

CASE NO

15860/08

DATE

17 MAY 2013

In the matter between

SIMPHIWE SHANGE

PLAINTIFF

5 and

MEC FOR EDUCATION, KWAZULU-NATAL

DEFENDANT

JUDGMENT

PILLAY J Did Mr Biyela the Deputy Principal of Gcwaluwazi High School in
10 Eshowe strike the plaintiff accidentally with his belt, which he used to beat
another learner? If he did, what amount should the Court award in damages to
the plaintiff? These are the two questions the Court has to decide in this action
for damages against the MEC for Education, Kwazulu-Natal.

The evidence for the plaintiff was that in June 2003 he was in Grade 9.
15 A temporary teacher Ms Ngema was invigilating a test. She instructed the
class to take their bags to the front of the classroom to prevent cheating. One
learner had left his bag on the window. Mr Biyela entered the classroom and
beat that learner, who was Nhlakhanipo Ntuli.

Another learner, Spamandla Nzuza also known as Jomo who sat
20 behind the plaintiff, started laughing. Mr Biyela turned to beat him. Mr Biyela
swung his belt over his shoulder several times. On one occasion it struck the
plaintiff in his right eye.

Clutching his eye the plaintiff stood up crying out in pain. Other
learners drew Mr Biyela's attention to the plaintiff. Mr Biyela told the plaintiff to
25 accompany him to his office. There he administered Vaseline to the plaintiff's

injured eye. He also wrote an apology and explanation in the plaintiff's homework book, which was the means used to communicate with learners' parents.

The plaintiff returned to the class shortly before the period ended. He
5 did not write the test. The plaintiff experienced pain for about two weeks. He did not report it to his grandmother with whom he lived because she was already distressed by a recent death in the family. He mentioned it to his aunt who has since passed away.

He also expected Mr Biyela to enquire from him how he was
10 recovering. If Mr Biyela had done so, the plaintiff would have taken up Mr Biyela's earlier offer to be attended to by a doctor. Mr Biyela did not follow up on the injury he inflicted on the plaintiff. That year the plaintiff passed Grade 9.

The following year he enrolled for subjects in which he was not
interested simply to be with his friends. Within a week he realised he had
15 made a mistake. He switched to subjects in which he was more competent. But he failed Grade 10. His mother, who had left Eshowe at the beginning of 2003 to seek employment in Cape Town, questioned his performance. His grandmother reported that he slept a lot and did not eat well.

About this time the plaintiff went to Swaziland to attend to his uncle's
20 graduation. He had planned to video the proceedings. When he tried to see through the lens of the video camera using his right eye, he found that he could not see at all. Until that moment he did not realise that the vision in his right eye was severely impaired.

His mother instructed the plaintiff to see a doctor in Eshowe. The
25 general practitioner at the local hospital reported to the plaintiff that he had a

serious problem, but not one that the hospital could treat. Unhappy that the plaintiff was unable to get proper treatment in KwaZulu-Natal and concerned about his vision, the plaintiff's mother brought him to her in Cape Town.

There he was referred to an ophthalmic surgeon, Dr R Scholtz, who
5 found that the plaintiff's right pupil was sluggish and that he had suffered chronic inferior retinol detachment. On 18 July 2005 the plaintiff started treatment with a right retinol detachment repair. A second surgery was performed to remove the retinol fibrosis. The third surgery was needed to remove the oil and residual fibrosis.

10 Over two years between 2005 and 2007 the plaintiff had 14 visits with Dr Scholtz for treatment and to monitor his progress. On his last examination on 13 February 2013, Dr Scholtz noted that the plaintiff complained of no pain or discomfort to areas to the right eye. On examination he found that the retina was stable.

15 Dr Scholtz's prognosis was that the plaintiff could experience sudden further deterioration, which might indicate a re-detachment of his retina. This would incur further surgery and cost, which would escalate at a rate of seven percent per annum since his last report on 31 January 2006. Dr Scholtz testified that the plaintiff's injury was consistent with being struck by a belt; he
20 conceded that it could have been caused in some other way.

Ms Liane Durra, a clinical psychologist took over from Ms Mellisa Melnick who became unavailable to testify. Ms Durra confirmed the diagnosis of Ms Melnick that the plaintiff suffered from chronic depression and anxieties attributable to his visual impairment and its consequences for his
25 future career prospects. He was anxious that he had not completed his

secondary and tertiary education.

Dr Hannes Swart an industrial psychologist prepared three reports on the plaintiff, the last being on 3 April 2013. Because of the interruption to his secondary education the plaintiff's income had been curtailed by four years. Initially

5 Dr Swart was unable to prognose whether the plaintiff would complete school or require tertiary education. However, in his last report he compared the examination results of two of the plaintiff's peers with each other and against the class average. This led him to conclude that the plaintiff would have completed Grade 12 and would probably have acquired some tertiary

10 education, although not necessarily a degree or a diploma. The plaintiff's peers had completed Grade 12 and were employed one at the KFC and the other was a paramedic, a career which required some tertiary education.

Dr Swart and Ms Durra suggested that the plaintiff might have passed in 2003 in the year in which he sustained the injury because he had acquired

15 marks in the first half of the year to hold him in good stead for the second half of that year. He failed in Grade 9, probably because he did not have a similar boost as in the previous year. Moreover, Grade 9 would have been more difficult. His visual impairment which caused headaches would also have contributed to his poor academic performance.

20 Although his performance in 2002 in Grade 8 showed that he was not a high achiever before the accident, Dr Swart urged the Court not to put much store in school examination results because of the general difficult conditions under which learners performed.

The plaintiff explained that in 2009 he had difficulty working

25 independently as his concentration was impaired. He had also contracted

tuberculosis and was on treatment but this did not affect his studies. This was the evidence for the plaintiff.

The defendant relied on the single evidence of Mr Biyela. His evidence which lasted a few minutes was that he never resorted to corporal punishment. He specifically denied injuring the plaintiff. That was the defendant's case.

The plaintiff's version must be accepted for the following reasons. It was corroborated in material respects. Although the plaintiff should have called Mr Khanyile, his classmate to testify about the assaults before testifying himself, his own evidence is sufficiently detailed and weighty. Furthermore, the experts testified that his narrative of the background to his injury was consistent and coherent despite the lapse of time.

The plaintiff also presented as a credible witness. He was relaxed in the beginning but became emotional when he testified about his anxieties, about his career prospects and inability to socialise with his friends who are now ahead of him in their careers. He remarked that it made him cry to learn that Mr Biyela denied injuring him.

Cross-examined about his homework book, he replied that he could not find it. He probably used it to start up a fire when at the end of the year he realised that he had no use for it. At that time, of course, he had not contemplated litigation and had not even made the connection between his injury and the symptoms he was experiencing.

All the witnesses testified in English. In the case of the plaintiff, his mother, Mr Khanyile and Mr Biyela, English was their second language. As a result the court had the benefit of assessing their evidence without the it being

filtered through an interpreter.

An aspect of the plaintiff's case that was troubling was the delay from June 2003 to December 2004 to seek medical assistance and to launch this application. His explanation was that initially he did not connect his headaches
5 and the inability to concentrate to his eye injury. Furthermore, he did not want to trouble his grandmother. If he was lying, it would have been easier for him to have pegged the date of the injury to 2004 closer to getting medical attention. What is not in dispute is that he did receive medical attention for the injury to his eye. His version was also too detailed to be contrived and
10 corroborated.

In contrast, Mr Biyela had a motive to be untruthful. He was prohibited by law from assaulting learners. If he did assault learners not only would he be in trouble personally and his job in jeopardy but the department could be held liable for damages in delict, as it has been.

15 Furthermore, his evidence was uncorroborated. He also proffered no evidence or explanation as to why no other witnesses were available to support his version. There was Ms Ngema the temporary teacher. If his version were true he was free to call any of the learners in that class of more than 40 in 2003.

20 A bare denial is easy to maintain to stonewall further interrogation. The risk of course is that a more credible version trumps a bare denial with equal ease. Compared to Mr Biyela's bare denial the plaintiff's version is reasonably probably true on the question of liability.

On causation the court questioned the plaintiff to establish whether his
25 poor academic performance in 2004 could be attributed to his mother parting

from him to work in Cape Town or his contracting tuberculosis and later HIV. He responded confidently that none of these factors impinged on his studies. He was used to being raised by his grandmother. He took his tuberculosis medication as instructed and was completely cured. He was also tested at the
5 time for HIV and he was not positive then. After he left school his depression and anxieties led him to alcohol abuse.

What is not disputed is that the injury to his eye had to be treated in Cape Town over two years. Consequently he could not be in school to complete his secondary education. He was also too old to return to school by
10 the time his treatment had been completed. Without Grade 12 his job prospects were also impaired. These factors feed into the quantum to be awarded.

As far as the probabilities go regarding his career prospects and performance henceforth, I take note of Mr Swart's observation that he should
15 not be judged necessarily by his academic performance. Assessing his performance in the witness box, his poor academic results belied his ability and maturity. He struck me as a person determined to advance himself academically and career wise. He testified to that effect. He has come to realise that his lack of education, secondary and probably tertiary, is an
20 impediment to his psychological wellbeing. He has had some guidance in that regard and has weaned himself off alcohol abuse. It must be remembered also that he was in his late teens when he strayed from being the obedient child that he testified to being whilst he lived with his grandmother.

Although there is no certainty as to how his future might unfold, and
25 much depends on his own will to turn his life around, the contingencies applied

in calculating his quantum will account for these uncertainties. As for the quantum, the plaintiff's experts were not seriously challenged. In the absence of evidence to the contrary, their expert evidence must be accepted.

The actuarial report was admitted to the extent that the methodology
 5 for calculating loss of earnings and future medical expenses was not disputed. The plaintiff has applied a steep contingency of 30 percent against his future loss of earnings. This is appropriate given objectively the vicissitudes in the job market and subjectively the uncertainties in the plaintiff's capabilities.

With regard to general damages I agree that this is a reasonable, if not
 10 conservative amount. A thoughtless and accidental act by an official has had such devastating consequences for a learner. I hope that educators realise that not only is it unlawful to practice corporal punishment but it is simply unconscionable that they do so in total disregard of the devastating, dignity-denying, life-changing impact their conduct has on learners, on our fiscus and
 15 ultimately on society.

In conclusion, I find on the merits in favour of the plaintiff. On quantum I find that the plaintiff has proved his losses. The order that I grant is the following:

1. The plaintiff is awarded his claims for:
 - 20 1.1 past and future loss of earnings in the amount of R3 601 050
 calculated as follows as per the draft order:

	Uninjured Tertiary	Injured	Loss
Past loss	R 381,700		
Less 10%	R 343,530		R 343,530
Future loss	R 6,174,500	R1,520,900	

Less 30%	R 4,322,150	R 1,064,630	3,257,520
			<u>R 3,601,050</u>

- 1.2 future eye operations as calculated by the actuary Mr Munro in the amount of R8 500.
- 1.3 future psychotherapy sessions calculated by the actuary Mr Munro in the sum of R57 200.
- 1.4 general damages of R180 000.
- 1.5 school fees, payable to Abbots College in the amount of R86 506.
2. The total amount payable in terms of the 5 claims above amounting to R3 933 256 shall be paid into the plaintiff's attorneys trust account, the details of which are in the draft order.
3. The defendant shall pay interest at 15.5% on the amount of R3 933 256 from 31 May 2013.
4. The defendant is ordered to pay the costs of the plaintiff, such costs to also include:
- 4.1 The costs of the expert witnesses for preparing reports and for their qualifying costs for testifying.
- 4.2 The cost of travel from Cape Town to Durban and return for Dr Scholtz, Ms Durra and Dr Swart.
- 4.3 The costs of accommodation in Durban for one night for Ms Durra and Dr Swart.
- 4.4 The costs of return flights, a hired car and accommodation in Durban for four nights for the plaintiff's attorney and counsel.
- 4.5 The costs of travel from Cape Town to Durban and return for

the plaintiff and his mother.

4.6 Any costs attendant on recovering these amounts.

COURT ADJOURNS

5

IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO : 15860/08

HEARING : 13-17 MAY 2013

DATE : 17 MAY 2013

In the matter between

SIMPHIWE SHANGE PLAINTIFF

and

MEC FOR EDUCATION, KWAZULU-NATAL DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE PILLAY

ON BEHALF OF PLAINTIFF : ADVOCATE BRIGMAN

ON BEHALF OF DEFENDANT : ADVOCATE F ABRAHAMS

REPORT ON RECORDING

Generally clear recording.
Only judgment was requested for transcription.

CONTRACTOR

Sneller Recordings (Pty) Ltd. Durban • 103 Jan Hofmeyr Road • Westville 3630
Tel 031 2665452 • Fax 031 2665459

CONTRACTOR

Sneller Recordings (Pty) Ltd. Durban • 103 Jan Hofmeyr Road • Westville 3630
Tel 031 2665452 • Fax 031 2665459