



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20604/14

In the matter between

Not Reportable

MINISTER OF POLICE

APPELLANT

and

STEVE DLWATHI

RESPONDENT

Neutral citation: *Minister of Police v Dlwathi* (20604/14) [2016] ZASCA 6 (2 March 2016)

Coram: Cachalia, Majiedt, Saldulker and Swain JJA and Baartman AJA

Heard: 16 FEBRUARY 2016

Delivered: 2 MARCH 2016

Summary: Damages – facial injuries, loss of hearing and depression resulting from unlawful assault by police – general damages award of R675 000 for pain, suffering, disfigurement and loss of the amenities of life excessive – reduced to R200 000.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg
(Siwendu AJ sitting as court of first instance):

- 1 The appeal is upheld in part.
- 2 Paragraph 1 of the order of the court below is set aside and substituted with the following:
‘The Defendant is to pay the Plaintiff the sum of R200 000 for general damages.’
- 3 The appellant is ordered to pay the respondent’s costs of appeal.

JUDGMENT

MAJIEDT JA (Cachalia, Saldulker and Swain JJA and Baartman concurring):

[1] This appeal concerns an award of damages made by the Gauteng Local Division of the High Court, Johannesburg (Siwendu AJ sitting as court of first instance). The award was made for injuries sustained by the respondent, Mr Steve Dlwathi, and their sequelae as a consequence of an unlawful assault on him by members of the South African Police Service (SAPS), acting within the course and scope of their employment with the appellant, the Minister of Police. The merits of the claim were conceded and the court below was seized only with the quantum of damages. Leave to appeal was granted by the court a quo in respect of the award for general damages and for loss of future earnings. This court granted leave in respect of the award for past loss of income.

[2] At the hearing before us the appeal against the award for past loss of income and for future loss of earnings was abandoned during the course of the hearing and the only remaining issue was the award for general damages. It is necessary, however, to say something later about the abandoned part of the appeal. I record at the outset that counsel who appeared for the Minister in this court did not appear at the trial.

[3] The events which gave rise to the claim are briefly these. Mr Dlwathi was a practising advocate of the Johannesburg Bar at the time of the assault. He was unlawfully assaulted in the presence of friends by members of the SAPS on 24 June 2005. At that time Mr Dlwathi was in his sixth year of private practice. The Minister initially admitted the nature and extent of the physical injuries sustained by him but not their psychological effects on him.

[4] The physical injuries were agreed at a pre-trial conference to be the following:

- (a) damage to, amongst others, the tympanic membrane of the left ear with resultant loss of hearing;
- (b) blunt force trauma to the head and jaw resulting in, amongst others, facial and dental injuries with multiple loss and damage to Mr Dlwathi's teeth and the temporo mandibular joints;
- (c) blunt force trauma to the face resulting in lacerations and bleeding;
- (d) a soft tissue injury to the cervical spine.

As regards the psychiatric effect of the assault the parties agreed that 'the Plaintiff manifests symptoms of depression. The degree and/or extent of such depression remains in dispute and furthermore, whether or not the Plaintiff is suffering from post-traumatic stress disorder'. In respect of the psychological effect of the assault, the parties agreed that those were as set out in the reports of their respective experts, Dr Naude (for the respondent) and Ms Motsamai (for the appellant). Dr Naudé and Ms Motsamai agreed in a joint minute that after the assault Mr Dlwathi:

- (i) experienced a significant deterioration in his functioning;

- (ii) has no self-confidence and feels self-conscious about his appearance and the difficulty with his teeth;
- (iii) has memory and concentration difficulties;
- (iv) has withdrawn from his hobbies, social and leisure time activities;
- (v) is more irritable and has developed depression and anxiety;
- (vi) suffers from post-traumatic stress.

[5] It was also common cause that, as a result of his injuries, Mr Dlwathi would have to use a hearing aid to compensate for his hearing loss and to undergo extensive surgery to his jaw. On Mr Dlwathi's version, his practice suffered as briefs from attorneys dwindled, causing him to close his practice and to resign from the Johannesburg bar during 2009. He ascribed this to the ongoing psychological and psychiatric effects of his ordeal, including loss of both memory and concentration, intolerance, impatience and irritability, sleeplessness and significant depression.

[6] The court below found that the evidence adduced proved that Mr Dlwathi suffered from 'severe and/or major clinical depression' It, however, found the probabilities evenly balanced in respect of his alleged post-traumatic stress disorder and found against him on this aspect. The court below accepted that his depression was chronic and that the prognosis in that respect was poor.

[7] After a consideration of the common cause and proved facts as well as awards in comparable cases, the learned judge awarded a globular sum for pain, suffering, disfigurement and the loss of amenities of life in the amount of R675 000. As stated, this is the only remaining issue before us.

[8] It is well established that an assessment of an appropriate award of general damages (sometimes also referred to as non-pecuniary damages) is a discretionary matter and has as its objective to fairly and adequately compensate an injured party (see *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H-535A and *Road Accident Fund v Marunga* ZASCA (144/2002) [2003] ZASCA 19; 2003 (5) SA 164 (SCA) para 23). An appellate

court will interfere with an award for general damages in instances of a striking disparity between what the trial court awarded and what the appellate court considers ought to have been awarded (*Protea* at 535A; *Marunga* para 23). It will also interfere where there has been an irregularity or misdirection (*Minister of Safety and Security v Scott & another ZASCA* (969/2013) [2014] ZASCA 84; 2014 (6) SA 1 (SCA) para 42). A misdirection might sometimes appear from a court's reasoning and in other instances it might be inferred from a grossly excessive award (*Minister of Safety and Security v Kruger ZASCA* (183/10) [2011] ZASCA 7; 2011 (1) SACR 529 (SCA) para 27). In the course of her judgment, the learned judge in the court below made the following remarks:

' . . . the court is of the view that the time has come to distinguish those cases, such as this one, where damages incurred arise out of an unwarranted, callous attack and violation that goes beyond the bounds of legitimate law enforcement to clearly signal that such conduct will not be tolerated. The defendant and the plaintiff cannot both be embraced under the same cloak when weighing considerations of what is just and fair regardless of the circumstances of the case.'

[9] In my view the learned judge misdirected herself by introducing a punitive element in the award of general damages so as to deter the kind of unlawful conduct to which the police subjected Mr Dlwathi. It should be borne in mind that general damages are awarded for bodily injury, which includes injury to personality. Its object is to compensate loss, not punish the wrongdoer. If it were otherwise awards would be made even where no loss is suffered. It is apparent that this misdirection resulted in the learned judge making what I regard as an excessive award.

[10] The amount of R675 000 for general damages, therefore, does not accord with awards in comparable cases. While there is no hard and fast rule, some guidance may be derived from comparable cases in assessing general damages (*Protea* at 535B–536B). Mr Dlwathi must be compensated for the pain and suffering (both physical and mental) he had to endure, as well as for his loss of the amenities of life and disfigurement from permanent minor facial scarring. It is plain that, while he has not been rendered unemployable (he

now works for the Department of Justice as a senior State advocate in a specialised unit of the prosecutions branch), he will not be able to pursue his first career choice as an advocate in private practice. His emotional well-being has been seriously compromised and his major depressive disorder is in all probability of a permanent nature. At the very least, the prognosis for treatment of that disorder is poor.

[11] In supporting the award made by the court below, counsel for Mr Dlwathi referred us to a number of what he contended are comparable cases. These range from cases involving dental and facial injuries to head injuries with associated anxiety and mood disorders and to those involving the violation of dignity and reputation. It is axiomatic that no two cases are exactly the same. I do not deem it necessary to trawl through all the authorities cited by counsel. Since the emphasis during oral argument was on the last mentioned category of cases (involving, amongst others, head or brain injuries), it will suffice to consider only some of those.

[12] The awards in those cases were significantly higher than the awards in the other categories of cases referred to, no doubt due to the significant brain injuries in all of them. In this regard, while it is certainly not conclusive, it is of considerable significance that the cases relied on most heavily by Mr Dlwathi's counsel are all categorized under 'very severe brain damage' in M M Corbett and D P Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* Vol VI (2013) (C & H). Mr Dlwathi did not sustain any brain damage as a consequence of the unlawful assault. It is, however, common cause that his psychiatric and psychological deficits are the sequelae of the assault perpetrated on him. I next consider some of the cases cited by counsel.

[13] First there is *Torres v Road Accident Fund* (C & H Vol VI at A 4-1) where an amount of R600 000 was awarded as general damages in 2007, which equates to R1 025 000 in present day value. There the plaintiff had, however, suffered, amongst other injuries, a severe diffuse brain injury with significant neuro-cognitive and neuro-behavioural deficits. In *Raupert v Road Accident Fund* (2153/2008) [2011] ZAECPEHC (1 February 2011); (C & H Vol

VI at A 4-52) the plaintiff had sustained, amongst other injuries, a very significant head injury consisting of extensive fracturing of the skull with bifrontal lobe contusions, subarachnoid haemorrhage and generalised brain oedema. She was awarded R750 000 as general damages in 2011 – R949 000 in today's monetary terms. In *Smit v Road Accident Fund* (24883/2008) [2012] ZAGPPHC 294 (16 November 2012); (C & H Vol VI at A 4-188) an amount of R650 000 was awarded for general damages in 2012 (present day value: R779 000) for a moderate to severe organic brain syndrome with associated frontal lobe symptomatology and post-traumatic epilepsy as well as a fractured right femur. A similar award was made in that same year (2012) in *Potgieter v Road Accident Fund* (2416/05) [2012] ZAECPCHC 99 (18 December 2012) (C & H Vol VI at A 4-195) for a severe head injury comprising a traumatic brain injury with considerable frontal lobe dysfunction and other soft tissue injuries and lacerations of the scalp.

[14] The most recent award referred to is *Mofokeng v Road Accident Fund* (11101/2009) [2014] ZAGPJHC 160 (1 July 2014) (C & H Vol VII at B 4 – 12) where the plaintiff had been awarded R700 000 for general damages (present day value R772 000) for a moderately severe head injury and soft tissue injuries to the neck and lower back. The brain injury was referred to as a diffuse rotational shear injury, characterised by an effective disconnection between the frontal lobes and the rest of the brain.

[15] It is readily apparent that the cases discussed above do not lend much assistance in assessing what the fair and adequate compensation in this case should be. They all involve moderate to severe head and brain injuries arising from motor vehicle accidents. This is not the case here. – Mr Dlwathi's deficits are the effects of the indignity and humiliation of an unlawful public assault. He did not sustain any brain injuries as a result of the assault. In deciding what an appropriate award would be to provide some solace to him and to compensate him for the pain and suffering, disfigurement and loss of the amenities of life, one will have to have regard to cases which are 'broadly similar in all material respects' (per Van Blerk JA in *Marine and Trade*

Insurance Co Ltd v Goliath 1968 (4) SA 329 (A) at 333G). These cases will deal with separate areas of similarity to the present instance.

[16] I start with *Van der Merwe v Minister van Veiligheid en Sekuriteit en ander* (716/07) [2009] ZANHC 72 (27 November 2009); (C & H Vol VI at K 2 – 1). There a 63 year old successful building contractor had been unlawfully arrested and detained in police custody for two and a half hours. As a result he was severely traumatised and had to undergo psychological and psychiatric treatment, without success. He presented with symptoms of depression and symptoms typically associated with post-traumatic stress disorder. He was awarded R25 000 in 2009, which equates to R32 000 in present day value.

[17] In *Sokombela v Minister of Safety and Security* (C & H Vol V, G6–1), the plaintiff had sustained a fractured mandible, laceration of the tongue, soft palate and lower lip and the destruction of two lower teeth (which subsequently had to be removed) after a bullet from a firearm had struck him behind the right ear and had exited through his mouth. Although these injuries are similar to those sustained by Mr Dlwathi, they are considerably more severe. In that instance the plaintiff was awarded R70 000 for general damages in 2003 (presented day value: R134 330).

[18] An assessment of appropriate general damages with reference to awards made in previous cases is, as Nugent JA observed in *Minister of Safety and Security v Seymour* (295/05) [2006] ZASCA 71; 2006 (6) SA 320 (SCA) para 17, ‘fraught with difficulty . . . (t)he facts of a particular case need to be looked at as a whole and few cases are directly comparable . . . (t)hey are a useful guide to what other courts have considered to be appropriate but they have no higher value than that’.

[19] After careful consideration and having regard to the physical and emotional sequelae of the assault upon Mr Dlwathi (in particular the poor prognosis in respect of his depression), I am of the view that an award of R200 000 for general damages will be fair and adequate compensation in this

case. In arriving at this amount I have derived some guidance from the awards made in *Van der Merwe and Sokombela*, above.

[20] It is necessary to say something briefly about the manner in which the trial was conducted by the Minister's legal representatives. During the course of the proceedings counsel for the Minister made a number of concessions and agreed that joint minutes and written reports of various experts would be admitted as evidence. These concessions and agreements resulted in the contents of joint minutes and/or written expert reports becoming common cause. Inexplicably though, the Minister's new legal team on appeal sought to challenge, in their main heads of argument, some of these agreed facts and contended that Mr Dlwathi's failure to call some of these experts to adduce evidence at the trial, should be held against him. They however, abandoned this stance in their supplementary heads of argument. One of the issues which then became common cause was the fact that Mr Dlwathi suffered from depression as a consequence of the assault. The concession on behalf of the Minister in this regard is surprising as the evidence adduced by Mr Dlwathi on his aspect was not too strong. In the main, that evidence emanated from Dr Larry Grinker, a specialist psychiatrist called by Mr Dlwathi. But Dr Grinker's conclusions appear to a large extent to be based on Mr Dlwathi's own narrative of the symptoms of his depression. There was no corroboration to support this diagnosis. Mr Dlwathi's own narrative of his depression in its various forms appears doubtful or, at best for him, exaggerated. He testified that, as a result of the assault, he felt despondent, lost and downcast and had lost his confidence and self-esteem. As a result he gave away his briefs, remained at home for some time and, upon his return to practice, battled to re-establish what he claimed used to be a flourishing junior advocate's practice. Eventually he said he resigned from the Bar and closed his practice.

[21] In my view the concession that Mr Dlwathi 'manifested symptoms of depression' and, more importantly, that there was no need to adduce the evidence of experts (other than Dr Grinker) on this aspect of Mr Dlwathi's case was incorrectly made. The manner in which this and other concessions were made caused the trial Judge some exasperation, quite understandably

so. As a result of this ill-considered concession, the fact of Mr Dlwathi's questionable depressive disorder and, to a lesser extent, the precise gravity thereof, largely fell away as an issue at the trial. There was also a lack of clarity on the part of counsel who appeared for the Minister in this court regarding the computation of the past and future loss of earnings, which they initially sought to challenge before us. This difficulty was largely due to a small but important part of the record not having been transcribed. Counsel for the Minister, however, accepted the correct state of affairs as explained in this court by Mr Dlwathi's counsel (who had also appeared for him at the trial). As a consequence, the Minister's challenge to the awards for past and future loss of earnings, was eventually abandoned before us.

[22] Lastly, there is the question of costs in this court and the punitive costs award made by the trial judge. As to the former – while the Minister has attained some success on appeal as far as the significant reduction in the amount of general damages is concerned, that was a relatively minor part of the case in the court below and before us. The larger part of the claim concerned past and future loss of earnings and it took up most of the time at the trial. That was also the case in this court until the appeal on these aspects was abandoned in the circumstances outlined above. The appellant's rather limited success in this court requires in my view an order for costs in the respondent's favour. With regard to the costs in the court a quo, the learned trial judge made a punitive costs order on an attorney and own client scale against the Minister. In exercising her discretion in this regard, the learned trial judge took into account the following factors:

- (a) 'her disquiet and dismay at the poor conduct of the matter which led to inordinate delays, adjournments and a failure to narrow the issues timeously through the pre-trial conference processes provided for in the Rules of Court';
- (b) the numerous ad hoc agreements and pre-trial conferences in the course of the hearing as a consequence of the laxity on the part of the Minister's legal team;
- (c) during the trial expert witnesses had not been provided with relevant information and reports by the Minister's legal representations, adversely affecting the calling of witnesses and the duration of the trial;

(d) the unseemly and unprofessional conduct, leading to inordinate delays in the prosecution of the dispute.

The difficulties enunciated above are borne out by the record. There are no grounds to interfere with the discretion exercised in this regard.

[19] The following order is made:

- 1 The appeal is upheld in part.
- 2 Paragraph 1 of the order of the court below is set aside and substituted with the following:
'The Defendant is to pay the Plaintiff the sum of R200 000 for general damages.'
- 3 The appellant is ordered to pay the respondent's costs of appeal.

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant: M Khoza SC and Z Gumede
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