

IN THE HIGH COURT OF LESOTHO

In The Matter Between

MATHAFENG NKOFI

PLAINTIFF

And

TALE RAMOREBOLI

DEFENDANT

JUDGMENT

Coram : Hon. N Majara
Date of hearing : 5th May 2014
Date of judgment : 12th August 2014

Summary

Claim for damages for assault – principles to be taken into account in assessing damages – damages designed to ameliorate the impairment of dignity caused by the physical and/or emotional suffering, but are not aimed at enriching the plaintiff – Court to also take into account prevalent economic conditions – onus on the plaintiff to establish the nature and extent of the injuries and the treatment he underwent – plaintiff awarded M75, 350.00.

ANNOTATIONS

BOOKS

1. Neethling, potgieter & Visser; Law of Delict; 5th Edition

STATUTES

1. High Court Rules No. 9 of 1980

CASES

1. Philander v Minister of Safety & Security (473/2011) (2013) ZAN WHC 51
2. De Jongh v Du Pisanie NO in Corbbet Nene v Road Accident Fund (EL 352/02) (2005) ZAECHC 49
3. Road Accident Fund v Delpot NO 2006 (3) SA
4. Road Accident Fund v Marunga 2003 (4) SA 164 SCA
5. Commander LDF & Another v Tlhoriso Letsie C of A (CIV) 28 of 2009

[1] The plaintiff instituted an action against the defendant for damages as a result of an alleged assault upon him by the defendant. Having been served with the summons as evinced by the return of service filed of record, the defendant did not enter notice of appearance to defend and the plaintiff set the matter down for a default judgement pursuant to the provisions of Rule 27(3)¹. On the date of hearing the plaintiff led evidence because his claim was un-liquidated.²

[2] In brief, his testimony was to the effect that on the 19th May 2013 the defendant assaulted him with a stick on the head as a result of which he suffered severe injuries *to wit*, 8 open wounds 6 of which had to be sutured at a hospital where he was treated as an in-patient for three days. He added that post the assault, he has lost his physical strength and has

¹ High Court Rules No. 9 of 1980

² High Court Rule 27 (5)

developed epilepsy. It was his case that he suffered damages as a result of the assault.

[3] The said damages were set out under various heads and totalled M155 000, 500. The amount was quantified as follows; M 100,000.00 for pain and suffering, M50.00 for hospital and medical expenses, M 50,000.00 for disfigurement and M5, 000.00 for medical expenses. Since the matter was uncontested, the Court postponed it for evaluation of damages to determine what would be a fair amount under the circumstances.

The Law on Damages

[4] In assessing damages, the courts are generally guided by the same principles, similar cases and past decisions all of which are generally instructive with respect to what factors are to be taken into account in the quantification of damages. It is a trite principle of law that when deciding the question of quantum in a claim for general damages the Court exercises a broad discretion in considering what would be fair and adequate compensation. These include but are not limited to, the particular facts and circumstances and the injuries sustained by the plaintiff, as well as the nature, permanence, severity and impact thereof on his life. See in this regard the decision in **Philander V Minister of Safety and Security**.³

[5] It has also been stated that these kinds of damages are designed to ameliorate as far as they can the impairment of dignity caused by the physical and/or emotional suffering, but are not aimed at enriching the

³ (473/2011) (2013) ZANWHC 51, (6 June 2013)

plaintiff. Thus in quoting with approval the decision in the case of **De Jongh v Du Pisanie NO** the Court in **Corbbet Nene v Road Accident Fund**⁴ stated that in awarding the damages the Court must strive to set reasonable and consistent limits and ensure that the award is fair to both sides. It must thus give just compensation to the plaintiff but *'must not pour out largesse from the horn of plenty at the defendant's expense'*.

[6] In the present case, it is clear from the doctor's note that the plaintiff submitted as part of his evidence that he suffered injuries as a result of the assault and developed epilepsy. However, it is unfortunate that the plaintiff did not give sufficient evidence to establish the nature and extent of the injuries and the treatment he received. Thus, while the doctor's letter does confirm the alleged assault, it does not show the extent of the alleged injuries, save to show that the plaintiff has since developed epilepsy. Therefore, it was incumbent upon him to establish that he did indeed sustain severe injuries on the basis of which he should be awarded the amount he claims.

[7] Contrary to what seems to be the norm in this jurisdiction, such evidence should not only come from the plaintiff but must also be supported by experts, including medical ones. In this regard, see the case of **Road Accident Fund v Delpot NO** and **Road Accident Fund v Marunga**.⁵

[8] Further, the Courts have been cautioned to also bear in mind awards in previously decided cases and to provide reasons for the basis of the amount they decide. In numerous decisions the Court of Appeal of Lesotho has reduced the amount of damages awarded by the High Court

⁴ (EL 352/02) (2005) ZAECHC 49

⁵ 2006 (3) SA; 2003 (4) SA 164 (SCA)

on the basis that the latter has failed to provide a reasoned basis for the ‘more often than not very high amounts awarded’.

[9] Thus, in this regard, it is salutary to note the remarks of the learned D.G Scott in the unanimous decision of the Court of Appeal in the case of **Commander, Lesotho Defence Force and Another v Tlhoriso Letsie** ⁶ which are is very instructive in this regard. At para 21-22 of the judgment the Court considered the difference between Lesotho and South Africa in terms of their respective prevalent economic conditions and how it is important to bear this factor in mind even where this Court is persuaded by South African decisions.

[10] In that case, the Court stated that based on the evidence before it, although the respondent was severely assaulted by the appellants, due to the economic situation in Lesotho, the amount awarded by the Court a quo was too high. I find it important to note that the evidence in that case was actually more elaborate than that adduced *in casu*. Therein the respondent had called an expert witness to testify about his condition which was not done in the present case.

[11] I have already stated that *in casu*, the only independent evidence aside from that of the plaintiff is the note from the doctor which shows that the plaintiff suffers from post-traumatic epilepsy as a result of the assault. In my view, the note is wanting insofar as proving the extent of the alleged injuries because *ex facie*, it is clear the doctor that wrote it is not the one that treated the plaintiff at the time of the assault. Thus, it is my view that its value is only relevant insofar as proving the resultant epileptic fits due to the injuries sustained It reads as follows:-

⁶ C of A (CIV) 28/2009 (unreported)

“This note serves to inform and confirm that the above-mentioned gentleman has a history of head injury in May 2013 (secondary to assault with a stick).

He now suffers from post-traumatic epilepsy (fits post-injury (head-)).

Kind regards.”

[12] In my view, in the absence of evidence from the doctor that actually treated the plaintiff after the assault, the evidence is not sufficient to prove the nature and extent of the injuries he sustained.

[13] In addition, although the plaintiff also claimed damages for disfigurement, he failed to bring sufficient evidence to establish same save his testimony that he sustained 8 open wounds, 6 of which were sutured. He did not testify that the said injuries and or scars have not healed completely though it was incumbent upon him to do so. Likewise, the doctor's note is not helpful in this respect as it sounds more like a confirmation of something that the author knows nothing about first-hand.

[14] At any rate it is my opinion that the plaintiff's claim with respect to disfigurement properly falls under the head of pain and suffering because epilepsy is a perpetual condition that undoubtedly brings about suffering to a person without necessarily being a physical disfigurement. It is also imperative that a claim for disfigurement which is the state of having one's appearance deeply and persistently harmed due to an assault must also be proved by medical evidence.

[15] Thus, in their work,⁷ **Neethling, Potgieter and Visser**, posit that the extent of the loss is determined by *inter alia* the plaintiff's sex, age, visibility of the disfigurement and its influence on the plaintiff's life. In the present case, there is no evidence to prove that plaintiff was disfigured and it is my view that this prayer should fall away.

[16] I should also mention that on the date of hearing, the plaintiff's Counsel informed the Court that the plaintiff was abandoning the second prayer for medical expenses but was proceeding with the fourth one which is more or less repetitive of that one in which he claims M5, 000.00. Once again, I have already shown that the plaintiff handed in a note which *ex facie*, was penned by a Dr. M.J. Rathebe as part of his evidence. However he did not hand in any documentary proof for the actual amount he had to pay for the treatment and or consultation.

[17] It cannot be overemphasised that he who alleges must prove and the plaintiff bore the onus of proving the amount that he claims he incurred under this head. Thus while it cannot be disputed that he had to seek medical help post the assault, the only amount this Court can award him can only be nominal in all fairness.

[18] Having taken all the above considerations into account, it is my finding that the amount that would be fair and just *in casu* is as follows:-

Default judgment is granted in favour of the plaintiff for payment of damages as follows:

(a) M75, 000.00 for pain and suffering;

⁷ Law of Delict; 5th Edition P225

(b) M350. 00 for medical expenses;

(c) Costs of suit.

N. MAJARA
JUDGE

For the plaintiff : Mr. Likhoeli

For the defendant : No appearance