

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

CASE NO: 3049/2011
Date heard: 31/01/2013 & 01.02/2013
Date Delivered: 9/04/2013

In the matter between

JACOLINE MAART

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

GOOSEN, J.

[1] The circumstances of this matter are tragic. The Plaintiff, a 38 year old mother of two children, instituted action for damages in respect of the emotional shock and trauma suffered by her as a result of the unlawful killing of her minor son, Angelo Marconi, by employees of the defendant. The merits of the plaintiff's claim were conceded shortly before the commencement of the trial and accordingly the facts giving rise to the claim were not in dispute.

[2] On Sunday 20 June 2010 the plaintiff attended a church service in the morning. On returning home she saw that her son, the deceased, was part of a group of youths who were consuming alcohol in the street outside of her home. She confronted her son who was under the influence of alcohol and told him to return

home. He responded to her in an aggressive and confrontational manner and returned to his friends in the street and continued drinking. The plaintiff was distressed by her son's behaviour and as a result she proceeded to the Kamesh Police Station where she requested the assistance of the policemen who were on duty. It seems that she wanted the policemen to apprehend her son and possibly take him in to custody. The policemen on duty informed her that they could not do so. Nevertheless a group of reservist policemen agreed to accompany her to where the youths were drinking. The policemen gathered outside of the home of the plaintiff and called the plaintiff's son over to speak to them. The deceased was under the influence of alcohol and apparently responded in an aggressive manner. When the policemen attempted to physically detain him, the deceased drew two knives, threatened the policemen and then fled to avoid detention. He was pursued by the police and he was cornered in a nearby yard. Although the precise details of what occurred were not presented in evidence, it appears that the deceased attempted to escape and during this attempt he was shot at close range. The bullet struck the deceased in the back of his head and he died instantly. The shooting occurred in full view of the plaintiff. As a result of observing her son's death, at the hands of the policemen summoned by her, the plaintiff suffered severe trauma. It is this shock and emotional trauma which forms the basis of her claim for damages.

[3] As indicated, the defendant conceded the merits of the claim. The only issue therefore was the determination of the quantum of damages to award to the plaintiff. In this regard too the issues were considerably narrowed by agreements concluded by the parties. In this respect the defendant accepted liability for payment of funeral expenses in the amount of R19 012.00; past medical expenses in the amount of

R2650.00 and future medical expenses in the amount of R51 500.00. The only issues in dispute relating to the quantum of the plaintiff's claim concerned past and future loss of income as well a general damages.

[4] It is common cause between the parties that the plaintiff has suffered severe emotional shock and trauma as a result of her having observed the shooting of her son. Reports prepared by Prof Zabow, a psychiatrist who assessed the plaintiff, were handed in by consent between the parties, it being agreed that the contents of the reports be admitted in evidence. According to the first of these reports, dated 21 September 2012, Prof Zabow provided a psychiatric clinical diagnosis of the plaintiff, indicating that she is presently suffering from chronic post traumatic stress disorder of a severe form and a major depressive disorder with attendant psychosis. Dr Zabow records in his report that the plaintiff, on examination, presented as "...markedly depressed and psychotic symptoms are present. Emotional distress increased with discussion of the sequence of events and her presentation is in keeping with persistent chronic post traumatic stress disorder syndrome. Her mood is secondary to this disorder. Her affect demonstrated depression and anxiety. She has hallucinatory experiences and expresses paranoid indication of delusional intensity." In his discussion Prof Zabow records that the plaintiff showed marked impairment in function with acute symptoms requiring urgent treatment. His conclusion was that "(s)he is not able to engage in employment or any substantial gainful activity due to her present symptomatology. There has been significant life style change and quality of life effects extending to family and domestic issues due to restriction of activities of daily living. She has difficulties maintaining social function at pre-morbid level or doing what she used to do. She is in need of psychiatric management and medication to address the depression and anxiety. It is difficult to predict response to treatment but the conditions are treatable." In his supplementary report Prof Zabow deals only with the psychiatric management which he identified as being

required and the cost estimates associated with an intensive 12 month treatment regime and a further 18 month period for follow up consultations.

[5] The Plaintiff also presented the evidence of Mr Ian Meyer, a clinical psychologist, and Michelle Nobre, an industrial psychologist. Both parties submitted reports prepared by actuaries based upon the report prepared by Nobre. These actuarial reports set out two different scenarios relating to the calculation of future loss of earnings for the plaintiff. These relate to the plaintiff's response to treatment, namely if she responds well to treatment and in future once again becomes employable or does not do so and remains unemployable for the rest of her life. I shall deal with the evidence presented by the plaintiff in relation to the heads of damages claimed by the plaintiff.

Past loss of income claim

[6] It is common cause that at the time of the incident giving rise to the claim, the plaintiff was employed as a stock controlling clerk for Metro Wholesalers in Uitenhage and had been employed by the company for a period 13 years. Following the incident the plaintiff was booked off work for a period of approximately a month. She thereafter returned to work, although it appears that she frequently had periods when she was ill and unable to work. This continued until April 2011 when the plaintiff was retrenched by the company, apparently because the company closed down its operations. Since then the plaintiff has been unemployed.

[7] The actuarial reports prepared by Munro and Jacobson on behalf of plaintiff and defendant respectively, calculate the plaintiff's past loss of earnings based on the income figures provided in the report of Nobre to date of calculation being 1 February 2013 as R108 800.00 and R170 814.00 respectively.

[8] It was suggested in argument that I should award the aggregate between these two figures as being the established past loss of earnings. Mr Jooste, who appeared for the defendant, conceded that this would represent a fair and reasonable basis for determining the plaintiff's past loss of earnings. Mr Mouton, for the plaintiff, submitted that I should apply the usual 5% contingency to this figure and that there are no circumstances present which would warrant the application of a greater contingency.

[9] Mr Jooste, to the contrary, argued that having regard to the fact that the plaintiff lost her employment as a result of her employer closing down that this warranted the application of a higher than normal contingency in relation to the calculation of past loss of earnings. He submitted that a contingency in the order of 15% would be warranted.

[10] In my view the fact that the plaintiff was retrenched by reason of her employer closing down certainly impacts upon the assessment of her past loss of earnings. Bearing in mind that these past loss of earnings relate to the calculation of her lost earnings consequent upon the damage causing event between the date of causation of the damage and the date of trial, the fact that some loss of earnings would have arisen in any event would have the effect of reducing the calculation of her actual loss of

earnings as at the date of the trial. This factor can, in my view, be brought to account by applying a slightly higher contingency than that for which the plaintiff contends.

[11] Contingencies are by their nature those “hazards that normally beset the lives and circumstances of ordinary people”¹. Once such circumstances is the possibility of a period of unemployment occasioned by retrenchment. I consider that a contingency allowance of 10% in respect of the plaintiff’s past loss of earnings, being the aggregate figure of R139 807.00 determined by the actuaries, would be appropriate in the circumstances of this matter.

Future loss of income claim

[12] The determination of the plaintiff’s future loss of income is dependant upon a finding as to whether the plaintiff is likely to respond well to the psychiatric treatment that she is required to undergo and, therefore, whether it is likely that she will be able to return to the open labour market. It was common cause between the parties that in the event that the plaintiff does not respond well to the treatment she will remain unemployable for the rest of her life.

[13] I have already set out hereinabove the evidence of Prof Zabow whose opinion was that the particular conditions experienced by the plaintiff presently are treatable. As indicated however he was unable to state with any precision how the plaintiff was likely to respond to the envisaged treatment regime.

¹ A A Mutual Insurance Association Ltd v Van Jaarsveld and Another 1974 (4) SA 729 (A) (Corbett & Buchanan Vol 2, 360 at 367)

[14] Mr Meyer's evidence was relevant in this regard. He testified that in his opinion there was a very poor likelihood that the plaintiff would recover to such an extent that she would be able to re-enter the open labour market and that she would, on the probabilities, remain unemployable. He stated that in considering whether the plaintiff would respond positively to the treatment regard must be had to the particular circumstances of her case, the chronic nature of her conditions and the severity thereof. Ordinarily it would be expected that a person suffering from post traumatic stress disorder would commence recovery within a period of three months of an incident giving rise to the disorder. In this instance the plaintiff has demonstrated no marked recovery even after two and half years has elapsed since the traumatic incident. The fact that she is, after this length of time, severely ill and presenting with severe post traumatic stress disorder, chronic severe major depressive disorder with psychotic features and with, what Meyer described as chronic bereavement disorder, suggests that her prognosis for positive response to treatment is poor. Meyer further suggested that there are certain features present which compound this poor prognosis, namely that the plaintiff still lives in the same neighbourhood and that she is confronted daily with the location of her son's death; that the neighbourhood is violent and that the plaintiff regularly experiences trigger events which stimulate recall of the tragic circumstances in which her son died.

[15] Meyer conceded, in cross examination, that the plaintiff possessed a number of personality traits that were conducive to her recovery, namely her extensive commitment, pre-morbidly, to engagement in her church where she serves as an elder. Her involvement in social and home visits to the elderly as well as in work with youth groups in the church. Although she is presently unable to participate in these activities

she nevertheless has a desire to do so once again. Meyer's opinion however was that these positive attributes which would stand her in good stead to recover from the trauma are vastly outweighed by the many difficulties she faces in her recovery.

[16] The defendant did not present any expert evidence to contradict the views expressed by Meyer. The defendant nevertheless argued that in determining the question as to likelihood of recovery this court must accept that the plaintiff accepts that there is a prospect of such recovery, having regard to the fact that provision has been made for a claim for future medical treatment. Given that such treatment is to be undertaken it must be accepted that it may have a positive outcome. It is indeed of course possible that once treatment has been received that the plaintiff's condition may improve and that she may well recover sufficiently to re-enter the open labour market. This much is the effect of Prof Zabow's evidence. However, as already noted Prof Zabow is unable to state whether the treatment will, as a matter of fact, be successful. The fact that treatment is to be received in the future and the fact that such treatment is necessary, says nothing about its likely effect. Whether the treatment will have the outcome that the plaintiff will have recovered sufficiently to re-enter the open labour market is dependant upon those factors which are presently able to be identified in the plaintiff's condition which point to a likelihood of recovery. Those are the factors identified by Meyer and, on his unchallenged evidence I accept that the prospects of recovery are poor.

[17] In the light of this evidence it was argued by the plaintiff's counsel that this court should accept the scenario of future loss of earnings based upon the plaintiff not being able to recover sufficiently to re-enter the open labour market. Having accepted

that scenario, it was contended that a contingency factor of 20%, being higher than the norm, should be applied to take account of the possibility of a recovery after treatment as well as the vicissitudes which would beset the plaintiff in re-entering the open labour market given her age, her qualification levels and the particular levels of unemployment in this region, factors adumbrated in Nobre's evidence.

[18] In my view that approach has much to commend it in the light of the particular difficulties, absent contrary evidence, in determining the likelihood that the plaintiff will recover as a result of treatment. I accept therefore that the plaintiff has established that the likelihood that she will recover sufficiently to re-enter the open labour market and obtain and retain employment for the remainder of her working life is poor. I accept therefore that in determining the value of her future loss of earnings it will be appropriate to assume that she will, in consequence of the damage suffered, remain unemployable for the remainder of her life.

[19] The evidence of Nobre, as indicated, is relevant in regard to the determination of an appropriate contingency allowance to be made. She testified that in the event that the plaintiff does recover sufficiently to re-enter the open labour market, her prospects of obtaining employment would be affected by a range of factors. On the one hand the plaintiff has a good employment record, including 13 years of employment with her former employer; she has a range of skills to offer a prospective employer and is a respected member of her community. Against this would need to be weighed the fact there is high rate of unemployment in the Eastern Cape; that the plaintiff will be vulnerable having experienced the trauma she has and that she may

not be able to present well during a job interview; that she will have been out of the formal labour market for some time and that she will be competing against more able bodied and younger individuals.

[20] Although these factors are relevant to determining the plaintiff's ability to re-enter the open labour market, their effect, cumulatively considered is suggestive of a reduced capacity to generate income at pre-morbid levels even in the event that the plaintiff recovers after treatment. For this reason these factors ought to be considered in the exercise of the discretion to determine a contingency allowance which is fair to both parties.

[21] Mr Mouton argued that it would be appropriate to apply a contingency allowance of 20% in this matter since although it is not likely that the plaintiff will recover and therefore be able to obtain gainful employment in future there remains a prospect that she may do so having regard to the positive attributes that she has which favour such recovery.

[22] Mr Jooste contended for a rather larger contingency allowance. I am unable to agree. As already indicated I do not consider, on the evidence presented, that there is indeed a significant likelihood that the plaintiff will recover. Even if it is accepted that the treatment will have a positive effect the prognosis of a recovery sufficient to re-enter the open labour market is not good. If indeed she is ultimately able to re-enter the open labour market, her prospects of securing employment are not substantial. The longer she takes to recover the less likelihood there is that she will indeed be able to re-enter the labour market and restore her earning capacity to pre-morbid levels. This

much seems abundantly clear from the evidence before. I consider that, having regard to all of these factors that a contingency of 20% is fair and I shall apply such deduction in the calculation of the plaintiff's future loss of earnings.

[23] Insofar as the actuarial calculation of the loss is concerned, the actuaries again produced slightly different figures notwithstanding the use of the income data provided by Nobre. The difference was however not significant and it was accordingly accepted by both parties that I should apply the aggregate of the two calculations to determine the plaintiff's future loss of income. That being so, the plaintiff's future loss of income is determined to be R1 068 609.50, to which a 20% contingency deduction will be applied.

General damages

[24] An award of general damages seeks to compensate the plaintiff for loss suffered in respect of the plaintiff's personality interests. It seeks therefore to compensate the plaintiff for pain and suffering occasioned by the loss causing event, physical and other trauma and loss of amenities of life. The assessment of non-patrimonial damages necessarily varies from case to case and is dependant upon the assessment of the plaintiff in the particular circumstances of the matter.

[25] In this instance Meyer testified that the plaintiff's loss of amenities of life has been significant and pervasive. This is supported by Prof Zabow. Meyer pointed to the fact that the plaintiff has, in consequence of the severe chronic post traumatic stress disorder and major depressive mood disorder, been rendered incapable of

employment in the open labour market. She has withdrawn socially, no longer functions within her church community and her functioning within her family is greatly impaired. The plaintiff feels directly responsible for her son's death, she believes that she set in motion the events that resulted in her son's death and she experiences her daily existence as dishonouring his memory. She is overwhelmed by guilt. Her experience of her family life serves to exacerbate these feelings of guilt and trauma and she considers that even recovery would be contrary to the punishment she believes God is meting out to her.

[26] The psychological profile presented is one of a deeply traumatised mother who remains, despite the passage of some years, in a desperately compromise and vulnerable state.

[27] In the course of argument reference was made to a number of matters similar to the circumstances that pertain in this matter by way of providing this court with some guidance as to an appropriate award.

[28] In *Draghoender & 'n Ander v Padongeluksfonds*² the plaintiff, who was the mother of a young child, was called to the scene of a motor vehicle collision outside her home where her child had been run down and killed. She suffered emotional shock and trauma and was diagnosed with an anxiety disorder (post traumatic stress), a major depressive disorder with psychosis and a panic disorder with related agoraphobia. She was awarded general damages in the sum of R125 000.00 at present day value. Similar facts were considered in *Kritzinger & Kritzinger v Road Accident*

² [2006]JOL 18271 (SE)

*Fund*³ where the plaintiff was the father of two girls who were killed in a motor vehicle accident. Plaintiff and his wife proceeded to the scene and were required to identify the bodies at the mortuary. Plaintiff was diagnosed as suffering from chronic bereavement reaction, post traumatic stress disorder and major depressive disorder. An award of R182 203.00, in today's value, was made for general damages.

[29] In *Walters v Minister of Safety and Security*⁴ the plaintiff's husband committed suicide whilst in police custody after the plaintiff had requested that the police detain him overnight because he was intoxicated. The plaintiff developed a phobia for police, experienced sleep disturbance, poor concentration and work motivation and was significantly depressed. She was awarded an amount of R195 000.00 at current value for general damages.

[30] It is of course trite that previous awards for general damages serve no more than as a general guide in the assessment of such damages. A court determining an appropriate award is required to consider the particular circumstances and to fix an amount that is fair and reasonable in the circumstances.

[31] In this matter it was argued that the particular circumstances are significantly more serious than that which applied in the authorities referred to. Here the plaintiff feels directly responsible for the death of her son; she witnessed the killing of her son at close quarters. These circumstances served, it was submitted, as "aggravation". It was also argued that the evidence establishes that the plaintiff's trauma is significantly

³ 2009 (5K3) QOD 21 (ECD)

⁴ 2012 (6K3) QOD (KZN)

greater than that apparently experienced by the plaintiffs in the authorities referred to. On this basis it was argued that a substantially higher award should be considered.

[32] Mr Jooste argued that there is no room for such an approach since the assessment of general damages is based upon the court's evaluation of the nature and extent of the injury suffered and its impact upon the plaintiff's amenities of life. There is accordingly no room to contend that one person's post traumatic stress disorder, even severe, is to be weighed differently to that suffered by another person because it arose in circumstances which notionally may be more shocking or traumatic than another set of circumstances. It was submitted that the "severity" of the circumstances giving rise to the injury is not relevant to the determination of the quantum of loss. What may give rise to differentiation in awards is the extent to which the injury impacts upon the plaintiff insofar as it gives rise to suffering, pain, discomfort and a loss of amenities.

[33] It is so that the circumstances in which a plaintiff suffers loss would not ordinarily play a role in the determination of the quantum of general damages. What the court is concerned with in the assessment of such damages is to compensate the plaintiff fairly and reasonably having regard to the range of impacts and effects that the injury and its *sequelae* have upon the plaintiff. There can be no precise calculus. It is however apparent in this matter that the injury here suffered has had and continues to have a profound effect upon the plaintiff. The pervasive effect of the psychological trauma and its ongoing severely debilitating effect on the plaintiff are undoubtedly related to the particular circumstances giving rise to her loss. These are factors which bear upon the quantum of an appropriate award of general damages. Having regard to

all of these circumstances I consider that an appropriate award will be an amount of R200 000.00.

Interest on the damages and costs

[34] Two final aspects require consideration. Mr Mouton, relying on the provisions of section 2A(2)(a) of the Prescribed Rate of Interest Act, Act 55 of 1975 argued that interest payable on the damages to be awarded should be ordered from the date of service of the summons upon the defendant.

[35] In support of this it was argued that the defendant did not plead a substantive defence to the merits of the plaintiff's claim yet the merits of the claim were conceded only on the morning before the trial date. In the light of this, it was submitted that the matter could have been resolved at a stage far earlier than when it was and that it would be appropriate to order interest on the damages to run from the date of service of summons, being 29 September 2011.

[36] Mr Jooste argued that, notwithstanding that the merits were conceded shortly before the commencement of the trial, the determination of the lion's share of the plaintiff's damages, namely loss of earnings and general damages, were matters that could not, given the circumstances of the matter, be resolved without resort to trial. Accordingly interest should be ordered only from date of judgment of the matter.

[37] Section 2A(2)(a) of the Act lays down the general principle that interest accrues from the date of demand or date of service of summons whichever is the earlier date. In this instance the plaintiff does not seek an order that interest runs from a date earlier than that contemplated in section 2A(2)(a) and accordingly that aspect need not be considered in the context of sub-section (5) ⁵. Sub-section (5) confers on the court a discretion to make such order as to it appears just in respect of payment of interest on an un-liquidated claim for damages.

[38] In the view I take of the matter, the plaintiff seeks no more than the application of the general principle in regard to the payment of interest. It was not suggested that such an order would bring about an injustice to the defendant. In the light of the circumstances giving rise to the plaintiff's claim that cannot, in any event, be so.

[39] The second issue concerned the question of costs, it being contended that the plaintiff ought to be awarded the costs of two counsel. It was submitted that the employment of two counsel was a "wise and reasonable precaution" in the circumstances of this matter, having regard to the fact that the amount claimed was substantial (being in excess of two million rand) and the legal issues are not uncomplicated.

[40] It was argued that regard should be had to the fact that the merits of the plaintiff's claim remained in dispute until the day before the trial. That being so, trial preparation involved consultation with a large number of witnesses. The processing of

⁵ *Springold Investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 (3) SA 235 (D&CLD) at 244G

a substantial volume of factual issues coupled with extensive involvement of expert witnesses in relation to the determination of the quantum of the plaintiff's claim necessitated the employment of two counsel.

[41] The award of costs, including the costs associated with the employment of two counsel, is a matter within the discretion of the trial court. The exercise of the discretion involves consideration of a number of factors, including the volume of evidence; the complexity of facts or the law relating to such facts; the importance of the matter, and whether there are any difficulties or other challenges present in respect of the legal principles or their application to the facts of the matter.⁶ I am satisfied that in this matter, the employment of two counsel was a wise and sensible precaution to be taken by the plaintiff and I am accordingly satisfied that such costs ought to be allowed.

[42] In the result I make the following order:

The defendant is ordered:

- i) to pay to the plaintiff the sum of R1 253 875.90;
- ii) to pay interest on the aforesaid amount at the legal rate from date of service of summons, being 29 September 2011, to date of payment thereof;

⁶ *Koekemoer v Parity Insurance Co. Ltd & Another* 1964 (4) SA 138 (T) at 144H- 145A

iii) to pay the plaintiff's costs of suit together with interest thereon from date fourteen (14) days after *allocatur* to date of payment, such costs to include:

- a) the costs of two counsel; and
- b) the qualifying expenses, if any, of the following expert witnesses:
 - a. Tuviah Zabow;
 - b. Ian Meyer;
 - c. Michelle Nobre;
 - d. Yolandi Swanepoel; and
 - e. Alex Munro.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff
Mr P. H. Mouton assisted by Ms. N Barnard
Instructed by Van Vollenhoven & Associates

For the Defendant
Mr P. Jooste
Instructed by the State Attorney