

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: D103/2020

In the matter between:

KHULILE MNGADI

PLAINTIFF

and

NATHI MYEZA

DEFENDANT

And

In the matter between:

Case No: D102/2020

KHONANI NYAWOSE

PLAINTIFF

and

NATHI MYEZA

DEFENDANT

ORDER

The following orders shall issue:

In case number D103/2020:

The defendant is ordered to pay the plaintiff Khulile Mngadi as follows:

1. Future medical expenses R127 000.
2. General damages R325 000.
3. Interest thereon at the legal rate from date of judgment to date of full payment.
4. Costs of suit, scale A.

In case number D102/2020:

The defendant is ordered to pay the plaintiff Khonani Nyawose as follows:

1. Future medical expenses R127 000.
2. General damages R210 000.
3. Interest thereon at the legal rate from date of judgment to date of full payment.
4. Costs of suit, scale A.

JUDGMENT

DAVIS AJ

Introduction

[1] On 21 June 2023 Kruger J ordered that the action instituted by the plaintiffs under case numbers D102/2020 and D103/2020 be consolidated and thereafter to proceed to trial on a date to be allocated by the clerk of the court. On 27 May 2024 the matter proceeded to trial on quantum only. On 16 May 2022, Mdladla AJ had ordered by default that the defendant is liable to compensate the plaintiffs in both cases 100% of their proven damages.

Parties

[2] The plaintiff in D103/2020 IS Khulile Mngadi, an adult female residing at [...] McClays Lamontville, Durban, KwaZulu-Natal. In the second consolidated matter, case number D103/2020 the plaintiff is Khonani Nyawose, an adult female residing at [...] N[...] Road, Mid Illovo, KwaZulu-Natal.

[3] The defendant is Nkosinathi Mngoma (formerly Myeza), an adult male, former attorney, residing at [...] D[...] Crescent, Woodlands, Durban, KwaZulu-Natal. Default judgment was granted against the defendant when he failed to defend the actions brought against him by the plaintiffs for professional negligence.

Background

[4] On 27 April 2012 a mentally ill male person armed with a firearm entered into the Westville Life Hospital and demanded to see a doctor. Mayhem ensued and the gunman ended up in a small office with glass walls with four hostages. The two plaintiffs, employed at the time at the Westville Hospital as hostesses, were two of those hostages. Their duties included being responsible for seeing that the patients' dietary requirements were being catered for.

[5] The gunman demanded that the hostages lie on the ground. He thereafter fired a shot into the floor and the ricochet or shrapnel from the bullet being fired into the ground struck the first plaintiff. She was injured in the buttock and the shrapnel also injured her foot.

[6] The first plaintiff was told to sit on a chair and made to 'pretend-type.' She was then told to call a number by the gunman and when the call was unsuccessful she was shot in the arm at close range. Fortunately, the bullet went through the fleshy part of the arm without causing any structural damage to any bones. Shortly after this the second plaintiff was released by the gunman.

[7] The other hostages were released over a period of time until only the first plaintiff remained in the custody of the deranged gunman. Around midday while the first plaintiff was being held by the gunman with a gun held against her body, a police sniper shot the gunman in the head. He collapsed and died and the first plaintiff was rescued by the police. Both plaintiffs were understandably severely traumatised by the event.

[8] Sometime later the plaintiffs sought to sue the Westville Hospital and approached the defendant in his capacity as an attorney and instructed him to institute legal action against the Hospital. The defendant failed to deliver the

summons and the plaintiffs' claims prescribed. Aggrieved, they instituted claims against the defendant for professional negligence. The defendant failed to defend the claims and had been absent from these proceedings at all material times.

[9] Both plaintiffs' claim the damages that they would have been able to claim from Westville Hospital, being general damages for pain and suffering, emotional shock and stress amounting to the sum of R700 000, future medical treatment in the form of psychotherapy to address their general anxiety disorder and post-traumatic stress disorder in the amount of R56 000 and an amount of R71 000 is claimed for psychiatric care and related in hospital treatment.

Plaintiffs' evidence

[10] Both plaintiffs testified about their ordeal and the impact it has had upon their lives and the difficulties they still endure that they say is directly related to the incident. A clinical psychologist, Ms Zanele Khumalo examined both plaintiffs' and compiled reports illustrating the effect of the ordeal on them.

[11] That the two plaintiffs had to endure a harrowing ordeal is without doubt true. Being held hostage by a mentally unstable person armed with a gun must be a truly terrifying circumstances. The first plaintiff was shot at point blank range after already been wounded by the ricochet of another bullet. She told the court that she thought she would be killed. She anticipated dying and this has had a profound psychological effect on her.

[12] The first plaintiff was held hostage for many hours, she watched the other hostages being released. She was forced to speak to her assailant while always being conscious of the fact that he might shoot her at any time. She believed that she was staring death in the face . While the gunman was holding her with a gun in his hand, it appears that a police sniper was able to get a clear shot at the gunman. The gunman was struck by the bullet in the head, fell to the ground and the traumatised first plaintiff was rescued.

[13] The first plaintiff was booked off for three months sick leave and was seen by a psychologist twice a week for three consecutive weeks. She reported feeling much better following the sessions with the psychologist, this together with the unwavering support from her family members who also helped her through this intensely traumatic ordeal.

[14] Since the traumatic incident she has exaggerated responses to loud sounds and suffers from a generalised anxiety disorder and is constantly fearful. She has an elevated level of intolerance to loud sounds, becomes irritable easily and has become extremely short tempered. Even her powers of recall have been affected, she forgets the names of people close to her. She tries to avoid talking about the incident.

[15] Testing done by the clinical psychologist who testified, Ms Khumalo revealed that the first plaintiff has severe symptoms of anxiety and she meet the criteria for a generalised anxiety disorder (GAD). Testing further revealed that the first plaintiff met the requirements for a diagnosis of post-traumatic stress disorder.

[16] Further testing revealed that the first plaintiff met the criteria for a diagnosis of a major depressive disorder. Her total score on the beck's depression inventory test fell within the moderate range. In Ms Khumalo's professional opinion, the first plaintiff is currently experiencing significant psychological problems and is in need of immediate psychological and psychiatric treatment and in her view the recommended treatment would be 40 sessions of psychotherapy to address the three major disorders. These recommendations are set out in the claim for psychiatric and clinical psychologist interventions.

[17] Ms Nyawose, the second plaintiff was a highly emotional witness. She struggled to remain composed when she gave evidence, the terror of her ordeal has had a major impact on her life. In the aftermath of the incident she was notable to properly function, could not go back to the Westville Hospital and effectively never went back to work. She bears a deep resentment towards the Hospital who she feels placed them in great danger.

[18] As a consequence of the incident the second plaintiff has avoidance issues. Even celebratory days such as birthdays of loved ones remind her of the incident and she therefore tries to avoid them. She also displays obsessive compulsive behaviour and is overwhelming negative in her psychological outlook as a result of the incident. She has anger issues as a result of the incident and believes the Westville Hospital management are cold-hearted and callous. She is of the view that management showed no remorse or empathy and she felt betrayed by managements reaction to the incident.

[19] A clinical psychologist has diagnosed the second plaintiff as suffering from a generalised anxiety disorder, a post-traumatic stress disorder, mild depression and she also suffers from issues of low self-esteem. The treatment recommended is the same for both plaintiffs.

Quantifying and assessing emotional damages

[20] Notwithstanding some reluctance in overseas jurisdictions in our courts have recognised that psychiatric injury is treated as indistinguishable from other injuries. "Courts¹ treat psychiatric injury as legally indistinguishable from any other form of bodily injury, the basis being the effect of the wrongdoer's conduct on the claimant's nervous or neurological system."²

[21] This approach was reaffirmed in *Barnard v Santam Bpk*³ where a mother claimed damages for psychiatric injury, upon being informed telephonically, a few hours after the event, of the death of her young son in a motor vehicle collision. As to liability, the court held in *Barnard* that the negligent driver should have foreseen that as a consequence of the serious physical injury or death of any person in a resultant collision, third parties closely connected by love or affection to the deceased or injured person might suffer psychiatric injury upon being informed of the event.⁴

[22] As Mr *Khanyile*, who appeared for the plaintiffs, correctly pointed out the quantification of psychiatric injury is not always straight-forward. Comparisons with

¹ *Mngomezulu v minister of Law and Order* 2014 (7k3) QOD 1 (KZD) para.10

² *Bester v Commercial Union Versekeringsmaatskappy Van SA Bpk* 1973 (1) SA 769 (A).

³ *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA).

⁴ *Mngomezulu v minister of Law and Order* 2014 (7k3) QOD 1 (KZD) para.11

awards in other matters may assist but each case is unique and the quantum of damages awarded must reflect this.

[23] The plaintiffs claim for emotional damages is not solely based on the evidence of their harrowing trauma, but on the evidence of the subsequent onset of depression and psychiatric challenges, from which they presently suffer. Windeyer J in the Australian High Court in *Mount Isa Mines Ltd v Pusey*⁵ expressed the following view on claims for shock:

‘It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had.’

[24] In *Allie v Road Accident Fund*⁶ the court held:

‘In making an award, the court is not bound by one or other method of calculating general damages. The court has a wide discretion... Comparative awards in other cases might be a useful guide. They may be instructive but not decisive...’

In *Protea Assurance Co Ltd v Lamb*⁷ the following dicta is apposite:

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters.’

[25] In assessing quantum I have considered a number of cases. In *Majiet v Santam Limited*⁸ the plaintiff was awarded general damages in the sum of R35 000 for a major depressive disorder after she came upon the sight of her nine-year-old child lying in the road, after being struck down by a motor vehicle. The plaintiff fainted at the scene, but was informed that her child called out for her before dying.

[26] The court in *Potgieter v Rangasamy and Another*⁹ in determining an award for emotional shock held that the sum of R75 000 would be reasonable in the circumstances. In that case, the plaintiff sued for emotional trauma following an

⁵ *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383 at 394.

⁶ *Allie v Road Accident Fund* [2003] 1 All SA 144 (C) para 37.

⁷ *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535H-536A.

⁸ *Majiet v Santam Limited* 1997 (4K3) QOD 1 (C).

⁹ *Potgieter v Rangasamy and Another* [2011] ZAECPEHC 36.

accident in which she was a passenger on a bus. The bus was carrying netball players from various schools and the plaintiff accompanied the players in her capacity as a teacher at one of the schools. Three children died in what appeared to be a horrific accident. As a result, she suffered severe emotional trauma as some of the parents of the deceased attributed blame to her for the accident.

[27] Navsa J in *Clinton-Parker v Administrator, Transvaal Dawkins v Administrator, Transvaal*¹⁰ cautioned against opening the floodgates if claims for nervous shock were not contained within manageable limits. This has been recognised as a factor to be considered in making such awards.

[28] In my view the quantum of the plaintiffs' damages for emotional shock and trauma are to be assessed in accordance with the degree of trauma suffered by them individually. Purely on that basis the amounts must differ.

[29] In doing so, I am mindful of the need to be fair to the plaintiffs and I have sought guidance from the judgments referred to above and below, but am mindful that the quantum of damages are case specific.

[30] In *Potgieter v Rangasamy*¹¹ the court refers to *Road Accident Fund v Ruth FS Draghoender*¹² the plaintiff's eight-year-old son was killed in a motor collision in front of the family home. As a result of the accident the plaintiff suffered severe emotional shock and trauma which rendered her permanently disabled to earn an income. In respect of general damages for emotional shock and trauma she was awarded R80 000 damages.

[31] Similarly in *Potgieter* at [46] the court refers to *De Barros v Road Accident Fund*¹³ the plaintiff a 25-year-old rigger was the driver of a motor vehicle when it was struck by another vehicle. He sustained blunt trauma to his lower lumbar spine. As a result, thereof, he experienced persistent pain which prevented him from engaging in

¹⁰ *Clinton-Parker v Administrator, Transvaal Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W) at 63B-G.

¹¹ *Potgieter v Rangasamy and Another* [[2011] ZAECPHC 36 para 45

¹² *Road Accident Fund v Ruth FS Draghoender* Case No. 1477/03; Corbett and Honey Volume 5, K3 – 16.

¹³ *De Barros v Road Accident Fund* 2001 (5C4) QOD 13 (C).

heavy manual tasks. The persistent pain resulted in him suffering from depression. As a result of his disabilities, he stopped working. He was awarded general damages of R85 000. The value of which is now R 305000.

[32] In *Daniels v Road Accident Fund*¹⁴ the plaintiff was injured in a motor vehicle accident as a result of which she sustained a mild whiplash injury. Her chest was bruised with tenderness in the midline. Her left hip was painful. Initially she was treated with analgesics and anti-inflammatories. Thereafter she experienced discomfort in her neck. Her doctor's assessment of the discomfort was that she suffered from a whiplash syndrome. She was subsequently boarded from work. She experienced pain in her shoulder and neck which was exacerbated by the increase in anxiety levels. She had a diminished range of movement of her neck, of flexion and extension, rotation and lateral flexion. She was diagnosed to have suffered severe psychological disorder which had become chronic. On two occasions, she attempted to commit suicide as a result of her mood state, she experienced episodes of panic attacks and agoraphobia. She was on anti-depressant medication and was receiving psycho-therapy. In respect of general damages for the whiplash injury and the psychological sequelae thereof she was awarded general damages of R80 000.¹⁵The value of which is now R 307000.

[33] In *Van Vuuren v Road Accident Fund*¹⁶ the plaintiff, a 61-year-old person, suffered a whiplash injury in her neck. Initially, the pain was acute for 2 to 3 days. Thereafter the neck pain became severe and constant. It radiated into her back, shoulders and down to her arms and fingers. According to medical evidence the pain was chronic. She lost strength in her hands and it was difficult for her to perform simple tasks like holding a cup or punch in the pin number to her prepaid electricity meter. Her treatment consisted of medication, x-rays and physiotherapy. The rotation of her neck was limited. For general damages, she was awarded R120 000¹⁷. The current value of which is R261 000.

¹⁴ *Daniels v Road Accident Fund* Corbett and Honey, 2011 Volume 5 at C3 – 1.

¹⁵ *Potgieter v Ramasamy* (ibid) para 47

¹⁶ *Van Vuuren v Road Accident Fund* 2009 JDR 0572 (GSJ).

¹⁷ *Potgieter v Ramasamy* (ibid) para 49

[34] In *Potgieter v Rangasamy*¹⁸ at [52] the court considered *Allie v Road Accident Fund*¹⁹ the plaintiff was awarded general damages of R80 000 as a result of emotional shock and trauma suffered after having observed his wife plunged through the windscreen of the car he was driving, caused by a vehicle which collided into his vehicle. He witnessed his wife bleed to death at the scene of the collision. He lost his wife and his unborn child. General damages of R80 000 (the current value of which is R132 000) was awarded to him in respect of emotional shock and trauma. He required psychotherapy and medication. Because he did not have psychotherapeutic treatment at an earlier stage the Court held that the plaintiff had a duty to mitigate his general damages and awarded him the damages referred to above. The current value of which is R274 000.

[35] In *Kritzinger v Road Accident Fund*²⁰ the first plaintiff, a 52-year-old male, was awarded general damages of R150 000 for chronic post-traumatic stress disorder and a chronic major depressive disorder. His two daughters were killed in a motor vehicle accident. He saw his daughters at the scene immediately after the accident. Later, he had to identify them at a mortuary. He required medication probably for the rest of his life. The current value of which is R326 000.

[36] These are only guides to what amounts may be fair and just. When awarding general damages, court have a wide discretion which must be exercised judicially on a case specific basis. In addition I must take into account what was said in *Wright v Multilateral Motor Vehicle Accidents Fund*²¹ as quoted with approval by the Supreme Court of Appeal in *Road Accident Fund v Marunga*²² namely:

'I consider that when having regard to previous awards one must recognise that there is a tendency for awards to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.'

¹⁸ *Potgieter* (supra)

¹⁹ *Allie v Road Accident Fund* [2003] 1 All SA 144 (C).

²⁰ *Kritzinger v Road Accident Fund* 2009 JDR 0275 (ECP).

²¹ *Wright v Multilateral Motor Vehicle Accidents Fund* 1997 (4EC) QOD 31 (N).

²² *Road Accident Fund v Marunga* [2003] 2 All SA 148 (SCA).

[37] I have taken into account the facts of this case, the judgments I have referred to above, and the need to differentiate between the two plaintiffs' as their experiences were not the same. I have decided that an award of R325 000 to the first plaintiff, Ms Mngadi in respect of general damages for emotional shock and trauma would be reasonable in the circumstances of this case. In respect of the second plaintiff Ms Nyawose I consider that an amount of R210 000 would be fair and reasonable.

Costs

[38] Despite some reservations about which court this action should have been brought, in particular that the quantum granted suggests that this matter should have been accommodated in the regional court, the circumstances of the matter are such that the plaintiffs should be awarded costs at the high court tariff, scale A.

Order

[39] In the circumstances the following order are made:

In case number D103/2020:

The defendant is ordered to pay the plaintiff Khulile Mngadi as follows:

1. Future medical expenses R127 000.
2. General damages R325 000.
3. Interest thereon at the legal rate from date of judgment to date of full payment.
4. Costs of suit, scale A.

In case number D102/2020:

The defendant is ordered to pay the plaintiff Khonani Nyawose as follows:

1. Future medical expenses R127 000.
 2. General damages R210 000.
 3. Interest thereon at the legal rate from date of judgment to date of full payment.
 4. Costs of suit, scale A.
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CASE INFORMATION

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Dates of Hearing : 27, 28 May 2024

Date of Judgment : 4 June 2024

