

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2020/01723

In the matter between:

JANE JELINDA OWOSES

PLAINTIFF

and

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

1st DEFENDANT

MINISTER OF HOME AFFAIRS, IMMIGRATION,

SAFETY AND SECURITY

2nd DEFENDANT

MINISTER OF DEFENSE AND VETERAN AFFAIRS

3rd DEFENDANT

MUNICIPAL COUNCIL FOR THE MUNICIPALITY

OF WINDHOEK

4th DEFENDANT

Neutral citation: *Owoses v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2020/01723) [2022] NAHCMD 484 (15 September 2022)

Coram: COLEMAN J

Heard: 1 August 2022

Delivered: 15 September 2022

Flynote: Delict – Assault – Action for damages – Assessment of damages is a discretionary matter and has as its objective to fairly and adequately compensate an

injured party – Amount to be awarded as compensation cannot be determined with mathematical precision and awards in previous cases serve as a guide.

Summary: The plaintiff is a woman, 53 years of age (she was 49 at the time of the incident) and was employed as a flight attendant with Air Namibia. She claims N\$145 000 as general damages for pain, suffering and loss of amenities of life as a result of an assault. Plaintiff says that she was assaulted by members of the Namibian Police, Defence Force and Windhoek City Police on or about 2 June 2019 at approximately 17h00 to 18h00. This assault occurred at or near her house in Windhoek North. She asserts that this assault resulted in her suffering injuries, trauma, pain and indignity. She alleges that she was slapped across the face by a tall unknown member of the Namibian Defence Force. He also hit her on her back with the butt of his assault rifle. She alleges that she ran into her house and was again assaulted in her house by the same person.

Held that in determining the quantum of general damages one should consider the person before court as well as the circumstances of the incident. The age of the person, his or her gender, the psychological make-up of the person, the nature and duration of the violation, the impact of the trauma on the person and the duration of the physical and psychological consequences of the violation should be considered. Plaintiff in this matter is a woman aged 53 (49 at the time of the incident). She was assaulted on her premises by members of the Namibian Police and Namibian Defence Force who were part of a law enforcement operation. This is atrocious and is treated as a severe assault. The fact that a man armed with an assault rifle sees it fit to assault a woman with the butt of the rifle is disturbing and must be extremely traumatizing for a 49 year old woman. She was diagnosed with post-traumatic stress disorder and suffers from depression and anxiety. It will likely haunt her for some time. Consequently, the court awards the plaintiff N\$145 000 as damages.

ORDER

1. The defendants are ordered, jointly and severally, the one paying the others to be absolved, to pay the plaintiff N\$145 000 as general damages for pain, suffering and loss of amenities of life.
2. Interest is payable on the said amount at the rate of 20% per annum from the date of this judgment.
3. No order as to costs.
4. The Registrar is directed to refer this matter to the Prosecutor-General's office to determine the outcome in the criminal matter Windhoek CR 41/06/2019, and to ensure the proper investigation of the assault on plaintiff by members of the Namibian Defence Force, Namibian Police and Windhoek City Police on or about 2 June 2019, between 17h00 and 18h00, at or near Erf 3 Blacket Street, Windhoek.
5. The matter is removed from the roll and regarded as finalized.

JUDGMENT

COLEMAN J:

Introduction

[1] This is a claim for damages as a result of an assault by members of the Namibian Police, Namibian Defence Force and Windhoek City Police. The parties settled the question of liability and left the quantum for damages to be determined by the court.

The Facts

[2] The parties agreed to put the facts for the purposes of deciding the quantum before court by way of affidavit. The plaintiff filed an affidavit deposed to by herself as well as an affidavit deposed to by the first doctor she consulted on the evening after the assault. The content of these affidavits is not disputed.

[3] The plaintiff is a woman, 53 years of age (she was 49 at the time of the incident) and was employed as a flight attendant with Air Namibia. She claims N\$145 000 as general damages for pain, suffering and loss of amenities of life as a result of the assault.

[4] The plaintiff says in her affidavit that it is common cause that she was assaulted by members of the Namibian Police and Defence Force on or about 2 June 2019 at approximately 17h00 to 18h00. This assault occurred at or near her house in Windhoek North. She also says it is not disputed that the Windhoek City Police participated in what is referred to as an 'operation' and her assault. She further asserts in her affidavit that this assault resulted in her suffering injuries, trauma, pain and indignity.

[5] The plaintiff does not set out in her affidavit how she was assaulted. In her amended particulars of claim, she alleges that she was slapped across the face by a tall unknown member of the Namibian Defence Force. He also hit her on her back with the butt of his assault rifle. She alleges she ran into her house and was again assaulted in her house by the same person. The defendants deny these allegations in their plea. I take it that since the plaintiff's affidavit records that it is now common cause that members of the Namibian Police and Defence Force assaulted her, it is this assault that she refers to.

[6] As a result of the assault the plaintiff suffered physical injuries as well as psychological consequences. She saw a doctor at around 21h20 on 2 June 2019, virtually hours after the assault. The doctor recorded her injuries. As mentioned, he also deposed to an affidavit that was filed herein. He recorded that she was very traumatized and emotional when he saw her. He states that he noted bruises and abrasions on her body. From the J88 form which he completed, it appears that the bruises and abrasions were on both sides of her face and both shoulders. He also

recorded that the plaintiff had tenderness all over her face and paraesthesia on the left side of her face. This is a hypersensitivity as a result of blunt force and normally results in moderate to severe pain that could last for weeks.

[7] The plaintiff states in her affidavit that she sustained extensive bruising on the left side of her face with swelling. On 6 June 2019 the plaintiff saw another doctor who also noted bruising and swelling on the plaintiff's upper back and scratch marks on her left shoulder. Plaintiff says she suffered severe pain for approximately three months and the left side of her face still feels numb occasionally.

[8] The second doctor the plaintiff consulted identified the potential of post-traumatic stress disorder (PTSD). This doctor recommended that plaintiff consult with a clinical psychologist. A report by the clinical psychologist is annexed to plaintiff's affidavit. In this report the clinical psychologist records that she saw plaintiff twice and '...it became clear that she most probably suffered from Post-Traumatic Stress Syndrome (PTSD) as a result of the assault'. This is not disputed.

[9] The Plaintiff explains that she could not attend some of the sessions scheduled with the clinical psychologist because she fell into a depression. She found herself unable to get out of bed on many days. She did attend further sessions on 2 October 2019 and 9 October 2019.

[10] The Plaintiff states that she developed severe anxiety, depression and insomnia after the assault. This also affected her work as flight attendant since she was unable to go to work on a number of days, which resulted in a loss of additional income. In 2021 the plaintiff was hospitalized twice after severe anxiety attacks.

[11] The plaintiff also says that she still becomes extremely anxious when she encounters police officers or soldiers. As a woman she felt a sense of helplessness and a sense of being reduced to nothing when she had to endure the assault.

Submissions on behalf of the parties

[12] Ms Katjipuka, who represented plaintiff, submits that N\$145 000 is an appropriate award under the circumstances. She stresses that this assault was perpetrated by officers of the second, third and fourth defendants in the context of a

law enforcement operation. According to her, the plaintiff was assaulted as she came out of her house because of a commotion outside. It was entirely unprovoked, unjustified and unconscionable says Ms Katjipuka.

[13] Ms Katjipuka referred to, amongst others, *Lazarus v The Government of Namibia*¹ for a number of propositions and to demonstrate the courts' approach in Namibia. She also stresses the principle that the damages awarded should be commensurate with the injury inflicted.

[14] Mr Ketjijere represented the defendants. He submits that N\$40 000 would be an appropriate award here since the injuries inflicted are not life threatening or severe. He emphasises the comparison approach and points to cases where damages ranging from N\$10 000 to N\$60 000 had been awarded.

Conclusion

[15] I have read all the material referred to and take cognisance of the submissions by counsel. I was not referred to any authority dealing specifically with damages awarded in relation to PTSD and psychological trauma. I am also not aware of any case on point decided in Namibia.

[16] It is accepted that emotional shock is associated with pain and suffering, but it may also cause further forms of loss such as insomnia, anxiety, depression or other mental or physical conditions which are recognized as non-patrimonial loss.²

[17] As far as damages are concerned, I have a somewhat clean slate as far as Namibian authorities are concerned. I have no choice but to venture across the Orange River. South Africa provides a relatively broad spectrum in the field of damages for PTSD and emotional trauma. I can do no better than to refer to *RA and Others v Minister of Police* (A315/2015) [2016] ZAGPPHC 264 (21 April 2016). In this matter, members of the South African Police Service entered the appellants' home at around 02h00 on 16 June 2009 and held them at gun point.

¹ *Lazarus v The Government of Namibia* (I 2954/2015) (2017) NAHCMD 249 (30 August 2017)

² Visser and Potgieter *Law of Damages* 2 ed at 100, Juta.

[18] It later transpired that the police were wrongly directed to the appellants' house in respect of a suspect in a casino robbery. Although no one was assaulted, the appellants were held at gun point and were not told that the intruders were police officers. The court *a quo* awarded the appellants R25 000 each for general damages. On appeal, the full bench replaced this award with R200 000 each for first, second and third appellants and R250 000 for fourth appellant.³ Adjusted for inflation R200 000 in 2016 is now about R265 000.

[19] In reaching its conclusions the court made a very useful comparison of other awards. In addition, it articulates the principle that in determining the quantum of general damages one should consider the person before court as well as the circumstances of the incident. The age of the person, his or her gender, the psychological make-up of the person, the nature and duration of the violation, the impact of the trauma on the person and the duration of the physical and psychological consequences of the violation should be considered.

[20] In a dissenting judgment in the *RA and Others* matter the award of R25 000 was replaced with R100 000 for each of the appellants. The dissenting judge referred, amongst others, to *Minister of Police v Dlwathi* (20604/14) [2016] ZASCA 6 (2 March 2016), where the Supreme Court of Appeal reduced an award of R675 000 to R200 000 for Mr Dlwathi who was assaulted by police in the presence of friends. He experienced significant psychological consequences.

[21] The *RA and Others* and *Dlwathi* matters demonstrate how difficult the exercise of awarding damages is. It clearly shows a distinct divergence in conclusions between courts and judges. In the *Dlwathi* matter the Supreme Court of Appeal interfered substantially with the award by the court *a quo* essentially on the basis that it imposed a punitive component and it was – in their opinion – excessive. I take cognisance of that. I also take cognisance of a readily perceptible tendency towards increased awards in respect of general damages in South Africa.⁴ In my view this tendency should apply in Namibia as well.

³ It was confirmed on appeal by the Supreme Court of Appeal in *Minister of Safety and Security v Augustine et al* (811/2016) [2017] ZASCA 59 (24 May 2017).

⁴ *Flanagan v Minister of Safety and Security* (497/2017) [2018] ZASCA 96 (1 June 2018) para 33.

[22] The plaintiff in this matter is a woman aged 53 (49 at the time of the incident). She was assaulted on her premises by members of the Namibian Police and Namibian Defence Force who were part of a law enforcement operation. This is atrocious and I treat it as a severe assault. The fact that a man armed with an assault rifle sees it fit to assault a woman with the butt of the rifle is disturbing and must be extremely traumatising for a 49 year old woman.

[23] I have outlined the evidence in respect of the plaintiff's injuries and the psychological consequences of the assault above. Suffice it to say that I accept that the consequences of the assault are extremely serious for the plaintiff. She was diagnosed with PTSD and suffers from depression and anxiety. It will likely haunt her for some time.

[24] I take heed of the approach espoused in matters like *Lazarus*⁵ and *Cloete v Minister of Safety and Security*⁶ here in Namibia. I also pay close attention to the approach in the *Dlwathi* matter since I consider it applicable here. Although the consequences of the assault on Mr Dlwathi are arguably more serious than in the instant matter, the reduction of the award from R675 000 to R200 000 is instructive. As mentioned R200 000 in 2016 adjusted for inflation is now roughly R265 000. In my view N\$200 000 would have been an appropriate award here, but the plaintiff claims less and her counsel submitted N\$145 000 is appropriate.

[25] Consequently, I award the plaintiff N\$145 000. As far as costs is concerned, both counsel agree that since the plaintiff benefited from legal aid no cost order should follow here as contemplated in s 18 of the Legal Aid Act, 1990.

[26] In conclusion, it is clear that assaults by the police – and defence force members – on members of the Namibian public are prevalent. This is intolerable. The awards of damages against the respective government entities are paid out of taxpayers' money. For some reason the individual perpetrators are allowed to disappear into the undergrowth and are not held accountable.

⁵ *Supra* para 13 of this judgment.

⁶ *Cloete v Minister of Safety and Security* (HC-MD-CIV-ACT-DEL-2018/00404) [2021] NAHCMD 523 (12 November 2021).

[27] The second, third and fourth defendants in this matter each have an obligation and duty to take steps to weed out members of their respective forces that assault people. Each of the members that assaulted the plaintiff or was complicit in it committed a crime and must face prosecution as well as disciplinary steps. According to the pre-trial order dated 19 April 2022 herein, the plaintiff instituted a criminal complaint with the Namibian Police recorded as Windhoek CR 41/06/2019. There is no indication how this criminal investigation was concluded.

[28] It also appears that these members go on the law enforcement operations without name tags. This is unacceptable. Wearing of name tags should be enforced. The members of public in Namibia are entitled to know who they deal with when accosted by a member of these forces and to be protected, not assaulted.

[29] I therefore make the following order:

1. The defendants are ordered, jointly and severally, the one paying the others to be absolved, to pay the plaintiff N\$145 000 as general damages for pain, suffering and loss of amenities of life.
2. Interest is payable on the said amount at the rate of 20% per annum from the date of this judgment.
3. No order as to costs.
4. The Registrar is directed to refer this matter to the Prosecutor-General's office to determine the outcome in the criminal matter Windhoek CR 41/06/2019, and to ensure the proper investigation of the assault on plaintiff by members of the Namibian Defence Force, Namibian Police and Windhoek City Police on or about 2 June 2019, between 17h00 and 18h00, at or near Erf 3 Blacket Street, Windhoek.
5. The matter is removed from the roll and regarded as finalized.

G COLEMAN
Judge

APPEARANCES:

PLAINTIFF: U Katjipuka
Of Nixon Marcus Public Law Office, Windhoek

DEFENDANTS: H R Ketjijere
Of Government Attorney, Windhoek