

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: NO

.....
SIGNATURE

DATE: 13 October 2021

CASE NO: 2018/28182

In the matter between:

SIBAMBISO NDLOVU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DOSIO AJ:

Introduction

[1] This is an action for general damages in terms of the Road Accident Fund Act 56 of 1996 ('Act 56 of 1996'). Sibambiso Ndlovu (the 'plaintiff') sustained bodily injuries as a result of a motor vehicle collision which occurred on 29 March 2015. The plaintiff was a pedestrian at the time of the collision.

[2] The merits have become settled and the Road Accident Fund (the 'defendant') has conceded liability for 80 percent of the plaintiff's proved damages. The defendant has settled the amount of loss of income in the amount of R249 092.56 and has also provided the plaintiff with an undertaking in terms of s 17(4)(a) of Act 56 of 1996 in respect of 80 percent of the plaintiff's future hospital and medical expenses.

[3] The Appeal Tribunal of the Health Professions Council of South Africa resolved on 31 July 2020 that the injuries sustained by the plaintiff constitute a serious injury as envisaged in s 17(1A) of Act 56 of 1996.

[4] The only issue in dispute and for my determination, is the quantum of general damages. Advocate Strydom, representing the plaintiff, has argued that an amount of R480 000 is an appropriate amount.

[5] The defendant's attorneys of record, Shereen Meersingh & Associates, withdrew on 8 December 2020. The defendant's attorney failed to comply with a court order to attend a pre-trial conference and failed to engage with the plaintiff's attorney. To date, the defendant has not indicated that it intends to appoint legal representatives on its behalf in this action. An order was granted on 21 April 2021 that the defendant's defence, as pleaded, be struck out. The plaintiff proceeded to serve and file its notice of set down for trial on the defendant.

[6] The matter proceeded to trial by way of default.

[7] The plaintiff relies on the following expert reports, namely: Dr I Wosu (a specialist physician), Dr H Enslin (an orthopaedic surgeon), Dr P Miller (a neurosurgeon), Ms L Grootboom (a clinical psychologist), and Ms M Spavins (an occupational therapist).

[8] The defendant delivered four expert reports, namely, that of Dr N S Ngcoya (an orthopaedic surgeon), Dr S K Hlahla (a neurosurgeon), Dr M J Ndhlovu (a clinical and consulting psychologist), and Dr M Ngoepe (an occupational therapist).

[9] Joint minutes were compiled by the parties' respective orthopaedic surgeons, neurosurgeons, clinical psychologists and occupational therapists.

[10] Due to the fact that affidavits were prepared in respect to the plaintiff, Dr Miller, Dr Enslin, Ms G Coetzee and Ms Grootboom, I am satisfied that the evidence to be adduced, be given on affidavit in terms of Uniform Rule 38(2).

Background

[11] The plaintiff is an unemployed adult male born on 21 April 1969. He was 45 years old at the time of the collision and is presently 52 years of age. He attained Form 3 (i.e. Grade 10) in Zimbabwe, being his highest scholastic achievement. He performed various piece jobs in Zimbabwe during the period 1988 to 1993, where he worked for approximately one year as a shop assistant and approximately three years as a post office assistant. He relocated to South Africa during 1993, whereupon he was employed mainly as a gardener. He was diagnosed as HIV positive in 2006 and placed on antiretroviral drugs.

[12] As regards his injuries, he suffered a mild head injury, fractures of the lumbar spine (L1 and L5), fractures of the thoracic spine (T3, T5 and T6) and abrasions to his cheek, forehead, right wrist and hands.

[13] Following the collision, the plaintiff was transported to the Charlotte Maxeke Hospital, Johannesburg, where he underwent X-rays of the spine, pelvis and chest. He received conservative treatment in the form of prescribed analgesics.

Expert reports

[14] From a neuro-physical perspective, the plaintiff presented with a head injury that may be categorised as being mild, according to the defendant's neurosurgeon. However, according to the plaintiff's neurosurgeon, the head injury may have been mild to moderate.

[15] A ventriculoperitoneal shunt was inserted after the collision. The plaintiff also presented with cognitive changes or deficits in the form of a poor attention span, being easily distracted, which may relate to the plaintiff's head injury. Both neurosurgeons noted that it would be difficult to separate out the effect of cognitive change from the head injury versus cognitive change which is based on the patient's other neurological morbidities.

Legal principles

[16] In arriving at an appropriate award for general damages, the learned author JJ Gauntlett SC in *The Quantum of Damages Bodily and Fatal Injury Cases*¹ referred to the case of *Sandler v Wholesale Coal Supplies Ltd*,² where the learned Watermeyer JA stated:

'...[I]t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money...there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations...'³

[17] In the case of *Protea Assurance Co Ltd v Lamb*,⁴ it was stated that although the determination of an appropriate amount for general damages is largely a matter of discretion of the court, some guidance can be obtained by having regard to previous awards made in comparable cases; however, as stated by the learned Potgieter J in that case:

'...this process of comparison does not take the 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 as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard

¹ JJ Gauntlett SC 'Volume I: General Principles' in *The Quantum of Damages Bodily and Fatal Injury Cases* 4 ed (1995) at 5.

² *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194.

³ *Ibid* at 199.

⁴ *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535H-536A.

being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.⁵

[18] In *AA Mutual Insurance Association Ltd v Maqula*,⁶ the court held:

'It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*.'

[19] There is no hard and fast rule in considering past awards, as it is difficult to find cases on all fours with the one presently being considered.

[20] I now proceed to consider some comparable cases and awards made previously.

Cases referred to by the plaintiff

[21] I was referred to the matter of *Ramolobeng v Lowveld Bus Services (Pty) Ltd*.⁷ The plaintiff in the matter was awarded R550 000 in 2015, which in present day value is R738 590. The plaintiff, a 34 year old male, was employed as a packer and he sustained a head injury with concussion, cervical and lumbar spine injuries (consisting of a L4/L5 inter-vertebral disc protrusion with compression of the left L4 nerve root), a L5/S1 inter-vertebral posterior disk bulge, and a thoracic spine inter-vertebral disk bulge at T5/T6. He was initially treated conservatively with the administration of analgesics, physiotherapy and rest, and subsequently underwent disc replacement surgery at levels L4/L5. He experienced chronic moderate to severe cervical and lumbar spine pain, which was aggravated by travelling and walking long distances, sitting too long or bending forward. He wore a lumbar support brace and was rendered unemployable in the open labour market as a result of the injuries.

⁵ Ibid at 535H-536B.

⁶ *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809A-B.

⁷ *Ramolobeng v Lowveld Bus Services (Pty) Ltd & Another* [2015] ZAGPPHC 31.

[22] In the matter of *S v RAF*,⁸ the plaintiff was awarded R600 000 on 28 June 2018, which in present day value is R673 550. The plaintiff was a 14 year old scholar at the time of the collision who sustained a moderate traumatic brain injury with a base of skull fracture, bleeding from the right ear and an injury to the left ear and lacerations of the left elbow and distal left arm. He also sustained an injury to the left leg. The plaintiff suffered an array of neuropsychological deficits which included:

- (a) A serious mood disorder, post-traumatic stress and a major depressive disorder;
- (b) Epilepsy with seizures, coupled with the TBI, PTSD and MDD neurological;
- (c) Impaired interpersonal relationships, causing a reduced self-esteem;
- (d) Headaches;
- (e) Change of behaviour;
- (f) Bilateral hearing loss in both ears;
- (g) Impairment in memory and high levels of anxiety;
- (h) Neurocognitive, neuro-behavioural and neuro psychiatric changes.

[23] The above would all persist into adulthood and would have a negative impact on the plaintiff's capacity to function in the workplace. Due to the mood disorder, the plaintiff would suffer a reduced earning capacity due to the injuries sustained in the collision.

[24] In the matter of *Mbalathi v RAF*,⁹ the plaintiff was awarded R450 000, which in present term value is R522 000. The plaintiff, a 22 year old student, sustained a transverse process fracture of T8-T10 and L1, rib fractures 9 and 11 and a left pneumothorax and pneumo-peritoneum. Due to the injuries sustained the plaintiff was unable to stand long, bend or extend his back and was accordingly limited to light physical to sedentary work.

⁸ *S v RAF* [2018] ZAGPJHC 452.

⁹ *Mbalathi v Road Accident Fund* [2017] ZAGPPHC 951; [2019] JOL 41449 (GP).

[25] In the matter of *Ndlovu v Road Accident Fund*,¹⁰ the plaintiff who was a 49 year old self-employed truck driver, was awarded R300 000 on 8 August 2013, which in present day value is R435 000. He sustained a closed tissue injury to the thoracic cage, a lumbar spine injury, a dislocation of the right shoulder and a head injury (unspecified). The plaintiff suffered from chronic back pain, chest pain and severe headaches up to three times per week and he presented with some impairment of his faculties due to the head injury, including forgetfulness and poor concentration. The impairments did not affect the plaintiff's ability to run his business.

[26] Although these cases have been of some assistance, it is trite that each case must be determined upon its own merits and no one case is factually the same as another.

Evaluation

[27] In this present matter, the salient facts which I must consider in determining an appropriate award for general damages are that the plaintiff sustained a head injury with loss of consciousness, a fractured lumbar spine (L1 and L5) and a fractured thoracic spine (T3, T5 and T6). The plaintiff's neurosurgeon, Dr Miller, found that the plaintiff may have sustained a mild to moderate head injury. Both the plaintiff's and defendant's clinical psychologists concur that the plaintiff seems to meet the DSM 5 criteria for a diagnosis of major depressive disorder, generalised anxiety disorder and post-traumatic stress disorder (PTSD). Both clinical psychologists further agree that the plaintiff has been rendered psychologically vulnerable as a result of the accident, and that the accident *sequelae* have likely influenced his enjoyment and quality of life. The plaintiff's and defendant's orthopaedic surgeons both agree that the plaintiff remains symptomatic in respect to his back, and that the plaintiff has been left with serious long term impairment and serious loss of body function.

[28] According to the plaintiff's neurosurgeon, the plaintiff is not employed and never returned to work. Dr Miller, however, did state that the plaintiff does relatively easy work, such as cleaning the garden of the house where he lives – even though

¹⁰ *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ); [2013] ZAGPJHC 201.

this takes him a few days. Dr Miller is of the opinion that the patient will never work again on the open labour market and that he can only do protected work. Dr Miller states that the major problem for the patient, in terms of a lack of mobility to work, is a profound weakness of the limbs which the patient experiences, together with depression and demotivation. Dr Miller also notes that the plaintiff has a precarious balance, has proper sight in only one eye and is cognitively impaired, with a decrease of drive and initiative to the extent that some of these problems could have been contributed to or exacerbated by the accident. Further, Dr Miller states that, '[t]he osteoporosis and osteopenia often fits with HIV and/or with other disease processes, for many reasons, completely unrelated to the accident.'

[29] There are certain factors in the matter *in casu* which distinguishes it from the matter of *Ramolobeng*.¹¹ Firstly, the plaintiff *in casu* did not undergo disc replacement surgery. According to the plaintiff's orthopaedic surgeon, there is a 15 percent contingency of occurrence for the plaintiff requiring surgical decompression of his lumbar spine. Secondly, the plaintiff *in casu* was in hospital for three weeks as opposed to six months in the matter of *Ramolobeng*. Thirdly, the plaintiff in *Ramolobeng* continued to experience chronic moderate to severe cervical pain which is absent in the matter *in casu*. The *sequelae* in the matter *in casu* are therefore less severe than in the matter of *Ramolobeng*, warranting a lesser award.

[30] Although the plaintiff *in casu* is suffering from similar neuropsychological deficits prevalent in the matter of *S v RAF*,¹² the plaintiff in the matter *in casu* is 52 years old as opposed to the 14 year old plaintiff in the matter of *S v RAF*. In addition, the epilepsy in the matter *in casu* existed pre-morbid. In the matter of *Road Accident Fund v Marunga*,¹³ the SCA stated, in comparison to a young person as opposed to an older person who sustains similar injuries, the older the plaintiff is, the lower the award of general damages. These above-mentioned factors lessen the award to be made.

[31] The injuries sustained by the plaintiff in the *Ndlovu v RAF* matter and the *sequelae*, appear to be more or less similar to those of the plaintiff in the matter *in*

¹¹ *Ramolobeng* (note 7 above).

¹² *S v RAF* (note 8 above).

¹³ *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA).

casu.¹⁴ In addition, the plaintiff in the *Ndlovu v RAF* matter and the plaintiff *in casu*, are similar in age, namely 49 years old and 52 years old respectively. The distinguishing factor between the matter of *Ndlovu v RAF* and the matter *in casu* is that, in the latter case, there is the prevalence of a major depressive disorder, which persuades me to increase the award.

[32] The prevalence of the hydrocephalus, which distinguishes the matter *in casu* from the cases cited by the plaintiff's counsel, does not persuade me to excessively increase the amount awarded in the matter of *Ndlovu v RAF*, as the plaintiff's neurosurgeon, Dr Miller stated in his report that:

'...it is stressed that the mild head injury and the moderate head injury, unless the hydrocephalus, deterioration and VP shunt followed very rapidly within a few weeks after the accident, i.e. by May 2015, [it] would not have had any responsibility towards the future development of hydrocephalus and/or other difficulties. To repeat, if indeed the surgery for hydrocephalus occurred in 2016, then the hydrocephalus, the vomiting, and/or other difficulties, relates to a decompression and a rise in intracranial pressure which had nothing to do with the accident and injury, which occurred in self-employed truck driver March 2015.'

[33] Taking into account all the relevant factors, I am of the view that an amount of R450 000, less the merits apportionment of 20 percent, namely, R90 000, totalling R360 000 would be fair and equitable compensation as general damages.

[34] The plaintiff's neurosurgeon opines that the plaintiff is cognitively disturbed, especially in the view of his memory loss which is significant and that he may need a curator *bonis* and curator *ad litem* to help him. In the light hereof I find it prudent that a trust is created pending any further steps to apply for a curator *bonis* or curator *ad litem*.

ORDER

[35] In the result, I make the following order:

¹⁴ *Ndlovu* (note 10 above).

1. The defendant shall pay to the plaintiff an amount of R360 000 (three hundred and sixty thousand rand) in respect of general damages, within 14 days from date of this order;
2. Interest on the aforesaid amount at the rate of 7% per annum, calculated from the day following the lapse of a period of 14 days from the date of the granting of this order to date of final payment;
3. The compensation payments shall be made:
 - 3.1. into the plaintiff's attorney's trust account, which trust account shall be one envisaged in s 86(2) of the Legal Practice Act 28 of 2014;
 - 3.2. for the sole benefit of the plaintiff, pending the establishment of the trust contemplated in paragraph 5 below (the 'trust');
4. The defendant shall pay directly to the plaintiff's attorneys, the costs of suit in this action, as taxed or agreed, on a party-and-party scale. Such costs are to include the costs:
 - 4.1. attendant upon the obtaining of the order for the payment of the compensation payments;
 - 4.2. occasioned by the preparation of expert reports and/or joint minutes and also the preparation fees, if any, of:
 - 4.2.1. Dr H Enslin;
 - 4.2.2. Dr P Muller;
 - 4.2.3. Lindi Grootboom;
 - 4.2.4. M Spavins;
 - 4.2.5. Dr Wosu,(the 'expert witnesses');
 - 4.3. subject thereto, the plaintiff shall:
 - 4.3.1. serve the notice of taxation on the defendant, in the event that such costs are not agreed;
 - 4.3.2. allow the defendant 15 court days to make full payment of the taxed costs;

5. The plaintiff's attorneys are hereby directed to:
 - 5.1. cause a trust to be established in accordance with the Trust Property Control Act 57 of 1988;
 - 5.2. pay all monies held in trust by them for the benefit of the plaintiff to the trust;
6. The trust instrument envisaged in paragraph 5 above shall provide that:
 - 6.1. the plaintiff shall be the sole beneficiary of the trust;
 - 6.2. the first trustee shall be Nolwazi Matheatsi, in her capacity as nominee for and on behalf of First National Bank Ltd and the second trustee, an additional nominee on behalf of First National Bank Ltd;
 - 6.3. the trustee(s) shall provide security to the satisfaction of the Master of the High Court of South Africa;
 - 6.4. the ownership of the trust property shall vest in the trustee(s) of the trust, in his/her/their capacity(ies) as trustee(s);
 - 6.5. the procedures to resolve any potential dispute, shall be subject to the review of the above Honourable Court;
 - 6.6. the trustee(s) shall be authorised to recover the remuneration of as well as the costs incurred by the trustee(s) in the administration of the undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996;
 - 6.7. the contingent rights of the plaintiff shall be suspended, in the event of cession, attachment or insolvency, prior to the distribution of payment of any sum from the trust by the trustee(s) to the plaintiff;
 - 6.8. the amendment of the trust instrument shall be subject to the leave of the above Honourable Court;
 - 6.9. the trust shall terminate upon the death of the plaintiff, in which event the trust assets shall pass to the estate of the plaintiff;
 - 6.10. the trust property and administration thereof shall be subject to an annual audit;

7. The plaintiff's attorneys shall be entitled to make payment of:
 - 7.1. expenses incurred in respect of accounts rendered by:
 - 7.1.1. the expert witnesses;
 - 7.1.2. counsel employed on behalf of the plaintiff;
 - 7.2. their own fees pertaining to this action incurred to date, from the funds held by them in trust for the benefit of the plaintiff;
8. The trustee(s) of the trust shall ensure that the payment envisaged in paragraph 7.2 above will be fair and reasonable;
9. The Master of the High Court and/or the trustee(s) may insist on the taxation of an attorney and own client bill of costs;
10. The order must be served by the attorneys on the Master of the Gauteng Local Division (Johannesburg) within a period of 30 days of the making thereof.



D DOSIO
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 October 2021.

Date of hearing:	6 October 2021
	via MS Teams
Date of judgment:	13 October 2021

Appearances:

On behalf of the plaintiff:

Adv S. Strydom

Instructed by:

Barbara Cheiman Attorneys

On behalf of the defendant:

No appearance

Instructed by:

N/A