

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
OSHAKATI



NORTHERN LOCAL DIVISION

CASE NO: HC-NLD-CIV-ACT-

DEL-2018/00074

In the matter between:

WALTER MWANDINGI

PLAINTIFF

and

JOSUA MWETUPUNGA

DEFENDANT

Neutral Citation: *Mwandingi v Mwetupunga* (HC-NLD-CIV-ACT-DEL-2018/00074)
[2022] NAHCNLD 21 (16 March 2022)

CORAM: MASUKU J

Heard: 24 August 2021

Delivered: 16 March 2022

Flynote: Delict —Damages – Quantum – Unlawful assault – Expert evidence—Awards in other comparable cases helpful – court applied the principles in *Lopez v Minister of Health and Social Services*-court grants general damages based on the evidence presented—Plaintiffs claim is successful.

Summary: Plaintiff instituted summons against defendant, predicated on a claim for damages in the amount of N\$304 720.06, due to defendant's alleged unlawful and wrongful assault on plaintiff's person and property.

The court first had to determine the issue of the defendant's liability and he was held to be liable for the harm of the plaintiff and his property.

The court was left with the determination of the quantum as claimed by the plaintiff. The plaintiff testified and called an expert witness to give testimony on the injuries he sustained.

The court applied the principle in the matter of *Lopez v The Minister of Health and Social Services*.

Court held that: It is quite clear that the plaintiff has managed to prove that he has suffered pain and suffering, this is evidenced by the fact that despite it being 5 years post the injury he still feels pain in his knees. This court is further satisfied that he has proven his claim on permanent deformity as medical evidence was place before this court by Dr. Gouda and also satisfied with the damages claimed against the damage to the plaintiff's tyres.

Court held further that it is not satisfied with the claim of *contumelia*.

Plaintiffs claim succeeds with costs

ORDER

Judgment is granted in favour of the plaintiff against the defendant in the following terms:

1. Payment in the amount of N\$ 184 720.
 2. Interest on the amount of N\$ 184 720 at the rate of 20 per cent *a tempore marae* from the date of judgment to the date of final payment.
 3. Costs of suit.
 4. The matter is removed from the roll and is regarded as finalised.
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JUDGMENT

MASUKU J:Introduction

[1] The plaintiff instituted action against the defendant for damages in the amount of N\$304 720.06. The said action was instituted due to defendant's alleged unlawful and wrongful assault on plaintiff's person and damage of the plaintiff's property.

[2] On 19 March 2021, the defendant after a fully blown trial, was held liable for the harm caused to the plaintiff's person and his property. The reasons for the said order were released on 23 March 2021.

[3] Following the finding that the defendant was liable, the court proceeded to deal with evidence in proof of the damages suffered by the plaintiff at the hands of the defendant. This judgment addresses that very issue.

The parties and their representation

[4] The plaintiff is Mr. Walter Mwandingi, a major male, employed at Hire Sales and Services in Windhoek. The defendant, on the other hand, is Mr. Josua Mwetupunga, resident of Onanjaba Village, Okalongo. Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as the "the parties".

[5] The plaintiff, on the one hand, was represented by Mr. P. Greyling, whereas the defendant, on the other hand, was represented by Mr. S. Aingura. The court is indebted to counsel on both sides for their assistance.

Background

[6] At the commencement of the trial on 1 June 2020, the plaintiff did not have all the requisite evidence, which was a prerequisite to enable the court to deal with the matter on a claim for damages. The parties agreed that the issue of liability be determined first. On 19 March 2021 the defendant was held liable for the harm caused

to the plaintiff's person and his property and the reasons for the said order were released on 23 March 2021.

[7] During the hearing on damages, the defendant raised an objection in terms of rule 29(1) and (2), namely that the name of the plaintiff's expert witness, his field of expertise, qualifications, the summary of the expert's opinion and the reasons are not included in the case management report filed in terms of rule 24.

[8] The court dismissed the said objection reasoning that the defendant could not argue that he did not agree to calling of the expert witness when at the commencement of the trial the court made a ruling to commence with the liability and then to later proceed to hear evidence on the quantum if the plaintiff succeeded in proving the defendant's liability.

[9] By stating this, the court specifically allowed the plaintiff to file its expert witness statement in order to proceed on its claim for quantum.

[10] It remains for the court to impress upon parties, especially plaintiffs, in claims for damages, to be ready when the trial is called, to deal with evidence appertaining to both liability and quantum. A piece-meal approach to both issues is not ideal as it tends to run up costs unnecessarily and amounts to an inefficient use of the court's time and judicial resources.

Issue for determination

[11] The only issue that presents itself for adjudication in this matter is the quantum of damages due to the plaintiff. In his particulars of claim, the plaintiff claimed payment in the following terms:

9.1 Payment in the amount of N\$304 720.06, categorized as follows:

9.1.1 Pain and Suffering: N\$150 000.00;

9.1.2 Permanent deformity: N\$100 000.00;

9.1.3 *Contumelia*: N\$50 000.00; and

9.4 N\$ 4 720.02 for damages to plaintiff's vehicle tyres.

[12] To address the above issue, it is now convenient to consider the relevant evidence led by the plaintiff and his expert. The defendant did not call any witness in this regard. Accordingly, the matter will be determined on the evidence led by the plaintiff, taking into account, the argument presented by both parties thereon.

The plaintiff's case

[13] In a quest to prove his case, the plaintiff adduced sworn evidence and further called Dr. Tarek Gouda as his witness. I will refer to Dr Tarek Gouda as 'Dr. Gouda'. The plaintiff's testimony in support of his claim on quantum was, *inter alia*, that: He was, at the time the incident took place employed as a forklift operator by Windhoek Hire Sales and Services.

[14] It was his evidence that on or about 27 May 2017 and at Okalongo, he was unlawfully and maliciously slapped and shot through both kneecaps with a firearm by defendant. He testified that after defendant shot him through his knees, he felt extreme pain and he was bleeding profusely from the gunshot wounds.

[15] The plaintiff testified that he was unable to walk due the pain from the injuries. It was his further evidence that the defendant proceeded to shoot all the tyres of his vehicle.

[16] He testified that he was transported to Oshikuku Roman Catholic hospital approximately 30 minutes after the gunshots. It was his evidence that an injection was administered to him at the places where the gunshot wounds were located in his body. He was thereafter transported to Oshakati Intermediate Hospital where he was delivered directly to the casualty ward. He proceeded to the x-ray department and from there he was booked into a room.

[17] It was his testimony that he was unable to walk by unassisted and had to use a wheelchair during his stay at the hospital where he was under excruciating and constant pain. He was discharged from the hospital on 29 May 2017. He testified that after his discharge, he was still unable to walk and had to be assisted by family members. It was his testimony that when he went home he stayed primarily bedridden.

[18] The plaintiff testified that each time he needed to do an activity, including going to the ablution facilities, he was assisted. He was only able to walk proximately 1 week after being discharged from hospital. It was his evidence that to this day it is still extremely painful to walk. As such, he testified, he could not walk long distances due to the pain. It was his evidence that as a result of the injuries he sustained he could no longer be able to use the higher forklift, as he became unable to climb up the said forklift due to the injuries sustained. Furthermore, he was unable to sit for long hours.

[19] During June 2021, he further testified, he attended to the office of Dr. T. Gouda, who diagnosed him with Post-Traumatic Osteo-Arthritis as a result of the injuries sustained at the hands of the defendant. He testified that he was informed that he would experience pain to his knees when walking for the rest of his life. He was further informed that he would inevitably be required to use a crutch when walking.

[20] On or about the 7th of March 2018, he received a quotation from Oshakati Tyres who provided him with a quotation for the replacement of his vehicle tyres that defendant had damaged when he shot them as well as for the balancing of the tyres. This amounted to N\$4 720.

Dr. T Gouda

[21] Dr. Gouda, testified that he is a medical practitioner who holds a Bachelor of Medicine Degree (M. B. CH. B), which he obtained during December 1985 from the Tanta University, which is situated in Egypt. He has been employed as a medical doctor since 1 March 1986. He commenced employment in Namibia on 1 June 1990.

[22] On 21 June 2021, Dr. Gouda indicated that the plaintiff attended to his office where he sought a diagnosis relating to an injury that he had sustained to his knees at the hands of the defendant during May of 2017. It was the learned doctor's testimony that he advised the plaintiff to attend to the office of Dr. Byarugaba, to obtain x-rays. The plaintiff duly attended to the said office and returned with the x-rays.

[23] From the x-rays, it was the doctor's evidence that he was able to diagnose the plaintiff with Post-traumatic Osteo-arthritis on both knees. In this regard, the doctor

testified, the plaintiff sustained soft tissue injuries to both his left and right knees as a result of the gunshot wounds meted to him by the defendant.

[24] He explained to the court that post-traumatic Osteo-arthritis is caused by the wearing of a joint that has any kind of physical injury such as in the present matter where plaintiff was shot through his knees. The injury damaged the cartilage, which caused a changing of the mechanics of the joint resulting in the joint wearing out more quickly. He further testified that the plaintiff, as a result of the gunshot wounds, sustained more damage to his right knee. This caused him to have to compensate by placing more weight on his left knee when walking. The doctor's testimony aggravated the damage sustained on the left knee.

[25] It was his further testimony that there is no cure for the plaintiff's diagnosis. All that can be done is for the plaintiff to manage the situation by weight loss, low impact exercise and the strengthening of the muscles surrounding the joints. In more severe instances, he testified, the plaintiff may require an injection of cortisone and/or other substances that can act as an artificial cartilage. Should the injury worsen, the doctor concluded his evidence, the plaintiff may require surgery to repair the joints or to replace them altogether.

[26] That was the extent of the doctor's evidence. There was nothing of major consequence that was put to him in cross-examination. As such, the court is entitled to rely on his evidence, which largely stands uncontroverted on his findings and medical opinion regarding the injuries suffered by the plaintiff.

The parties' contentions

[27] In *Esso Standard SA (Pty) Ltd v Katz* 1981(1) SA 964(A) the South African Appellate Division referred to the case of *Hersman v Shapiro & Co* 1926 TPD 367, at 379, with approval. There, Stratford J stated the following:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so

bound in the case where evidence is available to the plaintiff, which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.'

[28] The court is required, in determining the quantum of damages, to follow the enlightening approach quoted immediately above. I do so below.

[29] The defendant's contention was that the medical report dated 5 June 2017, which was tendered in evidence, does not assist the court in assessing the measure of pain experienced by the plaintiff. It was submitted in that regard in assessing the damages to be awarded to plaintiff the said report does not state the nature of the treatment administered to the plaintiff nor the medication if any, given to plaintiff for the alleged pain.

[30] The defendant contended further that Dr. Gouda was not able to determine which part of the plaintiff's condition at examination could be directly ascribed to the harm caused by the defendant. It was further argued on the defendant's behalf that Dr Gouda's evidence does not offer much assistance with regard to the assessment of the pain experienced by the plaintiff then. Furthermore, it was argued that the evidence does not assist in assessing the damages that are to be attributable to the defendant's conduct.

[31] The defendant holds the view that the plaintiff's evidence with regard to the extent of the pain and duration thereof is not sufficiently supported by evidence adduced by and on his behalf. The defendant, with regards to the claim for damages to the tyres, submits that the plaintiff failed to produce evidence of the market value of the tyres immediately before the wrong was committed and the market value after the commission of the wrong. Mr. Aingura argued quite forcefully that this claim should also be dismissed.

[32] I am of the considered opinion that the evidence adduced by the plaintiff and his witness is credible. He struck me as a witness of truth and he was consistent in his

testimony as the northern star. He did not contradict himself. This court further has no reason not to believe and accept the evidence as presented by the expert witness either. I also find that evidence credible and therefore fit to rely on same for making the determination necessary in this case.

[33] The only question left to determine is how much the plaintiff is entitled to as damages. In this connection, I will take a short review of applicable or comparable case law in an attempt to aid me in determining the appropriate quantum in the circumstances.

The law

[34] In *Lopez v Minister of Health and Social Services* 2019 (4) NR 972 (HC) at para 40, Parker AJ stated as follows:

‘Second, the general principle is that a successful plaintiff, as is the case in the instant proceedings, is entitled to be compensated for the loss suffered but is not entitled to profit from the loss. When determining the quantum of damages in such claims, the courts seek in aid awards granted in comparable cases. In doing so the instant court must always take into account the circumstances of each individual case. When making awards for general damages, as is in the instant matter, courts should guard against duplication of awards and awards that overlap, leading to the successful plaintiff being overcompensated.’

[35] I will begin the comparison of different cases in order to obtain the guidance required. In the case of *Haishonga v The Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL 359 of 2017) [2019] NAHCMD 219 (03 June 2019), 18, the plaintiff was negligently shot by a police officer on duty. The court awarded judgment in favour of the plaintiff in the following terms: Pain and suffering - N\$ 100 000 and emotional and psychological pain - N\$ 50 000.

[36] In *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 (HC), there was a claim for assault, apart from unlawful arrest and detention, perpetrated by the Council’s City Police officers. There, the assault consisted of the plaintiff being pulled forcefully and violently from the taxi he was driving. He was slapped, kicked and punched, and his head pushed to the kerb of a street in Windhoek by City Police officers who were on patrol. In the process the plaintiff hit his head against the kerb. The assault in *Sheefeni* was serious, brutal and life threatening. The plaintiff claimed

N\$150 000 as general damages for assault. The court considered the amount to be exorbitant, and awarded an amount of N\$50 000 for general damages to the plaintiff.

[37] In the case of *Tshabalala v Minister of Police (77421/2014) [2017] ZAGPPHC 331 (8 June 2017)*, the plaintiff was shot in the leg, resulting in a broken leg and one of his testicles had to be removed. The court awarded judgment in favour of plaintiff in the amount of N\$150 000.00 for general damages.

[38] Reverting to the instant case, the plaintiff submitted that in the assessment of an appropriate award for the plaintiff in respect of general damages, the court should take into consideration the fact that the defendant acted intentionally with no justification. He was not threatened by the plaintiff at all. He just shot the plaintiff because he simply could and had a firearm at his disposal. He shot the plaintiff, an elderly man, who was unarmed in full view of the general public. He shot him in both knees and at close range. There was no attempt on the plaintiff's part to flee as he was afflicted in any event by gout.

Pain and suffering and Permanent deformity

[39] Prinsloo J, in the matter of *W v Minister of Police and Another (72485/2012) [2016] ZAGPPHC 172; 2017 (1) SACR 441 (GP) (11 November 2016)* at para 40 quoted with approval the following passage from Neethling-Potgieter-Visser, at p. 16 at para [40]:¹

'The action for pain and suffering has been adopted by South African law and is considered by the courts, just as in Roman-Dutch law, to be a unique action that cannot be classified with the actio *legis aquiliae* or with the actio *iniuriarum*. The courts, however, continued to develop the action, with English law playing an important role, to the extent that it now protects the physical-mental integrity of a person in its entirety. In addition to pain, suffering and disfigurement, which had already been identified at common law, this protection is particularly apparent insofar as psychological or mental injury is equated with physical (bodily) injury in the area of emotional shock, and loss of (or shortened) life expectancy, amenities of life and health are recognised as injuries to personality for which compensation may be claimed.'

¹ Neethling-Potgieter-Visser, *Law of Delict*, 7th edition, p. 16.

[40] The same can be said with regards to the Namibian dispensation when it relates to actions for pain and suffering. In the instant matter the plaintiff sustained gun shot injuries on both kneecaps and had to be hospitalised for some time. He was unable to move freely unassisted and without excruciating pain according to his evidence. As it is, the pain is a constant in his life, reducing his mobility and ability to do what he could do before the needless assault. His life and movement have been altered eternally, resulting in ugly and indelible scars on both of his knees.

[41] Amler's Precedents of Pleadings², tells us that that when one pleads pain and suffering, one needs to indicate whether or not it was temporary or permanent and which injuries caused it. He further indicates that when one pleads disfigurement, a full description thereof should be given and whether or not same was temporary or permanent.

[42] It is quite clear that the plaintiff has managed to prove that he suffered pain and suffering during and after the shooting, and continues to do so. This is evidenced by the fact that despite it being 5 years post the injury, there is incontestable evidence that he still feels pain in his knees. This court is further accordingly satisfied that the plaintiff has proven his claim for permanent deformity as medical evidence was placed before this court by Dr Gouda and he has indicated that the injury caused permanent disfigurement.

Contumelia

[43] This is a troublesome concept in this matter. In the reportable case of *Philander v Minister of Safety and Security* (473/2011) [2013] ZANWHC 51 (6 June 2013) at para 38, Gutta J gives the definition of *contumelia*. He states that:

[38] *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. (Own emphasis).

² LTC Harms. *Amler's Precedents of Pleadings*, 7th ed, at page 156.

[44] The question is whether the plaintiff in the instant matter, suffered *contumelia*. The plaintiff testified that he feels embarrassed by the scars, resulting in him avoiding wearing short pants. This is done in an attempt to hide the scars from the general public. To a large extent, the court agrees with the emotional turmoil that the plaintiff has gone through and continues to go through.

[45] I am not, however convinced on the evidence presented that a case of damages for *contumelia* has been made out. There is no iota of evidence that the plaintiff suffered a direct and serious invasion of his bodily integrity and personal dignity as a result of the defendant's unlawful actions. Mental and emotional anguish cannot be supported under the action of *contumelia*. It is, in my view provided under head of pain and suffering.

[46] Having regard to the evidence led, I am of the considered view that the plaintiff's claim in regard to *contumelia* cannot succeed in the circumstances. It is dismissed.

[47] Regarding the quotation handed in evidence and relating to the damages sustained as a result of the damage to plaintiff's vehicle's tyres, I am of the considered view that the damage was ineluctably proved. I am of the opinion that the quantum of N\$4 720.062 has also been proved.

Conclusion

[48] Taking the above mentioned into consideration and assisted by the case law as cited above the court makes the following determination as to the damages suffered by the plaintiff:

- 43.1 Pain and suffering N\$ 120 000;
- 43.2 Permanent deformity N\$ 60 000;
- 43.3 Damage to plaintiffs' vehicle tyres N\$ 4 720.06

Costs

[49] The determination of the issue of costs stood over from the trial on liability. There is no reason advanced by the defendant nor are there any factors apparent from the evidence that would justify a departure from the beaten track that costs follow the event. The plaintiff has been successful in this matter and he must be reimbursed therefor. Costs are therefor awarded to the plaintiff against the defendant.

Order

[50] In the circumstances I make the following order: Judgment is granted in the plaintiff's favour against the defendant in the following terms:

1. Payment in the amount of N\$ 184 720.
2. Interest on the amount of N\$ 184 720 at the rate of 20 per cent *a tempore morae* from the date of judgment to the date of final payment.
3. Costs of suit.
4. The matter is removed from the roll and is regarded as finalised.

T S Masuku
Judge

APPEARANCES:

PLAINTIFF: P. Greyling
Of Greyling & Associates, Oshakati

DEFENDANT: S. Aingura
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