**REPUBLIC OF NAMIBIA** REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no.: (P) I 563/2007

In the matter between:

**JOHANNES JA GABRIELSEN** **PLAINTIFF**

and

**CROWN SECURITY CC** **DEFENDANT**

**Neutral citation:** *Johannes JA Gabrielsen v Crown Security CC (I 563/2007) [2013] NAHCMD 124 (13 May 2013)*

**Coram:** Namandje, AJ

**Heard on:** 19, 20, 21, 22 October 2010 and
13, 22, 23 August 2012

**Delivered on:** 13 May 2013

**Flynote:** Delictual claim against an employer of a security guard that, on the uncontested facts, gratuitously shot and seriously injured the plaintiff. Vicarious liability of an employer in a claim premised on the facts such as in this case discussed. The Court found the employer vicariously liable for damages arising from the delictual acts of the security guard. Court holding, in this respect, that our law recognises that were a delictual claim is based on an unlawful delictual conduct consisting of a positive act causing physical damage to another person or property such invasion is *prima facie* wrongful.

Further the Court, in the context of the disputed quantum of damages and in view of the defendant's failure to place in issue certain quantum claimed by the plaintiff, reiterated the importance of the institution of cross-examination in particular that if a point in dispute is left unchallenged in cross-examination the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. In this respect, with reference to **The President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others, 2000 (1) SA 1 CC** at par 61 to 63, the Court also adopted the South African Constitutional Court's *dicta* that the institution of cross-examination not only constitutes a right but it also imposes certain obligations such as that when it is intended to suggest that the witness is not speaking the truth on a particular point it is required to direct the witness's attention to that fact by question put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his/her character.

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**ORDER**

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1. Payment in the amount of N$7,647,190-79 for special damages.

2. Payment in the amount of N$1,000,000-00 for general damages and loss of amenities.

3. Interest at the rate of 20% per annum from date of judgment to date of payment.

4. Defendant to pay the plaintiff's costs of suit.

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**JUDGMENT**

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NAMANDJE, AJ

[1] This is a delictual claim against the employer of a security guard (hereinafter referred to as "the guard"), the latter being alleged to have shot and injured the plaintiff resulting in the plaintiff being wheelchair-bound as a paraplegic.

[2] The matter therefore involves only two questions; firstly whether or not the acts of the guard are unlawful and wrongful; and if unlawful and wrongful, whether or not the employer of the aforesaid guard should, on the facts of this matter, be held vicariously liable for the proved damages arising from the near fatal injury of the plaintiff in the form of various heads of damages dealt with towards the end of this judgment.

Parties

[3] The plaintiff is Johannes J.A. Gabrielsen who at the time of the incident that gave rise to this matter was a school teacher with certain business interests.

[4] The defendant is Crown Security CC, a Close Corporation registered and incorporated in terms of the laws of the Republic of Namibia, and at all relevant times duly registered as a security company as envisaged in the Security Enterprises and Security Officers Act, Act 19 of 1998. The defendant at all material times employed the guard who is alleged to have shot and injured the plaintiff.

Background

[5] In brief, the plaintiff was born in Windhoek and it is where he completed his primary, secondary and tertiary education. He did a three-year teaching diploma which he obtained in 2002 and was employed by the Ministry of Education as a teacher teaching Social Studies, Science, Physical Education, Biology, Woodwork and Technical Studies. He, not in small measure, enjoyed volleyball, hockey, cricket, ice-skating and dancing. Two months before the date of the incident which gave rise to this litigation he started a dancing school.

[6] He described himself as having many friends at the time. He testified that over weekends he usually went out for camping, fishing, farm tours and bike riding. While teaching, he also in his spare time did what he described as handiwork, *inter alia* woodwork which includes building cupboards on a commercial basis, as well as laying out gardens for customers. He therefore, according to his testimony, did not envisage being a teacher for much longer before starting a fully-fledged business[1]. He owned and managed a bar at which he also presented dance classes.

[7] On 4 March 2004 the plaintiff was busy at his dance bar called Armadilos. He was called outside by one of his barmen and told that a certain lady (hereinafter called "his friend") he was planning to start a love liaison with had just left with her ex-boyfriend, and that the two were fighting. He tried phoning her but could not get hold of her. He decided to get into his vehicle and drive to her place. He drove to an apartment address called Lalapanzi Flats. The flats were fenced with palisade fencing. Upon his arrival he stood in front of the fence and called his friend. There was no response. Although the lights in the apartment were on, no response came out of the flat. He decided to leave. His vehicle was parked in front of the gate outside. When he got in his vehicle parked on the pavement he saw the guard dressed in security guards' outfit coming from across the road walking towards him. The guard was armed with a firearm that appeared to be a 9 mm caliber pistol. The guard asked him if he was looking for the lady that was living in one of the apartments. When he confirmed that he was indeed looking for his friend the security guard indicated that he did see him (the plaintiff) the night before when he dropped her off. The guard suggested that she must be inside her flat and that her ex-boyfriend must be out for work. The security guard suggested that the plaintiff should go

1There is no clear and definite evidence as to when exactly, should the plaintiff not have been injured, would he have resigned from his job as a teacher. It was however not placed in dispute that he was indeed going to resign and pursue his construction business.

and call her because she must be in the apartment particularly because the lights were on.

[8] The plaintiff got out of his vehicle, stood with the guard outside the gate and started calling his friend again. After about two or three attempts the guard suggested that the plaintiff should go inside. Upon the guard's suggestion the plaintiff climbed over the gate and onto the roof and jumped inside the yard. He knocked on his friend's door a few times, but no response was forthcoming. Realizing that there was no response he turned around, climbed up the fence at the corner of the roof. To enable him to climb out he had his one hand on the roof of the garage and the other hand on the fence gate. At that time the security guard was standing about two metres away in front of him, still outside in front of the apartments' gate. When he reached the top of the roof, bent slightly forward with one foot on the roof and the other foot on the fence, about to jump off onto the pavement close to his car outside, he looked down and saw the guard pointing a firearm at him. He immediately felt the impact of a shot. He was shot while he was in a bent forward position ready to jump down. The bullet struck him on the right side of his chest below his right nipple. Having been struck by the shot he fell on his head and right shoulder. After a few minutes a number of people came and he saw the guard climbing up the same way he got onto the roof.

[9] He was taken to the Roman Catholic Hospital. At the Roman Catholic Hospital it was found that the bullet destroyed part of his lungs, part of his liver and hit his backbone which caused what is called a T10 injury. That injury was the probable cause of him becoming a paraplegic. After undergoing surgery it was found that he had lost all senses in the lower part of his body, as a result of which he was paralysed. He has since been wheelchair-bound and enduring a lot of pain on a daily basis, particularly on the left side of his stomach. After undergoing surgery at the Roman Catholic Hospital, he spent

a month at the State Hospital before he was flown to Cape Town in South Africa where he was hospitalised for three months. After about three months he returned to his teaching work, however it was difficult. He was eventually discharged from his teaching work on medical grounds relative to the injuries he sustained. He later decided to embark upon a construction business. While recovering he lost his dance bar and other businesses that he was involved in in addition to teaching at the time of the incident.

Pleadings

[10] The plaintiff alleged in his particulars that the guard, at the time acting within the course and scope of his employment with the defendant, alternatively within the ambit of the risk created by such employment relationship, unlawfully shot and injured the plaintiff as a result of which the plaintiff:-

‘10.1 sustained an abdominal injury, a chest injury, as well as a spinal cord injury;

10.2 underwent a palarotomy and thoracotomy on 4 March 2004;

10.3 sustained injuries in the form of lacerated liver and injured lung as well as a T10 complete spinal cord injury (which means that plaintiff does not have any sensation below the level of the umbilicus, and has no motor function below the level of the said umbilicus);

10.4 has been paralysed in the legs and became wheelchair-bound;

10.5 has a neuropathic bladder and has to do self-intermittent catheterisation;

10.6 has a paralysed bowel which has to be controlled by use of medication;

10.7 is a paraplegic of permanent and irreversible nature, with no improvement or recovery expected;

10.8 had to undergo an emergency laparotomy and thoracotomy;

10.9 was put in the intensive care unit until 5 March 2004 (at the Roman Catholic Hospital);

10.10 was thereafter transferred to the intensive care unit of the State Hospital in Windhoek where he remained until 5 April 2004;

10.11 was then transferred to the Southern Cross Hospital in Cape Town, South Africa, where he remained for a further 2½ months;

10.12 had to go back to the State Hospital in Windhoek for a day or two, in order for further medical treatment to be done on the right side of his chest;

10.13 during the aforementioned period, received intravenous flood therapy and blood transfusions;

10.14 had to undergo surgery for the bullet to be removed from his back;

10.15 is still wheelchair-bound and will remain so forever;

10.16 travelled to Germany during April 2005 for a stem cell transplant which was unsuccessful;

10.17 continues to be in need of medication being Lentogesic tablets, Senokot tablets, suppositories and fibre tables;

10.18 suffered from and will continue to suffer and experience pain and suffering;

10.19 will be in need of future medical treatment and hospital expenses, as well as equipment to assist him;

10.20 became incapacitated and unable to continue with his career and suffered a loss of income and will continue to suffer a loss of income, plaintiff having been, until his injury, a primary school teacher;

10.21 has a constant backache which increases when sitting in a wheelchair;

10.22 has a permanent nerve root pain on the left abdominal wall area;

10.23 suffers from repeated bladder infections;

10.24 has pain the right shoulder which is increased by movement and overcast weather or when plaintiff picks up heavy objects with his right hand;

10.25 continues to have pain when being active.'

[11] As a result of the aforesaid alleged unlawful and wrongful conduct, plaintiff suffered damages as follows:

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|---|---|---|
| 11.1 | past medical and hospital costs and similar expenses including costs to determine the exact nature of his injuries and costs to see experts in the field of claiming damages | N$ 238,987.59 |
| 11.2 | future medical and hospital and relates costs | N$3,442,283.00 |
| 11.3 | pain and suffering | N$ 900,000.00 |
| 11.4 | costs incurred to make plaintiff's home wheelchair friendly | N$ 40,813.20 |
| 11.5 | disability in respect of loss of income in respect of past and future losses | N$5,275,054.00 |
| 11.6 | the loss of enjoyment of amenities of life, incapability to continue with regular fresh water and sea water fishing, squash, cycling, volleyball, cricket, gardening, swimming, jogging, touch rugby, walking and incapability to enter into an intimate relationship and to have sexual intercourse | N$ 500,000.00. |

[12] Subject to what is stated below in relation to certain heads of damages, most of the allegations, if not all, in the particulars of claim as listed under paragraphs 10.1 to 10.25 were proved through the plaintiff's own evidence supported by his expert

witnesses' evidence. The defendant did not seriously challenge the evidence to that effect.

[13] While admitting that "*plaintiff on 4 March 2004 and at Windhoek was struck by a bullet fired by the security guard*", the defendant, in this respect, simply pleaded a bare denial and did not plead any justification. The defendant further denied that the guard was acting within the course and scope of employment or within the ambit of the risk created by that relationship. The defendant further denied the injuries and damages sustained and suffered, respectively, by the plaintiff and put the plaintiff to the proof of his injuries and damages.

[14] While clarity of issues pleaded by the parties to the dispute is of paramount importance, and while there is a duty on each litigant to plead his or her case in such a way that it is clear to the Court as to what issues fall to be decided as between the parties, it should be kept in mind that it is not necessarily the legal conclusions in the pleadings which determine the real issues between the parties but the facts placed before Court. With that in mind, I will now consider and decide the question of liability of the defendant, and damages, if it is found to be liable.

Did the guard act unlawfully and wrongfully, and if yes, should the defendant be vicariously liable for the delictual act committed by the guard?

[15] This Court per Maritz J, as he then was, carefully and neatly gave a useful exposition of our law on the extent of an employer's vicarious liability for a delict committed by an employee acting in the course and scope of his or her employment.[2] I must however add that any Court seized with a matter to determine whether or not an

2**Van der Merwe-Greeff Inc. v Martin and Another, 2006 (1) NR 72 (HC)** at p 72 – 75.

employer is liable for a delict committed by its employee should first determine whether the facts concern the standard test of vicarious liability or the so-called "*deviation cases*". While the former test is straightforward and traditional in nature, the "*deviation cases*" present both policy and jurisprudential difficulties in deciding whether or not the employer is vicariously liable. Vicarious liability in general can be summarised as:-

> 'Vicarious liability means a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct. This would arise where there is a particular relationship between those persons, such as employment. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed within the course and scope of employment, or while the employee was engaged in any activity reasonably incidental to it. Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the 'standard test'. The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as 'deviation cases'.'[3]

[16] The plaintiff's case was pleaded in the conventional manner, namely that the guard acted within the course and scope of his employment with the defendant and in the alternative, that the guard acted within the ambit of the risk created by the employment relationship. It is on that basis that the plaintiff is contending that the defendant should be held liable for damages sustained by him. It is therefore clear that both the facts and pleadings in this matter ground an action in direct liability against the defendant as an employer of the guard. The case therefore involves the standard test of vicarious liability.

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3**F v Minister of Safety and Security 2012 (3) BCLR 244** at 254 paras 40 and 41

[17] The undisputed facts in this matter are that the guard, who was employed as such by the defendant and at the time acting as a guard on duty within the course of his employment, after having suggested to the plaintiff to climb over the concerned apartments' fence (after the plaintiff's initial unsuccessful attempt to get a response from his friend) pointed a firearm at the plaintiff and shot and seriously injured him. There was no other evidence controverting the plaintiff's evidence regarding the circumstances under which he was shot. The guard, it was disclosed during the trial, passed away before the commencement of trial. The evidence of the defendant's three witnesses did not, and in fact could not, place the plaintiff's version (regarding the circumstances under which he was shot by the guard) in dispute, as they were not present when the plaintiff was shot by the guard.

[18] During arguments I posed specific questions to Mr Brandt, counsel for the defendant, in view of the bare denial in the defendant's plea and defendant's admission that the plaintiff was shot by the guard, whether the defendant was disputing the fact that the actions of the guard were unlawful and wrongful given the undisputed evidence of the plaintiff. I understood, not with ease, Mr Brandt to suggest that such was indeed the case. Mr Brandt argued that it was improbable that the guard, after having cooperated with the plaintiff, would have changed his mind and shot the plaintiff for no reason. He also invited the Court to consider the fact that for a number of months until the guard passed away no criminal charges were brought against the guard. Mr Brandt appeared to suggest that that fact on its own should be enough for the Court to draw an inference that the guard's actions were lawful. While it may be puzzling, and may even be improbable, for the guard to have initially been friendly and cooperative with the plaintiff only to shoot him a few minutes thereafter, I am of the view that on the facts presented by the plaintiff and in the absence of any other evidence *in contra*, the version of the

plaintiff should be accepted that he was indeed shot in and under the circumstances detailed above.

[19] During his cross-examination of the plaintiff Mr Brandt, as I understood him, sought to rely on certain allegations made by the guard in a sworn statement deposed to many months before he passed away. I ruled, at the time, that he could not do so on the ground that no basis was laid that such statement could be admitted as evidence on the basis of the common law hearsay exception in the form of a death declaration.[4]

[20] I have therefore no hesitation to find that the guard's action, on the uncontested aforesaid facts, were unlawful and wrongful. This is fortified by the fact that our law recognises that where a delictual claim is based on an unlawful delictual conduct consisting of a positive act causing physical damage to another person or property, such invasion is *prima facie* wrongful.[5]

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4This Court per Van Niekerk J in the matter of **Jordaan v Snyman, 2008 (2) NR 729 (HC)** at p 730, par 3, regarding the requirements and conditions for the admissibility of a death declaration stated as follows:

> "*[3] In the well-known work of Schwikkard & Van der Merwe Principles of Evidence 2 ed at 267 the conditions for admissibility of such statements D are conveniently set out to be the following:*
>
> *(a) The declarant must have died.*
> *(b) The statement must have been made against the pecuniary or proprietary interest of the declarant at the time of making.*
> *(c) The declarant must have known that the statement was against his interest.*
> *(d) There is uncertainty as to whether the declarant must have had personal knowledge of the fact he stated, but the learned authors are of the opinion that the better view is that personal knowledge is required, otherwise hearsay upon hearsay would be received."*

5 See:**Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd, 2006 (3) SA 138 (SCA)** at par 10: *"The exception raises the issue of wrongfulness which is one of the essential elements of the Aquilian action. From the nature of exception proceedings, we must assume that the respondent's decision to adopt the waterproofing option in its design was wrong. We must also assume that the wrong decision was negligently taken. Negligent conduct giving rise to damages is not, however, actionable per se. It is only actionable if the law recognises it as wrongful. Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases, wrongfulness is therefore seldom contentious.*" (Own emphasis)

[21] The defendant's evidence, in particular that of the sole member of the defendant and the defendant's general manager at the material time, in my view in fact confirmed that the guard was at the relevant time acting within the course of his employment with the defendant. I therefore find that not only did the guard act unlawfully and wrongfully, but that he, when he so acted, did so within the course of his employment with the defendant. The defendant would however only be vicariously liable if in addition, to the fact that the guard had acted unlawfully and wrongfully in the course of his employment, he also acted within the "*scope*" of the employment relationship or within the ambit of the risk created thereby.

[22] It is common cause that the defendant is a security company. For it to carry out its security operations in favour of its customers it uses security guards as its hands. In certain cases, such as in this matter, it arms its security guards with firearms when carrying out their duties. The defendant's witnesses confirmed that the guard was on duty at the time of the incident. It is clear on the facts placed before me that the guard in this matter, when he acted so unlawfully and wrongfully, acted in his capacity *qua servant* of the defendant. Maritz J in **Van Der Merwe-Greeff** *supra* stated at p 81 F-J – p 82 A-C:

> "One is apt, when using the expression "scope of employment" in relation to the work of a servant, to picture oneself a particular task or undertaking or piece of work assigned to a servant, which is limited in scope by the express instructions of the master, and to think that all acts done by the servant outside of or contrary to his master's instructions, are outside the scope of his employment; but such a conception of the meaning of "scope of employment" is too narrow. Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished; some may indicate the end to be attained and others the means by which it is to be attained. Provided that the servant is doing his master's work or pursuing his master's

ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained.'

In that case, the employee, after he had delivered parcels of his employer to customers in Johannesburg, drove to Sophiatown on his own business to consume liquor instead of returning the vehicle immediately after the completion of deliveries to his employer's garage in Sauer Street, Johannesburg. As he later embarked upon the journey to do so in a state of intoxication, he caused a collision. The Court held that if a servant

> 'does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs'.

Applying that reasoning to the facts of the case Watermeyer CJ held that the servant had not abandoned his master's work entirely. One of the duties he had, was to return the vehicle to the Sauer Street garage of the employer. Having failed to do so immediately,

> 'he was still retaining custody and control of the van on behalf of his master, both at the time when he became intoxicated and at the time when the accident occurred, for the ultimate purpose of delivering it at the Sauer Street garage in accordance with his master's instructions. He probably hoped that his escapade would remain undetected. In these circumstances, in my opinion, he was driving the van not solely for his own purposes but also for his master in his capacity as a servant, and the harm which was caused must be attributed, in part, to a negligent performance of his work as a servant, and his master is therefore legally responsible for it." (Own emphasis)

[23] The Court at the time of arguments asked Mr Brandt for the defendant as to whether there was any factual basis upon which an inference could be drawn that when the guard used the firearm he was acting in any other capacity completely outside the scope of his employment or pursuing his own interests, i.e. robbery. I did not understand Mr Brandt to suggest that there was any basis for such an inference to be made. In fact, on the facts of the matter such suggestion would have been untenable. I therefore find that the defendant is vicariously liable as the guard was at the time acting both within the course and scope of his employment with the defendant.[6] Even if I were to be wrong in respect of the "*scope*" element, I am of the view that given the nature of the defendant's business and the way it carries out its contractual obligations through, in some cases, armed security guards, the shooting of a person by a guard in those circumstances squarely falls within the ambit of the risk created by the employment relationship.

[24] Before considering specific damages it may be helpful and conducive to clarity if I first consider the expert witnesses' evidence presented by the plaintiff.

[25] Before the trial commenced the plaintiff delivered and filed relevant notices, as required in terms of the Rules of the High Court, that he was going to call a number of expert witnesses in support of his damages claims. During the trial and after it became clear that the defendant was not to call expert witnesses to rebut the plaintiff's expert witnesses' evidence, Mr Heathcote, counsel for the plaintiff, initially brought an application in terms of Rule 38(2)[7] for the evidence of one of the plaintiff's expert

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6 See also: **Isaacs v Centre Guards CC t/a Town Centre Security [2004] 3 BLLR 288 (C)** at paras 25 – 30.

7 "*38(2) The witnesses at the trial of any action shall be examined viva voce, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.*"

witnesses, Dr Kevin D. Rosman, to be given on affidavit. I granted that application. I prepared, at the time, a fully reasoned judgment which has since been reported. [8]

[26] Further, another application was brought by the plaintiff in terms of Rule 38(2) for three further expert witnesses namely Dr Anneke Greeff, Dr Irving Lissoos and Ian Walsh Morris to be given on affidavit. I granted the application in respect of the first two above witnesses. The plaintiff's application in terms of Rule 38(2) in respect of the actuary, Ian Walsh Morris was refused and that witness therefore gave his evidence *viva voce*. In terms of the orders I made in respect of the applicant's application in terms of Rule 38(2), the concerned two expert witnesses' evidence on affidavit was to be their evidence as appearing in their respective summary of evidence in terms of Rule 36(9) of the Rules of the High Court.

[27] In brief the plaintiff's experts' evidence was as follows:

(a) Dr Irving Lissoos, a practicing urologist in Johannesburg South Africa. This witness' evidence was given by affidavit in terms of Rule 38(2) of the Rules of the High Court. He testified that he examined the plaintiff during October 2006. He testified that the plaintiff underwent a laparotomy through a thoraco abdominal incision. He opined that the injury to the plaintiff's spinal cord which rendered him paraplegic is irreversible. He set out certain monetary amounts as money necessary for the plaintiff's bladder management. He further set out certain figures as being money necessary for prevention of bladder infection. Further he concluded that the plaintiff will need to see a urologist twice a year. He also testified about other monetary figures pertaining to prevention of infection and

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treatment of stones that may develop alongside plaintiff's urinary tract, as well as further figures pertaining to radiological investigation. Given the permanent disability, he also projected figures necessary for the plaintiff's sexual functions including sexual counseling. He projected that the plaintiff's life expectancy would be 36 years calculated from 2004. Because of the defendant's admission of certain quantum during the trial, I need not set out specific figures he testified about.

(b) Dr Anneke Greeff, a practicing occupational therapist in South Africa. This witness also gave evidence by affidavit. In brief, her evidence is to the following effect. The witness recommended that due to the complexity and complications associated with spinal cord injuries it would be of importance that the management and treatment of the plaintiff be managed at a multi-disciplinary level, as such effective management could improve the longevity of the plaintiff. She recommended that the plaintiff would benefit from occupational therapy intervention. She also listed a number of special equipment that includes two lightweight folding wheelchairs, a stand-up wheelchair, a transfer board, taxi commode, bath bench and seat, lightweight shower chair, wetsafe mattress protector and spare, additional set of double bed linen, pressure care mattress, long-handled mirror and free standing/moveable monkey pole with chain, electric wheelchair after the age of 50, wheelchair gloves, a wheelchair bag, wheelchair tray, an air/gel cushion, spare cushion cover, long-handled sponge particularly after the age of 40, lightweight pots and pans with panhandle holders and grab rails at toilet and bath. In relation to the loss of life amenities the witness's evidence is to the following effect:

‘10. LOSS OF LIFE AMENITIES

Mr Gabrielsen has suffered a devastating loss of life amenities, due to the shooting incident, which has resulted in him being a complete T10 paraplegic. Due to his status of paraplegia, he has to make use of adjusted ways of bowel and bladder control and would have to do so for the remainder of his life. He also is curtailed in his ability to perform activities of his choice. He is not able to partake or execute activities without the use of assistive devices, mainly a wheelchair.

With increased age, he will probably find himself progressively become more reliant on the use of an assistant and assistive devices.

The writer is of the opinion that Mr Gabrielsen should be allowed psychological counseling and support, taking note of the fact that he is only 28 years of age and does for example avoid heterosexual relationships post-incident. It is noted by the writer that he has lost sexual functioning since the incident and this aspect probably needs addressing. A further factor that should be addressed during psychological counseling and support, would be the fact that Mr Gabrielsen is no longer able to perform in his chosen occupation as a Teacher.

One has to accept that Mr Gabrielsen, even in the presence of assistance and assistive devices, would never regain his pre-incident level of capacity and abilities.’

(c) Dr Kevin D. Rosman, an accomplished neurologist. The witness gave evidence in the form of an affidavit in terms of Rule 38 and his opinion is to the following effect:

‘It would appear that this patient suffered a gunshot wound on 4 March 2004.

As a result of this injury, the patient has been left a T11 paraplegic.

The patient is wheelchair-bound. He will require the appropriate adaptations to his motor vehicle and to his residential accommodation, in order to allow for mobility on his wheelchair. An opinion from an occupational therapist is necessary in this regard. The occupational therapist should also comment about requirements for the patient to be able to participate in sporting activities, particularly bearing in mind his previous activities.

The patient is expected to have ongoing bladder and bowel problems. Opinions should be obtained from a urologist and a gastroenterologist in this regard.

The patient has lost his sexual functioning. The urologist should comment about this problem.

The patient is unable to perform any type of work which requires any level of mobility. An opinion from the occupational therapist should be obtained, and an assessment from an industrial psychologist would be important.

He is suffering from pain roughly at the level of the spinal injury. This is severe, and is interfering with his functioning as well as his sleep. This will need appropriate treatment. The treatment is likely to consist of, initially, various pain controlling agents. However, it is likely that he will ultimately require surgery to try and control the pain. The global sum of N$100,000 is suggested in regard to the pain management.

It is likely that, from time to time, the patient will develop a depression as a result of the situation in which he finds himself. In those instances he will require treatment from a psychiatrist. A psychiatrist should comment about the projected costs of treatment.

> As a result of this injury, the patient has a reduced life expectancy. It is thought that his life expectancy is in the region of 65 years of age.'

(d) Ian Walsh Morris, an actuary, gave his evidence *viva-voce* after the plaintiff's application in terms of Rule 38(2) of the Rules of the High Court was refused. He is an actuary of many years and has practiced in the United Kingdom and now in South Africa. His firm of actuaries was instructed by the plaintiff to assess the value of the loss of earnings and future medical costs suffered by the plaintiff, which occurred as a result of the injuries sustained by the plaintiff. His evidence is to the effect that the plaintiff was at the time of the delictual act employed as a teacher earning an annual salary of N$57,714-00 per annum plus a thirteenth cheque, and was a member of the pension fund. He made his assessment on the basis that the plaintiff would have left the teaching profession and become a self-employed builder. According to this witness, it was an appropriate basis when calculating the plaintiff's past and future losses that his losses are the costs to him for employing assistants to perform the duties he can no longer perform himself. He calculated the losses from October 2005 onwards. In that regard he assumed that the plaintiff would have to employ a building site foreman in the amount of N$26,000-00 and a nightclub manager at the amount of N$9,000-00. Taking the life expectancy of the plaintiff as has been reduced by 15% and using past and future medical expenses as determined by other experts, he then calculated the plaintiff's total damages. I deem it appropriate to quote verbatim the essential part of the report prepared by this witness in respect of the plaintiff's damages. His *viva voce* evidence essentially

confirmed the summary given in the expert notice in terms of Rule 36(9)(b), save that he supplemented his summary with a brief explanatory evidence. His summary filed by way of the aforesaid notice which was not placed in dispute reads as follows:-

'**A. INTRODUCTION**

As a result of injuries sustained in a shooting accident, the claimant, it is claimed, will suffer a loss of earnings, and also incur certain medical expenses.

We have been instructed to assess the value of the loss of earnings and future medical costs suffered by the claimant, which occurred as a result of the injuries sustained.

**B. INFORMATION**

B1. Mr Gabrielsen, the claimant, was born on 20 July 1978.

B2. The claimant is a male member of the population.

B3. The accident occurred on 4 March 2004.

B4. Earnings had the accident not occurred:

At the date of the accident, the claimant had been employed as a Teacher, earning an annual salary of N$ 57 714 p.a. plus a thirteenth cheque, and was also a member of the pension fund.

We are informed that the claimant would have left the teaching profession, and become a self-employed builder. (He has actually done this in any event.)

It seems that the appropriate basis for calculating the claimant's loss is the costs to the claimant of employing assistants to perform the duties he can no longer perform himself. This loss is calculated from October 2005 onwards.

In this regard, we are instructed to assume the following salaries:
N$ 26 000 p.m. at present for building site foreman.
N$ 9 000 p.m. at present for nightclub manger.

B5. We have been informed that the claimant's life expectancy is reduced by 15%.

B6. We are informed that the claimant will incur future medical expenses as set out in the Appendix.

B7. Earnings given the accident HAS occurred:

We have assumed full pay to 30 September 2005, and ignored all income between the date of the accident and this date.

The claimant was then medically boarded, and received N$ 192 860 in pension payment up to March 2010, and N$ 3 996.54 p.m. assumed since March 2010, and further assumed to be payable for life.

The claimant also received two lump sums totaling R 57 734 (sic). We have ignored these on the assumption that the claimant would have received the same amount when he left teaching in the 'uninjured' condition. (We have no information to indicate what the claimant would have received when he resigned pre-accident.)

Losses of income from 1/10/2005 onwards have been calculated as set out in B4 above, and the capitalized value of the disability pension deducted therefrom.

## C. ASSUMPTIONS MADE AND THE BASIS OF CALCULATION

C1. The date of calculating used was 31 May 2010.

C2. MORTALITY

Our mortality assumptions for the claimant were based on the South African Life Tables 1984/86 for the white male population group, from the date of calculation onwards, suitably adjusted for the reduction in life expectancy.

Mortality from the date of accident to the date of calculation has been ignored.

C3. THE NET DISCOUNT RATE

The net discount rate is determined by formula comprising two parameters – a rate of inflation and an after tax rate of investment return.

As such, the relative values of each parameter are important, and should be consistent with each other. Accordingly, C3.1 and C3.2 should be read in conjunction with each other, and not in isolation.

C3.1 RATE OF INFLATION

We have assumed that remuneration will increase from the date of calculation onwards utilizing the following rate of inflation.

In this regard, we have assumed where appropriate, the following rates of inflation:

| | |
|---|---|
| Up to date of calculation: | 6% per annum |
| 2010/2011 & onwards: | 5,1% per annum |

The inflation rate on future medical expenses was set at 6% p.a., unless otherwise indicated.

C3.2 RATE OF INTEREST FOR DISCOUNTING PURPOSES

The future values of the losses have been discounted to the date of calculation and the past values of the losses (that is, from the date of the accident to the date of calculation) have been stated at the date of calculation. No allowance for interest was made for losses that occurred between the date of the accident and the date of calculation.

We have assumed a rate of interest of 8% per annum, which takes into account expected income tax payable on investment returns over the long term.

Therefore, C3.1 and C3.2 imply a net discount rate of 2,76% per annum.

C4. EARNINGS HAD THE CLAIMANT NOT BEEN INJURED

As clearly set out in B4 above.

C5. EARNINGS GIVEN THE CLAIMANT IS INJURED

As clearly set out in B7 above.

Pensions in payment assumed to increase at 75% of the rate of inflation.

C6. INCOME TAX

Where applicable, we have assumed that the claimant would have paid tax according to the relevant tax tables applying in the appropriate tax year. In this regard, it is assumed that for constant real earnings from the date of accident onwards, tax rates will remain constant, using the 2009/10 Namibian tax table.

Bearing in mind the costs of the assistants are tax deductible, we have allowed for tax savings at a marginal tax rate of 35%. (The marginal rate is 34% on annual income between N$200 000 and N$ 750 000, and 37% on annual income over N$ 750 000.)

C7. RETIREMENT

We have assumed that the claimant would have continued working until age 65, irrespective of whether the accident occurred or did not occur.

C8. FUTURE MEDICALS

We have valued the cost of future medical costs as set out in the Appendix.

**D. CONTINGENCIES**

Contingency adjustments have been set aside as a matter for negotiation.

**E. RESULTS OF THE CALCULATION**

Using the information supplied and assumptions made, contained earlier in our report, the value of the loss of earnings suffered by the claimant is as follows:

| | BUILDING | NIGHTCLUB | TOTAL |
|---|---|---|---|
| **PAST LOSS** | 815 624 | 282 331 | 1 097 955 |
| **CONTINGENCIES** | 0 | 0 | 0 |
| **NET PAST LOSS** | 815 624 | 282 331 | 1 097 955 |
| **FUTURE LOSS** | 3 925 117 | 1 358 694 | 5 283 811 |
| **CONTINGENCIES** | 0 | 0 | 0 |
| **NET FUTURE LOSS** | 3 925 117 | 1 358 694 | 5 283 811 |
| **TOTAL LOSS** | 4 740 741 | 1 641 025 | 6 381 766 |
| **LESS PAST PENSION** | | | 200 853) |
| **LESS FUTURE PENSION** | | | 848 125) |
| **NET CLAIM** | | | 5 332 788 |

**F. CONCLUSION**

The calculations were done as at 31 May 2010.

An adjustment for interest should be made to these results if the date for settlement is different from the date of calculation.

If the delay is more than, say, 12 months, then we would recommend that a fresh calculation be performed.'

[28] The defendant did not place in issue any of the plaintiff's expert witnesses' qualifications, experience or that they are experts in their respective fields. In fact, this

issue was effectively conceded by the defendant. Having looked at their respective curriculum vitae, which was not disputed, and their qualifications, I am satisfied that all the witnesses called by the plaintiff to express opinions qualify as experts in their respective fields and that I would be able to safely rely on their opinions. With regard to their opinions, particularly in view of the fact that the defendant did not call any expert witness to rebut the expert witnesses' evidence, I am prepared, subject to qualifications and rejection of certain damage claims below, to accept their opinions on damages suffered by the plaintiff. In **Nomfusi Nompumza Seyisi v The State**,[9] the Supreme Court of Appeal of South Africa, under paragraph 12 of the judgment, among other things correctly stated:

> 'In this matter Stassen compared the finger and toe prints of the appellant to the prints uplifted from the payment vouchers and went further to explain his findings to the court. Other than a bad denial the appellant led no rebuttal evidence. Effectively the trial court was faced with the prima facie evidence of the expert. There was no challenge to the manner in which he had conducted his investigation, nor to his evidence that in each case there were seven points of similarity, nor was it contested that seven points were sufficient to establish that the prints had emanated from the same person. The court found the evidence acceptable and in its judgment stated:
>
> > 'If we have an expert, he is conceded to be an expert and his evidence is credible before the Court then the Court must at the very least accept his evidence as being prima facie proved and this is where then an onus rests on the defence to dispute facts that are prima facie proved before the Court…." (Own emphasis)

9**Case No. 117/12**, judgment delivered on 28 September 2012, para. 12..

[29] Having referred to the aforesaid principle regarding the status of unchallenged evidence of an expert, I now consider the experts' evidence in this matter with a view to deciding what damages, if any, should be paid to the plaintiff by the defendant.

Past medical expenses

[30] The plaintiff claims past medical and hospital related costs and expenses, including costs to determine the exact nature of his injuries as well as costs incurred to see experts in the field of claiming damages. The plaintiff submitted a schedule reflecting certain expenditures and costs thereof in respect of this claim. The past expenses and costs were also confirmed by the relevant experts. The total amount claimed in this respect is the sum of N$238,987-59. The defendant admitted this amount during the trial. I therefore need not comment further in respect of this claim, and find that the defendant is liable to compensate the plaintiff in the abovestated sum of money.

Costs incurred to make the plaintiff's residence wheelchair friendly

[31] In respect of the above claim the plaintiff claims an amount of N$40,803-20. The defendant admitted that amount during the trial as being reasonable and fair. On that basis I therefore find the defendant liable to compensate the plaintiff in the aforesaid sum of money.

Future medical and hospital related costs

[32] The plaintiff in this respect claims an amount of N$3,442,283-00. The amount is a total estimated amount deduced from the plaintiff's respective expert witnesses' evidence and reports which were confirmed by the actuary, Ian Walsh Morris, after he

has gone through their expert opinions and estimations in relation to the future medical and hospital related costs.

[33] As stated above, the defendant did not avail itself of the assistance of any expert in this respect to dispute any amount being claimed by the plaintiff on the basis of opinions prepared by accomplished experts in their respective fields. The amount was further confirmed as reasonable and fair by the actuary who testified *viva voce*. In addition to the fact that there was no evidence placing in issue the correctness of the experts' quantifications and/or reasonableness or fairness of the quantum, the defendant through questions it put to witnesses, through written questions (in respect of the expert witnesses that gave evidence on affidavit) and through its counsel's cross-examination of witness Ian Walsh Morris, did not seek to place in issue the quantum in this respect. In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**[10] at paras 61 – 63, the court stated the following:

> *'[*61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

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10 **2000 (1) SA 1 (CC)** at paras 61 - 63.

> [62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.
>
> [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[34] I fully agree with the above comments regarding the institution of cross-examination and fully adopt such *dicta* in this matter.

[35] I am therefore prepared to allow the amount of N$3,442,283-00 as the fair and reasonable quantum in respect of future medical and hospital related expenses. In arriving at my decision I considered the plaintiff's medical needs and requirements and the seriousness of his injuries which undisputably necessitate future medical treatments and other medical expenses. Counsel for the plaintiff invited the court to use 8% interest compounded as from 2010 to increase the amount by such interest rate at the date of the judgment. While I agree with counsel for the plaintiff that that would have been ordinarily the appropriate way to do it, unfortunately on the facts of the matter I am of the view that no sufficient evidence was given concerning the nature and extent of fluctuations of prices in respect of medical and hospital expenses over a certain period. I would assume that while some expenses' costs may increase over the passing years, it would not be farfetched to assume that in respect of other expenses there may as well be a downward movement in costs *inter alia* induced by competition related issues or as

a result of the market supply and demand and other market dynamics. I will therefore leave the amount at that amount as claimed in the summons.

Pain and suffering

[36] The plaintiff claims an amount of N$900,000-00 in respect of pain and suffering. It is common cause that the plaintiff was shot and seriously injured. His lungs and liver were both partly destroyed and the injury to his spinal cord resulted in a T10 injury which rendered him wheelchair-bound and made him a paraplegic for life. He spent almost three months in hospital and has lost his feelings in the lower part of his body. He underwent a major surgery. Since the date of the incident he has been enduring unbearable pain, on a daily basis, especially in the left side of his stomach. He has no control over his bladder functioning and for that reason he has to wear a catheter all day long. He would have a number of bladder infections which occur every five to six weeks. He now has a permanent catheter, with a leg bag, but it gets blocked after two to three weeks necessitating acquisition of a new one. Because of that problem he always has to control the quantity of drinks he would consume. He testified that because of his loss of feeling in the lower part of his body he would always get embarrassed when around people, particularly when he gets a bowel movement. He further testified about an incident where he got into his bath without realising that the water was too hot and burned both his feet resulting in the skin being completely burned off without him realising that, as he has no feeling in the lower part of his body including his feet. Although this may not be pain *per se* as he did not feel it, it is an element and part of suffering which is part of his claim.

[37] In considering the question of quantum on the particular facts of any case where the claim relates to pain and suffering, such as in this case, particularly where it appears

to have been caused by a coldblooded shooting of a person, the court should ever be mindful that we, until just a few years ago before independence, went through a shameful and dark period during which people's dignity were systematically violated. To this date, as testimony to such shameful and dark past, we have in our midst hundreds of men and women still enduring daily unbearable pain and suffering as a result of injuries sustained in firearm related incidents then. They are unable to fully enjoy, to the full extent, the fruits and benefits of our attained right to self-determination. They still represent, as a nation, our unhealed wounds of the past. Although the then social and political order has now somehow changed for the better after independence, we still have those amongst us that gratuitously use unjustifiable violence such as in this as a stock in trade to resolve petty issues or for no reason at all.

[38] *Afortiori*, now that our Constitution provides under its Bill of Rights that "*the dignity of all persons shall be inviolable*"[11] any Court considering damages as a consequence and a result of a delictual act premised on a factual basis reminiscent of the facts in this case, should give full recognition of the right to dignity and the inviolability thereof in our new political order and such recognition must be reflected in the damages award it makes.

[39] With the above in mind and regard being to the plaintiff's circumstances, I am prepared to use my discretion and make an award in the sum of N$600,000-00. In reducing the amount claimed by the plaintiff I considered the fact that the awards I have made in respect of past and future medical expenses and the awards that I made in respect of loss of life amenities all have the effects of somehow mitigating the plaintiff's pain and suffering.[12]

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11 Article 8 of the Namibian Constitution.

12 **Reynecke v Mutual and Federal Insurance Co. Ltd 1991 (3) SA 412 (W)** at 419 to 420

Claim relating to loss of enjoyment of amenities of life

[40] The plaintiff claims an amount of N$500 000-00 in respect of damages relating to "*the loss of enjoyment of amenities of life, incapability to continue with regular fresh water and sea water fishing, squash, cycling, volleyball, cricket, gardening, swimming, jogging, touch rugby, walking and incapability to enter into an intimate relationship and to have sexual intercourse*."[13] One of the plaintiff's expert witnesses, Dr Anneke Greeff, a practicing occupational therapist, gave evidence relative to this claim and summarised the plaintiff's loss of life amenities as set out under paragraph [27](b) of this judgment. The plaintiff testified that he used to be an outgoing person with many friends, and that he usually went out for camping, fishing, farm tours and bike riding. Dancing was his hobby and it was because of his dancing skill that he then opened a dance bar. Hoexter JA, in **Administrator-General, South West Africa v Kriel**[14] described the concept of the loss of amenities of life by reference to an English case when he stated the following:

> 'The concept of the loss of amenities of life has been tersely but aptly defined by Lord Devlin in H West & Son Ltd v Shephard [1963] 2 All ER 625 (HL) at 636G-H as
>
> 'a diminution in the full pleasure of living'.
> The amenities of life may further be described, I consider, as those satisfactions I none's everyday existence which flow from the blessings of an unclouded mind, a health body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; t he ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all

13 *Supra* at para. 11.6
14 1988 (3) SA 275 at 288 D - G

> such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent.'

[41] It is without doubt clear that the plaintiff has lost the most vital functions and faculties which would have enabled him to enjoy his life as he used to, before the shooting. Although the plaintiff, notwithstanding daily difficulties in his present day life, has what appears to be a thriving construction business (and that the ingenuity with which he manages his business should be applauded), the fact of the matter is that even if he were to be in a position that would have enabled to fully enjoy amenities of life, he can no more do that because of his current condition. His self-sufficiency, happiness and dignity have all been reduced to almost nothing. I am conscious and aware of the fact that there is a close relationship between claims in respect of pain and suffering and the loss of amenities of life. The reality is, however, that they are two different claims.[15] Taking into account the award I made in respect of the pain and suffering claim, I consider it fair and reasonable to award damages in the sum of N$400,000-00 in this respect.

Plaintiff's claim for 'disability in respect of the loss of income in respect of past and future losses'

[42] The plaintiff's claim in this respect as quoted above presents some problems because of the way it has been formulated in the particulars of claim. The claim is said to be damages for "disability in respect of the loss of income in respect of past and future losses". In this respect the plaintiff claims a total amount of N$5,275,054-00. The plaintiff's actuary, Ian Walsh Morris, calculated the damages in respect of this claim on the basis that the plaintiff, before being shot and injured, intended to leave his job as a

15 See Reyneke matter-*supra*.

teacher and become self-employed as a builder and would have had continued with his "*dance bar*". The claim in this respect is thus based on the ground that should he not have been injured he would have left his teaching profession and performed certain duties himself in respect of the two businesses. As a result of the injury, however, he has to incur extra costs which he would otherwise not have incurred.

[43] With regard to his construction business, he would require to hire a building site foreman in his stead at the cost of N$26,000-00 per month. That amount, the Court was made to understand during the trial was agreed between the parties as a fair and reasonable amount per month to pay a building site foreman. He has already been incurring costs and shall incur costs in future in this respect. The Actuary's assumption is therefore, in this respect, based on a correct factual assumption.

[44] The plaintiff himself testified that should he not have been injured he would have left his job to concentrate on his construction business. Although there was not precise evidence as to when he would have resigned, I will take it that it would have occurred more or less at the same time he was medically discharged. It became apparent during the evidence of Ian Walsh Morris that the quantum of this claim was determined on the assumption that as a matter of fact the plaintiff would indeed have pursued the two businesses after leaving teaching and would as a matter of fact incur such costs. Although this claim is inelegantly titled "*disability claim in respect of future and past loss of income*" a closer scrutiny of the evidence reveals that the title of the claim may be misleading. As I stated under paragraph 14-*supra*, it is not necessarily the legal conclusions in the pleadings that determine the real issues between the parties, but the evidence led to prove and disprove issues that fall to be decided.

[45] Although this claim ordinarily ought to be the claim sometimes described as one for the loss of earnings (which is in fact a claim for the loss of the claimant's earning capacity, which is an asset in his estate)[16], on the facts, notwithstanding his permanent disability the plaintiff has since been able to establish a thriving construction business that he intended to pursue before the shooting save that he now requires a building site foreman in his stead at an extra costs. The claim therefore relates, in respect of his construction business, to a claim for compensation to the plaintiff for the costs which if it was not for the delictual act would not have been incurred. As the defendant has admitted that the amount of N$26,000-00 per month is reasonable and fair, I am prepared to make a damage award in that amount. Ian Walsh Morris testified that the plaintiff would benefit from some tax deductions in respect of the cost incurred in paying the building site foreman. Although the plaintiff's experts somehow differ on the extent of the plaintiff's reduced life expectancy, I am prepared to accept that his life expectancy to be between 35 to 39 years calculated from the date of the incident. Because of the aforesaid there should be some downward contingent deductions. On the other hand, given the fact that the calculations were made during 2010 that this judgment is only being delivered now, there would necessarily also have to be a contingent increment at a certain percentage. Because of the mutually affecting divergent contingent considerations above, I am prepared to leave the total amount claimed in respect of the cost of the building site foreman at the sum of N$3,925,117-00 as determined by the Actuary.

[46] In respect of the second part of this claim relating to the cost in respect of to the salary of the night club manager, the facts before me are briefly the following:-

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16 See: **Heese Obo Peters v Road Fund Accident Fund, 2012 (6) SA 496 (W) at 509 para 61**.

46.1 The plaintiff, before being injured, because of his dancing skills, opened a "*dance bar*" where he usually gave dancing classes. He testified that after being shot and while he was recovering this bar was closed on account of bankruptcy. He did not give any evidence that he has in the meantime opened the "*dance bar*", nor did he give any credible evidence that he intends as a matter of fact to open another "*dance bar*" in future. His evidence related more to the construction business. The actuary, Mr Ian Walsh Morris, conceded that the calculations were made on the assumption that as a matter of fact the plaintiff had, in relation to the two businesses, been incurring such costs in the past, and would in the future run such businesses and consequently incur such costs.

46.2 I am of the view that unlike in respect of the construction business in respect of which the plaintiff gave good evidence that, that business is running and that it will continue, there was no evidence that the "*dance bar*" has since been opened nor was there evidence that there was a serious intention to open such a bar in future and recruit a club manager so as to pay him the amount claimed. I therefore decline to make a damage award in respect of the salary of a club manager, as without good evidence, the plaintiff, if I were to make an award in this respect, may be compensated for expenses he had not incurred and would not incur.

[47] I must concede that compensation of the kind above is difficult and amounts to guesswork as acknowledged in **Bane & Others v D'Ambrosi**[17] at 545 H – I and 546 A – C.

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17 **2010 (2) SA 539**

‘[12] . . . Secondly, the fact is that the courts habitually have to grapple with problems of this nature where resort must be had to estimates and speculation in order to arrive at a figure which the court considers to be as far as possible to both sides. This is clear from the well-known and much-quoted dictum by Nichalos JA in Southern Insurance Association Ltd v Bailey NO:

> ‘Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.
>
> It has open to it two possible approaches.
>
> One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.
>
> The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.
>
> It is manifest that either approach involves guesswork to a greater or lesser extent . . .’’

[48] This leaves me with the question of costs. I could not find any ground as to why the defendant should not pay the plaintiff’s costs of suit. Counsel for the plaintiff submitted that the costs should include costs incurred in consulting various experts and getting one at Court. I agree with counsel for the plaintiff that it would be fair and reasonable for such costs to be (only to the extent that such expenses were not included

in the damages claimed in relation to past and future medical expenses) included and considered in awarding the costs of suit to the plaintiff. For the purposes of the Taxing Master's work I therefore direct that the plaintiff is, subject to the above, entitled to recoup his expenses in that respect.

[49] In the result judgment is granted partly in favour of the plaintiff and I make the following orders:

1. Payment in the amount of N$7,647,190-79 for special damages.

2. Payment in the amount of N$1,000,000-00 for general damages and loss of amenities.

3. Interest at the rate of 20% per annum from date of judgment to date of payment.

4. Defendant to pay the plaintiff's costs of suit.

S Namandje

Acting Judge

APPEARANCES

PLAINTIFF: Mr R Heathcote SC
Instructed by van der Merwe-Greeff Inc.

VAN DER MERWE-GREEFF INC.

DEFENDANT Mr C Brandt
Instructed by Chris Brandt Attorneys
MR C BRANDT