REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2023/01547

In the matter between:

MATHIAS GOAM
PLAINTIFF

and

LINUS SOMOSEB **DEFENDANT**

Neutral citation: *Goam v Somoseb* (HC-MD-CIV-ACT-DEL-2023/01547) [2023] NAHCMD 454 (28 July 2023)

Coram: MAASDORP AJ
Heard: **2 June 2023**
Delivered: **28 July 2023**

Flynote: **Civil procedure — default judgment** — delictual damages — damages affidavit must not contain inadmissible hearsay evidence or inadmissible opinion evidence — court may grant absolution if not satisfied that plaintiff presented best available evidence.

Delict — general damages — Assessment of appropriate award for *contumelia* — principles discussed and applied.

Summary: In June 2021, the plaintiff was viciously assaulted by the defendant in public and in front of the plaintiff's minor daughter. The plaintiff's left eye was significantly damaged. He claimed to have lost all vision in his left eye permanently. The plaintiff claimed damages against the defendant of N$2 203 593,34 for past medical expenses, lost overtime while in post-operative care as a result of the assault, future medical expenses, future medical expenses, shock and trauma, pain and suffering, *contumelia*, permanent disfigurement, and permanent inconvenience, discomfort, and loss of enjoyment of amenities of life.

Held that the plaintiff proved that the defendant had committed a delict and is liable to compensate the plaintiff for damages.

Held that the plaintiff failed to prove the quantum of damages for the four largest claims because the plaintiff failed to present admissible evidence on the alleged permanent nature of the loss of vision in his left eye and failed to present admissible evidence to support the formula and variables, he used to compute his claims. Since the plaintiff did not adduce the best evidence available to him in the circumstances, the court granted absolution from the instance on the four largest claims as an appropriate award under High Court Rule 15.

Held that the plaintiff proved his entitlement to special damages for past medical expenses of N$389,94, for lost overtime of N$3732,83 as well as N$50 000 for general damages for *contumelia*.

ORDER

Judgment is granted in the following terms:

1. The defendant shall pay the plaintiff N$389,94 for past medical expenses.

2. The defendant shall pay the plaintiff N$3732,83 for loss of overtime during the plaintiff's post-operative care.

3. The defendant shall pay the plaintiff N$50 000 for *contumelia.*

4. The defendant shall pay interest on the total of N$54 122,77 at 20% per annum from date of judgment to date of full payment.

5. Absolution from the instance in respect of the plaintiff's claims for:

   5.1 Future medical expenses;

   5.2 Shock and trauma;

   5.3 Permanent disfigurement; and

   5.4. Permanent inconvenience, discomfort, and loss of enjoyment of amenities of life.

6. The defendant shall pay the plaintiff's costs of suit. For the avoidance of doubt, the costs shall not be limited to N$20 000 under Rule 32(11).

7. The matter is removed from the roll and regarded as finalised.

JUDGMENT

MAASDORP AJ:

The facts

[1] On Sunday morning, 25 June 2021, in the small town of Otavi in central Namibia, the plaintiff and his nine-year-old daughter visited Agra Wholesaler. The defendant was also at Agra during the time. Something must have happened between the plaintiff and the defendant to trigger what ensued. For an unexplained reason, the defendant started punching the plaintiff in the face. Amongst others, the defendant struck the plaintiff on his left eye. The plaintiff's left eye ruptured, spilling its contents. The plaintiff collapsed from the barrage of punches. While the plaintiff was on the floor, bleeding and pleading for the defendant to stop, the defendant repeatedly kicked the plaintiff in the head. All the time swearing at and insulting the plaintiff. Unprovoked. In full view of members of the public. And in full view of the plaintiff's then nine-year-old daughter.

[2] In the criminal court, the defendant pleaded guilty to assault with the intent to do grievous bodily harm. He pleaded for leniency as a first-time offender and breadwinner for five children along with his then-expectant wife, and his mother. He was sentenced to a fine of N$5000 or 24 months' imprisonment, of which N$2000 or 12 months were suspended for four years.

[3] In this civil action, the plaintiff claims N$2 203 593,34 (Two million two hundred and three thousand five hundred and thirty-three Namibian Dollars and thirty-four cents) against the defendant for damages that the plaintiff suffered from the assault. His claim is made up as follows:

(a)	Past medical expenses	N$389,94
(b)	Loss of overtime while under post-operative care	N$3732,83

(c)	Future medical expenses	N$424 470,57
(d)	Shock and trauma	N$550 000
(e)	Permanent disfigurement	N$150 000
(f)	*Contumelia*	N$75 000
(g)	Permanent inconvenience, discomfort and loss of the amenities of life	N$1 million

[4] As the factual foundation for his claims, the plaintiff alleges that his left eye has been permanently disfigured by the assault. While his left eye remains in its socket, its content spilt out from a rupture in the eye. He asserts that the sight of his eye is unnerving and even repulsive to the average person. He must cover his left eye to feel normal around people. He also avers that he has permanently lost all eyesight in his left eye. This affected his personal life and his work. The plaintiff works as an operator in a physically engaging field. Before the assault, he was often in the field on site. After the assault, he has had to shift to the control room. He is grateful that he still has a job despite his diminished capacity but fears that he might lose it. The plaintiff testified that his monthly medical aid contribution increased by N$1150 to cover the costs of the care for his eye. He alleges that he suffered severe shock and trauma from the incident and physical consequences. And he claims that he felt, and feels, deeply humiliated by the public nature and gravity of the assault.

Default proceedings under High Court Rule 15

[5] According to the return of service on record, the plaintiff's combined summons was served on the defendant on 5 April 2023 at 11:03. The return indicates that the deputy sheriff served the summons and its attachments on Ms Saima Mateus, 'the Human Resource Officer', at the defendant's place of employment. Despite service, the defendant did not oppose this action. Thus, the action proceeded by way of an application for default judgment.

[6] Under High Court Rule 15(3), the court may grant default judgment without hearing evidence where the claim is for a debt, liquidated demand, or foreclosure of a bond. The plaintiff's claim does not fall within that category. Instead, this claim falls within the second category covered by High Court Rule 15(3) – 'any other claim'. The court may grant default judgment under this second category of claims 'after hearing or receiving evidence orally or on affidavit'. If the court does not grant a default judgment in the plaintiff's favour, the court may make such order as it considers appropriate.

The law on delictual liability and quantum of damages

[7] It will not serve any constructive purpose to set out the legal principles on establishing delictual liability and assessing the quantum of delictual damages generally, since these principles have been explained and applied in numerous superior court judgments.[1] I will identify and apply the relevant principles when discussing liability and assessment of damages for *contumelia*.

Liability

[8] To establish liability in a delictual action for assault, the plaintiff must prove that the defendant committed a wrongful and unlawful act against the plaintiff and that the plaintiff suffered damages as a consequence. The law regards every assault or every infringement of bodily integrity as wrongful. Thus, every assault is *prima*

[1] These include *U v Minister of Education, Sports and Culture and Another* 2006 (1) NR 168 (HC) 190 G – 192 H; *Susanna Vivier N. O. and Another vs The Minister of Basic Education, Sports and Culture* 2007 (2) NR 725 (HC); *Minister of Basic Education, Sports and Culture v Vivier N. O and Another* 2012(2) NR 613 (SC). *Van Wyk v Van Wyk* (I 3793/2012) [2013] NAHCMD 125 (14 May 2013); *Milunga v Tania* (I 353/2009) [2015]NAHCMD 112 (15 May 2015); *Haishonga v The Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL 2017/00359) [2019] NAHCMD 219 (03 June 2019); *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC); (HC-MD-CIV-ACT-DEL-2017/02346) [2019] NAHCMD 367(24 September 2019); *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] unreported NAHCMD 409 (4 September 2020); *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021); *Shaalukeni v Minister of Safety and Security and Others* (HC-MD-CIV-ACT-OTH-2019/05140) [2021] *Mwandingi v Mwetupunga* (HC-NLD-CIV-ACT-DEL-2018/00074) [2022] NAHCNLD 21 (16 March 2022); *Owoses v Government of Namibia* (HC-MD-CIV-ACT-DEL-01723/2020) [2022] NAHCMD 484 (15 September 2022); *Johannes JA Gabrielsen v Crown Security CC* (I 563/2007) [2023] NAHCMD 124 (13 May 2013); *Philander v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-00984/2022) [2023] NAHCMD 284 (24 May 2023). The list is not exhaustive.

facie unlawful. Once infringement is proved, the wrongdoer must prove a ground for justification.

[9] Since the defendant did not defend the action, and because there is no reason to disbelieve the plaintiff, the court accepts that the defendant assaulted the plaintiff without any justification, thus wrongfully and unlawfully. In addition, based on the evidence, the court finds that this assault caused the plaintiff to suffer damage. The quantum of damages will be addressed later in this judgment.

Absolution from the instance on the four largest claims

[10] I regret being unable to determine appropriate damages awards for the plaintiff's four largest claims.[2] The plaintiff did not present admissible or reliable evidence on the one unifying factor under all four claims: the alleged permanent loss of eyesight in his left eye. In addition, he did not present admissible evidence on the formula or the variables used for calculating future medical expenses. I wrestled with the idea that the court 'must do the best it can with what it has' to ensure that a wrongdoer is not relieved of the necessity of paying damages.[3] However, I could not fix amounts for damages without doing injustice to all the parties. It would also have added to the considerable confusion that exists in our courts on the quantum of damages in comparable matters. There are sound policy reasons for courts to remain consistent although not stagnant in awarding damages.[4] One of these reasons is that litigants and parties contemplating litigation rely on previous awards to reach settlements or decide to approach a court at all. I doubt that it can assist the ideal of relative certainty in this area of the law if courts should be forced to guess, where the plaintiff did not make out a case that he was not in a position to supply better evidence.

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[2] Future medical expenses, N$424 470.57; Shock and trauma, N$550 000; Permanent disfigurement, N$150 000; and Permanent inconvenience, discomfort and loss of the amenities of life, N$1 million.

[3] For illustrations of the application of this principle in disputed appeal judgments, see *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 and *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A)

[4] For an illuminating discussion of relevant considerations for the assessment of general damages and the wider impact of the courts' approach to general damages, see *Heil v Rankin & Another* [2000] 3 All ER 138

[11] I find that the plaintiff did not present the best evidence available to him on his four largest claims. If he had, the court would have had to do what it could with what it had.[5] Here, the plaintiff instituted a claim for what would have amounted to the highest award for an assault of this nature, if the court agreed with the plaintiff. The plaintiff did attach reports by two experts who treated the injuries to his eye. The reports could have been sufficient if the experts confirmed their reports on affidavit. They did not. Similarly, it is clear that the future medical expenses were calculated with the assistance of an expert. The calculation sheet was attached to the particulars of claim. Despite the court's invitation, the expert did not depose to an affidavit to explain the formula or variables. In addition, one of the variables on which the plaintiff relies is the anticipated annual increase in the cost of medical aid. The plaintiff relies on this alleged increase percentage for the truth. Without any confirmation by someone with direct knowledge, this is hearsay and thus inadmissible, whether objected to or not. The same would apply to the mortality rate unless an expert were to explain in his opinion why it would be safe to rely on the variables.

[12] In my understanding, the purpose of a damages affidavit is for those with expertise to assist the court in making an appropriate award, considering that the court would not have had the benefit of opposing evidence or arguments. The plaintiff may also wish to testify on affidavit about liability and the quantum (for example by expressing his humiliation and supplying invoices for medical services already received). However, I have not found authority to support the proposition that in default judgment applications, the plaintiff's evidence can replace the evidence of an expert or otherwise turn hearsay evidence into something else.[6]

[13] It appears to me that absolution from the instance is the most appropriate order to make in respect of these four claims. Dismissing the claims would have been unduly harsh on the plaintiff when it is clear that he did suffer damages on account of the defendant's unlawful conduct. The order for absolution does not destroy the plaintiff's ability to seek damages as the cause of action arose in June 2021. The order of absolution allows the plaintiff to return to court with the best

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[5] *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) 970

[6]

available evidence to prove his damages. The plaintiff relied on para 40 of *Mouton v Mouton*[7] for the proposition that the court should do the best it can with what it has. But the argument missed the all-important last sentence in para 40:

"[40] Corbett, Buchanan & Gauntlett[14] the authors state that: 'In the case of damages which are capable of exact mathematical computation, such as for example medical and hospital expenses, proper evidence establishing the loss and substantiating the precise amount of the claim must be tendered. Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then, provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order, absolution from the instance.'"

Past medical expenses and overtime

[14] These two claims are uncontroversial. The plaintiff addressed these claims fully in his particulars of claim and supplied admissible and reliable evidence to back them up. The claims for past medical expenses and overtime are allowed.

Contumelia

Plaintiff's case

[15] The plaintiff's claim for *contumelia* is argued with reference to three Namibian High Court judgments. The first is *Van Wyk v Van Wyk*.[8] The *Van Wyk* case was an action for divorce. The plaintiff in that case claimed, amongst others, N$20 000 for *contumelia* on account of the second defendant's extramarital relationship with the first defendant, then the plaintiff's husband. The affair led to the breakdown of the marriage. The plaintiff alleged that the second defendant knew at all times that the first defendant was married yet continued inviting the first defendant to have

[7] *Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021) para 40
[8] *Van Wyk v Van Wyk* and Another (3793/2012) [2013] NAHCMD 125 (14 May 2013).

extramarital relations with her. The court's definition of *contumelia* is relevant to the present matter: '[it] simply relates to the infringement of the plaintiff's right to privacy, dignity and reputation'.[9] The court awarded the plaintiff N$20 000 as claimed.

[16] The second and third Namibian judgments on which the plaintiff relies, address *contumelia* in the context of assault. In *Mwandingi v Mwetupunga*[10], the court adopted[11] the following approach:

> 'contumelia is awarded for a direct and serious invasion of the plaintiff's bodily integrity and personal dignity. These damages should not be confused with damages for mental pain or anguish or psychological illness and its consequences.'

[17] In *Mwandingi*, the court found that the defendant had slapped the plaintiff before shooting him through both kneecaps. On the subject of *contumelia*, the plaintiff testified that he felt embarrassed by the scars on his knees and thus avoided wearing shorts in public. The court agreed that the plaintiff had suffered emotional turmoil and continued to suffer. But the court declined to grant damages for *contumelia* as it found the plaintiff had not placed any evidence before it, of any direct and serious invasion of his bodily integrity and personal dignity. The court held that emotional and mental anguish cannot be the foundation for damages for *contumelia*; instead, such damage is covered under pain and suffering.[12] The court awarded N$120 000 for pain and suffering based on the plaintiff's evidence that he continued to suffer five years after the incident.[13]

[18] *Nghilundwa v Maritz* [14] is the other assault case on which the plaintiff relies for the contumelia-part of his claim. Mr Nghilundwa had been transporting goats when his truck had a flat tyre and he pulled off to the side of the road. Mr Maritz must have been passing by and stopped next to the side of the road to find out what was happening with the truck. Amongst others, Mr Maritz demanded to see Mr

[9] *Ibid.,* para 23.
[10] *Mwandingi v Mwetupunga* (HC-NLD-CIV-ACT-DEL-2018/00074) [2022] NAHCNLD 21 (16 March 2022).
[11] *Ibid.,* para 43.
[12] *Ibid.,* paras 43–46.
[13] *Ibid.,* paras 39–42.
[14] *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCNLD 409 (4 September 2020).

Ngilundwa's permit to transport the goats. Mr Nghilundwa refused and asked Mr Maritz on what authority he was demanding to see the permit. Later on, a veterinarian came around. When he asked to see the permit, Mr Nghilundwa duly proved to the veterinarian that he was legally transporting the goats. This did not satisfy Mr Maritz. The men argued about Mr Maritz's continued demand for the plaintiff to prove his authority to transport goats. At one point Mr Maritz decided to get into his car and drive away. Once on the road, the two men exchanged insults by hand gestures, initiated by Mr Maritz. This caused Mr Maritz to stop, exit his car and start a physical fight with the plaintiff. The plaintiff fought back until he decided to back away. Mr Maritz would have none of it. He instructed his employees to join him in the attack on the plaintiff.[15]

[19] The court found that the circumstances of the assault on the plaintiff were 'barbaric' and do 'not belong in a civilised society'.[16] The court found that 'the defendant's actions were brazen beyond belief and he had 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 employees as well as those of the defendant'.[17] The court accepted the plaintiff's evidence that, when the plaintiff tried to flee, the defendant instructed his employees to chase after the plaintiff and bring him back 'for a further beating'. And the court found that the initial verbal disagreement ultimately morphed into a 'grave and degrading invasion of the bodily integrity of [the plaintiff] and deserves [the] strongest possible form of [censure] by any court of law'.[18] The plaintiff claimed N$150 000 for pain and suffering and N$10 000 for the infringement of his right to dignity (thus, for *contumelia*).[19] The court awarded only N$50 000 for pain and suffering but the full claimed amount of N$10 000 for *contumelia*.[20] The *contumelia* award was justified by the public nature of the assault and the court's acceptance that the 'incident caused the plaintiff to feel humiliated'.[21]

Distinguishable?

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[15] *Ibid.,* para 15.
[16] *Ibid.,* para 76.
[17] *Ibid.,* para 76.
[18] *Ibid*.
[19] *Ibid.,* para 18(f).
[20] *Ibid.,* para 96.
[21] *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCNLD 409 (4 September 2020) para 95.

[20] The plaintiff attempted to distinguish his case from both *Mwandingi* and *Nghilundwa* on several bases. Starting with *Mwandingi.* The plaintiff argued that here, unlike in *Mwandingi*, the plaintiff led evidence of the public as well as malicious nature of the assault and the aggravating behaviour of the defendant. About *Nghilundwa*, the plaintiff argued that the difference is the much more detailed evidence led in this case about 'the nature of his injuries, the treatments and permanency thereof.'

[21] I do not agree with the plaintiff that these factors are distinguishing, either on the facts or the law. However, I agree that the plaintiff has made out a case for an award of damages for *contumelia*.

[22] This case is not distinguishable from *Mwandingi* or *Nghilundwa* on the malicious nature of the assault or the aggravating behaviour of the defendant since the nature of the assault and the aggravating behaviour in both those cases were at least equal to this case. In *Mwandingi*, the court explained in paragraph 38 that the defendant had no justification to shoot the plaintiff, 'an unarmed man, in both knees at close range in view of the general public'. The 'barbaric' nature of the assault and the defendant's conduct in *Nghilundwa* was described earlier in this judgment, with reference to paragraph 76 of that judgment.

[23] Concerning the nature of the injuries sustained from the assault, and the treatment and permanence of those injuries, there may be a difference between this case and *Nghilundwa* and *Mwandingi*. However, the difference is irrelevant to the inquiry on the award of damages for *contumelia*. *Contumelia* concerns the subjective feelings of hurt, insult and humiliation (not physical pain): it is about the infringement of the person's dignity. Damages for the nature, treatment and permanence of physical injuries are covered under the actions for pain and suffering, loss of amenities of life, permanent disability or disfigurement and recovery of past and future medical expenses. (Loss of future income might be another category but it is not relevant to this case).

[24] To illustrate this conclusion, I will briefly discuss three reported judgments from our neighbours South Africa, the former Republic of Transkei, and Botswana.

Those judgments also contribute to this judgment's conclusion on the damages awarded under this heading.

Comparable authority

[25] In *Radebe v Hough*[22], Mr Radebe had been part of a group of four men who threw stones at Mr Hough and another man. When Mr Radebe and his friends stopped throwing stones and retreated into a room, Mr Hough fired three shots into the room from his point 22 rifle. One of the bullets had lodged into Mr Radebe's penis. Mr Radebe claimed damages for this injury. The court *a quo* found that the firing of the rifle was not in the act of self-defence. This was not disputed on appeal. The court *a quo* awarded Mr Radebe damages for pain and suffering equal to two months of his weekly wages of £2, thus £16. On appeal, the damages award was increased to £200.

[26] This is the relevant part of the appeal judgment in *Radebe*:

'Mr Radebe's participation in the initial assault would have been relevant to a claim for *contumelia* [and may have completely disqualified him from receiving anything for *contumelia*, according to the High Court], but should not have played any role in the claim for pain and suffering, contrary to what the High Court found.' [23]

[27] In my view, the converse must also be true: a plaintiff's complete innocence in the lead-up to an assault may qualify him for a claim for *contumelia* but will be irrelevant to the calculation of any claim for pain and suffering.

[28] Proceeding to 1989, in what was then known as Transkei. These were the core facts in *GQ v Yedwa and Others*.[24] A captain in the Air Force was invited to have a drink with seven other men, six of whom were his subordinates in the Air Force. The captain never had that drink. Instead, his companions pulled him from his vehicle, assaulted him with a stick, and dragged him to a nearby kraal. At the kraal,

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[22] *Radebe v Hough* 1949 (1) SA 380 (A).
[23] See PQR Boberg *The Law of Delict* Vol 1, Aquilian Liability, 1984, Juta & Co at 550-551.
[24] *GQ v Yedwa and Others* 1996 (2) SA 437 (TK).

his companions forced him to strip, spread his legs and undergo a second circumcision with a rusty spear.

[29] The plaintiff claimed R7500 for shock, pain and suffering, and R10 000 for *contumelia*. He abandoned his R250 claim for disfigurement as the physical damage was fortunately not serious because he had been circumcised before. The court awarded only R5000 for shock, pain and suffering. The court found that the plaintiff had not suffered serious or lasting physical injuries or excessive pain, and did not require hospitalisation.

[30] The relevant part of the judgment in *GQ v Yedwa* for this case is the court's application of the principles around calculating damages for *contumelia*. After equating '*contumelia*' with 'insult', the court held that '[t]hree aspects of the case exacerbated his humiliation. They were the nature of the assault, the imputation against [the plaintiff's] manhood and the effect of this imputation on his subordinates'.[25] The court explained that it was an extremely emotive and humiliating experience for an already circumcised Xhosa man to be subject to a second circumcision. Such treatment in effect meant that the man had no standing in the Xhosa society. The imputation was that 'the plaintiff was not a man'. It was an aggravating factor in the plaintiff's humiliation and degradation that the defendants were his subordinates in the Air Wing. And the court believed it should award a substantial amount as damages for *contumelia*: it granted the full R10 000 as claimed.

[31] Turning now to Botswana and specifically an incident involving members of the Botswana Defence Force.[26]

[32] In 2004, a young man joined the Botswana Defence Force as a trainee. Four months after joining the Force, he took part in a parade with around 500 soldiers. Apparently, he did not march properly. As punishment, one of his supervisors ordered him to take off all of his clothes, run around naked around the square where the parade was being conducted, and then walk as if a gorilla ('with my legs open').

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[25] *GQ v Yedwa and Others* at 438I to 439A.
[26] *Dubane v Attorney-General* [2014] BLR 250 (CA).

The plaintiff had no option than to comply. After the incident, he was ridiculed by males and females, even outside the army base and army community. The plaintiff was often referred to as 'Jibajiba' or gorilla. Jibajiba was the name of the officer who forced him to run around naked. The plaintiff sought damages of P120 000. The court *a quo* awarded P20 000. The plaintiff appealed.

[33] These are the material findings by the appellate court:

(a) P20 000 was inadequate compensation for the severe humiliation suffered by the plaintiff before and after the relevant event.

(b) The court was mindful to refrain from making extravagant awards in cases of non-patrimonial damages.

(c) The plaintiff was entitled to aggravated (but not punitive) damages in the peculiar circumstances of the case.

(d) Presumably relying on the award in *GQ v Yedwa* as discussed above, where the plaintiff had received R10 000 18 years prior to the *Dubane* appeal court decision, and then adjusting for the significant loss of value of money, the appeal court found that P40 000 was an appropriate award for the 'deliberate aggression upon the personal dignity of the appellant'.[27]

[34] One more South African judgment appears particularly useful. In *Bennett v Minister of Police*,[28] the plaintiff and his friend were arrested by two policemen at approximately 04h30 while they were sitting on an open lot, across from the plaintiff's parental home. The plaintiff resisted being loaded into the police van as he believed that he had not done anything to justify his arrest. In trying to break the plaintiff's resistance to being loaded into the van, one of the policemen struck the plaintiff two or three times on the back of his left wrist and four or five times on his right hand with a baton. The plaintiff had been holding on to the mesh wire. The blows resulted in two broken fingers. More specifically, the plaintiff pleaded that the assault led to

[27] *Ibid* 253C.
[28] *Bennett v Minister of Police* 1983 SA 24 (C).

'severe contortion over the left wrist' and 'injured the nerve at the side of the left wrist and thumb' and caused 'fractures of the second and third metacarpals of the right hand'.[29] The plaintiff sought R2000 for general damages arising from bodily injuries, and R1500 for humiliation (injuria).

[35] The court conducted a detailed evaluation of the evidence on the disputed reason for the arrest. It found that the policemen had a valid reason to arrest the plaintiff. However, the court also found that the force used to break the plaintiff's resistance had been excessive. The force could not be justified by the alleged provocation claimed by the policemen, which included the words 'jy kan fokol aan my doen'.[30] After a detailed excursion through awards in similar cases, the court awarded R600 for the physical injuries.[31]

[36] The next part of the *Bennett v Minister of Police* judgment is key to the current debate.

[37] From page 34D, the court discussed the relationship between assault and humiliation (injuria). The court first identified the deficiencies in the pleading of the plaintiff's case on humiliation. Then it highlighted various judgments on the infringement of the dignity of subjects, who had been legally jailed or arrested but were then detained under unduly harsh conditions such as solitary confinement. One example involved the unnecessary use of dogs to assist in an arrest. The key defect in the plaintiff's case was that the plaintiff had not testified in chief or at any other time that his dignity had been impaired by the assault. 'He did not say that he was in fact humiliated by the assault….'[32] The court found that '[t]here is a very large subjective element in any injuria; 'and if [a] plaintiff feels aggrieved in his dignity he must say so'.[33]

[38] In addition to this defect in the plaintiff's case, the court found that 'not all assaults necessarily involve *contumelia*', and that '[a] policeman who unlawfully

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[29] *Ibid* 26.
[30] *Ibid* 31–32.
[31] *Ibid* 34C.
[32] *Ibid* 37.
[33] *Ibid* 37D.

shoots a person does not normally impair that person's dignity'. Despite both findings, the court still awarded R50 for humiliation because it held that assault by a policeman with a baton does involve a measure of *contumelia* when regarded objectively.[34]

[39] The final judgment that informs my conclusion on *contumelia* is the recent Supreme Court judgment in *Government of the Republic of Namibia v Benhardt Lazarus.*[35]

[40] Mr Lazarus owned a bar in Katutura, a suburb in Windhoek, Namibia. He reported a break-in and theft of money in the slot machine on his property. Instead of assisting Mr Lazarus, the investigating officers decided that Mr Lazarus had staged the break-in. Police officers arrested him on three occasions, in front of his patrons, friends and staff. The court found the arrests were without cause and malicious. He was never charged yet kept in jail in short stints for a total of ten days. The police also ransacked his bar and threatened him with harm. Mr Lazarus claimed, amongst others, N$300 000 for *contumelia* against the defendants. The relevant passages from the judgments are in paragraphs 60 and 61, and 66 – 78:

'[60] In *Minister of Safety and Security v Tyulu* the correct approach in respect of the determination of an award for damages, and which I endorse was aptly stated as follows:

It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of a particular case and to determine the quantum of damages on such facts.

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[34] *Ibid* 37F. Also see Neetling, Potgieter, Visser *Law of Personality* 2nd edition 2005 LexisNexis at 84-86 for a concise discussion of the interplay between an infringement of a person's dignity and infringement of physical integrity.

[35] *Government of the Republic of Namibia v Benhardt Lazarus* (SA 54/2017) delivered on 9 September 2021.

[61] In addition a court should keep in mind, in considering the appropriate award for damages, the effect inflation has on the value of money.'

And

'[66] Returning to the present matter, I agree with the court a quo that the police officers were callous. They seriously abused their powers and acted as if they were beyond any level of accountability. To treat the respondent, who as a complainant sought the assistance of the police, in such a highhanded manner is inexcusable. The police officers acted as if they were 'a law unto themselves'. The legal practitioner for the appellant conceded that the police officers in this case acted with malice. An arrest is malicious when the defendant makes improper use of the legal process to deprive the plaintiff of his or her liberty, as happened in this case.

[67] The arrest of the respondent in the circumstances described above, clearly impaired the respondent's dignity, followed by the unlawful deprivation of his liberty and at one stage the respondent's life was threatened. The conduct of the police officers calls for serious censure and this court must show its displeasure with their depraved and repeated unlawful conduct.

[68] The legal practitioner for the appellant submitted that without the aggravating features of the respondent's arrest and detention having been pertinently pleaded, the court a quo appears to have used various such features as a basis to award the full amount claimed. It was submitted that the court a quo relied on the alleged violation of various constitutional rights, eg the right to privacy where the house of respondent was searched without a search warrant, whilst the respondent did not pertinently rely on those violations in his claim but simply claimed damages under the heading contumelia, ie insult or injury to self-esteem.

[69] Wrongful arrest consisting of the wrongful deprivation of a person's liberty, also may involve other aspects of a litigant's personality in particular his or her dignity.

[70] In *Sentrachem Bpk v Wenhold* it was held that where a court of appeal had all the relevant evidence before it, it should not place undue emphasis on the pleadings, but should

rather decide the case on the real issues canvassed during the course of the trial in the court a quo.

[71] I shall nevertheless approach the assessment of damages on the undisputed allegations in the particulars of claim and on the testimonies of witnesses called on behalf of the respondent. It is apparent from the particulars of claim and the evidence presented that the respondent was arrested in circumstances which indisputably impaired his dignity. He was repeatedly and unlawfully deprived of his liberty, harassed, and his life was threatened. Even though it was not pertinently stated in the particulars of claim that the arrests were malicious, this may be inferred from the particulars of claim. That the arrests were malicious was conceded by counsel acting on behalf of the appellant.

[72] Even if the court a quo had impermissibly relied on the violations of certain constitutional values (without so finding), this court is of the view that considering the factors mentioned in the previous paragraph, the eventual award by the court a quo was appropriate in aforementioned circumstances and should not be disturbed.

[73] I am of the view that the award for damages by the court a quo where the defendant had been deprived of his liberty for about ten days was not unusually excessive in the circumstances. In my view it was appropriate and should be confirmed.'

Analysis and conclusion

[41] These are the principles on damages awards for *contumelia* that I deduce from the Namibian superior court judgments and those from South Africa and Botswana examined earlier:

(a) If a victim of assault believes that his dignity was infringed by the assault in the sense that he felt humiliated or insulted, he should plead this specifically and testify to his feelings;

(b) Even if the victim does not testify to feeling humiliated but has instituted a claim for *contumelia* and persists with the claim, a court may still award damages if it is clear that the assault impaired the victim's dignity when the total circumstances are regarded objectively;

(c) It is not automatic that every assault will sustain a claim for *contumelia*;

(d) It is not automatic that every insult or infringement of dignity will go hand in hand with a physical assault, or with a physical assault that is more than trivial in nature[36];

(e) Awards for *contumelia*, even in cases of unprovoked malicious assault appear rather conservative (the reasons for this position, and the appropriateness of this position, are not relevant in this case but may need reconsideration since Art 8 is one of the pillars of the Namibian constitutional order, and the awards for infringement of dignity in cases of assault ought not (are not?) subject to tension with other Art 3 rights and freedoms, such as the case in defamation matters).

(f) Serious attempts must be made to ensure awards are commensurate with the injury inflicted on the victim;

(g) Previous awards in similar circumstances must be considered, albeit with the qualification that they should not be slavishly followed;

(h) When previous awards are considered, the court must be alive to 'the effect inflation has on the value of money.'

[42] The application of the facts of this case to the principles extracted from the authorities, yields the following results:

(a) The plaintiff's dignity was clearly infringed by the assault, based on his subjective evidence, and when the circumstances are objectively regarded;

(b) The plaintiff is entitled to damages for *contumelia*;

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[36] See Neethling, Potgieter, Visser *Law of Personality* 2nd edition 2005 LexisNexis at 84-86 for examples.

(c) Although the factual setting in *Nghilundwa* is comparable, the amount awarded there cannot act as a reasonable comparator because that court gave that plaintiff everything he claimed under this head of damages and did not have the opportunity to express itself on the appropriateness of higher damages;

(d) The N$20 000 award in *Van Wyk,* whilst not comparable on the facts, and also not directly comparable for the same reason as *Nghilundwa*, would have amounted to approximately N$33 000 today;

(e) The N$300 000 award in *Lazarus* for *contumelia* included the court's assessment of the value of the malicious deprivation of Mr Lazarus' liberty for ten days and the aggravating factors of that case, yet remains a useful guide on the Supreme Court's view on the value to be placed on preserving dignity;

(f) The closest comparators I can find are the awards for the severe humiliation and imputations against the manhood of the soldiers in *GQ v Yedwa* and *Dubane v Attorney-General.* Although the facts are different, it seems to me the impact on the victims is very similar. The defendant in this case, by attacking another man for no reason, not giving him a chance to defend himself, kicking him in the head while he is down, and doing so in front of strangers in a public place, in front of his victim's minor child and all the while swearing at and insulting his victim, seriously humiliated and degraded the plaintiff. The attack was a deliberate and unacceptable infringement of the plaintiff's dignity.

(g) I believe N$50 000 is an appropriate award under this head of damages. This amount is based on the approximate present values of the awards in *GQ v Yedwa* and *Dubane v Attorney General* (I am cognisant that the standards of living in Namibia and our neighbours are similar but not identical) and on my application of the principle of conservatism.

[43] In the premises, judgment is granted on the following terms:

1. The defendant shall pay the plaintiff N$389,94 for past medical expenses.

2. The defendant shall pay the plaintiff N$3732,83 for loss of overtime during the plaintiff's post-operative care.

3. The defendant shall pay the plaintiff N$50 000 for *contumelia.*

4. The defendant shall pay interest on the total of N$54 122,77 at 20% per annum from date of judgment to date of full payment.

5. Absolution from the instance in respect of the plaintiff's claims for:

5.1 Future medical expenses;

5.2 Shock and trauma;

5.3 Permanent disfigurement; and

5.4. Permanent inconvenience, discomfort, and loss of enjoyment of amenities of life.

6. The defendant shall pay the plaintiff's costs of suit. For the avoidance of doubt, the costs shall not be limited to N$20 000 under Rule 32(11).

7. The matter is removed from the roll and regarded as finalised.

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R MAASDORP

ACTING JUDGE

APPEARANCE

PLAINTIFF:	N Kloppers of Kloppers Legal Practitioners Windhoek
DEFENDANT:	L Somoseb In person