

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: 317/2019

In the matter between:

ADILIHA RIGINA LOUW

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MAAKANE AJ

Introduction

[1] Plaintiff in this matter issued summons against the defendant, claiming delictual damages for bodily injuries she sustained after being shot with rubber bullets by a member of the South African Police Services (“SAPS”), who at that time was acting within the scope and ambit of his official duties as such.

[2] Initially the matter was set down for hearing on **17 January 2022**. The parties agreed at that stage that there be separation of issues of liability on the one hand and quantum on the other. The issue of liability was heard by my sister, madam Justice Mahlangu AJ, who ruled that the defendant was delictually liable for the plaintiff’s 100% proved or agreed damages.

[3] For the purpose of dermination of quantum, the parties agreed at the commencement of the trial that reports compiled by two experts appointed by the plaintiff, being a Clinical Psychologist Ms Moyra Tsambos as well as a Plastic, Reconstructive and Cosmetic Surgeon Dr Danie Hoffmann, be admitted as evidence without the need to lead any further evidence thereon.

[4] Prior to the commencement of the trial, plaintiff also abandoned her claim for past medical expenses. It was also common cause that the

total amount in respect of future medical expenses amounted to R261 656-96. The remaining issue for determination by this court therefore is the amount of damages to be awarded in respect of general damages only.

Plaintiff's case

[5] Plaintiff testified under oath. Her evidence is basically to the effect that she resides at Coldridge, a township in Vryburg. On **25 April 2018**, her family had a bereavement. They were preparing for a funeral. She, drove from her house accompanied by her son aged 9, to go and buy some grocery items in preparation of the funeral.

[6] While driving through the streets of Coldridge specifically at the T junction of Kameeldrift and Rodenweg she saw a burning tyre. She turned left and drove to her father's house. There she parked her car under a tree and then walked with her son to the shop. Along the way she met her friend, by the name of Sally. All three walked together to the shop.

[7] Along the way to the shop, she saw and observed a group of small boys standing on the road. She immediately took her cellphone, and unsuccessfully tried to contact the police. She kept on trying but could not get through to the police. Sally suggested that they go as someone might have called the police. While the three were still standing there,

they saw a police van emerging and the children running away, in an attempt to evade the police. One police officer jumped out of the van and started shooting.

[8] At the time of the shooting, she was leaning against the palisade fence and her son was standing next to her. She was shot twice on her right lower leg and once on the left lower leg. After the shooting she went to the police station to lay a charge. Hereafter, she went to Joe Morolong Hospital in order to receive treatment for her injuries. At the hospital, she was seen and examined by a doctor. However, her wound was merely cleaned and was referred to her local clinic to have the wound dressed.

[9] Unfortunately, her wound did not show any signs of improvement. For this reason, she again consulted with a private doctor who referred her for admission to a hospital. She was admitted for five (5) days, from the **1st** to the **5th of May 2018**, at the Vryburg Private Hospital.

[10] She feels hurt, because she was shot under circumstances where she did nothing that justified the shooting. She was a member and part of a community group called "Women Against Drugs and Crime." The group had a close working relationship with the police. Over and above that, her husband is a police officer, and holds the rank of Warrant Officer.

EXPERT EVIDENCE

Clinical Psychologist: Moyra Tsambos

[11] According to this expert's report plaintiff has been diagnosed with post-traumatic stress disorder, with depressive features. She states the following:

"Post-Traumatic Stress Disorder (PTSD) is classified as an anxiety disorder whereby the fear-evoking traumatic event that is experienced by a person is commonly relived by the individual...in this instance; Adiliha was a casualty of a physical assault."

[12] With regard to depressive teatures, the expert states the following:

"The core symptom of depression is said to be anhedonia, which refers to loss of interest or a loss of feeling of satisfaction in certain activities that usually bring satisfaction to people..."

[13] She goes on and point that in order to effectively deal with the condition plaintiff will require the following:

- (i) Psychological services for psychotherapy fortnightly for **12 months** at R1 900.00 per month, totaling to R57 000.00.

- (ii) Sessions with a psycho-pharmacological therapy for **30 months** at R2 650.00 totaling the sum of R79 500.00.
- (iii) Prescription medication for **30 months** which will amount to R27 656.96.

Plastic, Reconstructive and Cosmetic Surgeon: Dr Danie Hoffmann

[14] Following consultations with plaintiff, the Cosmetic Surgeon in the report states the following:

“She finds the scars on the right calf and left calf troublesome as it is very visible and unsightly. She complains of discomfort over the scar tissue. She feels self-conscious about the scarring. The effects of scarring are not only physical, but has a psychological component as well. Not only is damages caused to the body’ largest organ, but also the patient’s self-image.”

[15] As regards the scarring on the right leg, that is the Right Lateral Superior\Inferior Calf.

“She sustained now penetrating rubber bullet injuries to the right lower leg. She now presents with a round 2.0cm x 2.0cm wide pigmented scar over the lateral aspect of the right superior calf and a round 3.0cm x 2.0cm wide pigmented scar over the lateral aspects of the right inferior calf...”

The patient complains that the scars are very and cause her discomfort. She is not able to do exercise or participate in sport anymore...”

[16] With regards to the scarring on her left leg that is the Left Medial Calf the expert's report reads:

"She sustained a non-penetrating rubber bullet injury to the left lower leg. She now presents with a faint 1.0cm x 1.0 cm wide pigmented scar over the medial aspect of the left calf."

[17] What is of essence is that the expert states specifically what the injury suffered on the left lower leg is non-penetrating. This can be treated with surgical revision which amounts to R48 000.00, including medication.

[18] The prognosis recorded by the doctor in her report is to the following effect:

"It is my opinion that the patient's scarring over the right leg is amenable to improvement with treatment but will always be present.

Factors like the patient's age, rate of healing and skin condition all play a role in the overall success rate.

Another factor that would play a role is patient's attitude towards the surgery as well as aftercare.

The fact that her scarring will not be visible, should also better the patient's self-esteem and self-image.

I defer to the opinion of a clinical Psychologist in this regard."

PARTIES' SUBMISSIONS

The plaintiff

[19] Counsel for the plaintiff, Ms Smit submitted that from her evidence, plaintiff has suffered emotional trauma as a result of the incident. In this regard, she referred to the report of the expert witness, Clinical Psychologist Moyra Tsambos.

[20] The shooting occurred in the presence of the plaintiff's 9 year old son. She feels hurt because she was a member of a community based group known as "Women Against Drugs and Crime". This organisation has a working relationship with the police. Unfortunately, it is the same members of the SAPS who have now shot her. She is justified in feeling betrayed.

[21] Regarding her she injuries and scars, plaintiff feels hopeless and ugly. People's consistent enquiry regarding her scars, serve as a constant reminder of the trauma she went through. Based on all of the above, she submitted that a fair and reasonable amount of compensation in respect of general damages is R400 000-00.

The defendant

[22] Counsel for the defendant Ms Ramabulana submitted that there are material contradictions in the evidence of the defendant. These contradictions are important and relevant because expert opinions are based on evidence and facts presented to them, for example in this case, by the plaintiff personally. She also referred the court in this regard to case law, being

Coopers (South Africa) Ltd v Deutsche Gaelschaft fur Schadelings bekampung MBA 1976 (3) SA 352 (A) AT 371G-H

LW Phakathi v Road Accident Fund Case no: 14783/2017 an unreported case of the North Gauteng, Pretoria Division.

[23] She submitted that a fair and reasonable amount in this specific case is R200 000-00. In support of this submission, she points out and on the following facts and circumstances:

- i) According to the report of the clinical psychologist, plaintiff's post traumatic stress disorder ("the PTSD") is not permanent. It is for this reason that the treatment recommended is for a specified short period only.

- ii) In her prognosis, the Plastic and Reconstructive Surgeon points out that while the plaintiff's scarring on the right leg will be permanent, it is amenable to improvement with recommended treatment, over a period of time.

- iii) Over and above that, the specialist surgeon makes the point that this scarring will not be visible. For this reason, the plaintiff will not be detrimentally affected, in her self-esteem.

LEGAL PRINCIPLES AND RELEVANT CASE LAW ON GENERAL DAMAGES.

[24] It is trite that in consideration and determination of quantum of general damages, a trial court has a discretion to determine and arrive at what it considers a fair and reasonable amount. In exercising the discretion it has, the court must have regard to the plaintiff's nature of injuries sustained pain and suffering, scarring and discomfort, loss of amenities of life and so on. Having done so, the court must also take into account and determine whether any of these are of a temporary or permanent nature.

[25] In Mashigo v Road Accident Fund (2120/2014) [2018] ZAGGPPHC 539 the court summarised the approach to be adopted by a trial court as follows:

“[10] A claim for general or non-patrimonial damages requires an assessment of the plaintiff’s pain and suffering, disfigurement, permanent disability, and loss of amenities of life and attaching a monetary value thereto. The exercise is, by its very nature; both difficult and discretionary with wide-ranging permutations. As will be illustrated herein later, it is very difficult if not impossible to find a case on all four with the one to be decided. The oft-quoted same of Southern Insurance Association v Bailey NO 1984 (1) SA 98 AD confirmed that even the Supreme Court of Appeal had difficulty in laying down rules as to how the problem of an award for general damages should be approached. The accepted approach is the ‘flexible one’ described in Sandler v Wholesale Coal Supplier Ltd 1941 AD 1941 at 199, namely; the submissions were ‘The amount to be awarded as compensation can only be determined by broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge’s view of what is fair in all the circumstances of the case.’”

[26] In Road Accident Fund v Marunga 2003(5) SA 164 (SCA) the court held:

“This court has repeatedly stated that in cases which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises, a trial court in considering all the facts and circumstances of the case, the court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.”

[27] Where a court has a discretion to exercise as in the case in the determination of general damages, such as discretion has to be exercised judicially, taking into account basic principles of fairness and justice to all the parties as well as considerations of public policy. Having said that, one of the most useful tools and considerations in the exercise

of such discretion is to have regard to previous comparable cases on the issue.

[28] In Minister of Safety and Security v Seymor 2006 (6) SA 320 (SCA) the court held:

“The assessment of awards of courts damages with reference to awards made in previous cases is brought with difficulties. The fact of a particular case need to be looked as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that...”

[29] This approach was also confirmed by Constitutional Court in Mahlangu and Another v Minister of Police 2021 (7) BCLR 698 (CC) where the Constitutional Court held that the awarding of damages in such a case, is intended to deter and prevent future infringements of human rights, by organ of state. The court went further to confirm that the award of damages constitutes goodwill gesture for the successful plaintiff and not intended to try and rectify the wrong that has been committed.

COMPARABLE CASE LAW

[30] In her submissions, counsel for the plaintiff referred me to a member of previous cases. In Minister of Police v Dlwathi (20604/14) [2016] ZASCA6 (2 March 2016). In this case the plaintiff suffered facial injuries, loss of hearing and PTSD. All of these, as a result of assault by the police. The court awarded R200 000.00 in **2016** which in today's adjustment amounts to approximately R258 000.00.

[31] She again referred the court to MTA obo MK v Road Accident Fund (4484/2016) [2018] ZAGPJHC (18 June 2018). In this case, a minor sustained a scar on her forehead, which was clearly visible. The court awarded damages of R400 000.00. In doing so, the court took into account the fact that the scar was clearly visible and ugly.

[32] I have also been referred to and asked to have regard specifically to cases involving leg injuries. In Ndzungu v Road Accident Fund (790/2008) ZAECMHC 9 (1April 2020), a 70 year old male sustained and suffered leg injuries which included; a comminuted compound fracture of the tibia and fibia, with associated fibular fracture; malunion of the fracture of the tibia and fibia with angulation resulting in 3cm shortening of the leg. He was unable to walk for long distances. He walked with a limp and used a crutch. The court awarded R220 000.00 as general damages.

Conclusion

[33] Taking into account all of the above, I am of the view that the plaintiff's scars on the legs are distinguishable from those facial scars which are clearly and easily visible, which was the position in cases to which I have been referred.

[34] Under the circumstances, I am of the view that a fair and just compensation in this case is the amount of R300 000.00 (Three Hundred Thousand Rand) in respect of general damages. This is over and above the amount of R261 656.91 which is common cause.

[35] Counsel for both parties are in agreement that plaintiff is in addition, entitled to interest on the capital amount at the rate of 10% per annum.

Order

[36] Consequently, I make the following order

1. The defendant is ordered to pay to the plaintiff a total amount of R561 656-96, made up as follows:

1.1 Future Medical Expenses: R261 656-96

1.2 General Damages: R300 000-00

2. The Defendant shall pay interest on the said amount of R561 656-96 at rate of 10% per annum calculated from date of judgment to date of payment thereof.

3. Defendant shall pay Plaintiff's costs of suit, which shall include:

3.1 All reserved costs.

3.2 All reservation costs of the plaintiff's two (2) expert namely.

3.2.1 Clinical Psychologist: Dr Moyra Tsambos

3.2.2 Plastic, Reconstructive and Cosmetic Surgeon: Dr Danie Hoffmann

S.S. MAAKANE
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

On behalf of the plaintiff:

Adv Smit

Instructed by:

Nienaber & Wissing Attorneys

Leopard Park

MMABATHO

On behalf of the respondent:

Adv Ramabulana

Instructed by:

The State Attorney

MMABATHO

Date Heard: 27 February 2023

Date of Judgment: 12 October 2023