and attention difficulties, although he was able to return to his previous employment within 9 weeks after the accident. A sum of R700 000 was awarded for general damages in 2006, which if adjusted amounts to R1 373 000.00 in 2017.
- [24] In *Marunga* the plaintiff did not suffer a brain injury as did the Plaintiff in this matter, but, in addition to soft tissue injuries of the chest and bruises, a fracture of the left femur. This fracture was initially corrected through the insertion of a plate and screws. When these were removed it transpired that they had caused a mal-union of the femur and angulation, so that the

plaintiff's left leg was shortened. This resulted in a number of subsequent hospital visits. The leg deformity could be corrected through further surgery, with a 80% chance of success. An amount of R175 000 was awarded on appeal in 2003, that amounts to R435 000.00 if adjusted to 2017.

- [25] Mr Malatji in turn referred me only to the matter of *Hurter v Road Accident Fund & Another* 2010 6 QOD A4-12 (ECP). The plaintiff in this matter, a 20 year old art student sustained extensive facial fracturing and lacerations on her face; injuries to her chest, neck, abdomen, back and upper and lower limbs; and 'a severe diffuse axonal injury to the brain which included a brain contusion and a fracture of the base of the skull'.
- [26] As a result of these injuries she has undergone a profound personality change – she suffers from acute inhibition and is irritable and prone to outburst. Although she has been able to continue studying and has in fact advanced in her studies (at tertiary level), she has not performed as well as in the past. She is disfigured and faces the prospect of future surgery to correct some of the disfigurement.
- [27] The court in *Hurter* awarded a sum of R500 000.00, which represents a figure of R750 000.00 if updated.
- [28] As can be expected, this matter is not on all fours with any of the cases cited by counsel for the Plaintiff or the Respondent.
- [29] The consequences of the brain injury in *Dlamini* seem more severe than those suffered by the Plaintiff in this matter, although the plaintiff in *Dlamini* did not suffer a corrolary leg injury with chronic consequence such as the Plaintiff here did.
- [30] In *Megalane* the plaintiff was injured more severely with more severe consequences (he had to be placed in a nursing home) and he was also much younger than the Plaintiff herein at the time of the accident.
- [31] In *Mnguni* the head injury and its consequences were not so severe as the Plaintiff's in this matter, but the leg injury, resulting in an amputation had more severe consequences.

- [32] In *Marunga* there was of course no brain injury, but a leg injury that caused chronic problems well into the future and required frequent hospitalisation long after the accident, similar to the sepsis in the Plaintiff's knee, which has turned into a long term medical problem for her.
- [33] In *Hurter*, although the plaintiff's disfigurement there seems more severe than that of the Plaintiff herein, the consequences of her brain injury seem to have affected her less in her enjoyment and quality of life – she has been able, for example, to continue with her studies. She has also not experienced the kind of chronic problem that the Plaintiff in this matter has had with her knee.
- [34] The salient factors to consider with respect to the Plaintiff to my mind that distinguishes her from all the previous cases are her prolonged hospitalisation and period of unconsciousness after the accident; her severe retrograde and post-accident amnesia, that lasted for an inordinately long time after the accident; the extent to which her world has been narrowed and her prospects in life limited by her cognitive, speech, concentration and other difficulties (although she can function nominally independently); and the stubborn persistence of the problems with her knee, that causes not only physical discomfort and continuing pain and suffering, but also social embarrassment.
- [35] These factors taken together lead me to conclude that an amount of R1 500 000.00 is fair and reasonable as general damages under the circumstances.

Loss of earnings

- [36] As stated at the outset, on the second day of the trial it emerged that the Defendant would not contest the contingencies applied with respect to past and future loss of earnings and so also not the amount proposed to be awarded for that by the Plaintiff by way of its actuarial report.
- [37] The Plaintiff proposes that the normal contingency of 5% be applied to past loss of earnings and a slightly adjusted from normal 20% to loss of future earning capacity. This results in an amount for past and future loss of earnings after application of the limit or 'cap', of R6 683 069.00.


- [37] This court does have a discretion with respect to the contingencies. However, I find no reason to depart from the contingencies as proposed by the Plaintiff. As a consequence, I find that the amount of R6 683 069.00 should be awarded for past and future loss of income.

Costs

- [38] Ms Makopa for the Plaintiff motivated strongly that the Defendant should be saddled with a punitive costs order in the form of costs *de bonis propriis*. She points in this respect to the conduct of the Defendant's case and in particular that the Defendant's conduct resulted in the Plaintiff having to secure the presence of a witness and of the *curator ad litem* for the first day of trial; and alleged after the fact interference by the attorney for the Defendant in the joint minute prepared by the two industrial psychologists during the course of the trial. In light of the fact that the Defendant has in any event tendered the wasted costs associated with securing the witness and the presence of the *curator ad litem*, I am of the view that a punitive costs order of this or any other kind is not warranted. I do, however order that the Defendant as per its tender pay the costs related to securing the presence of the Plaintiff's witness and the *curator ad litem* on the first day of trial.

Order

- [39] The parties handed up a draft order that was complete except for the amount of damages to be awarded. I have inserted that amount and make the draft order, now marked draft order "A" an order of court. This order is appended to this judgment.
- [40] In addition to the terms of that order, I also order the following:
- The Defendant is ordered to pay the costs of securing the Plaintiff's witness and the *curator ad litem* at court on the first day of trial.



JFD Brand

Acting Judge of the High Court

"B"
24/10/2017
JFO Brand

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 18209/2015

HELD AT PRETORIA ON THIS _____ DAY OF MAY 2017 BEFORE THE
HONOURABLE JUDGE BRAND AJ.

In the matter between:

KRIEL: HERMAN N.O obo JUSTINE PRETORIUS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

ORDER

After having heard counsel, it is ordered that:

1. The Defendant pay damages to **Justine Pretorius** (hereinafter referred to as "the Plaintiff"), in a total amount of
R 8 183 069.00 (Eight million one hundred and eighty three thousand and sixty nine Rand)
("the capital amount"). Payment of the capital amount shall be paid within 60 (sixty) days of the date of this order.
2. The Defendant is to furnish the Plaintiff with an **Undertaking** in terms of Section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996, for **100%** of the Plaintiff's future accommodation in a hospital or nursing home, or treatment or rendering of a service, or supplying of goods or related expenses as *inter alia* set out in the Plaintiff's medico legal reports, in respect of injuries sustained by the Plaintiff in a motor vehicle collision which occurred on or

about **16 December 2011.**

3. Payment of the capital amount is to be made into the following account:-

Account Name	:	Edeling Van Niekerk Incorporated
Bank	:	Nedbank
Branch	:	Business Westrand
Account number	:	1286083516
Branch code	:	128605

4. Should the defendant fail to effect payment of the capital amount within 60 (sixty) days of the date of this order, the Defendant shall become liable for interest *a tempore morae* on the capital amount at a rate of 10.5% per annum from 14 (fourteen) days from date of this order to date of final payment;

5. The payments by the Defendant referred to in this order shall be made into a trust account as contemplated in Section 78(2A) of the Attorney Act 53 of 1979, of the Plaintiff's Attorney, EDELING VAN NIEKERK INCORPORATED, for the sole benefit of the Plaintiff.

6. The Plaintiff's attorney shall be entitled to make payment of expenses incurred in respect of accounts rendered by:

6.1 experts witnesses namely:-

- | | |
|-------|--|
| 6.1.1 | Dr G Fredericks, General Medical Practitioner |
| 6.1.2 | Dr C M Lewer-Allen (Neurosurgeon) |
| 6.1.3 | Robert MacFarlane (Clinical Psychologist) |
| 6.1.4 | Odette Guy (Speech / Language Pathologist and Audiologist) |
| 6.1.5 | Dr L Grinker (Psychiatrist) |
| 6.1.6 | Alison Crosbie (Occupational Therapist) |

- 6.1.7 Dr VD Bout (Orthopaedic Surgeon)
- 6.1.8 Bridgette Purchase (Educational psychologist)
- 6.1.9 Louis Linde (Industrial Psych.)
- 6.1.10 Mr G Whittaker - Algorithm (Actuary)

from the aforesaid funds held by them for benefit of the Plaintiff.

7. The Plaintiff's attorneys shall be entitled to payment, from the aforesaid funds held by them for the benefit of the Plaintiff, of their fees in accordance with their written fee agreement.

8. The Defendant pays the Plaintiff's taxed or agreed attorney and own client costs on the High Court Scale which costs *inter alia* will include the following:

8.1 The Costs of Senior-Junior Counsel for the 18th and the 19th of May 2017;

8.2 All costs in obtaining all medico-legal/addendum-reports, joint minutes and an actuarial report as well as the Plaintiff's travelling and lodging costs in attending the Plaintiff's and Defendant's Experts. The Plaintiff filed the following expert reports:

- 8.2.1 Dr G Fredericks, **General Medical Practitioner**
- 8.2.2 Dr C M Lewer-Allen (Neurosurgeon)
- 8.2.3 Robert MacFarlane (Clinical Psychologist)
- 8.2.4 Odette Guy (Speech / Language Pathologist and Audiologist)
- 8.2.5 Dr L Grinker (Psychiatrist)
- 8.2.6 Alison Crosbie (Occupational Therapist)
- 8.2.7 Dr VD Bout (Orthopaedic Surgeon)
- 8.2.8 Bridgette Purchase (Educational psychologist)
- 8.2.9 Louis Linde (Industrial Psych.)

8.2.10 Mr G Whittaker - Algorithm (Actuary)

8.3 The cost of the curator *ad litem*, Adv Kriel, for his attendance at the trial on the 18th of May 2017 upon request of the defendant.

8.4 The attendance fee for the Industrial psychologist, Ms J Bosman on the 18th of May 2017.

9. The protection of funds will be dealt with in the report to be prepared by the curator *ad litem*. The issue regarding protection of funds is postponed pending receipt of the said report.

BY ORDER OF COURT

REGISTRAR

COUNSEL FOR PLAINTIF:

ADV N MAKOPO

083 258 0435

COUNSEL FOR DEFENDANT:

Adv SM Malatji

083 456 8815