

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: 1080/2015

In the matter between:

KGOSIMANG JACOB JANUARY

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

CONSTABLE SM MOEKETSI

Second Defendant

CONSTABLE NCAMILE

Third Defendant

JUDGEMENT

O'BRIEN, AJ

1. The plaintiff claims an amount of R1 778 991.00 from the defendants for damages due to injuries he sustained on 7 June 2012. The amount is made up as follows:

1.1. Future medical expenses:

R44 906.00

1.2. Past loss of income:	R169 369.00
1.3. Future loss of income / earning capacity:	R858 716.00
1.4. General damages:	R700 000.00

2. On 30 May 2017, Acting Justice Lever (as he then was) ordered that the merits and quantum of the plaintiff's claim be adjudicated separately. Furthermore, in paragraph 2 of the order, the defendants shall *singuli* and, in *solidum*, liable for all damages that the plaintiff will be able to prove caused by the incident at Jan Kemp Dorp Police Station on 7/8 June 2012. The trial on the quantum was postponed *sine die*.

3. Due to a discrepancy in the order separating the merits and quantum, I requested the parties to file a supplementary note about the issue. The difference relates to a typographical error in the order. All the parties agree that the reference to defendant's in paragraph 2 should read defendants.

The evidence

Kgosimang Jacob January

4. The plaintiff testified that he was born in Christiana. He is married according to customary law and has three children he supports. He reached grade 10 at school.

5. On 7 June 2012, the police picked him up at home and took him to the police station based on allegations against him. There were approximately six members of the public who made specific allegations against him.

6. There was a discussion between him and the police when a particular female police officer approached him and said that he did not want to give his co-operation. While sitting, the female officer assaulted him with a hand radio on his forehead. He stood up and pushed her, whereafter a group of police officers threw him to the ground. While on the floor, these offices continuously assaulted him. The assault

consisted of kicking, beatings, and kicks. These officers also used handcuffs. After the assault, the police officers demanded he clean the blood on the floor, but he refused. His eyes were both swollen due to the assault.

7. No charge was formulated against him by the members of the public who made the allegations against him. Instead, he was accused of assaulting the female officer. After that, he was detained.

8. The following day, he was given a notice to pay an admission of guilt fine of R300 for the assault on the female police officer. He refused to accept the notice but took it due to his mother's intervention.

9. He left the police station with his mother and attended his house doctor. The doctor referred him to Kimberley Hospital due to the severity of the injury to his left eye. The doctor completed a J88 form.

10. The plaintiff attended a disciplinary hearing and the court case where he was the complainant. He later learned that two police officers were found guilty and fined R500 each.

11. The plaintiff confirmed that both his eyes were healthy in September 2011. However, there was an incident where he injured his left eye. After the incident, the vision in his left eye deteriorated. He received treatment at Kimberly Hospital for this incident. The treating doctor at the hospital informed him that he must operate on his left eye to improve his vision. He was told that the operation would be done on 28 May 2012. From September 2011 until 28 May 2012, although the sight in his left eye was deteriorating, he could still see with the eye. The only problem he met was with lights.

12. After the operation, which happened only on 29 May 2012, his sight improved.

13. After the assault on him, he has no sight in his left eye.

14. He told the court he never had fixed employment. He did piecemeal jobs as a gardener, a labourer on construction sites and a taxi marshal. He did a security

course in Gauteng and later took up employment as a security officer with Coin Security. He earned between R3500 and R4000 per month.

15. After security work, he obtained a code 10 learner driver's license. He then got employment as a taxi driver. He earned between R5000 and R6000 per month

16. Due to his left eye injury, he cannot obtain his public driver's permit. Furthermore, his eye pains daily, and he is light sensitive. The doctors informed him that nothing further could be done to the eye. As a consequence, he receives a disability grant of R1690 per month. This lapsed after twelve months. He played soccer, which he was unable to do after the injury. After the incident in June 2012, he was unemployed.

17. Under cross-examination, he said that he did not have a public driver's permit when he consulted with Delport, but he intended to get one. He conceded that he only had a code 8 license. He obtained his driver's license on 8 August 2014 with no restrictions. He never applied for a public driver's permit. He never applied to be a driving instructor. On 25 June 2014, his driver's license was endorsed due to fraud. He fraudulently helped persons to obtain their learners driver's licenses.

18. He helped his father-in-law drive a taxi to earn an income from 2013 to 2014. After the assault, he still managed to transport children to the crèche earning R200.00 per month per child. He also conveys hikers to Kimberley. When he did this, he neither had a public driver's permit nor a drivers license. By acting in this manner, he knew he was contravening the law, but states that taxi drivers work in this manner which helped him to support his children.

19. After the assault, he could only obtain a code eight licence, allowing him to drive small vehicles, not transport people.

Letitia Delport

20. Letitia Delport, an occupational therapist, has been doing medico-legal work since 2007 for plaintiffs and defendants. She had in her possession an instructing

letter from the plaintiff's attorney, Dr Vos's report, the ophthalmologist's report, and Kimberly Hospital's medical records.

21. On 26 March 2015, she assessed the plaintiff. He complained of blindness in his left eye, inability to distinguish between colours, loss of vision in his right eye, and sensitivity to light affecting his eyesight.

22. He explained to her his employment record as a security officer, a labourer, participation in a driving school where he taught driving lessons and finally, as a taxi driver until 2012. After the incident, he struggled with his driving ability and could not obtain a public driver's permit. In her opinion, the plaintiff cannot get a public driver's permit with his eye impediment.

23. Apart from his difficulty walking in darker or lighter offices, he presented with no other functional impairments. The plaintiff informed her that his right eye tires when completing tasks that take a while. Furthermore, sunlight causes pain in his eyes. He cannot lift heavy objects, which puts pressure on his eyes.

24. He needs aids such as a walking stick for blindness, a magnifying glass, and a cell phone with a bigger dialling pad.

25. Regarding his earning ability, he is unable to work in direct sunlight. He would not be able to work as a taxi driver because of his inability to obtain a public driver's permit. The plaintiff will be able to do sedentary or semi-sedentary work. Due to his injury, the plaintiff will not be able to work in a mining environment. The witness confirmed that unemployment is a huge problem in the country. In her experience, people with physical disabilities are mostly unemployed.

26. Under cross-examination, she testified that the reference to attorneys' notes should read medical notes. The plaintiff informed her that his eyesight deteriorated, and his right eye problems were due to the incident on 7 June 2012.

27. She further confirmed that the information in her report from the plaintiff was her source. Delport said the plaintiff told her he could not renew his public driver's

permit. She described that he could not climb ladders due to the plaintiff's difficulty with depth perception. She is not able to comment on the plaintiff's report to Dr Vos that he does not perceive any problems with his eyesight in his right eye.

28. The plaintiff also told her he has a code 8 driver's license. He can drive short distances.

Everhardus Jacobs

29. Dr Everhardus Jacobs obtained degrees at masters and doctorate levels from the Universities of the Free State, Stellenbosch, and Johannesburg. He is a registered industrial psychologist with 30 years of experience in the corporate sector. At the time of his testimony, he had completed approximately one thousand seven hundred reports.

30. He assessed the plaintiff on 14 May 2015. During his assessment, he interviewed the plaintiff and obtained collateral information to determine the plaintiff's earning capacity. He established that the plaintiff obtained grade 10 with no further qualifications. The plaintiff did construction jobs for ten years and four years as an unregistered security officer with a grade C classification. The plaintiff resigned and started working as a taxi driver in Jan Kempdorp. Later, the plaintiff became a part owner in a driving school. According to the plaintiff, as co-owner of the driving school earned R7500,00 per month. However, he could not produce evidence of proof of income.

31. After he stopped the driving school, the plaintiff worked for his stepfather as a taxi driver and did casual jobs like transporting school children. At the time of the assessment in 2015, the plaintiff was unemployed.

32. Although the occupational therapist recommended that the plaintiff would be able to do semi-sedentary work, he has no experience in sedentary work. According to the occupational therapist, the plaintiff is excluded from certain types of employment. He will not be able to pass an eye test for working in a mine as a general worker.

33. From an employment perspective, the plaintiff will be an unequal competitor. The plaintiff will also not benefit as a disabled person because he cannot do a sedentary job. Because of the plaintiff's physical limitation will result in a disadvantage when competing with able persons.

34. As the co-owner of a driving school, the plaintiff was able to teach people to obtain a learner's driver's license. And he derived an income from it.

35. After first saying that the plaintiff cannot obtain a PDP, Jacobs testified that he is not certain whether the plaintiff will be able to get it. Jacobs further testified that the plaintiff would be unable to do security work.

36. In an uninjured state, the plaintiff was able, as an unskilled worker, to earn R82 000,00 in 2019. He would have moved up the scale to a semi-skilled worker, earning R124 600,00 in 2019, which would be his career plateau.

37. Regarding his injured career path, Jacobs opines that the plaintiff has some earning capacity. The plaintiff will be able to do casual jobs earning R124 600,00 in 2019 terms.

38. Under cross-examination, Jacobs perceived the plaintiff as unimpaired in an uninjured state. The plaintiff did not give the specific years he worked for Coin Security. He conceded that a person like the plaintiff, who was out of the security business for ten years, will have difficulty returning to that sector. He confirmed that the plaintiff did not refer to his criminal record during the assessment. A criminal record will influence the appointment of an individual in the corporate sector. It is doubtful that an individual will obtain employment in the corporate sector. Individuals with a fraud conviction will not likely be appointed to the security sector.

39. Jacobs conceded that the plaintiff could continue as a taxi driver in the informal sector. The witness could not say whether the plaintiff, with his previous conviction of fraud, would be able to obtain a PDP.

Dr Jacob Vos

40. Vos qualified as a doctor in 1978. He specialises in ophthalmology since 1994. Since 1995 he has been in private practice. For the last few years, he has only done anterior segment work, including cataracts, glaucoma, and filtration. There was a misconception about the date of the injury. Initially, he thought it referred to the assault in September 2011, but the actual assault was on 7 June 2012.

41. He testified that the plaintiff was blind in his left eye. The scenario was sketched that the plaintiff was assaulted in September 2011; he attended the hospital in Kimberley; he was recommended to undergo an operation on his left eye; on 29 May 2012, he was operated on at Barkley West hospital; he had to return the following day for a follow up within two weeks. Before the follow-up, he was assaulted on 7 June 2012. The plaintiff was admitted to Kimberley Hospital on 8 June 2012, where he was examined. He again went to Kimberley hospital on 18 June 2012.

42. Against the above background, the witness testified that the assault on 7 June 2012 played a direct role in the blindness in the plaintiff's left eye. He explained that the eyeball holds a liquid – which is not water – made up of enzymes, salt and calcium. This liquid circulates in the eye, fusing with the blood vessels. This fusion happens in a channel called Schlemm. If the channel is blocked or damaged, it will influence the pressure in the eye.

43. During the incident in September 2012, the iris pulled up and sealed the laceration in the eye. This laceration was at the bottom of the cornea. When the plaintiff was seen on 23 September 2011, the notes stated that he had a mature cataract – meaning that the lens turned white. The plaintiff's top vision was very weak. The doctors diagnosed the plaintiff as having a post-traumatic cataract. The future treatment would be the removal of the cataract.

44. When the plaintiff returned, the doctors prepared to remove the traumatic lens to implant a new one. This process included the determination of the size of the new lens. At that time, the intra-ocular pressure in his eye was 15mm tonometry. Vos states this is within normal limits between 10 and 20mm.

45. Apart from the cataract, there was a vitreous haemorrhage as well as a retinal lapse, and afferent pupil defect

46. In his opinion, the doctors who decided on the operation to remove the cataract, the plaintiff will have vision in the eye, or the vision that he had will improve.

47. On 29 May 2012, the doctors operated, and the left extracapsular lens was extracted. According to Vos, the operation was a success. An air bubble was placed to hold the iris to avoid chafing. Due to the air bubble, the doctors could not see inside the eye. Neither could the plaintiff see with the eye.

48. If there was no air bubble in the eye, he would have been able to see with the eye but not have perfect vision. After the operation, the plaintiff still had a cut in the cornea, which impaired his vision. This can be improved through a cornea implant. If a cornea implant is not done, a procedure whereby the current cornea is operated on will result in better vision. If that is done, the plaintiff would not be blind.

49. Dr Vos also explained that the cut in the cornea affects your navigational sight.

50. After the assault on 7 June 2012, the plaintiff was at the hospital. The pressure in the plaintiff's left eye dropped to four. The doctors queried the existence of fluid at the top of his eye where the incision was made to extract the lens. The liquid formed a bubble.

51. On 18 June 2012, the plaintiff was again at the hospital. There was some infection in the eye. Ten days after the assault, his pupil was not in its normal position. According to Vos, trauma probably caused the shift in the pupil. The intra-ocular pressure was thirty-six, way beyond the average score of 22. The score of 36, according to Vos, is not threatening. If dealt with correctly, his vision can be saved.

52. Vos opines that he suspects that the plaintiff had a pressure attack of above 50 in his eye, which caused damage to the eye. The leakage of fluid caused

pressure on the incision wound. This results in pressure because the eye does not produce fluid anymore.

53. In Vos' opinion, the trauma of the assault on the plaintiff's head caused the rise in pressure. Cortisone could also cause raised pressure. The nerves were not damaged by glaucoma.

54. On 25 August 2014, the medical notes state that the pupil is skewed. It was established that the eye's nerves were permanently damaged.

55. In his opinion, the assault on 7 June 2012 caused a leak under the mucous membrane resulting in lower pressure in the eye. The treating doctors were compelled to give the plaintiff stronger medication to stop the leakage. He suspected that the plaintiff had a vascular incident due to the high pressure in the eye, resulting in a bleak nerve, thin blood supply, and retinal atrophy. Glaucoma could not have caused the blindness. The assault contributed to the blindness.

Dr Kenneth Hornby

56. He is a medical specialist who completed his qualification in October 2011. Since 2012 he has worked as a consultant at Kimberley Hospital and became the head of the ophthalmology department in 2017. He is the only doctor who performs retinol surgery in the Northern Cape for state patients.

57. According to the medical records, the plaintiff's first contact with the hospital was on 8 September 2011, when he had normal vision.

58. The plaintiff had a cornea laceration. An operation sealed off the corneal laceration without any leakages. The plaintiff had some inflammation which was treated with cortisone. He developed a cataract in his left eye.

59. After the operation on 8 September 2011, the plaintiff had a follow-up visit on 28 May 2012.

60. The medical notes show that on 28 May 2012, measurements were taken to decide the strength of the lens. At that stage, his left eye nerve was intact. The pressure in the left eye was normal. Dr Jordaan indicated a vitreous haemorrhage. He testified that the treating doctor could not assess the nerve function for possible retinal lapse on the sonar. In such an instance, his practice is to remove the cataract to allow him to see the retina. He confirms that the treating doctor completed a difficult medical procedure when he loosened the iris, pulled open the pupil and removed the lens. When he removed the lens, there was a tear,

61. Dr Hornby confirmed that the assault in September 2011 caused the cataract. He also confirmed that after September 2011, the plaintiff not only had a cut and an air bubble but also bleeding. All these would have influenced his vision testing. He agreed that for the plaintiff to have normal vision, he must have a cornea implant. According to Hornby, interpreting the medical notes, there was moderate intra-ocular inflammation. The treating doctor was uncertain whether there was fluid leakage in the eye, which is why he queried it. The nerve in the left eye was functional after the operation.

62. Two weeks after the operation, the notes show that the pressure in the left eye was thirty-six but still bleeding. There was no vitreous bleeding in the front section. Furthermore, it is not stated that the pupil shifted. He explained that if there is a leakage, the fluid will go to that area to seal it, but it is not noted that it was present.

63. He explained to the court how the pressure in an eye works. He did not see any evidence of pressure of more than sixty, resulting in an artery shutting down completely. The fact that the plaintiff did not complain shows that between 8 June to 18 June 2012, there could not have been so much pressure to have caused optic nerve failure.

64. Hornby opines that the permanent loss in the left eye is most likely due to the injury that occurred in September 2011.

65. It is not in dispute that on 11 September 2011, the police attacked the plaintiff. It is common cause that the police assaulted the plaintiff on 7 June 2012. After the assault in September 2011, the plaintiff received treatment at Kimberley Hospital.

66. After the assault on 7 June 2012, Dr Fisher saw him and recommended that he should attend Kimberley Hospital as he was seriously injured.

67. After the incident in September 2011, the vision in his left eye deteriorated, and the plaintiff attended Kimberley Hospital for treatment. The doctor recommended an operation on his left eye to enable him to see better. The hospital booked a procedure for 29 May 2012.

68. After the operation on 29 May 2012, there was a visual improvement in his left eye.

69. The first question to be decided is whether the cause of blindness in his left eye was due to the assault in September 2011 or the assault stated in the claim on 7 June 2012. A secondary question is the failure of the plaintiff to obtain treatment for a period of 10 months which may have contributed to the loss of vision in his left eye.

70. In the plaintiff's case, the assault on 7 June 2012 was the sole cause of his blindness. Contrary to that, the defendant submits that the assault on 7 June 2012 is not the sole cause of his blindness but other inter-related issues after the assault in September 2011. Stated differently, the defendant argues that multiple factors contributed to the blindness in the plaintiff's left eye.

71. Thus, it is a question of whether the assault on 11 September 2011 and various factors caused his blindness in the left eye or the assault on 7 June 2012.

72. The onus is on the plaintiff to prove a causal connection between the assault on 7 June 2012 and the damages he suffered.

73. In **Lee v Minister for Correctional Services (Treatment Action Campaign & Others as *amici curiae*) 2013 (1) SACR 213 (CC) at para 38:**

“The point of departure is to have clarity on what causation is. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry a juridical problem, arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether the harm is too remote. This is termed legal causation.”

74. In **Lee**, the Constitutional Court held that factual causation depends on a conclusion drawn from available facts or evidence and relevant probabilities.¹

75. In a case of positive conduct on the part of a defendant, the behaviour is mentally removed to decide whether the relevant consequence would still have resulted.

76. In its reasoning, the Constitutional Court rejected the view of the Supreme Court of Appeal that reasonable systemic adequacy would have altogether ended the risk of cotangent (TB). The Constitutional Court held that it was unnecessary to substitute reasonable alternative measures to determine factual causation because our law allows for a more flexible approach.² In developing the Constitutional Court’s argument, Mhlanthla J reasoned that the simple question to ask is whether the factual conditions of the plaintiff’s incarceration were a more probable cause of his tuberculosis than that which would have been the case had he not been incarcerated in those conditions.

77. In **Lee at para 57**, the court reasons as follows:

“Postulating hypothetical lawful, non-negligent conduct on the part of a defendant is thus a mental exercise in order to evaluate whether probable factual causation has been shown on the evidence presented to court. It is not a matter of adducing evidence, as the Supreme Court of Appeal appears

¹ Ibid

² Ibid

to have found. I accept that the postulate must be grounded on the facts of the case, but that is not the same as saying that there is a burden on the plaintiff to adduce specific evidence in relation thereto.”

Was the cause of the plaintiff’s blindness the assault in September 2011 or June 2012?

78. With the above question in mind and having regard to the principles laid down in **Lee**, I consider the evidence presented by the parties.

79. Before doing so, it is necessary to set out a court’s approach in evaluating expert evidence because both parties called experts with opposing views about the cause of the plaintiff’s blindness.

80. In **Michael & Another v Links Field Park Clinic (Pty) Ltd & Another [2002] 1 All SA at para 36**, the court said the following:

“That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City & Hackney Health Authority [1998] AC 232 (HL). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised they are to the following effect.”

and [37]

“The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely help, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion’ (at 241 G – 242 B).”

81. Counsel on both sides tried to persuade me that I should accept the opinion advanced by their expert. However, as a general observation, I cannot help but think that the opposing medical experts were proponents of a view depending on who called them. It left this uneasy feeling with me in the assessment of their evidence.

82. Dr Vos was of the view that the incident on 7 June 2012 was independent of the incident in September 2011. The opposing view by Dr Hornby was that a multiplicity of factors played a role in causing the blindness in the plaintiff's left eye.

83. Both doctors agree that the plaintiff suffered a laceration to his cornea in his left eye after the assault in September 2011. Therefore, both agreed that the plaintiff had developed a post-traumatic cataract and was scheduled for an operation to remove it. Both doctors further agreed that the cataract operation would be complicated, and the plaintiff would have had a 5% to 10% sight in his left eye after the operation.

84. Both doctors agreed that a cornea transplant is not a guarantee for improving the vision in the plaintiff's left eye. Regarding the shortage of corneas, it was highly unlikely that the plaintiff at the lower end of the receiving scale would have been a candidate for such an operation.

85. In the words of Dr Vos, it is exceedingly difficult to give a prognosis given the risk of complications inherent in such an operation. Dr Vos initially said in his report that the injury to the plaintiff's left eye resulted from the assault on 6 June 2012 (read 7 June 2012). However, he was uncertain about the cause of the blindness in the plaintiff's left eye. His evidence was that he would have to confer with Dr Hornby, and he might amend the cause of the plaintiff's blindness because nobody knows what caused it. Furthermore, he conceded that the penetrating incident in September 2011 could have caused damage to the eye because the posterior segment of the eye could not be evaluated.

86. Dr Vos' theory that the pressure in the eye could be the cause is pure speculation.

87. Given the uncertainty in the evidence of Dr Vos regarding the probable cause of the plaintiff's blindness, I am not convinced that the underlying speculative factual basis is correct.

88. Initially, Dr Vos commended the record-keeping of the Kimberley Hospital. However, when confronted during cross-examination about certain entries, his view was that he was not prepared to accept the medical notes or the content. He was not prepared to concede when faced with something not in the plaintiff's favour.

89. Hornby could not, with certainty or as a matter of probability, state that the assault on 7 June 2012 was the cause of the plaintiff's blindness in one eye. According to him, the pre-existing ocular pathology sustained in 2011, the effects of longstanding vitreous haemorrhage, glaucoma and non-compliance with treatment and follow-up all contributed to the significant visual loss in his eye.

90. Regarding the pressure in the eye, Dr Hornby said that there is no documentation suggesting high pressure in the eye.

91. Mr Botha, for the plaintiff, was extremely critical of the evidence of Dr Hornby. Because initially, he said in his report that the permanent loss of vision of the left eye was most likely due to an injury that occurred in September 2011, while in cross-examination, several factors contributed to the plaintiff's blindness which started in September 2011.

92. Furthermore, he conceded that the trauma of June 2012 could have caused vitreous bleeding.

93. What is troublesome is that even before he consulted with the plaintiff, he believed that the former had fabricated his version.

94. During the address by counsel for the defendants, she conceded that before the events of 7 June 2012, the plaintiff had 10% vision in the left eye. On a question I asked, she argued that the defendant, in those circumstances, would only be liable for 10% of the damages.

95. Applying the **Lee** test for factual causation, the assault on the plaintiff on 7 June 2012 was one of the causes that contributed to the blindness in the plaintiff's left eye. However, I do not exclude that other factors may have contributed to the blindness in the eye. But that does not mean the defendant would escape liability because the assault was only one factor contributing to the plaintiff's injury. The defendant must take his victim as he finds him. The plaintiff had some vision in his left eye, which a cornea transplant may have improved. The fact that the plaintiff, according to Dr Hornby, was at the lower end of receiving one is of no moment.

96. I accept that the plaintiff's failure to go for treatment before the assault on 7 June 2012 may have aggravated his medical condition as far as his left eye is concerned. I do not accept the evidence of the plaintiff that he felt not to go to the hospital because he was given a medical script for medication. A prudent person would, given his eye condition in similar circumstances, have taken the necessary steps to go to the hospital and have follow-ups concerning his condition after the assault of September 2011. But the failure to go to the hospital happened before the assault on 7 June 2012.

97. It is still necessary to decide on legal causation. The question is whether the assault on 07 June 2012 is linked sufficiently closely or directly to the loss for legal liability to ensue or whether the loss is too remote. (See: **International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700 E – 701 G**)

98. The test to be applied is flexible in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness, and justice all play their part.³

99. In delict, the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general

³ Standard Chartered Bank of Canada v Nedperm Ltd 1994 (4) SA 747 (AD) at 765 A – B

manner of the harm occurring was reasonably foreseeable. (See **Burchell Principles of delict at 92 ff** and the authorities cited.)⁴

100. In my judgment, when the police assaulted the plaintiff on 7 June 2012, it was reasonably foreseeable that he might suffer serious injuries. In this regard, the fact that he was bruised when Dr Fischer saw him speaks for itself. In any event, hitting a person on his forehead or face with a weapon that could cause serious harm is reasonably foreseeable.

101. Furthermore, police officials must uphold the law and promote constitutional values. To act contrary to those principles would undermine the public's confidence in the police. Therefore, fairness and justice require that unlawful acts committed by police officers go against the grain of society which cannot be countenanced.

102. I, therefore, found that the damages claimed were not too remote, and a causal link has been established between the assault by the police officials on 7 June 2012 and the damages the plaintiff suffered.

Loss of Earning Capacity

103. Under this rubric, the plaintiff claims an amount of R858716.00 for loss of earning capacity. The basis of this amount flows from the report of the industrial psychologist Jacobs.

104. Mr Botha submitted that the plaintiff should be compensated based on the evidence of Jacobs' 100% loss of his earning capacity due to loss of vision in his left eye. According to this argument, Jacobs testified that people who are physically disabled, like the plaintiff, find it almost impossible to find any gainful employment.

105. Mr Botha further submitted that Jacobs evaluated the earning ability of the plaintiff not on the work that he did but on the income that he was able to generate in his uninjured condition, which put the plaintiff in the unskilled category in the non-corporate sector. Accordingly, the argument goes, it is unnecessary to make any

⁴ Standard Chartered Bank of Canada (supra) 768 F – G

finding about whether the plaintiff is entitled to be compensated for earnings that he generated without a driver's license.

106. Ms Sieberhagen submitted that the plaintiff failed to prove a causal connection between the assault on 7 June 2012 and the total loss of vision in his left eye. Therefore, he is not entitled to claim damages for loss of income.

107. Furthermore, the evidence of Delport is based on the wrong facts. Delport's report refers to the incident of September 2011, and the report of Dr Vos dated 4 December 2014 which refers to the assault that took place during September 2011.

108. Ms Sieberhagen further submitted that Jacobs' evidence considered the plaintiff uninjured and without impairments.

109. The central issue about the plaintiff's ability to generate an income must be based on facts. Mr Botha submitted that because the defendant did not call an occupational therapist or an industrial psychologist as witnesses, this court should accept the evidence presented by the plaintiff. I cannot entirely agree with the submission that because the defendant did not call any opposing witnesses, the court should *mero motu* accept the evidence of the occupational therapist and industrial psychologist.

110. In my judgment, it is simplistic to calculate the plaintiff's earning capacity not on his work but on the income that he could generate in his uninjured condition. Such an argument does not consider the facts, the plaintiff's employment history, which shows that he was unemployed for various periods. Furthermore, the plaintiff has a criminal record for fraud. This fact was not taken into consideration by either Delport or Jacobs.

111. Calculating the plaintiff's income in his injured state is problematic. This is because the plaintiff was not truthful. He initially testified that he did not work after the incident in June 2012. However, during cross-examination, he testified that he worked as a driver from 2013 to 2014. This labour consisted of transporting children and picking up hikers with his motor vehicle to generate an income.

112. Given the uncertainties regarding his uninjured employment history and the fact that he did work in his injured state, I cannot find credible evidence to determine the loss of earning capacity on an actuarial basis. Therefore, in my view, this is a case where the plaintiff suffered some form of loss of earning capacity, in which case, I shall award a globular amount.

113. In finding the amount, I consider the plaintiff's employment history, his criminal record, and the disability grant he received per month, knowing well that he earned an income, R300 000.00 would be fair.

General Damages

114. As is usually the case, the parties referred me to various instances where the plaintiffs suffered similar injuries.

115. The plaintiff referred to the case of **Matladi v RAF (36243/08) [2010] ZAPJHC 173** 10 June 2010, where the plaintiff suffered a broken jaw and lost vision in one eye. He was for two months in hospital and was awarded general damages of R210 000.00 in 2010, equating to R377 552.00 in 2022 terms.

116. In **Mtembu v Minister of Police [1991] LNQD 10 (D)**, the plaintiff, a 42-year-old male, lost sight in one eye due to a gunshot wound. In 1991 he was awarded R55 000.00, equating to R360 972.00 in 2020 terms.

117. In **Smith v Minister of Safety & Security (51/2010) [2016] ZAECPEHC 73 (22 November 2016)**, the plaintiff was assaulted and left blind in one eye and with a hearing impairment. He was awarded R280 000.00 in 2016, equating to R363 837.00 in 2022.

118. The plaintiff submitted that the court should award general damages of R350 000.00.

119. The defendant referred me to cases where the plaintiffs either suffered an injury to an eye without loss or partial loss of sight. In this instance, I deem it

unnecessary to refer to those cases as the plaintiff suffered a complete loss of vision in his left eye.

120. In deciding general damages, the court has considered various facts, including that the police officers were supposed to protect the plaintiff. Also, the loss of vision in an eye is serious because it affects a person's ability to live his life optimally.

121. Considering all factors, an amount of R350 000.00 is awarded for general damages.

122. The plaintiff also claims for future medical expenses, as testified by Dr Vos. The defendant indicated that the plaintiff did not pursue this claim. I do not agree. The amount of R27 767.00 is the amount Dr Vos testified, which the plaintiff will need for further medical expenses.

123. I make the following order:

123.1. The defendant shall pay the plaintiff for damages he suffered due to the assault on him by members of the defendant on 7 June 2012, amounting to R677 767.00, calculated as follows:

- | | | |
|-------|---------------------------|-------------|
| (i) | Future medical expenses: | R27 767.00 |
| (ii) | Loss of earning capacity: | R300 000.00 |
| (iii) | General damages: | R350 000.00 |

123.2. The defendant shall:

- (i) Be liable to pay interest on any outstanding amount payable in terms of paragraph 1 above unless the full outstanding amount is paid within 30 days of the date of this order calculated at 7% per annum from the date of this order to the date of payment, both inclusive;

(ii) Be liable for payment of interest at a rate of 7% per annum on any and all tax or agreed costs payable in terms of this order, or any portion thereof, not paid within 30 days calculated from the date of affixing of the Taxing Master's *allocatur*, alternatively from date of agreement in respect of costs, to date of payment.

123.3. All amounts payable in terms of this order in respect of capital, interest, and costs shall be payable by a direct transfer into the trust account of Elliot Maris Attorneys, the details of which are as follows:

Account Holder: Elliot Maris Attorneys Trust Account

Bank: Standard Bank

Account Number: [...]

Branch Code: 050002

Branch: Kimberley

Reference: VN6457

123.4. The defendant shall pay the plaintiff's reasonable tax or agreed party and party costs of this action in respect of the quantum on the high court scale, which shall include but is not limited to the following:

(i) Counsel's fees;

(ii) The cost of obtaining all expert medical, legal reports and any addenda thereto, the qualifying and reservation fees (if any), the costs of consultation by the plaintiff's expert witnesses in preparation for trial and attending trial (if any), in respect of the following expert witnesses:

- (a) Dr J Vos – Ophthalmologist;
- (b) Dr E Jacobs – Industrial Psychologist;
- (c) Letitia Delport – Occupational Therapist;
- (d) Robert Koch – Actuary.

(iii) The costs of consultations between the plaintiff's attorneys and/or counsel with expert witnesses and/or the plaintiff in preparation for trial, including:

- (a) The costs of consultation with the plaintiff to consider any offer from the defendant;
- (b) The travelling expenses (if any) of the plaintiff's legal representatives to consult with expert witnesses in preparation for trial;
- (c) The reasonable taxable accommodation and transportation costs incurred by or on behalf of the plaintiff in attending all medical, legal consultations with the parties' experts, attending consultations with his legal representatives and the court proceedings.

O'BRIEN AJ

2 September 2022

Parties:

For the plaintiff:

instructed by

C Botha

Elliot Maris Attorneys,

Kimberley

For the defendant:

instructed by

A Sieberhagen

The State Attorney,

Kimberley