



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 47666/2017

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: YES/NO
OF INTEREST TO OTHERS JUDGES:
YES/NO
REVISED

03 July 2020

DATE

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SIGNATURE

In the matter between:

RUSSEL RICHARD LOMBARD

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOGALE AJ;

BACKGROUND

1. The Plaintiff is a 40 year old male who sues the defendant for damages suffered as a result of personal injuries sustained on the 24th January 2015 wherein the insured vehicle collided with the Plaintiff who was a cyclist at the time.
2. It should be noted that the Defendant previously rejected general damages on the basis that the injuries sustained by the Plaintiff were not of a serious nature. Consequently, the matter was referred to the Health Professions Council of South Africa (HPCSA). The latter made a finding that the plaintiff's injuries are of a serious nature and therefore she deserves compensation.
3. The Plaintiff sustained the following injuries:
 - 3.1. An intra-articular fracture of the right wrist (distal radius);
 - 3.2. Multiple abrasions on his left knee and right elbow; and
 - 3.3. Post-traumatic stress disorder.
4. Parties to the proceedings agreed on the following:
 - 4.1. The merits of the matter have been settled on the 3rd May 2020 on the basis that the Defendant is liable to pay 90% of the Plaintiff's proven or agreed upon damages.
 - 4.2. The Defendant will also furnished the Plaintiff with an Undertaking, in terms of Section 17(4) (a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff arising out of the injuries sustained in the collision.
5. The crisp issues left to be determined are as follows:
 - 5.1. General Damages
 - 5.2. Past and Future loss of earning

SEPARATION IN TERMS OF RULE 33(4) OF THE UNIFORM RULES

6. The Plaintiff filed reports by five experts but the Defendant failed to comply with Rule 36(9) (a) as per court order dated that the Defendant filed on or before the 23 March 2020. The Defendant requested separation in terms of Rule 33(4) and made the following submissions:
7. Rule 33 (4) specifically provides that if, *in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.*
8. The Defendant's submits that the Defendant's claim for General Damages ought to be heard separately from that of the Loss of Earning Capacity. The Defendant was unable to appoint its own medical experts to examine the Plaintiff and timeously due to the Coronavirus disease (Covid-19) as the Nationwide Lockdown imposed strict limitations on movement of persons and various business operations were suspended except those providing essential services as per the Regulations in terms of the Disaster Management Act, 2020.
9. The national lockdown severely disadvantaged the Defendant's case, specifically as the Plaintiff is currently claiming a total Loss of Earnings in the amount of R2 378 096.00 and General Damages in the amount of R650 000.00. In the absence of the Defendant's expert reports the Defendant is not in the position to properly advance its defense in challenging the Loss of Earnings claim in respect of Loss of Earnings, which is an excessive amount. The Defendant needs to schedule appointments with medical

practitioners for purposes a medical examination.

10. After evaluating oral evidence presented by both counsels I agree with Mr Marx for the plaintiff that this court should not lose sight of the possibility of inconveniencing and prejudice to the other party should the litigation be dealt with on a piecemeal.
11. In ***Denel Bpk v Voster 2004 (4) SA 482 (SCA)***, the Supreme Court of Appeal cautioned against the assumption that the result would be achieved by separation of issues. Even though at glance it may appear that the issues are discrete, they may ultimately be found to be inextricably linked. The court found that the expeditious disposal of litigation is best by ventilating all the issues at one hearing. An important consideration in this regard is that expeditious disposal of issues cannot outweigh the principle of fairness. The principle of fairness requires the balancing of the interest of both parties.
12. On the other hand, I cannot turn a blank eye to the fact that the implementation of the Regulations in terms of the Disaster Management Act, 2000 restricted movements of people with effect from the 27 March 2020. Because of the implementation of restrictions, this court finds that it was impossible for the defendant perform.
13. The Defendant made an undertaking to comply with the Provisions of Rule 36(9) (a) within 14 days.
14. The Plaintiff seeks an order for general damages in the amount of R650 000-00 and relies on number of authorities indicating that an amount of R650 000.00 is fair and reasonable.
15. The Defendant argued that the Plaintiff calculations and submissions in respect of general damages are misplaced and misleading, an amount of R250 000, 00 is a fair and reasonable amount to be awarded. He further argued that, in respect of the physical injuries, the cases submitted by the Plaintiff are extremely distinguishable and relied on a case of ***Eyssen v Parity Insurance Co Ltd 1*** where the Plaintiff was involved in a motor collision due to a negligent driver. The Plaintiff sustained a right wrist fracture and

out of joint. The soft tissue in the vicinity of the wrist was badly damaged to the extent that even after the wrist came out splints it was still swollen and painful. As a result of the injuries sustained, the Plaintiff was awarded an amount of R2 000.00 for general damages.

16. Mr Marx for the applicant submitted that the Plaintiff sustained serious injuries with the sequelae which are more serious than one would have ordinarily expected. He argued that the Plaintiff complains of the following accident related symptoms:

- 16.1. Constant pain over the radial and ulnar aspect of the right wrist;
- 16.2. the plaintiff struggles to work as a chef because of the disturbance by pain and discomfort in his right wrist;
- 16.3. Inclement weather and lifting of heavy objects exacerbate symptoms in his right wrist;
- 16.4. he experiences difficulty with typing or cutting vegetables or even to lift heavy pot;
- 16.5. he is easily angered, frustrated and occasionally feels depressed.

17. The Plaintiff filed the medico-legal reports appearing herein in which his injuries are detailed:

- 17.1. Orthopaedic Surgeon Dr Theo Enslin,
- 17.2. Occupational Therapist R Van Biljon,
- 17.3. Psychiatrist Dr Ballyram,
- 17.4. Industrial Psychologists Ben Moodie

18. The Plaintiff after the accident was taken to Entabeni Hospital in Durban where he was stabilized before being transferred to King Williams hospital where X- Rays were conducted and medication were provided. A black slab was applied to his right arm. He underwent an open reduction and internal fixation of his right wrist three days later at King William hospital.

19. According to Dr Enslin, the Orthopaedic Surgeon, the Plaintiff confirmed the injury to his right wrist. That on the 10 March 2016, after the accident, the Plaintiff fell at work after losing strength in his right wrist while carrying a pot. He depends on tablets on daily bases and the pain worsens when it is cold or when he works long hours. The Plaintiff sustained a fracture of the right wrist (distal radius) and multiple abrasions on his left knee and right elbow.
20. The occupational Therapists confirms that the Plaintiff is ambidextrous, he is predominantly left handed and writes with his left hand (pre- and –post accident). The injury sustained is on the right wrist.
21. The Psychiatrist, Dr Ballyram confirms that the Plaintiff has a long standing history of psychological difficulties which was never treatment. She suffered childhood trauma and severe social and relationship difficulties from a very young age. Plaintiff's psychiatrist further confirms that these psychological problems are unrelated to the accident that took place on 24 January 2015.
22. On the issue of awarding quantum, a court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.

In ***Protea Insurance Co v. Lamb*** it was stated as follows:

“In assessing general damages for bodily injuries, the process of comparison with comparable cases 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 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."

23. In my view the patient was severely injured as a result of the accident. His injuries were also confirmed by the HPCSA. The report of the Orthopaedic Surgeon confirms that because of the injury sustained, he is unable to perform normal duties that he normally performed.

24. Counsel for the Plaintiff referred to the matter of **C Ngomane vs RAF (53010/12) {2017} ZAGPPHC 401 (26 May 2017)** I agree with the counsel for the defendant that, this case is apposite to the facts in casu. Herein, the Plaintiff sustained severe fracture of right humerus, right radius and right ulna. The Plaintiff also had dysfunctional left arm and scarring. In accordance to the psychologist in that case, the Plaintiff was diagnosed to have post traumatic headaches, as well as impaired functionality of his right arm. The facts of this case are not comparable to the present case.

25. The counsel for the Plaintiff also referred to **S Vukubi vs RAF (1704) {2007} ZAECHC 111 (18 October 2007)** which I also agree with the counsel for the defendant that, this case is also an apposite to the facts in casu. The Plaintiff sustained severe injury to the right knee which has an open dislocation to the right knee joint, patellar tendon and cruciate ligaments torn. The Plaintiff sustained a closed fracture to the right humerus and

closed fractures of the left radius and ulna. I agree with the counsel for the defendant that, the facts of this case are not comparable to the facts in *casu*.

26. In the case of ***D'Hooghev Road Accident Fund 2009 (6) QoDJ2 -1 (ECP)***, the facts are not the same but the court can seek guidance from the above case. The plaintiff in this matter was 21 years of age. He was involved in a motor vehicle accident in which he was rendered unconscious and had to be extricated from the vehicle. He sustained a fracture of the right tibia and left humerus which were treated by open reduction internal fixation. He developed respiratory distress syndrome which resulted in the operative procedures being curtailed and was returned to intensive care unit to be treated by a pulmonologist thereafter. A tracheotomy was performed eleven days later to assist rectification. He however developed infection of the lungs and was sent back to the intensive care unit for management. In about a month he was put on the ventilator to assist with breathing. He was discharged 42 days after the accident. The head injury resulted in profound personality and behavioural changes, cognitive and executive functioning impairment. He further undergone an arthroscopy of the right knee and internal fixation of the tibia and third 1/3 tibia together with bone grafting. He presents with unsteady legs when walking and loses balance and falls at times. He presents with amongst others, an unattractive gait, no movement on the right ankle, a clawed right foot which is severely deformed. The court awarded R650, 000.00 for general damages.

27. Having considered the authorities cited by the parties, the medico legal reports submitted by the Plaintiff, injuries suffered by the Plaintiff and the sequelae thereof, I have come to the conclusion that an award in the amount of **R400 000, 00 (Four Hundred Thousand Rands Only)** would be an appropriate compensation for general damages.

ORDER

1. The merits are settled on the basis that the Defendant shall pay 90% of the Plaintiff's proven or agreed damages;
2. The Defendant shall pay to the Plaintiff the sum of R360 000, 00 (Three Hundred and Sixty Thousand Rand Only) which is less 90% Contingency deduction of R400 000, 00 (Four Hundred Thousand Rand only);
3. The Defendant will also furnished the Plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff arising out of the injuries sustained in the collision;
4. The remainder of Loss of Earning Capacity is separated in terms of Rule 33(4) and that the remaining issues are postponed sine die;
5. The Defendant must comply with the provisions of Rule 36 (9) (a) with immediate effect;
6. Therefore the draft order marked "XYZ" signed and dated is made the order of court.

K MOGALE (Ms)

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

Date of hearing: 02 June 2020

Date of judgment: 03 July 2020

Corrected: 08 July 2020

APPEARANCES

For the Plaintiff: ADV DJ MARX

Instructed by: VZLR Inc.

For the Defendant: ADV P ZUMA

Instructed by: DIALE MOGASHOA