

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



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG**

CASE NUMBER: 393/2015

In the matter between:-

MOSEPELE REBECCA

Plaintiff

and

L MOKGETHI N.O

1st Defendant

**(In her capacity as executrix of the deceased
Estate of JEFFREY KESOABAKA MOKGETHI)**

MINISTER OF POLICE

2nd Defendant

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **16 February 2024**.

ORDER

(1) The first and second defendants shall pay an amount of R36 450.00 for past and future medical expenses in respect of the plaintiff.

(2) The first and second defendants shall pay an amount of R650 000.00 for pain and suffering, loss of amenities of life, violation and contumelia in respect of the plaintiff.

(3) The defendants shall pay interest on the amounts in (1) and (2) above at the prescribed legal rate a tempora morae to date of payment, jointly and severally, the one paying the other to be absolved.

(4) The defendants shall pay the costs of suit on a scale as between party and party.

JUDGMENT ON QUANTUM

MFENYANA J

Introduction

[1] This matter served before me for determination of the

quantum of damages suffered by the plaintiff as a result of the assault and rape by an off- duty police officer on 2 September 2014.

- [2] The plaintiff had sued out a summons against the defendants claiming an amount of R1 950 000.00 for general damages, and R50 000.00 for past and future medical expenses.
- [3] The claim against the second defendant was premised on vicarious liability, as the first defendant was a member of the South African Police Service (SAPS) at the time he committed the offences.
- [4] The issues of merits and quantum were separated and the matter proceeded on the merits only, before Gutta J. On 29 August 2018, the court granted judgment on the merits, against the first defendant, and dismissed the plaintiff's claim against the second defendant.
- [5] Having successfully appealed against the decision of Gutta J, in respect of the liability of the second defendant, the Full Court of this Division, on 4 February 2021 found that the first

defendant was acting within the course and scope of his employment with the second defendant when he assaulted the plaintiff, threatening to shoot her with his official firearm, and thereafter raping her.

[6] The second defendant is, as a consequence, vicariously liable for the acts committed by the first defendant. The nett effect of the two judgments by Gutta J and the Full Court is that the defendants are liable for 100% of the agreed or proven damages of the plaintiff.

[7] It is common cause that on 2 September 2014 at Vryburg, within the jurisdiction of this Court, the first defendant assaulted and raped the plaintiff. At the time of the commission of the offences, the plaintiff was 23 years old. It is further common cause that on 7 February 2017, the first defendant succumbed to injuries he sustained in a motor vehicle accident.

Trial on quantum

[8] During trial, the plaintiff testified that she was three months pregnant when the offences were committed. She further

testified that she gave birth prematurely and the child died six months later. She could not remember the date of birth of her baby but stated that they were discharged from hospital after 3 months. She ended up losing her job as she was away for a long time.

[9] Upon being discharged she found employment at Legalwise in Mahikeng. At the time, she had left her newborn and her eight year old son with an elderly woman in her residential community, and would visit them on weekends.

[10] One Friday, after she had arrived back home in Vryburg, the baby got sick. At the time the childminder was not at home, and had left the children with neighbours. It later turned out that she had been admitted in hospital. Unbeknown to her, the baby had also been admitted to hospital. He died that Friday in her absence.

[11] The plaintiff further testified that she was assessed by psychologists, but could not remember her baby's name as she tried to forget it, as it traumatised her. After she buried the baby in Taung, her hometown, she moved out of Vryburg and settled in Kuruman as the first defendant was terrorising

her, breaking windows and damaging her property. That was the only time that the first defendant stopped harassing her.

[12] She recounted an incident where one night, the first defendant entered her house at night. She testified that she escaped through the window with her children and got help from a passer-by.

[13] The plaintiff further testified that she had been left traumatised by the ordeal, that she sought psychological intervention, and does not feel free even when she is with her partner.

[14] There was no appearance on behalf of the first defendant, and the second defendant did not call any witnesses.

[15] A report submitted by Ms Moyra Tsambos (Ms Tsambos), a clinical psychologist, records that the plaintiff suffers from post-traumatic stress disorder with depressive features. She recommended that the plaintiff be referred to a specialist psychiatrist for treatment. Ms Tsambos interviewed and assessed the plaintiff on 9 July 2021.

[16] On 26 July 2022, the plaintiff was interviewed by the clinical

psychologist, Ms Nicole Healy (Ms Healy) on behalf of the second defendant. Likewise, Ms Healy concluded that the plaintiff is experiencing residual symptoms of post- traumatic stress and recommended psychotherapy sessions as well as a consultation with a psychiatrist.

[17] In a joint minute signed by the psychologists in April 2023, both Mses Tsambos and Healy record that the plaintiff had no history of trauma prior to the incident, and that the plaintiff had no psychological changes and behavioural problems before the incident. Both psychologists agree that the rape has left her with feelings of anger, bitterness, self-loathing and emotional pain, which contribute to her fluctuating day-to- day cognitive functioning.

[18] Notably, both experts conclude that the plaintiff's quality of life has been compromised, and that she has suffered a substantial loss of amenities of life and has feelings of a devalued sense of self, which the plaintiff feels has led to her social failures. They both recommend a total of twenty-seven psychotherapy sessions estimated at R1 350.00 per session, to a total amount of R36 450.00.

- [19] It is on this basis that the quantum of damages in respect of past and future medical expenses was settled between the parties, at an amount of R36 450.00.
- [20] In cross examination, it was suggested to the plaintiff that her baby died due to miscarriage. She denied this, stating that she had given birth, and actually buried the baby after he died. The precise time of death of the plaintiff's baby was placed in dispute as there are contradicting versions from the plaintiff.
- [21] It was pointed out by Mr Mmolawa, for the second defendant, that the plaintiff was tailoring her evidence in order to solicit sympathy from the court, and possibly obtain a higher award.
- [22] There were material contradictions with regard to the evidence given by the plaintiff in relation to the time she spent in hospital after the birth of her baby, and the account she gave to the psychologists. She told the court that her baby spent one month in an incubator. She thereafter stayed in hospital for three months with the baby, and on the third month she asked to be discharged from hospital as she had

left her older son at home. The baby started getting sick again, and was readmitted for a further two months. She told the psychologists that her baby died after two months. She was taken to task on this. In my view this has no bearing on quantum. Rape in itself is an abhorrent crime and a violation of the victim. No evidence was led that there was any causal link between the death of the plaintiff's baby and the incident.

[23] Further contradictions relate to whether she was susceptible to suicide attempts before the incident, or whether this was as a result of the incident. The import of this is the amount of time for which the plaintiff had to endure the consequences of the rape, as the baby was born prematurely, which according to Ms Healy is not uncommon. Whether she spent two months or six months caring for the baby is also material.

[24] While it cannot be gainsaid that the plaintiff suffered greatly as a result of the rape and assault, her disposition prior to the incident, and whether she had suicide attempts even before the incident, are also of relevance.

[25] Even though the plaintiff was questioned about the cause of death of her baby, there is no evidence to the effect that her

baby died due to miscarriage, as was suggested by the second defendant. Mr Mmolawa questioned the plaintiff why none of the reports from the psychologists say anything about the birth of the child. She stated that the psychologists were asking her questions and she told them her story.

[26] It was put to the plaintiff that she was not telling the truth when she told the court that she had attempted suicide three times. Essentially, Mr Mmolawa stated that the plaintiff exaggerated her story in order to extort more money in damages.

[27] I agree with Mr Mmolawa that while the plaintiff is entitled to compensation, she may have overplayed some of the events and exaggerated their impact, as there is no evidence to support some of her allegations, and in some instances chose to simply deny having made the allegations.

[28] She denied that her house was under police guard, or that she gave a different description of the car driven by the deceased at the time of the incident. Thus Mr Mmolawa contended that although the second defendant was entitled to compensate the plaintiff, it could not be in the amount

claimed by the plaintiff in light of conflicting evidence. Consequently he submitted that an amount between R400 000.00 and R600 000.00 would be appropriate in the circumstances. He further contended that no separate award should be made for *contumelia*, as there was no separate claim for it.

[29] There is no doubt that the rape had a negative effect on the plaintiff. According to Ms Healy, the loss of her baby had a significant impact on her.

Determination of damages

[30] What stands to be determined by this Court is the appropriate amount of general damages. In her particulars of claim, the plaintiff claims a total amount of R2 000 000.00 against the defendants.

[31] In the heads of argument submitted on behalf of the plaintiff, it is submitted that an amount of R1 100 000.00 (R500 000.00 for *contumelia*, and R600 000.00 for loss of amenities of life) as well as the agreed amount of R36 450.00 for past and future medical expenses would be

fair in the circumstances.

[32] Placing reliance on *AK v Minister of Police*¹ and *F v Minister of Safety and Security and Another*², Ms Zwiendelaar in her written submissions stated that the issue of the quantum of damages to be awarded to the plaintiff should be considered against the background that the prohibition of rape and all forms of gender-based violence is a norm of international law and various treaties, to which South Africa is a signatory, as well as the fact that as a policeman, Mr Mokgethi was in a position of trust, charged with a duty to protect the plaintiff.

[33] Conceding to the horrifying nature of the crime that rape is, in which the victim's dignity and feelings are treated with utter contempt, counsel for the second defendant relied on *N v T*³ and submitted that the award to be awarded should be substantial. Counsel further stated that 'sexual violence and the threat of sexual violence goes to the core of women's subordination in society, and is the single greatest threat to the self-determination of South African women'.⁴

¹ 2023(1) SACR 113 (CC).

² 2014(6) SA 44 (WCC).

³ 1994 (1) SA 862 (C).

⁴ See in this regard: *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC), paragraph 62.

Comparative awards

[34] I was referred to previous awards made by this Division, and other Divisions. What stands out is that an award of damages is intended to provide a *solatium* for the infraction on her rights and not to enrich the plaintiff. Of importance is that it must be noted that an arrest is an infringement of a constitutionally entrenched right to freedom of movement and dignity. In this case, the plaintiff was also violated by the first defendant.

[35] Previous awards provide no more than a guide of what other courts have considered appropriate, and “have no higher value than that”.⁵ I might also add that no price can be assigned to a person’s worth in such circumstances.

[36] As the court observed in *Pitt v Economic Insurance Co. Ltd*⁶:

“...the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour

⁵ See in this regard: *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA).

⁶ 1957 (3) SA 284 (D), paragraph 287E – F.

out largesse from the horn of plenty at the defendant's expense."

[37] In *F v Minister of Safety and Security and Another*⁷ the court awarded a total amount of R500 000.00 for *contumelia* and pain and suffering to a 29 year old plaintiff who had been raped by an off-duty policeman when she was 13 years old.

[38] In *DW v Minister of Police and Another*⁸, the court awarded an amount of R1 100 000.00 for *contumelia*, pain and suffering, disfigurement, psychological and mental injury, emotional shock and loss of amenities of life to a 22 year old plaintiff. The plaintiff also sustained numerous stab wounds some of which were life threatening. She had spent a long time in the intensive care unit.

[39] In *Bridgman NO v Witzenberg Municipality*, an 18 year old plaintiff was awarded an amount of R750 000.00 for general damages after she was abducted and raped by three youths at a holiday resort. She suffered post-traumatic stress disorder and was still suffering same at the time of the trial.

⁷ Ibid.

⁸ 2017 (1) SACR 441.

[40] In *Philander v Minister of Safety and Security*⁹, this Division in 2013 awarded an amount of R180 000.00 for general damages to a 36 year old woman who had been assaulted and raped twice by a police officer.

[41] What is clear from these awards is that an award for damages cannot be made with mathematical precision. No two matters are the same.

[42] In the present case, the plaintiff was raped by the first defendant at gunpoint. She was 23 years and pregnant at the time. She suffered mental distress as a result of the rape and the loss of her baby. She still harbours feelings of anger and self-loathing which she is still struggling with, as well as post-traumatic stress for which she has to be treated.

[43] With regard to her suicide attempts, the plaintiff testified that she made three attempts on her life before the incident. However, it transpired after considering the psychologist's report that the plaintiff had attempted to take her life before the incident due to problems in her upbringing and the hardships she faced, having lost her mother at a young age and having to fend for herself. Whilst the suicide attempts would

⁹ (473/2011) [2013] ZANWHC 51 (6 June 2013).

ordinarily have an additional bearing on the amount of damages to be awarded, the fact that these happened before the incident, mitigates against the amount of damages to be awarded by this court.

Order

In the result, I make the following order:

- (1) *The first and second defendants shall pay an amount of R36 450.00 for past and future medical expenses in respect of the plaintiff, jointly and severally, the one paying the other to be absolved.*
- (2) *The first and second defendants shall pay an amount of R650 000.00 for pain and suffering, loss of amenities of life, violation and contumelia in respect of the plaintiff, jointly and severally, the one paying the other to be absolved.*
- (3) *The defendants shall pay interest on the amounts in (1) and (2) above at the prescribed legal rate a tempora morae to date of payment jointly and severally, the one paying the other to be absolved.*
- (4) *The defendants shall pay the costs of suit on a scale as between party and party.*

**S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION MAHIKENG**

Appearances:

For the plaintiff:

C J Zwegelaar

Instructed by:

**Nienaber & Wissing
Attorneys**

For the defendants:

M. E Mmolawa

Instructed by:

State Attorney, Mmabatho

DATE RESERVED:

12 MAY 2023

DATE OF JUDGMENT:

16 FEBRUARY 2024