



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates	YES / NO

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

Case No: 2924/2018
Heard on: 15/06/2021
Delivered on: 10/09/2021

In the matter between:

ITUMELENG GODFREY MELATO

Plaintiff

and

FIDELITY SECURITY GROUP (PTY) LTD

First Defendant

FIDELITY SECURITY SERVICES (PTY) LTD

Second Defendant

SHADRACK VINGER

Third Defendant

JUDGMENT: APPLICATION IN TERMS OF RULE 33(4)

MAMOSEBO J

- [1] The plaintiff, Mr Itumeleng Godfrey Melato, instituted action against Fidelity Security Group (Pty) Ltd, Fidelity Security Services (Pty) Ltd and Mr Shadrack Vinger, the defendants, claiming R1,324,000.00 under the following heads of damages :

- 1.1 General damages for pain and suffering, emotional shock and loss of amenities R500,000.00;
- 1.2 Future medical expenses in the estimated amount of R200,000.00;
- 1.3 Past loss of earnings in the amount of R24,000.00;
- 1.4 Future loss of income and/or earning capacity in the estimated amount of R600,000.00 based on whether the plaintiff will be required to retire earlier or not.

The first and second defendants are cited in the action as the employers of the third defendant and the claim against them is based upon the principle of vicarious liability for the actions of the third defendant. All the defendants are defending the action.

[2] The defendants brought an application in terms of Rule 33(4) seeking the following relief:

2.1. Separation of issues to determine the questions of law and fact before the determination of merits and quantum of the plaintiff's claim. What follows are those questions of law and fact first:

2.1.1 Whether the plaintiff's claim for damages against the defendants arising from bodily injuries allegedly sustained in an incident which occurred on 31 December 2016 at the Diamond [Pavilion] Mall was settled, extinguished or otherwise compromised on or before 27 February 2018;

2.1.2 In the event of it being found that the plaintiff's claim was not settled, extinguished or otherwise

compromised, whether his claim or any residue thereof falls to be reduced in terms of section 36 of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA).

- [3] The defendants further sought that the action proceedings be stayed until the above questions have been disposed of. Further ancillary relief as to costs is also sought.
- [4] The facts are largely common cause. The plaintiff is a security guard employed by Thompson Security. On 31 December 2016 and at Diamond Pavilion Mall, Kimberley, the third defendant, Mr Shadrack Vinger, an employee of the second defendant, Fidelity Security Services (Pty) Ltd, shot the plaintiff with a firearm while the plaintiff was on duty. The plaintiff reported the accident¹ to the Compensation Commissioner at the Department of Labour for purposes of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA). The date on which he submitted the claim is unspecified. He received compensation² in the amount of R4,399.53 for permanent disablement, assessed by the commissioner at 2% and in terms of COIDA.
- [5] Mr Vinger was criminally charged and appeared in the Regional Court in Kimberley. On or about 27 August 2019 the State, on behalf of the plaintiff, and Mr Vinger, entered into a written agreement in terms of section 105A of the Criminal Procedure Act, 51 of 1977 (CPA).

¹ Sec 1 of COIDA provides the following definition for the word “accident”: accident means an accident arising out of and in the course of an employee’s employment and resulting in a personal injury, illness or the death of the employee.

² “compensation” means compensation in terms of this Act, and, where applicable, medical aid or payment of the cost of such medical aid.

Consequent to this agreement, Mr Vinger pleaded guilty and was sentenced as follows:

“5(Five) years imprisonment, totally suspended for a period of 5 (five) years on condition that the accused is not found guilty of the offence of murder or attempt thereto or assault with the intent to cause grievous bodily harm or contravention of the Firearms Control Act, No.60 of 2000, during the period of suspension and further subject to the condition that the accused makes payment of an amount of R50,000.00 as compensation to the complainant by means of monthly instalments of R5,000.00. The first payment is to be made on/or before 07 March 2018 and thereafter on/or before the 7th day of each and every consecutive month by direct deposit into the complainant’s banking account with the following details...³.

[6] The parties are not in agreement that the identified questions of law be separated. The application for separation is opposed primarily on three grounds. The first ground was that it is not convenient to separate the issues because the separation results in a piecemeal approach discouraged by the courts. The second ground was that there may be oral evidence to be led which extends beyond the question of law. Thirdly, that in s 105A there is no reference to s 300 of the CPA and it cannot be said that the magistrate had considered all the relevant factors.

[7] Rule 33, in as far as it is relevant, reads as follows:

“33 *Special Cases and Adjudication upon Points of Law*

(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions

³ I deemed it unnecessary to include the banking details in this judgment.

thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

(c) ...

(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.

(4) If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

(5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence."

[8] The pleadings are closed and the matter was enrolled for trial for 15 June 2021. It is significant to note that the parties had attended a pre-trial conference on 2 September 2020. Paragraph 6 of the minute of the pre-

trial, in particular clause 6.2 thereof, is material for present purposes. It reads:

*“... Defendants’ counsel indicated that there is a question of law, which, in their view, **may conveniently be adjudicated** before evidence is led, or separately from any other question. Plaintiff’s counsel requested that the defendants’ legal representatives prepare a stated case on such issue(s) for consideration by plaintiff’s legal representatives.” (my emphasis)*

[9] The plaintiff and or his legal representatives participated in the pre-trial conference and received the minutes thereof. Despite the plaintiff also having been aware of the defendants’ plea, which included the aforementioned questions of law, nothing came out of it, hence this application was launched to separate the issues.

[10] After careful thought, it does seem to me that the present case is indeed a matter where the two issues concerning points of law can conveniently be decided separately from any other issues in dispute and that such a procedure is clearly expedient having taken cue from the remarks by Navsa ADP and Mothle AJA in *Tshwane City*⁴ where the Court said:

“[2] Careful thought should be given to a separation of issues and the issues to be tried separately have to be clearly circumscribed in order to avoid confusion. A decision on a separate issue should be dispositive of a portion of the relief claimed and essentially should serve expedition rather than cause delay in the resolution of the principal issue.”

It therefore follows that the application to separate the issues in terms of Rule 33(4) and hear paras 1.1 and 1.2 first stands to succeed because it will be expedient and dispositive of the relief claimed.

⁴ *Tshwane City v Blair Athol Homeowners Association* 2019 (3) SA 398 (SCA) at 400 para 2

[11] As stated earlier, the plaintiff was injured on duty and had launched a claim against the three defendants jointly and severally. There is a dispute between the parties in respect of the categorisation of the compensation awarded by the Regional Court Magistrate following a plea-bargaining agreement. While Mr Mooij, counsel for the defendants, submitted that the order of compensation by the Regional Court constitutes an award as envisaged in s 300(3)(a)(ii) of the CPA which stipulates that an award made under this section shall have the effect of a civil judgment, Ms Erasmus, counsel for the plaintiff, relying on the commentary in Hiemstra,⁵ argued that the sentence was imposed in terms of s 297 of the CPA and the payment of R50,000.00 was merely a condition of the suspension and not an order of compensation as contemplated in s 300 of the CPA.

[12] It is also common cause that injury on duty falls squarely within the purview of COIDA. Section 105A(a)(ii)(dd) specifically permits an award of compensation as contemplated in s 300. The following clauses in the pre-sentence agreement entered into between the parties on 27 February 2018 are noteworthy:

“4.7 He is willing to compensate the complainant for the injury that was suffered.

4.10 He is willing to compensate the complainant for pain and suffering. The complainant is willing to enter into negotiations for a civil settlement. The complainant and Investigating Officer were consulted and accepts this agreement. The complainant suffered a flesh wound and has recovered.”

[13] Although the award or the order does not specifically make reference to s 300, the terms used in the agreement, at clauses 4.7 and 4.10

⁵ Hiemstra's Commentary on the Criminal Procedure, 6th Ed at page 779

unambiguously refer to “*compensation for injuries*” and “*the negotiations are for a civil settlement.*” Moreover, if one has regard to the fact that there was no appeal or review launched against the regional court proceedings, then the submission that this was not compensation as contemplated in s 300 cannot pass muster.

[14] The plaintiff, at whose instance the award was granted may, within 60 days after the date on which the award was made, renounce the award in writing. Unquestionably, the plaintiff did not renounce the award as aforesaid. He is, therefore, precluded from instituting any further civil proceedings against the third defendant in respect of the injury for which the award was made.⁶ Had the plaintiff noted his dissatisfaction with the amount of compensation awarded by the court in terms of s 300, he would have been entitled to renounce the award within the 60-day period in order to be able to institute separate civil proceedings against the defendants for a claim greater than the compensation awarded by the court.

[15] It is necessary to show the distinction between sections 297 and 300. Section 297(1)(a)(i)(aa) provides that where the court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may, in the exercise of its discretion, postpone the passing of sentence for a period not exceeding five years and release the person concerned on one or more conditions, which may include an award of compensation. An important distinction between the two sections is that a compensation order in terms of s 300 is made as part of the conditions of sentence, whereas a compensation order in terms of s 297 is a condition of suspension of sentence. Failure by the accused to pay the compensation in terms of s 300 will not result in his

⁶ (see s 300(5)(a) and (b)).

incarceration. However, where the accused fails to pay compensation in terms of s 297 he/she may be committed to prison.

- [16] A further distinction is that s 297 does not give the complainant the right to apply for compensation. The court has a discretion whether to invoke the provisions of this section or not. Any award of compensation under s 297 does not have the effect of a civil judgment, as is the case of an award made in terms of s 300. Where the amount of compensation awarded in terms of s 297 is less than the actual amount of damages suffered by the complainant, the complainant concerned will be entitled to institute separate civil proceedings against the accused for the recovery of the balance of such damages.
- [17] Sight must not be lost of the following facts: The Magistrate made that award based on the information that *the plaintiff suffered a flesh wound and has recovered*. I could not detect in the plaintiff's particulars of claim that he did not instruct the prosecutor to negotiate the civil settlement on his behalf. More importantly, there was no renunciation of the award within the sixty days of the order. The plaintiff claimed his damages from the defendants jointly and severally, therefore, if he settled with the third defendant and accepted the amount, it absolves the first and second defendants.
- [18] Regard being had to the analysis above, I am persuaded that the defendants have made the case that the plaintiff's claim has been settled or extinguished on 27 February 2018. I do not deem it necessary to deal with the alternative in 1.2 above. Careful thought has been given to the

application for a separation of issues.⁷ The conclusion reached, therefore, is dispositive of the entire claim by the plaintiff.

[19] In as far as costs are concerned there is no reason why they should not follow the result.

[20] It is ordered that:

1. The application for the separation of issues to determine the questions of law and fact before the determination of merits and quantum of the plaintiff's claim is granted in terms of Rule 33(4) of the Uniform Rules of Court.
2. The plaintiff's claim is dismissed with costs.



MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the plaintiff:
Instructed by:

Adv. SL Erasmus
Elliot, Maris, Wilmans & Hay Attorneys

For the defendants:
Instructed by:

Adv. A Mooij
Blake Bester De Wet & Jordaan Inc
c/o Van de Waal & Partners

⁷ Tshwane City v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA) para 2