

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



**Case number: 43235/2014**

**Date: 22/9/16**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/ NO
- (2) OF INTEREST TO OTHERS: YES/NO
- (3) REVISED

22/9/2016

DATE

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SIGNATURE

In the matter between:

**T M KGOPYANE**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**REASONS FOR JUDGMENT DELIVERED ON 1 AUGUST 2016**

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*PRETORIUS J,*

(1) The plaintiff instituted action against the defendant for damages

suffered as a result of personal injuries sustained in a motor vehicle collision that occurred on 20 January 2013 involving a motor vehicle in which the plaintiff was a passenger at the time.

- (2) After hearing counsel it was ordered that the defendant shall pay 100% of the plaintiff's proven or agreed damages which was granted by ordering the defendant to pay the plaintiff R1 212 988.00 in respect of loss of income and R600 000 in respect of general damages, as well as the relevant cost orders on 1 August 2016.
- (3) Both counsel argued the matter without leading any evidence. I was informed by both counsel that they only sought a decision and an order and if they deemed it necessary they would request me to supply reasons for my decision. On 5 August 2016 a request was received from the defendant's attorneys for the reasons for the decision. The heads of argument, case law, court order and court file were finally handed to my registrar on 5 September 2016 which enables me to supply the reasons for the decision. The calculations of contingencies only came to hand on 21 September 2016.
- (4) The plaintiff sustained severe injuries which were documented by an orthopaedic surgeon, occupational therapist, clinical psychologist, gynaecologist and industrial psychologist A report by an actuary on behalf of the plaintiff was also obtained. The defendant's counsel

informed the court at the outset that all the reports were admitted by the defendant and was common cause, The plaintiff and defendant's counsel only differed as to which contingencies had to be applied pre- and post-morbid.

### **INJURIES:**

- (5) The plaintiff sustained a pelvic fracture, which caused damage to her bladder and this resulted in permanent chronic incontinence. According to Dr Swart, the gynaecologist she has involuntary bladder contractions as when the bladder fills, she leaks urine.
- (6) Furthermore she sustained a fracture of the right superior rami as well as a left inferior ramus fracture along the link of the bone. She had a chest contusion, injury to her right foot, as well as a soft tissue injury to her neck and shoulder. She suffers from moderate depression and post-traumatic stress disorder.
- (7) She was taken to the Mamelodi Hospital by ambulance where she was resuscitated in the emergency unit. She remained in hospital for three weeks after the accident. She was treated with Tramel and Panado for pain, antibiotics were prescribed as well. She spent a further six weeks at home in bed. She had to make use of crutches.

- (8) The future medical treatment will be determined by further gynaecological investigation to determine the influence of the bony pelvic deformity on her pelvic organs and the effect of the pelvic fractures on her ability to have further children and also on marital relations. Further evaluation of the lower spine is indicated and a MR investigation will determine whether the lower backache she is experiencing is as a result of damage to the SI joint, which may lead to a SI fusion and possibly to lumbar spinal surgery. Dr Truter, the clinical psychologist, is of the opinion that she needs psychotherapy as a result of the mild depression and post-traumatic stress.
- (9) Her present complaints are that she experiences chronic pelvic pain, cannot lift heavy objects, cannot walk for long distances and cannot sit for long periods. She feels discomfort and pain on the left side of her pelvis. She feels a clicking in her left hip as she walks and she can feel a bone sticking into the upper part of her inner thigh. Her present complaints were confirmed by X-rays of her pelvis which shows a left inferior ramus fracture with significant displacement. She walks with a slight limp due to pain in the left side of the pelvis.
- (10) She presents with a prominent bulge on the sternum wall. Dr Mennen, the orthopaedic surgeon, found on examination that the right SI joint is unstable and the left inferior pubic ramus is displaced. The bones of the inferior pubic ramus can be felt as a prominence on the inner thigh.

This probably caused atrophy in the left leg. She indicated that her sternum was painful for a year after the accident. Her right ankle remained painful for six months and when she walks the ankle still gets swollen and is painful.

(11) Her bladder leaks which causes her to wear a sanitary pad every day.

She feels embarrassed by her incontinence and has mishaps. She visits the toilet up to twelve times a day and limits her fluid intake. She avoids intimacy with her husband due to the fact that during sexual intercourse she leaks urine, which causes a strain in the marriage. This causes her to be more emotional and irritable. She suffers panic attacks when travelling in a motor vehicle.

(12) Her pregnancy after the accident exacerbated her pain. She has difficulty in sleeping, due to her pain. Dr Mennen is of the view that reconstruction of the pelvis will be very difficult.

#### **WORK:**

(13) At the time of the accident the plaintiff was 22 years old and worked part-time at Wakaberry's and was studying part time. She had completed grade 12 and has a certificate in business management. She has completed part of a marketing diploma. She intends completing the three modules necessary to obtain the marketing

diploma.

- (14) She returned to Wakaberry's four to five months after the accident and it took her three months to start working fulltime once more. She received no pay during her absence due to the accident.
- (15) At present the plaintiff is employed at Outsurance as a call centre operator and is involved in client services. She earns a basic salary and commission. She has pain in her pelvis, lower back and left groin due to her having to sit all day. She is unable to sit for longer than two hours at a time and has to alternate between sitting and standing. She has bladder urgency and to avoid incontinence she has to go to the bathroom immediately when she feels the need.
- (16) According to Ms Adroos, the occupational therapist, the plaintiff has to perform sedentary to light work. The fact that she has to intermittently change posture to allow relief for her lower back and pelvis could interfere with her productivity and could impact on future promotions. Ms Adroos' opinion is that the plaintiff is a disadvantaged employee in the open labour market.
- (17) Mr Prinsloo, the industrial psychologist, is of the opinion that pre-morbid the plaintiff would have attained the position of Junior Financial

Advisor and would most probably have advanced to a Senior Financial Advisor position, functioning on a Patterson C3 job level at the age of 40. She would have functioned at this level until retirement.

(18) The post-morbid scenario, according to Mr Prinsloo, was similar to the pre-morbid scenario, but a higher contingency has to be applied post-morbid. His opinion is that the plaintiff will experience diminished personal productivity as she has a 17% whole person impairment; 12% orthopedically and 5% psychologically. He is of the opinion that she "suffers in silence" at present, due to pain and suffering and not wanting her disabilities to have an impact on her ability to work. This, as well as her bladder dysfunction will have an impact on her work flow, speed and productivity. She has lost self-confidence which may be attributed to her bladder problem and sexual difficulties as a result of the bladder problem.

(19) She will have to take sick leave to attend psychotherapy, have treatment for her incontinence by way of Botox injections or a neuro-modular implant. She may also be a candidate for a fusion at the right SI joint and lumbar surgery. She is working in an environment which is result-driven and where the amount of her commission depends on her productivity.

(20) All this will lead thereto that she will be disadvantaged in the labour

market when competing with healthy applicants.

#### **CONTINGENCIES:**

- (21) In **Southern Insurance Association v Bailey N.O.**<sup>1</sup> Nicholas JA stated:

*"In a 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."*

- (22) I have been furnished with several authorities but I am aware that each case has to be considered on its own merits. In **Protea Assurance Co Ltd v Lamb**<sup>2</sup> Potgieter JA found:

*"It should be emphasised, however, that 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 to become a fetter upon the Court's general discretion in such matters."*

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<sup>1</sup> 1984(1) SA 98 AD at p114 C-D

<sup>2</sup> 1971(1) SA 530 AD at p535 H-536 A



(23) The amount to be awarded is still in the court's discretion and the court will use amounts awarded in similar cases only as a guideline to exercise its discretion. All the other facts of the matter must play a roll and I am mindful that no two matters are the same regarding facts and circumstances.

(24) I have not compartmentalised the injuries in respect of the orthopaedic and other injuries, but deal with them holistically when determining the amount

(25) In **Road Accident Fund v Marunga**<sup>3</sup> the Supreme Court of Appeal confirmed the *dictum* of Broom DJP in **Wright v Multilateral Motor Vehicle Accident Fund**<sup>4</sup> where it was set out:

*"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 other countries."*

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<sup>3</sup> 2003(5) SA 164 (SCA) on p170 F - G

<sup>4</sup> 1997 NPD – Corbett and Honey: The Quantum of Damages in Bodily and Facial Injury Cases. Vol. 4 at E3-31

(26) In **Road Accident Fund v Guedes**<sup>5</sup> the plaintiff, a 26 year old journalist/editor at the time of the accident had sustained a whiplash injury to her cervical spine, a thoracic sprain and a mild T7 vertebral compression fracture. She had never injured her back before the accident. She was worse affected by the whiplash injury and was frequently troubled by a stiff and painful neck, particularly when working at her computer as she was required to do. The court found that the plaintiff suffered pain on a daily basis, that her future as a journalist was precarious and that her earning capacity had been severely compromised by her injuries and the consequences. A contingency deduction of 30% in the "having regard to" scenario was awarded. This ultimately translated into a contingency differential of 20%.

(27) The plaintiff submitted that a 20% contingency should be applied both pre- and post-morbid, whilst the defendant's counsel submitted that 5% contingency pre-morbid and 35% post-morbid should apply. The court came to the conclusion that 15% pre-morbid and 30% post-morbid contingencies should apply.

(28) The loss of earnings was calculated as follows:

Future loss of income (uninjured):	R8,086,588	15% (pre-morbid)
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<sup>5</sup> 2006(5) SA 583 (SCA)

contingency) (page 7 of the actuarial report)

Future loss of income (injured): R8,086,588 30%

(post-morbid contingency) (page 7 of the actuarial report)

Contingency differential / spread: 15%

When the aforementioned contingencies are applied a future loss of income in the amount of R1,212,988 is arrived at.

#### **GENERAL DAMAGES:**

(29) In **Sandler v Wholesale Coal Suppliers Ltd**<sup>6</sup> Watermeyer JA held:

*"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case."*

(30) In respect of general damages the plaintiff's counsel suggested an amount of R700 000, whilst the defendant's counsel suggested that an amount of R400 000 would be adequate compensation.

(31) In the matter of **Schmidt v RAF**<sup>7</sup> the plaintiff sustained numerous fractures to all the upper and lower limbs involving the left humerus; the left proximal radius and ulna at the elbow; the right midshaft radius

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<sup>6</sup> 1941 AD 194 at 199

<sup>7</sup> WLD, case number 200514834, judgment handed down in 2006

and the left tibia and fibula. Finally she sustained an injury to the right knee with rupture of the anterior cruciate ligament and the medial ligament as well as fractures to the midshaft of the left foot, and the metatarsal bones. In 2006 the court awarded the plaintiff general damages in the sum of R600 000 which in 2016 terms translates into R1 083 720.

(32) In the matter of **TJ Tobi v The Road Accident Fund**<sup>8</sup> the plaintiff was a 49 year old man with six children. The plaintiff's left leg had lots of scarring and was disfigured. The plaintiff's right leg had less scarring. The plaintiff experienced pain in his legs and knees. Plaintiff also experienced pain when walking. The court awarded general damages in the amount of R460 000 in 2013 which amounts to R526 293.82 in 2016 terms.

(33) In the matter of **Makeke v The Road Accident Fund**<sup>9</sup> the plaintiff lost three teeth and sustained an injury to his jaw and minor injuries to his shoulder and neck, the court awarded the plaintiff an amount of R387 000 in respect of general damages in 2010, which translates to approximately R530 904 in 2016 terms.

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<sup>8</sup> Unreported under case no 868/2010, Eastern Cape. Grahamstown on 9 September 2013

<sup>9</sup> Eastern Cape High Court. case number 611/2009 delivered 23 November 2010

(34) In the matter of **Roe v The Road Accident Fund**<sup>10</sup> the plaintiff sustained a fracture of the femoral shaft, fracture of the tibia and fibula. fracture of the right patella, fracture of the left humerus, injury to the right foot and upper tooth fractures. In this matter the court awarded the plaintiff R650 000 in respect of general damages, which amount translates into an amount of R995 171.60 in 2016 terms.

(35) In the matter of **Benade and Benade v The Road Accident Fund**<sup>11</sup> the plaintiff sustained multiple orthopaedic and neurological injuries, which were a whiplash injury, fracture of the left clavicle, compound fracture of the radius and ulna, fracture of the left 4th and 5th metacarpal shaft of the knuckle joints of the hand, intra-articular fracture of the right distal radius, fracture of the right superior and inferior pubic rami of the pelvis and fracture of the right tibia. The court held that a sum of R600 000 was fair and reasonable, compensation to be awarded on the claim for general damages to the plaintiff which amount in 2016 terms translates into R919 543.02.

(36) In the matter of **Nonkwali v The Road Accident Fund**<sup>12</sup> the plaintiff sustained a pelvic ring disruption, a closed fracture of the left humerus, a closed fracture of the right tibia, a subluxation C2/C3 with no cord or nerve damage and some fractures of her left ribs, a moderate to

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<sup>10</sup> Judgment of the South Gauteng High Court case no. 2008/16157, handed down 3 April 2010

<sup>11</sup> Eastern Cape High Court, case number 536/2007. delivered in 2008

<sup>12</sup> Eastern Cape High Court, case no. 771/2004

severe head injury with diffuse axonal damage. The court awarded the plaintiff R500 000 for general damages in May 2009, which translates into R715 339.23 in 2016 terms.

(37) Two of the cases the defendant referred to were both dealt with before the **Maruga judgment**<sup>13</sup> was handed down. The third case did not reflect the principle enunciated by the Court in **Marunga**<sup>14</sup>, although it was delivered in 2006. Once more it is in my discretion to decide what amount would be fair to both parties in the present circumstances.

(38) It is clear that the plaintiff has suffered considerable pain and took at least four to five months to heal to such an extent that she could once more be employed.

(39) She is suffering pain every day in her workplace due to the fracture of her pelvis and her back problems. Her incontinence is causing her not only discomfort every day of her life, but also severe embarrassment, not only in her work environment, but also in her marriage. Her incontinence has an impact on her sexual relations with her husband. which contributes to her psychological problems.

(40) Having considered all the evidence, factors and circumstances

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<sup>13</sup> *Supra*

<sup>14</sup> *Supra*

relevant to the assessment of damages and having regard to past awards and the more modern approach approved by the Supreme Court of Appeal in the **Marunga case**<sup>15</sup> I am of the opinion that an amount of R600 000 (six hundred thousand Rand) will be reasonable and fair to both the plaintiff and the defendant I do not set out separate figures in respect of pain, disfigurement and loss of amenities or permanent disability.

(41) These are then the reasons for having made the following order on 1 August 2016:

1. The merits are settled on the basis that the defendant shall pay 100% of the plaintiff's proven or agreed damages;
2. The defendant shall pay to the plaintiff the sum of R1 212 988.00 in respect of loss of income.
3. The defendant shall pay to the plaintiff the sum of R600 000.00 in respect of General Damages.
4. The amounts mentioned in paragraph 2 and 3 in the sum of R1 812 988.00 is to be paid to the Plaintiff within 14 days of the date of this Court Order.
5. 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 10.50% per annum, calculated from the 15th calendar day after the date of this Order to date of payment

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<sup>15</sup> *Supra*

6. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of the future accommodation of the plaintiff in hospital or nursing home or treatment of or rendering of a service or supplying of goods to him resulting to the injuries sustained by the plaintiff in the motor vehicle accident that occurred on 20 January 2013, to compensate the plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.

7. The defendant shall pay the plaintiffs taxed or agreed party and party costs on the High Court scale, subject thereto that:

7.1 In the event that the costs are not agreed;

7.1.1 1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record;

7.1.2 The plaintiff shall allow the defendant 7 (seven) Court days from date of allocator to make payment of the taxed costs.

7.1.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 10.50% per annum on the taxed or agreed costs from date of allocator to date of final payment.

7.2 Such costs shall include but not be limited to:

7.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 4 and 6 above;

7.2.2 The costs of and consequent to the employment of Counsel, including counsel's charges in respect of his full



day fee for 1 August 2016, as well as reasonable preparation;

7.2.3 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 defendant 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:

- 7.2.3.1 Dr E Mennen, Orthopaedic Surgeon;
- 7.2.3.2 Ms A Adroos, Occupational Therapist;
- 7.2.3.3 Dr K Truter, Clinical Psychologist;
- 7.2.3.4 Mr K Prinsloo, Industrial Psychologist;
- 7.2.3.5 Mr T Doubell, Actuary (Present at court)
- 7.2.3.6 Dr P Swart, Gynaecologist

7.2.4 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the following experts:

- 7.2.4.1 Dr E Mennen, Orthopaedic Surgeon;
- 7.2.4.2 Ms A Adroos, Occupational Therapist;
- 7.2.4.3 Dr K Truter, Clinical Psychologist;
- 7.2.4.4 Mr K Prinsloo, Industrial Psychologist;
- 7.2.4.5 Mr T Doubell, Actuary (Present at court)
- 7.2.4.6 Dr P Swart, Gynaecologist

7.2.5 The reasonable costs incurred by and on behalf of the plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties.

7.2.6 The costs consequent to the plaintiff's trial bundles and witness bundles, if any;

7.2.7 The cost 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:

7.2.8 The cost of and consequent to compiling all minutes in respect of pre-trial conferences;

7.2.9 The reasonable travelling costs of the plaintiff, who is hereby declared a necessary witness.

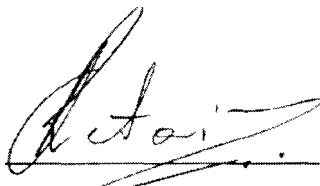
8. The amounts referred to above will be paid to the plaintiff's attorneys, Spruyt Incorporated as per Annexure "A" hereto (The consent and instruction), by direct transfer into their trust account, details of which are the following:

Standard Bank

Account number: [.....]

Branch code: Hatfield (01 15 45)

REF: SD 1827

A handwritten signature in black ink, appearing to read 'C Pretorius', written over a horizontal line.

Judge C Pretorius

Case number : 43235/2012

Matter heard on : 1 August 2016

For the Plaintiff : Adv SG Maritz

Instructed by : Spruyt Incorporated

For the Defendant : Adv

Instructed by : Diale Mogashoa Attorneys

Date of Reasons for Judgment : 22 September 2016