

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO. 439/16

In the matter between:

NOMAROMA FEKENISI

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE**

Defendant

JUDGMENT

MBENENGE, JP:

[1] On 25 August 2015 the plaintiff sustained a knee injury whilst at her home, after she slipped and fell. She was thereupon admitted to the Stutterheim Provincial Hospital and, on the following day, transferred to the Frere Hospital, East London, where, upon her admission thereto, she received further treatment.

[2] In a judgment delivered on 9 October 2018, this Court¹ found that the treatment meted out to the plaintiff at the hospitals had been substandard and that the nursing and medical staff concerned had been negligent, with the result that the defendant was held liable to the plaintiff in proven or agreed damages.

[3] The matter proceeded before me on the issue of general damages, the parties having agreed on the amount of compensation as and for special damages.²

[4] By way of a stated case, the narrative given hereunder, on the strength of which an appropriate award of general damages will be considered, was made common cause between the parties.

[5] The plaintiff was born on 26 November 1955, is married and has four offspring. As a result of her negligent treatment, the plaintiff developed lymphoedema of the right lower leg, ankle and foot, a large infected area over the dorsal aspect of the right ankle, skin hyper-pigmentation, a significant degree of tissue necrosis, the ankle being in a position of fixed equines chronic vascular insufficiency, hypaesthesia of the lower leg and the loss of superficial sensation distal to the knee joint resulting in chronic arterial insufficiency.

[6] In 2005 the plaintiff underwent a knee replacement operation to her right knee, and was on treatment for high cholesterol and hypertension, but was otherwise in good health, both physically and emotionally. During her hospitalization for two months, she was referred to theatre on several occasions for the performance of a reduction of the knee dislocation. She developed chronic osteitis of the right lower leg and ankle and had to undergo a skin graft operation due to a wound that had developed on her right foot and ankle.

¹ Per Tokota J (*Nomaroma Fekenisi v MEC for Health, Eastern Cape* case no 439/16).

² Past and future loss of income, costs of adaptations to the plaintiff's house, past caregiver's costs and future medical expenses, all of which totalled R2 705 031.43.

[7] Since the incident, the plaintiff has been unable to walk or stand and is constantly in pain. She presents with depressive features, is withdrawn from family and friends, isolates herself and has become easily irritable. She has gained weight, has decreased energy level, struggles to sleep at night, and experiences a strained home atmosphere due to difficulty in doing things for herself. She also experiences a sense of insecurity and the *sequelae* of the injury has made her feel less of a woman and that her life has drastically changed.

[8] Prior to the incident the plaintiff had been an active person in her family, in business dealings and in church events, but has been unable to continue with these amenities of life consequent upon the incident. She has also lost interest in sexual activities. The plaintiff continues to have intrusive thoughts and dreams about the incident. She has been diagnosed as being severely depressed with feelings of sadness, pessimism, loss of pleasure, loss of interest, agitation, feelings of hopelessness/helplessness, loss of energy, irritability, changes in appetite, concentration difficulties and tiredness/fatigue. She suffers from high anxiety levels, predominantly fear of the dark and strangers, difficulty in falling asleep, bad dreams, nightmares, and night terrors. Even though she will be treated in future, it is foreseen that the plaintiff will experience pain and discomfort on a permanent basis by reason of the extent of the lymphoedema on the right lower leg and ankle, and the extensive scarring of the right lower leg and ankle.

[9] The life of the plaintiff, who had hitherto been fairly healthy, took a sudden turn for the worse; pain and depression have become the new normal for her.

[10] It is trite law that the award in respect of general damages falls within the broad discretion of the court of what it considers to be fair and adequate compensation in the circumstances of the case. Not only must the nature, extent

and effect of the injuries sustained be considered, but also the escalation of the quantum of awards for general damages of late by our courts, always of course within the confines of moderations.³

[11] It has also been held that an adequate award for general damages must be fair to both sides; it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense.⁴

[12] The court must be guided by awards made in similar cases where plaintiffs were granted compensation. Although it is helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous.⁵

[13] Mr *Louw*, counsel for the plaintiff, referred me to previous comparable awards made for general damages. These are dealt with *seriatim*.

13.1 In *AA Mutual Insurance Association Limited v Van Jaarsveld*⁶ an award of R22 500 (currently translating to R1 530 000) was made. The plaintiff had suffered partial paralysis following a dislocation of his cervical spine with multiple injuries and a right spastic hemiplegia, but the brain and personality were relatively unaffected. Over a period of six months, the plaintiff was moved from a wheelchair to crutches and eventually walking with a stick.

13.2 In *Michael v Bruwer*⁷ an award of R21 500 (currently translating to R1 332 000) was made. The plaintiff had been a young lady who sustained multiple injuries to her spine and ankle and having been

³ *Roe v Road Accident Fund* 2011 (6J2) QOD 59 (GSJ) (*Roe*).

⁴ *Pitt v Economic Insurance Company Ltd* 1957 (3) SA 284 (N) at 287 E – F, *per* Holmes J.

⁵ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) at 93 d – f; also see *Minister of Safety and Security v Augustine and others* [2017] ZASCA 59;; 2017 (2) SACR 332 (SCA), where the Supreme Court of Appeal remarked that the amount of the award is not susceptible of precise calculation; it is arrived at in the exercise of a broad discretion.

⁶ *AA Mutual Insurance Association Limited v Van Jaarsveld* 1974 (4) SA 729 (A).

⁷ *Michael v Bruwer* 1973 2 QOD 345 (T).

left with a painful ankle joint, previous operations to the ankle joint having been unsuccessful with a further future operation a probability with a prospect of fusion of four spinal vertebrae in the future.

13.3 In *Roe*⁸ an award of R650 000 (presently equalling R1 086 000) was made. In that case the plaintiff, a 44 year old, male sustained multiple injuries to his neck, face and both lower extremity. Several surgical procedures were carried out and the plaintiff remained in a rehabilitation hospital for two months, was wheelchair-bound for two months thereafter and then started walking with the aid of crutches. He was off work for about six months, but despite the seriousness of the injuries able to continue running his business until retirement age.

[14] For his part, Mr *Mayekiso*, counsel for the defendant, likewise referred me to comparable cases which, in his view, would be of assistance in guiding the Court to navigate the matter to a fair and just award for general damages. I also deal with the cases, one after the other.

14.1 *Mgudlwa v Road Accident Fund*⁹ is a case wherein R300 000 (currently translating to R500 000) was awarded to a 34 year old plaintiff, who had suffered from fractures to the femur and tibia causing the left leg to be 5cm shorter than the other leg due to deformity of the proximal end of the femur. Surgery in the form of a total knee replacement and realignment of the femur was anticipated.

14.2 In *Ncama v Road Accident Fund*¹⁰ the Court awarded R500 000 (currently translating to R650 000) to a female cleaner in

⁸ *Roe* above n 3.

⁹ *Mgudlwa v Road Accident Fund* 2011 (6E3) QOD 1 (ECM) E3-1.

¹⁰ *Ncama v Road Accident Fund* 2015 (7E3) QOD 7 (ECP).

November 2014. The plaintiff sustained a fracture of her right femur causing an open reduction and internal fixation to be performed, where after she acquired crutches to ambulate. She also sustained a skull fracture, a neck injury and soft tissue injuries to her pelvic ring and sacroiliac joints. A thirty percent chance that a fusion at C5/6 would be required was predicted. The plaintiff sustained further injuries to her pelvic, neck and head, but the extent of her lower limb injuries was much less severe.

14.3 *Abrahams v Road Accident Fund*¹¹ is a matter wherein an award of R500 000 (currently translating to R750 000) to a 41 year old spray painter. The Court found that the head injury complained of was really minimal and no cognisance was taken thereof in considering the amount to be awarded for general damages. In that case the plaintiff sustained a badly comminuted fracture of the right proximal femur as well as fractures of the right distal fibular, patellar and medial malleolus. Open reductions were performed on all three areas with internal fixation. The lower right leg was shortened and the plaintiff had to put on an assistive device.

14.4 *Ndaba v Road Accident Fund*¹² is a matter in which the Court awarded R300 000 (translating to about R500 000 currently) to a female informal hawker who was 42 years old at the time of the injury. The plaintiff sustained multiple orthopaedic injuries including a pelvic fracture, and fractures to the right femur and tibia as well as a left knee injury. Open reduction and fixation were performed on the hip joint, femur and tibia. Injuries to her shoulder and hip might require hip and shoulder replacement overtime. The

¹¹ *Abrahams v Road Accident Fund* 2014 (7J2) QOD 1 (ECP).

¹² *Ndaba v Road Accident Fund* [2011] ZAECELLC 6.

plaintiff was bound to have a knee replacement in future due to degenerative changes. The plaintiff also suffered a ruptured bladder.

14.5 In *Road Accident Fund v Marunga*¹³ the Supreme Court of Appeal reduced an award made by the trial Court in 2001 for general damages to R175 000 (translating to approximately R500 000, currently). The plaintiff was 19 years old when he was injured. He sustained a fractured femur, soft tissue injuries and bruises. An open reduction and fixation were performed on the femur and he initially spent 5 months in hospital recuperating. Thereafter he ambulated with crutches. He was readmitted four years later for removal of the plate and screws when it was discovered that there was mal-union of the femur. His left leg was 3.5 cm shorter than the right leg. Corrective surgery was required although the left would never revert to its pre-collision length.

14.6 *Rieder v Road Accident Fund*¹⁴ is yet another matter wherein the Court awarded the sum of R300 000 (estimated present day value of which is R500 000) for general damages to a 43 year old qualified artisan. The plaintiff had suffered a right side tibia plate fracture, a fracture of the right ankle, nerve injury including injury to the muscle group of the lower leg.

14.7 In *Alla v Road Accident Fund*¹⁵ the Court awarded general damages in the sum of R200 000 (translating to about R400 000, currently) to a 41 year old correctional officer. The plaintiff had suffered a fracture of the ankle with displacement of the tibia-fibular joint and soft tissue injury. The plaintiff was rendered unable to carry heavy objects, run

¹³ *Road Accident Fund v Marunga* [2003] ZASCA 19; 2003 (5) SA 16 (SCA); [2003] 2 All SA 148 (SCA).

¹⁴ *Rieder v Road Accident Fund* QOD VOL VI E 6- 1.

¹⁵ *Alla v Road Accident Fund* QOD VOL VI E 8-1.

or walk fast and there was a risk of degenerative arthritis and an ankle replacement procedure.

[15] It should be apparent from a reading of the cases mentioned above that some of the injuries and their *sequelae* are of a more serious nature, whilst others are of a less serious nature, than in the present matter. Indeed “*similar is not identical.*” Even in those matters where the injuries and their *sequelae* were significantly more severe than in the present matter, the award was not as high as that sought by the plaintiff in the instant matter. For instance, in the *van Jaarsveld* matter, just over R1 500 000 was awarded in circumstances where the plaintiff had, unlike the plaintiff in the instant matter, sustained not only injuries to the lower limbs, but severe injuries to the spinal cord, as well.

[16] The plaintiff, in this matter, has suffered severe pain since the date of the incident, being 25 August 2015 to date, and is expected to continue to experience pain, for an indefinite period. She has been rendered wheelchair-bound and mostly bedridden. On that score, this case stands out. Her life has dramatically changed, rendering her to a state of dependency, depression and severe incapacity. It is not the case of the defendant that the plaintiff will ever resume a normal life.

[17] Having considered all the circumstances of this matter, I am of the view that an appropriate, fair and reasonable amount for general damages is R950 000.

[18] In the result, I grant judgment in favour of the plaintiff for -

(a) payment of R950 000;

(b) interest on the capital amount at the rate of 09.75% *per annum* calculated from a date 30 days from today to date of payment;

(c) costs of the action as between party and party on the High Court scale and any costs attendant upon the payment of the capital, such costs to include those of the reasonable qualifying expenses of the plaintiff's experts witnesses, if any, of -

- (i) Dr P A Olivier;**
- (ii) Prof M G Veller;**
- (iii) Ms A R Fryer;**
- (iv) Ms P Hill;**
- (v) Mr R Toogood;**
- (vi) Dr H J van Daalen;**
- (vii) Mr G Scheepers;**
- (viii) Mr B van der Merwe;**
- (ix) Mr C J Davies; and**
- (x) Dr R J Koch (Actuary).**

(d) The plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant's attorney of record and the defendant shall pay to the plaintiff interest on the taxed party and party costs calculated at the legal rate of 09.75% from a date 14 days after taxation to date of payment.

(e) Payment in terms of this order shall be effected into the following account:

Bank	:	Nedbank
Branch Code	:	126 317
Account Name	:	Niehaus McMahon Attorneys
Account Type	:	Trust Account
Account Number	:	126[...]

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the plaintiff : *S S W Louw*

Attorney for the plaintiff : *Niehaus McMahon Attorneys*
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C/o Christopher's Private School,
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Counsel for the defendant : *M Mayekiso*

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Date of hearing : 15 June 2020

Date judgment delivered : 11 August 2020