

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2019/04292

In the matter between:

**THEOFILUS JAKOB NGHILUNDWA**

**PLAINTIFF**

and

**GERHARDUS SALOMO MARITZ**  
**DEFENDANT**

**Neutral Citation:** *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020]  
NAHCMD 409 (4 September 2020)

**Coram:** PRINSLOO J  
**Heard:** 8 –9 June & 11 June 2020  
**Delivered:** 4 September 2020  
**Reasons:** 14 September 2020

**Flynote:** **Delict – Action for damages** – Delict relating to the invasion of the bodily integrity of an individual – Every infringement of bodily integrity is prima facie unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification

**Delict – General damages** – Assessment of appropriate award for general damages is a discretionary matter and has, as its objective, to fairly and adequately

compensate an injured party – It is proper for the court to take into account previous awards and make allowance for increases in such awards – Results cannot be determined with mathematical precision and awards in previous cases are merely a guide – Object of an award is to see justice done – it must be fair to both sides – Court to consider each case according to its specific and unique circumstances, the injuries sustained by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life

**Delict – Special damages** – Plaintiff to prove extent of loss as well as amount of damage that should be awarded – Measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not, that is, that there is more than a fifty per cent chance that it will occur

**Summary:** The plaintiff, Mr Nghilundwa, issued summons against the defendant, Mr Maritz, claiming payment of the amount of N\$ 674 053.89 for losses and damages suffered as a result of an alleged unlawful and wrongful physical attack by the defendant on the plaintiff, causing him to sustain injuries. The plaintiff further pleaded that the defendant, without reasonable and probable cause, insulted him and in addition thereto damaged his truck.

The losses and damages claimed by the plaintiff consists of medical and hospital expenses (past and future); loss of expected income; damage to a vehicle tyre; payment of assistant; traveling expenses; pain and suffering; and infringing the plaintiff's right to dignity.

The defendant pleaded to the plaintiff's claim and also filed a counterclaim wherein the defendant claimed that the plaintiff unlawfully assaulted him by striking him, grabbing him by the private parts, biting him on the arm and threatened to assault him with a rock. The defendant claimed N\$ 120 000 in respect of general damages and damages as a result of the alleged unlawful and intentional impairment and infringement of the defendant's dignitas.

*Held* that although the only version before this court of the incident is that of the plaintiff and his witness, Elzibo Jonker, as the defendant chose not to testify in his own defence or in support of his counterclaim, the plaintiff's evidence was clear but

lacking details as to the assault and the injuries sustained. However the assault and injuries sustained stand unchallenged as there was no cross-examination directed to the plaintiff in this regard. The cross-examination of the plaintiff focused more on the issue of special damages and the quantification thereof and not the actual assault.

*Held* that the fact that the issue of the attack and the subsequent assault was left unchallenged during the cross-examination causes this court to draw the inference that the plaintiff's evidence is to be accepted as correct. Even more so as his evidence was corroborated by another witness who enlightened the court more than the plaintiff as to the assault and the circumstances surrounding it, which evidence was also not challenged during cross-examination. The evidence was straight forward and without any inherent improbabilities.

*Held further* that there might appear to be slight contradictions between the evidence of the plaintiff and that of Mr Jonker but it is more a case of Mr Jonker filling in the blanks where the plaintiff himself was silent as to the details of what happened and I will draw no negative inferences from these slight variances in evidence.

*Held further* that if the prima facie evidence or proof remains unrebutted at the close of the case, it becomes 'sufficient proof' of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the onus of proof. Once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification. An assault violates a person's bodily integrity and every infringement of the bodily integrity of another is *prima facie* unlawful.

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## ORDER

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Judgment is granted in favor of the plaintiff in the following terms:

1. General damages:

- 1.1 Pain and suffering in the amount of N\$ 50 000.
- 1.2 Plaintiff's right to dignity in the amount of N\$ 10 000.

2. Special damages:
  - 2.1 Medical expenses in the amount of N\$ 7698.79.
  - 2.2 Travel expenses in the amount of N\$ 6080.00.
3. The following claims in respect of special damages is dismissed:
  - 3.1 Loss of expected income.
  - 3.2 Payment to assistant.
  - 3.1 Damage to the truck tyre.
4. Interest on the total of the said sum, namely N\$ 73 778.79 at the rate of 20% per *annum*, as from date of judgment to date of final payment.
5. Costs of suit, with the exclusion of the following:
  - 5.1 Plaintiff will be liable for the wasted cost of one court day for 9 June 2020. Said cost to be cost of one instructed and one instructing counsel.
  - 5.1 Cost for preparation by defendants counsel in respect of the application for postponement which the plaintiff intended to move on 10 June 2020 (which was abandoned on 10 June 2020).
6. The defendant's counter-claim is dismissed with costs.

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## JUDGMENT

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PRINSLOO J

### Introduction

[1] The parties before me is Theofilus Jakob Nghilundwa, a business person and farmer in the Maltahöhe district and Gerhardus Salomo Maritz, who is also a farmer in the Maltahöhe District.

[2] The plaintiff, Mr Nghilundwa, issued summons against the defendant, Mr Maritz, on 24 October 2018, claiming payment of the amount of N\$ 674 053.89 for losses and damages suffered as a result of an alleged unlawful and wrongful physical attack by the defendant on the plaintiff, causing him to sustain injuries. The plaintiff further pleaded that the defendant, without reasonable and probable cause, insulted him and in addition thereto damaged his truck.

[3] The losses and damages claimed by the plaintiff consists of:

- a) Medical and hospital expenses (past and future);
- b) Loss of expected income;
- c) Damage to a vehicle tyre;
- d) Payment of assistant;
- e) Traveling expenses;
- f) Pain and suffering;
- g) Infringing the plaintiff's right to dignity.

[4] The defendant pleaded to the plaintiff's claim on 7 March 2019 and also filed a counterclaim wherein the defendant claimed that the plaintiff unlawfully assaulted him by striking him, grabbing him by the private parts, biting him on the arm and threatened to assault him with a rock.

[5] The defendant claimed N\$ 120 000 in respect of general damages and damages as a result of the alleged unlawful and intentional impairment and infringement of the defendant's dignitas.

[6] In his plea the defendant admitted that he struck the plaintiff but pleaded that he was justified in doing so as the plaintiff had attacked and assaulted him (as also set out in the counterclaim). The defendant further pleaded that force was necessary in the circumstances to repel the attack by the plaintiff.

The pre-trial order

[7] In terms of the pre-trial order the parties agreed that the following issues stand to be determined during trial:

a) In respect of the issues of fact:

- 1) Whether or not the defendant physically attacked the plaintiff and the circumstances under which the plaintiff was physically attacked.
- 2) Whether or not the plaintiff suffered the damages claimed.
- 3) Whether or not the plaintiff physically attacked the defendant and the circumstances under which the defendant was physically attacked.

b) In respect of the issues of law to be resolved during the trial:

- 1) Whether or not the defendant's attack (if proved) on the plaintiff was unlawful.
- 2) Whether or not the defendant is liable for damages claimed by the plaintiff.

### The plaintiff's case

#### *Theofilus Jakob Nghilundwa*

[8] The evidence of the plaintiff is that he is a self-employed farmer farming at Farm 37/2 Kampe, Maltahöhe district.

[9] On 8 October 2018 the plaintiff was in the process of transporting goats to auction from his farm to the place of auction, Farm Kuteb. The plaintiff testified that he was traveling with an 8 ton double decker truck, with registration number N 158067W on the D804 road when he noticed that the truck had a flat tyre. He proceeded to pull over on the side of the road and made a call to arrange for a spare tyre to be brought.

[10] Whilst waiting on the side of the road another motorist stopped and offered assistance, but as the plaintiff already made arrangement for a spare tyre to be brought he declined the assistance.

[11] The plaintiff testified that a while later he heard another vehicle approaching. At the time he was sitting in the cab of the truck and his assistant, Elzibo Jonker, was

on the back of the truck inspecting the goats. The vehicle driven by the defendant stopped and after having a conversation with Mr Jonker the defendant approached the plaintiff as the plaintiff was getting out of the truck.

[12] The plaintiff testified that the defendant approached him in an aggressive manner and the defendant insulted him for driving a truck without a spare tyre. There was an exchange of words and thereafter the defendant went back to his vehicle and the plaintiff got back into the truck.

[13] However, according to the plaintiff, the defendant returned to the cab of the truck after a short while and knocked at the door of the truck. The plaintiff opened the door and noticed that the defendant was now with another person. The defendant demanded from the plaintiff his permit to transport goats, which the plaintiff refused to present as the plaintiff was of the view that the defendant had no authority to demand such a permit. The gentleman with the defendant then identified himself as a veterinarian and presented the plaintiff with his credentials. As the plaintiff was satisfied with these credentials he proceeded to present his permit to the veterinarian, who inspected it and then informed the defendant that the permit was valid and this gentleman then left.

[14] The plaintiff testified that he regarded the matter as closed but the defendant then insisted on inspecting the permit that was earlier presented to the veterinarian. The plaintiff again refused to present the defendant with the permit and an argument ensued between the two of them. The plaintiff testified that the defendant then without consent, started to take pictures of him and his truck, as a result the plaintiff likewise proceeded to do the same in turn.

[15] Hereafter the defendant got into his vehicle and drove off and as he was driving away he showed the plaintiff a rude hand gesture and in turn the plaintiff did the same. The defendant stopped his vehicle, got out and without any reason or provocation started to physically fight the plaintiff. The plaintiff testified that he fought back but at some stage he broke away from the defendant and when he did so the defendant instructed his employees to assist him. Two of the employees assisted the defendant by joining in the attack.

[16] After the attack the plaintiff was taken to the Maltahöhe Police Station where he reported the incident under CR 9/10/218 and subsequently the defendant was arrested.

[17] The plaintiff testified that as a result of the unlawful and wrongful physical attack he suffered bodily injury and had to go to Windhoek in order to receive medical assistance and could not transport the remaining goats at the farm to the auction for sale.

[18] The plaintiff testified that he suffered losses or damages as a result of the physical attack. The plaintiff set out these losses/damages as follows:

a) Medical and Hospital expenses

The plaintiff testified that to date he incurred expenses in a total amount of N\$ 30 729.39.

b) Loss of expected income

The plaintiff testified that as a result of the attack on him the defendant was unable to deliver 350 goats to the auction. This resulted in a loss of N\$ 473 294.50 as the goats were sold at an average price of N\$ 1352.27 per animal at this specific auction.

c) Damaged tyre

The plaintiff testified that he had to drive the truck with a flat tyre after the assault to get medical attention and the tyre got damaged in the process and he therefore suffered damages in the amount N\$ 3500, being the market value of the said tyre.

d) Payment to assistant for loading goats onto the truck

The plaintiff testified that he paid an amount of N\$ 450 in respect of an assistant who assisted in loading the goats on the truck but as a result of the attack the last load of goats could no longer be loaded onto the truck and transported from the farm to the auction for sale.

e) Travelling expenses



The plaintiff testified that as a result of the injuries sustained he had to travel twice to Windhoek for medical treatment and testified that a return trip is 760 km. He testified that reasonable cost of travelling was calculated at a rate of N\$ 4 and testified that the defendant is liable to compensate him in the sum of N\$ 6080.

f) Pain and suffering

The plaintiff testified that as a direct result of the physical attack the defendant is liable to compensate him for pain and suffering in the amount of N\$ 150 000 and N\$ 10 000 for the infringement of his right to dignity.

*Cross-examination*

[19] During cross examination the plaintiff testified that apart from the farming industry he also operates a long distance transport business as well as a business dealing with earth moving equipment under the name and style of Nghilundwa Farming CC and TJ Civil Technology CC respectively.

[20] The plaintiff during cross testified that the livestock and the truck on which it was transported is owned by the close corporation, Nghilundwa Farming CC. The plaintiff testified that as he had to get medical attention after the incident he was unable to transport the third load of 350 goats to the auction and as a result these goats were not sold at the time. These animals were only sold during 2019 at a similar auction as the one that was scheduled for 9 October 2018.

[21] In respect of the damage to the tyre of the truck the plaintiff testified that the tyre had a slow puncture and although it is a double axle double-decker truck, the load on the truck (230 goats) was of such a nature that the truck could not be driven without a new tyre as there would be a risk of damage to the rest of the tyres. The witness was not sure in whose name the truck is registered and testified that it could either be registered in his name or that of TJ Civil Technology CC.

[22] The plaintiff stated that after the incident he left the truck next to the road and proceeded to Maltehöhe for medical treatment and after receiving the treatment he called for someone to assist and take the truck and deliver the goats on the truck to

the auction. The remaining goats (350 goats) remained on the farm and could not be delivered to the auction. The plaintiff indicated that the person who brought the spare tyre to the truck was also the person who transported him to Maltehöhe for medical attention.

[23] On a question by Mr Van Vuuren, counsel for the defendant, as to whether the plaintiff is claiming the difference between what he could have sold the goats for at the 2018 auction and what he got for the goats at the 2019 auction, the plaintiff indicated that he is claiming the expected income for the animals he would have earned at the 8 October 2018 auction, as he could not deliver the animals to the said auction.

[24] On another question by Mr Van Vuuren regarding the claim for travel expenses the plaintiff testified that he has proof of the money expended for fuel but conceded that it was not contained in the discovery bundle. The plaintiff testified that the claim consists of reasonable and fair charge for the fuel and the wear and tear of his vehicle.

[25] During cross-examination Mr Van Vuuren took issue with the receipts for payment of medical expenses presented by the plaintiff which were not authenticated or original documents. In this regard the plaintiff testified that he has the originals but conceded the originals were not before court.

[26] In respect of a quotation for dental work Mr Van Vuuren pointed out that the amount of N\$ 7757 was quoted twice and the plaintiff is therefore in essence claiming this amount twice. The plaintiff conceded that this amount was duplicated.

*Elzibo Jonker*

[27] Elzibo Jonker testified that he is employed at Farm Kampe in the Maltahöhe district and that the plaintiff is his employer. Mr Jonker testified that on Monday 8 October 2018 between 08h00 and 09h00 he was traveling with the plaintiff on the D804 gravel road on route to Farm Kuteb with a truck loaded with goats. Whilst on their way the truck's tyre got flat. As they had no spare tyre they stood next to the road whilst waiting for one Mr Jan Burger to bring a replacement tyre.

[28] The witness stated that whilst waiting for the tyre a vehicle stopped next to the truck and a gentleman, that the witness later came to know as the defendant, exited the vehicle and approached the truck. The witness testified that the defendant aggressively asked him where they were going. The witness informed the defendant that they were waiting for a tyre to be brought from Maltahöhe. The defendant then proceeded to the cab of the truck where the plaintiff was seated.

[29] Mr Jonker testified that he walked over to the defendant's vehicle where the defendant's farm workers were and while on his way to the vehicle he heard the plaintiff and defendant swearing at each other. The witness testified that he saw the defendant taking his cell phone and started taking pictures of the plaintiff and the truck. The witness stated that the plaintiff also took pictures of the defendant and his vehicle.

[30] The witness further testified that the defendant went back to his vehicle and as he drove off he made a rude hand gesture. The plaintiff showed the defendant the same hand gesture. This caused the defendant to reverse his vehicle, stopped and got out. The defendant then started to physically fight the plaintiff. The witness testified that plaintiff managed to run away however the defendant instructed his farmworker to give chase. When the plaintiff was caught the farmworkers held the plaintiff while the defendant assaulted him with fists and kicking him over his body. The witness stated that the plaintiff was bleeding heavily and became unconscious. The defendant thereafter drove off and the plaintiff proceeded to Maltehöhe to report the incident with the Namibian Police Station.

[31] During cross-examination the witness testified that after the incident the plaintiff turned the truck around with the flat tyre and drove the truck towards Maltahöhe and on the way they met with the gentleman bringing the spare tyre from Maltahöhe. This gentleman dropped off the tyre and the plaintiff then proceeded with the said vehicle to Maltahöhe whilst Mr Jonker remained with the truck. Another driver then arrived and drove the truck to the farm where the auction was due to be held.

The defendant's case

[32] The defendant proceeded to close his case after the plaintiff's case without presenting any evidence in support of the counterclaim.

### Closing arguments

#### *On behalf of the Plaintiff*

[33] Mr Namandje argued from the onset that this matter should never have gone to trial and that in his opinion the defendant ought to have conceded to the claim at an early stage of the proceedings before it escalated to a trial during which the defendant neither disputed any material or incriminating evidence by the plaintiff nor did he put his case in defence and in support of his counterclaim to the plaintiff, and then proceeded to close his case without tendering any evidence in respect of the counterclaim. Counsel argued that paras 2.3.1<sup>1</sup> and 2.4.1<sup>2</sup> of the defendant's plea constitutes prima facie an unlawful infringement, implying wrongfulness.

[34] Mr Namandje submitted that any positive act that causes injury to another person is prima facie wrongful and unlawful. In this regard counsel directed the court to *Gabrielsen v Crown Security*<sup>3</sup> wherein the court found as follows:

'[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

<sup>1</sup> '2.3.1 Save for pleading that:

- a) the defendant struck the plaintiff, and that the defendant was justified in so doing since the plaintiff had attacked and assaulted the defendant by inter alia hitting defendant, grabbing the defendant on his penis and biting the defendant on his arm, requiring the defendant to defend himself for his own protection (the defendant on reasonable grounds also believing that he was in physical danger); and
- b) the plaintiff threatened to assault the defendant further with rocks, which threat was real imminent (the defendant on reasonable grounds believing that his was in physical danger), necessitating the defendant to defend himself against such imminent attack;
- c) the force used was necessary in the circumstances to repel the attack and commensurate with the plaintiff's aggression;

the remaining contents as if specifically traversed and thereafter denied and the plaintiff is put to the proof thereof.'

<sup>2</sup> '2.4.1 Save for pleading that the plaintiff was injured as a result of the defendant striking the plaintiff, for the reasons pleaded in paragraph 2.3.1 supra, the remaining contents is denied as if specifically traversed and thereafter denied and the plaintiff put to the proof thereof.'

<sup>3</sup> *Johannes JA Gabrielsen v Crown Security CC* (I 563/2007) [2013] NAHCMD 124 (13 May 2013).

consisting of a positive act causing physical damage to another person or property, such invasion is *prima facie* wrongful.<sup>4</sup>

[35] Mr Namandje further argued that a positive act causing physical damage to the property or person of another is *prima facie* wrongful and it therefor follows that the vicious and brutal attack perpetrated by the defendant, assisted by his employees on his instructions, which led the plaintiff becoming unconscious, is *prima facie* wrongful. In the current matter, so argued counsel, the wrongfulness has been conclusively proven as the defendant's counsel did not put any contrary instructions and/or allegations to the plaintiff, nor did he in any way seek to put the defendant's pleaded grounds of defence to the plaintiff's witnesses. He further contended that as the evidence of the plaintiff and his witness were not contradicted during cross-examination it must be accepted as the truth.

[36] Mr Namandje thus contended that the total evidence of the plaintiff, not only in respect of the attack but also in respect of all the claimed damages, should be accepted by the court. Mr Namandje further contended that all the authorities and common sense dictate that, particularly in view of the defendant's silence in cross-examination, no actual dispute exists between the parties.

[37] Mr Namandje further argued that defendant's counsel attempted to dispute the damages particularly in respect of medical expenses, damages to the plaintiff's vehicle and travelling expenses, but that is of no moment, as it cannot be disputed that the plaintiff was injured and that he paid for the medical treatment received.

[38] In conclusion Mr Namandje, during his oral argument, indicated that the plaintiff reduced the claim amount in respect of the loss of income to the amount of N\$ 150 000 but that the remainder of the claim should be granted as prayed for with costs of two legal practitioners. Mr Namandje submitted that this cost should be granted on a punitive scale.

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<sup>4</sup> See: *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*, 2006 (3) SA 138 (SCA) para 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)

*On behalf of the defendant*

[39] Mr van Vuuren conceded that the defendant has not led evidence in this matter and the defendant's case stand and fall by what the court finds in this matter. Accordingly the plaintiff's case is to be considered on the evidence tendered and the applicable legal principles.

[40] Mr van Vuuren argued that the plaintiff's evidence was confined to his witness statement and the aspects of his particulars of claim he referred to in his evidence (with the exclusion of the disputed evidence objected to and documentation objected to).

[41] Counsel argued that the plaintiff's approach to the matter was to rely on paras 2.3.1 and 2.4.1 of the defendant's plea and further places reliance on an argument that the 'striking' pleaded by the defendant constitutes prima facie an unlawful infringement, implying wrongfulness. Counsel contended that the defendant pleaded that he 'struck' the plaintiff, not assault the plaintiff. He argued that the word assault carries with implied wrongfulness but the striking alleged does not carry with it the implication of prima facie wrongfulness.<sup>5</sup>

[42] Counsel referred the court to the pre-trial report and pointed out that the plaintiff had to prove whether or not the defendant physically attacked him and the circumstances under which the plaintiff was physically attacked and in addition thereto whether or not the defendant's attack (if proved) on the plaintiff was unlawful. Counsel pointed out that considering the pre-trial report the plaintiff carries the overall onus to prove the following:

- a) an alleged assault;
- b) the nature of the alleged assault;
- c) the treatment received for the alleged injuries; and
- d) the damages that flowed from the alleged assault.

[43] Mr van Vuuren argued that the plaintiff failed to discharge the onus resting on him as the plaintiff's evidence in respect of the assault and injuries consisted of

<sup>5</sup> Harms, *Amler's Precedents of Pleadings* 8<sup>th</sup> ed LexisNexis p 47-48.

vague statements for example by stating 'he started physically fighting me', 'I was wrongfully and unlawfully attacked', 'the defendant was beating the plaintiff with fists and kicked him all over his body' and 'the plaintiff was heavily bleeding and became unconscious'.

[44] Counsel submitted that due to the vagueness it is not clear as to where plaintiff was struck or how many times he was struck. There is also not sufficient evidence of the injuries sustained by the plaintiff or from where he was bleeding as Mr Jonker did not explain the extent thereof since every person perceives bleeding differently.

[45] Mr Van Vuuren argued that the evidence of the plaintiff was lacking in a number of respects, which he summarised as follows:

Medical treatment

[46] On the issue of the treatment received by the plaintiff Mr van Vuuren argued that it is lacking in the details of the treatment received. He argued that the plaintiff testified that he went to the police station to register a criminal case and received medical treatment but the plaintiff did not testify in regards to what treatment he sought.

Medical expenses

[47] The plaintiff testified that he incurred losses in the amount of N\$ 30 729.39 for medical and hospital expenses however the plaintiff conceded that the amount of N\$ 7 757 was a duplication in respect of an expense claimed for dental work. Mr Van Vuuren argued that the plaintiff relied on documentation, which he (the plaintiff) had the onus of handing the documents in as evidence. However, there is no evidence as to where the plaintiff obtained the documents referred to and all the documents presented to court are printed copies and whereas the plaintiff is apparently in possession of the original documents same were not presented in court.

[48] The defendant further objects to the admissibility of the medical invoices and receipts the plaintiff presented to court as the plaintiff failed to call the doctor to testify as to the medical treatment and no expert evidence was presented about the medication prescribed to the plaintiff for treatment of the alleged injuries sustained. In addition thereto it is the defendant's complaint that the plaintiff did not call the author of the documents and the authenticity of the documents have not been established.

#### Loss of expected income

[49] Mr Van Vuuren argued that the claim has no basis in the circumstances and facts of the matter. Plaintiff testified that he managed to sell the 350 goats during 2019, however the plaintiff did not claim for the difference between what he would have earned from the sale of the goats and what he sold the goats for eventually. The plaintiff is claiming for the full price of the goats.

[50] The plaintiff alleges he suffered a loss of income however it was determined during cross-examination that the goats belong to Nghilundwa Farming CC and therefor this claim must fail.

#### Damaged Tyre

[51] It was submitted that no evidence was tendered as to the make, size or model of the tyre that was flat before the arrival of the defendant. The plaintiff testified that he was uncertain whether he or the close corporation was the owner of the truck. Although the plaintiff indicated that he is in possession of the necessary proof the plaintiff failed to bring same to court. The plaintiff did not testify that he has in fact replaced the alleged damaged tyre. Mr van Vuuren submitted that the plaintiff could have removed the tyre before driving further. Counsel further submitted that the plaintiff's evidence on market value constitutes inadmissible, irrelevant opinion and hearsay evidence to which the defendant objects.

#### Assistant



[52] Mr van Vuuren argued that from the evidence of Mr Jonker it is clear that the auction was held on 9 October 2018 and the two loads of goats destined for the auction were indeed delivered and the plaintiff therefore has no claim in this regard.

#### Travelling expenses

[53] It is submitted that there is insufficient evidence before court of the injuries allegedly suffered by the plaintiff and following on that the plaintiff's evidence on the 'fair and reasonable cost' per kilometre constitutes opinion evidence. It is submitted that the plaintiff could have called a witness from the AA to testify in this regard but he failed to do so. Mr van Vuuren argued that the evidence on 'fair and reasonable costs' per kilometre consists of inadmissible opinion and hearsay evidence.

#### Pain and suffering (including the claim for infringement of the right to dignity)

[54] Mr van Vuuren argued that there is no evidence from the plaintiff on what exactly the swearing and insults related to. Counsel argued that there is no clear method of determining the damages in respect of pain and suffering and the courts are generally conservative with the amount awarded and it depends on the circumstances of each case. Further, the plaintiff did not testify as to the extent of the alleged pain and suffering. No medical report was introduced in evidence and no doctor testified about the extent of any injuries, or the pain that may be experienced. The plaintiff also failed to testify about how long the alleged injuries took to heal or whether he suffered any life changing injuries or permanent injuries. The plaintiff also did not testify on any psychological impact the events had on him.

#### Discussion

[55] Before dealing with the legal principles and the evidence, I want to say a word or two about the witness statements filed on behalf of the plaintiff.

[56] The formal requirements of witness statements are governed by rule 92 of the Rules of Court. Witness statements relate to the oral evidence which a party

servicing intends to adduce during the trial in relation to any issues of fact to be decided at the trial.

[57] On the morning of the first day of trial the court was informed by Mr Mhata, counsel for the plaintiff, that there was what appears to be, a belated amendment sought to the witness statement of the plaintiff. Mr Mhata proceeded to inform the court that in the event that there is opposition to the proposed amendments by the opposing counsel then the plaintiff will not persist with the application but will indeed proceed with the witness statement as it stands and will seek to amplify the witness statement in respect of certain issues (simple issues according to the counsel) that were omitted from the plaintiff's witness statement. Mr van Vuuren in unequivocal terms indicated that any amendment or amplification to the plaintiff's statement will be opposed.

[58] The court drew the attention of plaintiff's counsel to the provisions of rule 92 and 93 of the Rules of Court and the Practice Note issued by the Judge President and requested the parties to advance brief arguments regarding the proposed application for amplification.

[59] After having heard counsel on the issue my ruling in this regard was thus:

[60] Rule 93 deal with the use of served witness statements at a trial. Rule 93(2) has the following rendering:

'Where a witness is called to give oral evidence under this rule his or her witness statement will stand as his or her oral evidence-in-chief unless the court orders otherwise.'(my underlining)

[61] The Practice Note<sup>6</sup> of the Judge President issued 21 May 2013 pertinently deals with witness statements as well.

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<sup>6</sup> '2. In the first place, the witness statement need not be under oath. In fact it is preferable that it is not under oath, unless the parties choose to provide statements under oath.

3. Counsel must be required to prepare statements that are sufficient to constitute the witness' evidence-in –chief and should not provide summaries. The statement must identify all the documents that the witness will have admitted as exhibits.'

[62] Amplification of witness statements is not as of right and leave need to be sought from the court to do so. This procedure is regulated by rule 93(3) which states as follows:

'(3) A witness giving oral evidence at a trial may, with the leave of court, amplify his or her witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties, except that the court may give such leave only if it considers that there is good reason not to confine the evidence of the witness to the contents of his or her witness statement.' (My underlining)

[63] During Mr Mhata's address regarding amplification of the plaintiff's witness statement it became clear that the issues that the plaintiff wanted to amplify related to the specifics regarding the insults and the assault/attack on the plaintiff. It was this court's understanding that the plaintiff wishes to provide details of the said insults and the assault, which were not contained in the witness statement.

[64] This is clearly information that was available to the counsel who drafted the witness statement as far back as 2018. There was no new information that came to the fore after the witness statement was delivered. The intended amplification would cut to the heart of the matter on which the claim of the plaintiff is based.

[65] The court expressed its concern that the approach of the plaintiff's counsel was an attempt to amplify a critical witness statement and thereby introduce evidence that should have been contained in the witness statement from the onset and it would result in taking a short cut to get evidence admitted in lieu of the application to amend the witness statement.

[66] I am aware of the pressure under which counsel must function and indeed do so on a daily basis and that witness statements do not necessarily cover each and every minute detail and fact of what happened, but the statement must make out the factual basis for the claim of the plaintiff. The particulars of claim is merely the frame over which the plaintiff will hang his or her facts. The frame that is fleshed out by the witness statement.

[67] I must reiterate what the court remarked in *Josea v Ahrens*<sup>7</sup> where Shimming-chase AJ said the following in this regard:

[15] . . . [it] is advisable to follow the chronological sequence of events and to deal with each factual allegation in such a manner as to enable the reader to understand the evidence that will be given. Each paragraph should be numbered, and, so far as possible, be confined to a distinct portion of the subject. All facts must be set out clearly and with adequate particularity.<sup>8</sup>

[16] I think parties should attempt as much as possible to prepare the witness statement as if the witness is giving evidence in chief already, and telling the story which brought the litigants to court in the first place, in a simple and chronological fashion.'

[68] Masuku J in *Botes v McLean*<sup>9</sup> at para 119 cautioned against the courts slavish observance of the rules which might lead to absurdity or injustice that may not have been contemplated by the rule-maker. I fully agree with my Brother in this regard, however it is also so that the rules are there to guide and direct and the amendment to the rules with regard to witness statements was to avoid long protracted trials where the parties go on fishing trips for facts. This is no longer the case. There is no longer trial by ambush.

[69] The plaintiff's witness statement was lacking in the details of the matter. These are deficiencies that could have been rectified by bringing the relevant application timeously, especially bearing in mind that this matter was set down for hearing in March 2020 already, but was postponed due to COVID-19, yet the plaintiff's counsel waited until the day of trial to want to move an application to amend his witness statement. Needless to say the parties were directed to limit themselves to their written witness statements with the exception of the corrections or clarification that might be required.

### Evaluation of evidence

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<sup>7</sup> (I 3821-2013) [2015] NAHCMD 157 (2 July 2015).

<sup>8</sup> Blackstone's Civil Practice, 2011, Oxford University Press, Chapter 49 para 49.5.

<sup>9</sup> (I 853/2014) [2019] NAHCMD 330 (2 September 2019).

[70] The only version before this court of what happened on the 8<sup>th</sup> of October 2018 is that of the plaintiff and his witness, Elzibo Jonker. The defendant chose not to testify in his own defence or in support of his counterclaim.

[71] The plaintiff's evidence was clear but lacking details as to the assault and the injuries sustained, however the assault and injuries sustained stand unchallenged as there was no cross-examination directed to the plaintiff in this regard. The cross-examination of the plaintiff focused more on the issue of special damages and the quantification thereof and not the actual assault.

[72] The fact that the issue of the attack and the subsequent assault was left unchallenged during the cross-examination causes this court to draw the inference that the plaintiff's evidence is to be accepted as correct. Even more so as his evidence was corroborated by another witness. The evidence was straight forward and without any inherent improbabilities.

[73] The plaintiff's witness, Mr Jonker corroborated the evidence of the plaintiff and actually enlightened the court even more than the plaintiff as to the assault and the circumstance surrounding it. Mr Jonker's evidence in this regard was not challenged during cross-examination.

[74] It would appear from the plaintiff's own version that his conduct of mirroring the hand signs of the defendant contributed to a very limited extent to his predicament as the last rude hand sign exchanged between the defendant and plaintiff caused the defendant to reverse his vehicle and to get out of his vehicle. However what followed thereafter could not have been predicted by the plaintiff or anybody else for that matter. The defendant attacked the plaintiff and it would appear that the plaintiff initially fought back but at some point decided to flee and that is when the defendant ordered his farm workers to go after the plaintiff and bring him back and these men assisted the defendant in assaulting the plaintiff. The plaintiff was bleeding and even became unconscious for a few moments according to Mr Jonker.

[75] There might appear to be slight contradictions between the evidence of the plaintiff and that of Mr Jonker but it is more a case of Mr Jonker filling in the blanks

where the plaintiff himself was silent as to the details of what happened. It can clearly be attributed to the way in which the plaintiff's witness statement was drafted as discussed above, and I will draw no negative inferences from these slight variances in evidence.

[76] The circumstances of the assault upon the plaintiff was barbaric and does not belong in a civilized society. The defendant's actions were brazen beyond belief and he had paid no regard to the fact that the assault was witnessed by a number of people as the incident took place in front of the plaintiff's employee as well as those of the defendant. The uncontradicted evidence given by the plaintiff that the defendant instructed three of his employees to chase after the plaintiff when he attempted to flee and got them to bring him back for a further beating, in my opinion, escalated what was initially a verbal disagreement to a grave and degrading invasion of the bodily integrity of an individual (the plaintiff in this instance) and deserves a strongest possible form of censor by any court of law.

#### *Prima facie case*

[77] In *Senekal v Trust Bank of South Africa Ltd*<sup>10</sup> it was held that the inquiry is whether at the end of the case the prima facie evidence given had been so disturbed, as to prevent it becoming sufficient proof. Miller JA stated at page 383 B-C of the judgement that a court is entitled, when considering that question, to take into account that the defendant closed his case without having led any evidence whatsoever.

[78] The court in the *Senekal*<sup>11</sup> matter proceeded to refer to *Salmons v Jacoby*<sup>12</sup> wherein the court found that if the prima facie evidence or proof remains unrebutted at the close of the case, it becomes 'sufficient proof' of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the onus of proof.<sup>13</sup>

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<sup>10</sup> 1978 (3) SA 375 (A).

<sup>11</sup> At 382 H to 383 A.

<sup>12</sup> 1939 AD 588 at 593.

<sup>13</sup> 'In the absence of further evidence from the other side the prima facie becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends on the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence, and that evidence 'calls for an answer' then in such case he has produced prima facie proof, and, in the absence of an

[79] The court will consider the facts as presented to this court whilst reminding itself that it is trite that every infringement of bodily integrity is *prima facie* unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification.<sup>14</sup>

[80] This position was endorsed in the unreported judgment of *Lubilo and Others v Minister of Safety and Security*<sup>15</sup> wherein this Court<sup>16</sup> remarked that an assault violates a person's bodily integrity and that every infringement of the bodily integrity of another is *prima facie* unlawful.<sup>17</sup>

[81] Having considered the evidence of the plaintiff and Mr Jonker I am satisfied that the plaintiff was assaulted by the defendant and in the absence of any evidence to the contrary, there is no reason why the court should not accept the plaintiff's evidence as correct and conclude that the defendant attacked and assaulted the plaintiff without any justification whatsoever.

[82] I am satisfied that in light of the evidence and the pleadings, the *prima facie* case has ripened into proper proof. The whole tenor of the cross-examination was directed at the issue of special damages and the quantification thereof. The defendant, at his own peril, refrained from giving or leading evidence to counter the *prima facie* proof of the assault perpetrated on the plaintiff and the fact that injuries were sustained.

### Quantum of damages

[83] The plaintiff's claim consist of general damages for pain and suffering and *contumelia* as well as special damages consisting of loss of income and alike.

### *General damages (non-patrimonial loss)*

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answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof.

<sup>14</sup> *Noor Moghamat Isaacs v Centre Guards CC* [2004] 1 All SA 221 (C) para 7, citing *Mabaso v Felix* 1981 (3) A 865 (A) 873E – 874E; *Malahe and Others v Minister of Safety and Security and Others* [1998] ZASCA 64; 1999 (1) SA 528 (SCA) 533J – 534A, 540F – H.

<sup>15</sup> High Court Case No (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

<sup>16</sup> Per Damaseb JP para 9.

<sup>17</sup> Followed in *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).

[84] It is well established that an assessment of an appropriate award of general damages (sometimes also referred to as non-pecuniary damages) is a discretionary matter and has, as its objective to fairly and adequately compensate an injured party.<sup>18</sup>

[85] In the exercise of its discretion it is proper for the court to take into account previous awards and make allowance for increases in such awards. Nevertheless the result cannot be determined with mathematical precision and awards in previous cases are merely a guide. The object of an award is to see justice done – it must be fair to both sides. (See *De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA)* paras 58-65.)

[86] Ultimately the court must consider each case according to its specific and unique circumstances, the injuries sustained by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life.

[87] Unfortunately the court was not pointed to any authority that may be used as a baseline for its assessment of damages, leaving it with a discretion to source relevant authorities, particularly those that have similarities to the present case.

[88] Comparable cases of a similar nature were quite difficult to locate, however the following cases appear to be of a similar nature than the one before me.

#### Comparable cases in this jurisdiction

[89] *Meyer v Scholtz*.<sup>19</sup> The defendant assaulted the plaintiff through the side window of his motor vehicle which was half open, pushed the window glass down with force and hit the plaintiff with his fists in his (plaintiff's) face a couple of times. The plaintiff was hit on his left ear, and as a result of the assault the plaintiff's spectacles broke and his hearing apparatus got damaged and fell out of his left ear. The plaintiff claimed N\$ 20 000 in general damages and the court awarded N\$ 15 000 for pain, suffering and *contumelia*.

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<sup>18</sup> *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H-535A.

<sup>19</sup> (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).



[90] *Du Plessis v Katjimune*.<sup>20</sup> The plaintiff was assaulted by the defendant in the presence of the public. The plaintiff conducted a restaurant business in a small town and the defendant's assault on the plaintiff resulted in her losing consciousness for about 25 minutes. She had sustained a fractured nose, as well as several bruises and had also suffered emotional stress. The plaintiff claimed an amount of N\$300 000 as general damages for pain and suffering and *contumelia*. During oral argument counsel moved for an award of about N\$60 000 and the court awarded general damages for pain, suffering and *contumelia* in the amount of N\$30 000, together with medical expenses.

#### Comparable cases in other jurisdictions

[91] *Kumar and Another v Mpai*.<sup>21</sup> An appeal from the Magistrate's Court - The respondent was employed with second appellant and whilst acting in the course of his employment with the second appellant the first appellant assaulted him by hitting him with a firearm and hands, causing him certain injuries. Respondent claimed damages in the sum of R100 000 for pain and cost of medication and legal fees. On appeal the court awarded him R25 000 for general damages in respect of shock, pain, suffering, loss of amenities of life, disfigurement and *contumelia*.

[92] *Viviers v Jentile*.<sup>22</sup> The plaintiff and the defendant in this matter are both female.

The plaintiff was assaulted by the defendant who is physically bigger than her in full view of other employees. The defendant punched the plaintiff once in the face and kicked her once on the right lower leg. The plaintiff claimed R 50 000 for iniuria and damages in the amount of R 70 000 for assault. During default judgment application the court found that the plaintiff was entitled to substantial damages even though the insult and assault were not repeated and the assault itself was not serious and awarded damages in the sum of R50 000.

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<sup>20</sup> 2006 (1) NR 259 (HC).

<sup>21</sup> (AR551/16) [2017] ZAKZPHC 65 (16 November 2017).

<sup>22</sup> (57590/2007) [2010] ZAGPPHC 239 (10 December 2010).

[93] The plaintiff sustained bodily injuries and is therefore entitled to compensation for pain and suffering and also to compensation for all medical and similar expenses reasonably incurred by him or her in the treatment of bodily injuries and their consequences.

[94] From the evidence before me I am satisfied that the nature and extent of the assault fall within the limits as the cases referred to above and the comparison with similar cases and the upper limit appears to be N\$50 000 (or R50 000) and the bottom base line appears to be N\$ 15 000.

[95] The assault caused the defendant to bleed heavily and become unconscious and in spite of the condition of the plaintiff the defendant made no attempt whatsoever to assist the plaintiff. He got in his vehicle and drove off. This assault took place in front of a number of employees and I accept that this incident caused the plaintiff to feel humiliated.

[96] The plaintiff claims damages in the amount of N\$ 150 00 for pain and suffering and *contumelia* in the amount of N\$ 10 000, which in my view is excessive on the facts before me. I am of the considered view that the amount of N\$50 000 in respect of the pain and suffering and N\$ 10 000 of *contumelia* is reasonable and it meets the justice of this case.

#### *Special damages (patrimonial loss)*

[97] The plaintiff must prove the extent of his loss, as well as the amount of damage that should be awarded.<sup>23</sup> The measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not, that is, that there is more than a fifty per cent chance that it will occur.<sup>24</sup>

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<sup>23</sup> See *Erasmus v Davis* 1969 2 SA 1 (A) 9E: "The *onus* rests on plaintiff of proving, not only that he has suffered damage, but also the *quantum* thereof"; *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 784F-G; *Hendricks v President Insurance Co Ltd* 1993 3 SA 158 (C) 163E-F: "I appreciate that in assessing damages in this type of case it is invariably impossible to have resort to precise arithmetical calculations. That notwithstanding, both the fact that damages have been suffered and, if so, the *quantum* of such damages must be proved by the plaintiff who, in order to do so, must establish that after allowing for the costs saved he is still out of pocket"; Gauntlett *Quantum of Damages* 8; Buchanan 1960 SALJ 187; Zeffertt *et al Law of Evidence* 45.

<sup>24</sup> Visser *et al Law of Damages* 3<sup>rd</sup> ed at 487.

### Medical and Hospital expenses

[98] The plaintiff claims expenses in the amount of N\$ 30 729.39. This claim consists of the expenses paid in respect of the treatment on 8 and 9 October 2018. In addition thereto the plaintiff filed a quotation as well as a treatment estimate for dental work dated 16 October 2020. Firstly it is clear from these two documents that there is a duplication in the amount of N\$ 7757. The second issue that the court has with this portion of the claim is that there was no indication in evidence that the plaintiff sustained any injuries to his mouth. In order to succeed with this portion of his claim the plaintiff must show that the dental work, if done, was fairly attributable to the injuries for which the defendant is liable.<sup>25</sup>

[99] I find no merits in the objections raised in respect of the receipts submitted. The issue of authenticity was never raised by the opposing party and nor was the admissibility of the documents raised during judicial case management period when it was the apposite time to raise any of these issues. I am satisfied that the plaintiff is entitled to medical expenses in the amount of N\$ 7698.79. I am however not satisfied that the plaintiff proved the portion of his claim which relates to dental work.

### Travelling expenses

[100] The plaintiff is entitled to be compensated for medical expenses but also for cost of transport to and from hospital. The evidence of the plaintiff was that he had to travel to Windhoek for medial treatment. The plaintiff submitted that the reasonable cost of traveling was calculated in the amount of N\$ 6080. This amount would include fuel and wear and tear. Wear and tear on a vehicle is however not easily quantifiable. And whereas the plaintiff has proven his basic claim the court is satisfied that he is entitled to be compensated for his traveling costs and is of the opinion that the amount claimed in this regard is not unreasonable.

### Loss of expected income

[101] The methods which can be employed to determine the extent of damage suffered may differ from case to case and there may in a particular case be more

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<sup>25</sup> *Supra* at 456.

than one method which can appropriately be applied. The method which is ordinarily applied in the case of damage to a thing is enunciated by McKerron<sup>26</sup> as follows:

'So if a thing has been wrongfully damaged, the ordinary measure of damages will be the difference between the market value of the thing immediately before the wrong was committed and the market value of the thing after the commission of the wrong. But it is to be observed that there is no objection to taking as the measure the cost of restoring the thing to its original condition, provided such cost does not exceed the diminution in value of the thing.'

[102] During oral arguments by Mr Namandje it was indicated that the claim amount for the loss of expected income in respect of the selling of the goats is reduced to N\$ 150 000.

[103] The plaintiff testified that as a result of the attack on him he was unable to deliver 350 goats to the auction. However what became apparent during cross-examination is that the plaintiff is not the owner of the livestock but indeed Nghilundwa Farming CC, who is not a party to the current proceedings. Therefore, if there was any losses suffered, it would be the CC that suffered the losses.

[104] The goats were not sold at that specific auction but indeed at a later auction. At most, if there was loss it cannot be calculated in the manner proposed by the plaintiff. The calculation would be as explained by McKerron. There is no indication for which amount the goats were sold in 2019 and how that amount relates to the possible income that the CC could have earned in 2018. The evidence by the plaintiff regarding the average prices for the livestock during the 2018 auction is based on opinion evidence and therefore inadmissible.

[105] The plaintiff was therefore unable to prove this claim on a balance of probabilities.

#### Damaged tyre

[106] The plaintiff claims damage for a tyre of a truck that is not clear to be the property of the plaintiff. The plaintiff could not verify who the owner of the truck was.

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<sup>26</sup> McKerron RG *The Law of Delict* 5<sup>th</sup> ed at 108.

From the evidence it appears that the truck might belong to TJ Civil Technology CC, who is not a party to these proceedings. In any event the plaintiff did not prove any evidence regarding the replacement value of the tyre. The plaintiff bases his claim on the market value of the tyre, however according to *Visser et al*<sup>27</sup> where damages are assessed with reference to the market value of something, the plaintiff has to adduce evidence upon which market value may be determined.<sup>28</sup> This was not done and therefore this portion of the claim cannot succeed.

#### Payment to assistant for loading goats onto the truck

[107] The plaintiff testified that he paid an amount of N\$ 450 in respect of an assistant who assisted in loading the goats on the truck however, two truckload of goats were delivered and the assistant was clearly paid for services rendered. The evidence of the plaintiff was not that the assistant was paid for every truckload and therefore the plaintiff cannot claim this amount from the defendant.

#### Cost

[108] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[109] I find no reason not to follow the general rule in this regard. However, I must immediately interpose and add that this is in respect of the main action but one should not lose sight of the fact that after the court gave directions regarding the conduct of the trial and specifically regarding the witness statement, the plaintiff's initial counsel, Mr Mhata indicated that he intends to launch an application for

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<sup>27</sup> *Law of Damages* 3<sup>rd</sup> ed at 565

<sup>28</sup> See *Monumental Art Co (Pty) Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 119; *Bid Financial Services (Pty) Ltd v Isaac* [2007] JOL 19125 (T) at 7. Mere proof of the cost of something without evidence linking it to the market price is never prima facie proof of market value. When quantifying damages for breach of contract, it is unnecessary to insist on expert evidence to establish market value in a foreign market where it would impose a prohibitively expensive burden of proof on the plaintiff (*Woolfson's Import and Export Enterprises CC v Uxolo Farms* 1995 (2) PH A29 (A)).

postponement which was scheduled to be heard on 10 June 2020. The parties received directions regarding the filing of their papers.

[110] As a result of the application that the plaintiff intended to launch a whole court day of trial was wasted. The counsel for the defendant filed all their papers in opposition to this interlocutory application, including the filing of notes on argument only for Mr Namandje, who took over the matter to indicate on the morning of 10 June 2020 that the plaintiff will not persist with the application for postponement and that the plaintiff is ready to proceed to trial.

[111] The plaintiff is not entitled to the cost in this regard and should be liable for the wasted cost of the day and the cost of preparation of the interlocutory application by the opposing counsel as this application was abandoned.

[112] The intended application for postponement was interlocutory in nature and rule 32(11) would apply.

### Order

[113] Judgment is granted in favor of the plaintiff in the following terms:

1. General damages:

1.3 Pain and suffering in the amount of N\$ 50 000.

1.4 Plaintiff's right to dignity in the amount of N\$ 10 000.

2. Special damages:

2.1 Medical expenses in the amount of N\$ 7698.79.

2.2 Travel expenses in the amount of N\$ 6080.

3. The following claims in respect of special damages are dismissed:

3.1 Loss of expected income.

3.2 Payment to assistant.

3.1 Damage to the truck tyre.

4. Interest on the total of the said sum, namely N\$ 73 778.79 at the rate of 20% per *annum*, as from date judgment to date of final payment.
  
5. Costs of suit, with the exclusion of the following:
  - 5.1 Plaintiff will be liable for the wasted cost of one court day for 9 June 2020. Said cost to be cost of one instructed and one instructing counsel.
  - 5.1 Cost for preparation by defendants counsel in respect of the application for postponement which the plaintiff intended to move on 10 June 2020 (which was abandoned on 10 June 2020).
  
6. The defendant's counter-claim is dismissed with costs.

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JS Prinsloo  
Judge

## APPEARANCES

PLAINTIFF:

Mr Namandje assisted by Mr Mhata  
Of Sisa Namandje & Co. Inc  
Windhoek

DEFENDANT:

Mr van Vuuren  
Instructed by Delport Legal Practitioners  
Windhoek