

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

**JUDGMENT**

Case no: HC-NLD-CIV-ACT-DEL-2016/00301

In the matter between:

**HASSAN MUSONI**

**PLAINTIFF**

and

**PAULUS COSMAS**

**1<sup>ST</sup> DEFENDANT**

**IGNATIUS AMUKESHE**

**2<sup>ND</sup> DEFENDANT**

**Neutral citation:** *Musoni v Cosmas* (HC-NLD-CIV-ACT-DEL-2016/00301) [2018]  
NAHCNLD 67 (23 July 2018)

**Coram:** CHEDA J

**Heard:** 25 June 2018

**Delivered:** 23 July 2018

**Flynote:** In a claim for delictual damages, plaintiff must separate patrimonial and non-patrimonial loss. The court cannot award costs for medical expenses or loss of property where there is no proof for the expenses incurred.

**Summary:** Plaintiff sued defendants for various amounts both for patrimonial and non-patrimonial loss. The claims were lumped together and there was no proof of the

loss incurred. The court requires proof of damages in order to make a reasoned decision. Plaintiff partially succeeded in his claim.

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### ORDER

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#### 1. Claim 1

Claims for:

- a) Medical and ancillary expenses in the sum of N\$163 000 is dismissed.
- b) Permanent deformity of N\$50 000 is dismissed.
- c) Damages to spectacles N\$3999 is dismissed.
- d) Claims for:
  - i) Pain and suffering is granted in the sum of N\$50 000.
  - ii) *Contumelia* in the sum of N\$30 000 is granted with interest a *tempora morae*.

#### 2. Claim 2

Claim for:

- a) Cash in the sum of N\$50 000 is granted with interest a *tempora morae*.
- b) Rolex Wrist Watch in the sum of N\$180 000 is dismissed.

#### 3. Costs of suit.

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## JUDGMENT

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CHEDA J:

[1] Plaintiff sued defendants for general and special damages. Plaintiff is a businessman based in Oshakati while both defendants are employed by the Ministry of Safety and Security and are attached to the VIPP section of the Namibian Police.

[2] Plaintiff made two claims against defendants as follows:

### Claim 1

- a) Medical and ancillary expenses N\$163 000
- b) Pain and suffering N\$75 000
- c) Permanent deformity N\$50 000
- d) *Contumelia* N\$50 000
- e) Damages to spectacles N\$3999

### Claim 2

- a) Theft of N\$50 000
- b) Theft of a Rolex Wrist Watch N\$180 000

[3] Defendants were duly served with summons, but, did not defend the court proceedings which led to plaintiff applying for a default judgment. The plaintiff's legal practitioner was ordered to file heads of argument to support plaintiff's claims which he did.

[4] According to plaintiff's particulars of claim, plaintiff was unlawfully assaulted by defendants on the 01 April 2014 at Oshakati and that during the assault, defendants are alleged to have stolen cash and a Rolex Wrist Watch from him. It is also alleged that the defendants had paid admission of guilty fines of N\$600 each.

[5] Before I deal with the damages claimed, it is essential that I firstly state the correct legal position with regard to damages which plaintiff's legal practitioner seems to have not realised. In his claims he lumped patrimonial and non-patrimonial losses together. This is not proper as they are different claims altogether.

[6] A patrimonial loss is adequately defined in Visser & Potgieter *Law of Damages* 3rd ed. at p 51 where the learned authors state:

'The loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of his or her patrimony (a patrimonial debt).'

[7] It is a diminution or reduction of a value or quality of a patrimonial or personality interest occasioned by a damage causing event. There should be a damage which is legally recognised as either patrimonial or a personality interest. In patrimonial loss it is the loss of a value of a particular object. It is also referred to as a universitas of rights and duties, see *Schnellen v Rondalia Assurance Corporation of South Africa Ltd* 1969 (1) SA 517 (W) at 520 and *Evins v Shield Insurance Co. Ltd* 1980 (2) SA 814 (A) at 840-1. This is the judicial concept. I will give three brief examples of patrimonial loss:

- (a) it happens when a patrimonial right or expectation with a monetary value is lost; or
- (b) where someone's property is destroyed or stolen from which property the owner derives some profit or benefit whose future is reduced; or
- (c) a creation or increase in debt (expense) and delay in receiving benefits.

[8] On the other hand, non-patrimonial loss, consists of a physical injury accompanied by actual loss incurred. The following are the common categories which fall under this heading:

- a) pain and suffering;
- b) shock, which is a psychiatric injury;
- c) disfigurement;
- d) loss of amenities of life; and
- e) shortened expectation of life etc.

[9] The list is inexhaustive. Mr Greyling for plaintiff should, therefore, have drafted his summons and particulars of claim with these distinctive principles in mind. He should also have led evidence to prove some of the allegation's relating to the alleged damages suffered. He should have called witnesses from the hospital to introduce and prove the invoices of medical expenses paid or incurred by the plaintiff.

[10] Plaintiff claimed medical and ancillary expenses in the sum of N\$163 000, permanent deformity and damages to spectacles in the sum of N\$3999. There is nothing in his papers which show where these figures came from. There is no proof for these claims. Plaintiff is expected to have attached proof of medical expenses inclusive of the repairs or replacement of the spectacles.

[11] In the absence of such proof the court cannot pluck figures from the air, as it were. It is trite that in our law, he/she who asserts must prove all the damages. It is puzzling that plaintiff claims permanent deformity with no medical evidence. While this may be true, but, such a claim should be backed by medical evidence. In the absence of this, then the court is not in a position to determine damages and hence the *quantum* suffered by the plaintiff. It is the duty of the plaintiff to prove that he incurred medical expenses and that he is now permanently deformed.

[12] I now turn to the issue of non-patrimonial loss. These courts have adopted an approach referred to by Visser & Potgieter (*supra*) quoting Neetling and Potgieter thus:

'Theoretically, non-patrimonial loss is (like patrimonial damage) determined by means of comparative method. The utility or quality of the personality interest in question before and after the delict are compared in order to establish the existence and extent of the loss. In this way, information is obtained on the nature, seriousness, extent, intensity and duration of the objective party of the loss as well as the impairment of the plaintiff's feelings.'

[13] Damages for pain and suffering has been claimed. The learned authors, above, clearly state that an action for non-patrimonial loss is intended to make compensation available in cases of intentional or negligent conduct. The same applies to the claim for *contumelia*.

[14] No strong and persuasive arguments have been advanced for the court to make an informed decision. I have been referred to the matter of *Sheefeni v The Council of the Municipality of Windhoek* (I 2473/2013) [2015] NAHCMD (30/07/2015) where judgment in the sum of N\$50 000 was granted. I am grateful to counsel for this authority.

[15] With regards to claim 2, I will give plaintiff the benefit of doubt with regards to the alleged cash stolen, but, I am not convinced that the Rolex Wrist Watch allegedly stolen was worth N\$180 000. Again in the absence of documentary proof, the court is not in a position to make a fair assessment of the compensation sought. In this respect the plaintiff should have presented at the minimum the best evidence of a value of a second hand Rolex watch of the type of watch lost by the plaintiff from a dealer in Rolex watches. He would have obtained information regarding the specifications of the watch in question and possibly its fair market value at the time of loss.

[16] As regards the claim for damages relating to the assault, there is no doubt that plaintiff was assaulted and lost property even if there is no proof that he had cash and a watch one can safely conclude that he was unlawfully assaulted and lost cash and a wrist watch, unfortunately whose fair market value cannot be independently verified.

[17] There is no scale to assess the pain and suffering. The court is called upon to do its best to assess such damages based on the evidence placed before it and having regard to comparable previous awards. In this matter no evidence was led regarding this aspect of claim. In the absence of case authorities this court endeavoured to assess the fair amount of N\$50 00 as adequate compensation to the plaintiff for the pain and suffering he endured at the hands of the defendants. In the absence of any case authorities which support the higher amount I am not persuaded that this is a case where a higher sum for pain and suffering should be granted.

[18] I must also hazard to add that despite service on the defendants, they did not enter appearance(s) to defend. Be that as it may, it is my view that, the fact that they have not done so, does not give a plaintiff a *carte blanche* cheque to come up with any figure which he can think of. The court is an arbiter and it must strike a balance between two competing interests taking into account the dictates of public policy, justice and equity.

[19] In my view this is a matter where plaintiff has partially succeeded in its claim and should be entitled to his partial costs. In the result the following order is made:

1. Claim 1

Claims for:

- a) Medical and ancillary expenses in the sum of N\$163 000 is dismissed.
- b) Permanent deformity of N\$50 000 is dismissed.
- c) Damages to spectacles N\$3999 is dismissed.

Claims for:

- i) Pain and suffering is granted in the sum of N\$50 000 is granted.

- ii) *Contumelia* in the sum of N\$30 000 is granted with interest a *tempora morae*.

2. Claim 2

Claim for:

- a) Cash in the sum of N\$50 000 is granted with interest a *tempora morae*.
- b) Rolex Wrist Watch in the sum of N\$180 000 is dismissed.

3. Costs of suit.

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M Cheda  
Judge



## APPEARANCES

PLAINTIFF: J Greyling  
of Greyling & Associates, Oshakati