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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 19251/2014

In the matter between:

TANYA KLEYN

Plaintiff

and

KFC SOMERSET WEST

Defendant

JUDGMENT

PARKER, AJ:

Introduction

[1] On the 26th September 2013, at Defendant's premises Plaintiff slipped and fell on a wet floor/stairs. On 25th October 2018 this Honourable Court held Defendant liable for

50 percent of Plaintiff's agreed or proven damages. This judgment therefore is in respect of Quantum only.

[2] As a result of the fall at the premises of Defendant, Plaintiff sustained a soft tissue injury to her lower back for which she was initially treated conservatively, and when pins and needles in both her feet and pain ensued in her lower back she consulted a general practitioner on 27th September 2013. In the result there was a narrowing of the L4 disc space.

[3] As a result of Plaintiff's aforesaid injuries and their sequelae, Plaintiff has sustained damages and as amended claimed follows:

3.1	Past medical expenses	R 24 779.77
3.2	Future medical expenses	R338 777.00
3.5	General Damages	R350 000.00
	TOTAL	R713 556.77

[4] **Witnesses**

For Plaintiff:

Dr P A Olivier, Orthopaedic Surgeon

Michelle Barnard, Quantum Actuarial Services CC, Actuary

For Defendant:

None

Dr Oliver's Report

[5] Dr Olivier, as confirmed in his testimony diagnosed Plaintiff with a significant soft tissue injury to her lumbar area resulting in the mechanical backache. In Dr Olivier's opinion the incident resulted in symptomatic disc degeneration at the L4/5 level of

Plaintiff's lumber spine. Dr Olivier opined that Plaintiff would need conservative treatment on a permanent basis and initially foresaw Plaintiff having to undergo possible three surgical interventions. The surgical interventions would have been an initial fusion, extended fusion and possible disk replacement. However, she did not undergo the procedures.

[6] Due to the lapse of time Dr Olivier and at the time of the hearing, Dr. Olivier foresaw only the fusion operation still necessary and applied a 60% deduction in Plaintiff's favour that she would have to undergo the operation. Dr Olivier confirmed the Plaintiff's testimony that she will probably never be pain free, but the operation will give her pain relief. Dr Olivier furthermore confirmed the costs involved in her future medical procedures as being fair and reasonable, which costs formed the basis of the actuarial calculations. None of the Plaintiff's future medical procedures or the costs thereof were disputed.

Michelle Barnard

[7] The report by Michelle Barnard (Actuary) of Quantum Actuarial Services was received into evidence when it was indicated by Defendants legal representatives that her viva voce evidence would not be necessary. Her updated actuarial report quantifies Plaintiff's future medical expenses, based on Dr Olivier's updated report.

Past medical expenses

[8] The amount claimed under this head of damages is R 24 779.77 for which vouchers were produced which expenses were paid by her medical aid, Gems. These expenses related to the accident and for her radiology admissions that she had to endure from 27th September 2013 to 25th August 2014.

[9] Contingencies

Given the Plaintiffs hesitance to have undergone procedures in the past I deem it prudent to apply a general contingency deduction by another 10 percent. In other words, Dr. Olivier stated that there is a 60% chance that she will submit thereof to the operation. In my view, based on her past conduct and having taken her personal circumstances into account, coupled with the pain she suffers deem it appropriate for a 50% chance that she will do so. The amount of R162 790.00 is adjusted to R146 511.00.

Future medical expenses

[10] The Plaintiffs testimony was throughout the hearing steadfast that she, on the advice of her local physician attempted to postpone the medical procedure as far as possible and she indicated that she has now decided to undergo the necessary medical procedure as indicated by Dr Olivier, during the early part of 2025, due to the ongoing pain.

[11] The result of the above, as was evident from the second report by Dr Olivier dated 16th July 2024 and confirmed by his oral testimony before this Court is that the Plaintiff will now only require one (1) medical intervention and Dr Olivier has stated and confirmed in his evidence that he foresees a 60% chance that she will undergo the procedure. Defendant was critical and skeptical of this procedure, indicating the unlikelihood that Plaintiff will submit herself to the procedure.

[12] With regards to the values attached to the Plaintiff's future medical expenses the reasonableness and fairness of the amounts proffered by Dr Olivier was confirmed by him during his testimony, and, his testimony of the expected costs stands uncontested.

[13] The updated actuarial calculation was done which eliminated two further medical procedures¹ that was initially indicated by Dr Olivier, were removed from the

¹ Items 2 and 6 on page 3 (page 55 of exhibit A) of updated and amended actuarial report by Michelle Barnard

calculations and the actuarially adjusted and calculated future medical expenses, as per the amended actuarial calculation by Michelle Barnard (the actuary) amounts to R338 777.00.

[14] Provision was made for conservative treatment for R30 293.00 as well as R112 207.00 in the calculations. Since the past medical expenses adequately cover the first conservative treatment, I deem it prudent to disregard the sum of R30 293.00. The total future medical expenses are R292 205.00. (inclusive of the additional 10%adjusted)

General Damages

[15] At the time of the fall Plaintiff was 36 years of age and a Security Officer which included an active lifestyle. She described at the hearing that she experienced lower back pain immediately after the fall which she continues to suffer from and used pain medication for relief. She had delayed the fusion operation previously on advice of her general practitioner for as long as she was able to bear the pain and limitation of her movements, however she has now found acceptance to undergo the procedure in 2025. She described to court how she had felt about her mobility as she experiences discomfort when sitting, walking or standing for long periods of time.

[16] In determining the quantum of General damages in personal injury cases the trial court essentially exercises a general discretion. This description is not fettered by an inexorable tariff drawn from previous similar awards. In the first instance a proper basis for comparison must be ascertained. It is not enough to compare the general nature of the injuries; all factors affecting the assessment of damages must be considered. Once it is established that the circumstances are sufficiently comparable, then such cases are to be used to provide a general yardstick to assist the court in arriving at an award appropriate.

[17] However, each case differs and must be determined on its own merits. The purpose of awarding damages “*is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings*” to ensure that the damages awarded are commensurate with the injury inflicted.

[18] In determining an appropriate award for general damages, I considered Radebe v Road Accident Fund². The Plaintiff sustained a soft tissue Injury to the right leg and lower back. She was transported by ambulance to Jubilee hospital. The initial resuscitation was done. She was given medication for the right leg pain and discharged on the same day. She started experiencing lower back ache. She consulted a general practitioner, the next day. She was given pain medication. She was referred to a physiotherapist for rehabilitation from January 2015. She consulted with the Plaintiff's orthopedic surgeon, in May 2016. X-rays were taken and an MRI scan was done. On 17 May 2016 she was admitted at Louis Pasteur hospital where she was treated with NSAIDS. The MRI scan showed disc changes at L5/ S1. She continued receiving physiotherapy. In this matter, Plaintiff also suffered a mild head injury. But for the head injury, this case is similar although no medical procedures are indicated.

General damages awarded:	R 450 000.00
Updated value:	R 700 000.00

[19] In PM v Road Accident Fund³, the Plaintiff suffered an injury to her neck (C1 and C2 vertebrae) and to her knee. Plaintiff had limited neck movement and could only work in a neck friendly environment. Plaintiff continued experiencing pain, two years after the accident and would continue experiencing chronic pain for the rest of her life.

General damages awarded:	R 300 000.00
Updated value:	R 366 400.00

² [2019] ZAGPPHC 475

³ [2019] ZAFSHC 168

[20] In *RAF v Maasdorp* 2002⁴, the Plaintiff, a 49 year old hawker and home mechanic, suffered a severe L5/S1 listhesis as well as a slight slip at level L3/L4. He experienced chronic lower backache and certain activities causing nerve root compression and "*typical sciatica*" in his leg. The plaintiff spent most nights twisting and turning in bed trying to find a position of comfort. Driving time and walking distance was curtailed. A fusion (with bone and screws) at level L5/S1 was immediately indicated, which could be expected to significantly alleviate the symptoms, including the pain down the leg and enable the plaintiff to walk further and sit and stand much longer but still unable to resume work as a mechanic. In the mean time the pain was kept under control by the avoidance of certain activities.

General damages awarded:	R 110 000.00
Updated value:	R 330 000.00

[21] I agree with Plaintiff's counsel that none of the above cases are 100% similar to the situation of the Plaintiff. It is submitted that the injuries in some of the cases were less and in others worse than those of the Plaintiff. In *De Jongh v Du Pisani N.O.*⁵ the Supreme Court of Appeal at paragraph 60 laid down the basic rule in that the award should be fair to both sides. Considering the injuries which Plaintiff sustained, and her ongoing pain, lack of optimal mobility and her frustration with her condition, an award in the sum of R300 000.00 is appropriate.

Costs

[22] There are no reasons for me to depart from awarding costs order in favour of Plaintiff

Order

⁴ 5 C&B C4-31(C)

⁵ 2005 (5) SA 547 (SCA)

[23] Having considered the pleadings filed on record and having heard evidence and arguments on behalf of the plaintiff and defendant, the following order is made:

(a) Payment by the defendant to the Plaintiff in the sum of R308 492.38, after the 50% apportionment which amount is calculated as follows:

Past medical expenses	R24 779.77
Future medical expenses	R292 205.00
General Damages	R300 000.00
Balance	R616 984.77
Less 50% apportionment	R308 492.38

(b) The aforesaid amount is to be paid into the following bank account:

VISAGIE VOS INC -TRUSTACCOUNT

ABSA BANK

N1 CITY

BRANCH CODE: 632005

ACCOUNT NO: 1[...]

REFERENCE: (K711) K512

(c) legal costs on a party and party basis on scale B, which costs are to include the following experts, including the compiling of the reports of:

(i) Dr P A Olivier, Orthopedic Surgeon

(ii) Michelle Barnard Quantum Actuarial Services CC, Actuary

(d) Interest a *tempore morae* at 10.25%

R K PARKER
Ms Acting Justice of the High Court
Western Cape Division

Appearances

Counsel for Plaintiff: Adv H E de la Rey - Bloemfontein Chambers
Instructed by: Visagie Vos Attorneys
Mr EJ van der Westhuizen

Counsel for Defendant: Adv W J van der Merwe
Instructed by: Kellerman Hendrikse Inc.
Mr HD Hendrikse

Date of Hearing: 10 September 2024
Date of Judgment: 30 January 2025