

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: YES/NO

07/06/24
DATE

SIGNATURE

In the matter between:

Case No: 85840/2015

PETER JOHN NICHOLSON

PLAINTIFF

and

MINISTER OF DEFENCE

DEFENDANT

JUDGEMENT

INTRODUCTION

[1] The Plaintiff has instituted delictual action against the Defendant seeking compensation for damages suffered as a result of an incident that occurred on 20 April 2015 at approximately 20:00 on R525 road between Tshipise and Bokmakierie in Limpopo Province.

[2] At the commencement of the proceedings, the parties informed the Court that the issue of liability was settled at 100% in favour of the Plaintiff. The merits were finalized, on 23 April 2018. The basis upon which liability was conceded by the Defendant is that the roadblock conducted by the members of the Defendant was not in accordance with the law. The issue before the court is the issue of quantum.

[3] The Defendant is cited in this case on the basis of the principle of vicarious liability as the members of the South African National Defence Force (SANDF) are employees of the Defendant. On the day of the incident, they were acting within the course and scope of employment with the Defendant.¹

BACKGROUND FACTS

[4] The Plaintiff was driving at approximately 20:00 on R525 road between Tshipise and Bokmakierie in Limpopo Province on 20 April 2015 when his vehicle suddenly struck a spiked expanding metal trap strip which was pulled across the road. As a result, all the four tires of his vehicle were punctured. At the same time, the Plaintiff heard the sound of semi- automatic rifle fire from the side of the road hitting his vehicle. He realized that he was under attack. He decided to continue driving in order to get away from fire.

[5] The police, after being called, arrived at the scene and arrested the members of the SANDF who were stationed at SMG Military Base, in Musina. The members involved accepted responsibility claiming that it was a mistaken identity. The Plaintiff was severely traumatised by the attack. He suffered severe emotional and mental shock. As a result,

¹ Caselines C3 paras 1.5 and 2.2.

he had to undergo psychiatric treatment. He still suffers from mental injuries sustained as a result of the attack on him and his vehicle. At the commencement of the proceedings, the parties informed the Court that the issue of liability/merits was settled at 100% in favour of the Plaintiff on 23 April 2018 and there is a Court Order to that effect.² According to the Counsel for the Defendant, the basis upon which liability was conceded is that the roadblock conducted by the employees of the Defendant was not in accordance with the law. The Counsel for the Defendant submitted that the fact that liability was conceded does not mean that the Plaintiff is entitled to be compensated. It is trite that the onus rests on the Plaintiff to prove his case on the balance of probabilities (see *Pillay v Krishna*, 1946 SA 946).³

ISSUES FOR DETERMINATION

[6] The Court is called upon to determine the issue of quantum. On 26 February 2024, the trial started. The Plaintiff's Heads of Argument replying to the Defendant's Heads of Argument were submitted on 8 March 2024. The Judgment was signed off and deemed delivered on 7 June 2024.

PLAINTIFF'S CASE

[7] On 26 February 2024, the Plaintiff's trial started and he gave evidence in chief. The Plaintiff's Heads of Argument replying to the Defendant's Heads of Argument were submitted on 8 March 2024.

The Plaintiff testified that he was an outgoing warm person before the incident on 20 April 2015. The Plaintiff was very involved with his family, church, business and the industry. In fact in the same year of the incident the Plaintiff, won an award for the best farmer in the citrus industry. He was also the chairperson of the Citrus Growers' Association of South Africa. Under his leadership the industry grew from a 20 billion-a-year export industry to a 200 billion industry, therefore earning the South African economy much-needed foreign trade. After the incident the Plaintiff, withdrew from public life, people, his

² Caselines 005-9.

³ Caselines C4 para 2.4.

family and business. The Plaintiff testified that he became angry and anxious, he was obsessed with what happened to him and could not make decisions.

[8] The Plaintiff testified that the incident happened in the most productive years of his life, as being between 55 and 65 years old. The Plaintiff became so incapacitated that he was requested by his sons to leave the farming business, which he did. The effect was that the Plaintiff's salary before the incident as being R540 000 per year was reduced to R140 000 per year, according to his IRP5's. He had copies thereof in court and testified that he handed it to the industrial psychologist. This reduced the Plaintiff's income for the past 8 years with R400 000 per month.

[9] The Plaintiff went for counselling, but did it not have much effect and was he also placed on subscription drugs. Although nearly 10 years have passed since the incident the Plaintiff is still emotional and sensitive about what happened. The Plaintiff testified that his prescription drugs cost him an amount of R1000 per month. The Plaintiff testified that although he does not go to the psychiatrist a lot, he must consult with him every 6 months to renew his medication, the consultation fee is about R1500 per session. The Plaintiff, testified he went to a psychologist for about two years, two times a month, whose fee was R750 per session. He does not go to the Psychologist anymore as he now goes to see his minister at the church for therapy. The minister does not ask for any fee for this therapy.

[10] The testimony of the Plaintiff was accepted as is by the Defendant's legal team as they did not cross-examine the Plaintiff and his testimony is unchallenged.

[11] The Plaintiff's testimony was confirmed by the expert reports, discussed in the stated case, which was also uploaded on caselines.

[12] In the joint minutes between Merryll Vorster (MV) for Plaintiff and Dr R T H Lekalakala (RTHL) for Defendant, they agreed that Plaintiff's condition/disorder has become chronic and that he requires ongoing treatment.

[13] They are in agreement that the Plaintiff's primary psychiatric diagnosis is a Post-Traumatic Stress Disorder with depression and MV notes the additional possibility of an underlying psychosis.

[14] They are also in agreement that the Plaintiff is going to require ongoing psychiatric treatment, possibly on a lifelong basis and we agree on the cost of such treatment as outlined in M Vorster's report.

[15] The Plaintiff filed reports of the following experts:

- Dr Merryll Vorster (Forensic Psychologist)
- Dr Henk J. Swanepoel – Clinical Psychologist)
- Karen Kotze (Industrial Phycologist)
- Namir Waisberg (Actuary Consulting).

DEFENDANT'S CASE

[16] The Counsel for the Defendant argued that the fact that liability was conceded does not mean that the Plaintiff is entitled to be compensated. It is trite that the onus rests on the plaintiff to prove his case on the balance of probabilities see *Pillay v Krishna, 1946 SA 946*. He further argued that the Defendant is cited on the strength of the principle of vicarious liability, in that the employee(s) of Defendant, were acting within the course and scope of employment with the Defendant.

[17] The Defendant filed reports of the following experts:

- Dr Lekalakala (Forensic Psychologist)
- Dr Louisa Maritz (Industrial Psychologist)

[18] The Counsel for the Defendant argued in his Heads of Argument as follows:

“

4.1. *We submit that the Plaintiff was assessed during 2019 by the experts.*

4.2. *The experts' reports were also prepared during 2019. We submit that the reports are stale and therefore irrelevant.*

4.3. *The Plaintiff, to be precise, was seen by the experts as follows:*

4.3.1. *Dr Merryll Vorster (Forensic Psychologist)*

Date of report: 21 November 2018

Date of assessment: 26 November 2018

4.3.2. *Dr Henk J. Swanepoel – Clinical Psychologist)*

Date of report: 25 February 2020

Date of assessment: 09 March 2020

4.3.3. *Karen Kotze (Industrial Phycologist)*

Date of report: 02 August 2019

Date of assessment: 19 March 2019

4.3.4. *Namir Waisberg (Actuary Consulting)*

Date of report: 27 September 2021

Date of assessment: 26 August 2021

4.3.5. *Dr Lekalakala (Forensic Psychologist)*

Date of assessment: 01 October 2019

4.3.6. *Dr Louisa Maritz (Industrial Psychologist)*

Date of report: 07 October 2019

Date of assessment: 27 September 2019.”

[19] He argued that in the case of **NG vs Road Accident Fund**,⁴ reliance on an expert's opinion that was stale was abandoned because of the risks that come with the reports in that they may mislead the Court regarding the real sequelae from the injuries sustained. The date of the 26th of July 2012 is recorded as the date of assessment on the first page of each report. The report by Dr. Kaplan shows the date of 26 July 2012. This is almost seven years before. The report by Dr. Cathy Angus's, a clinical psychologist, was dated

⁴ Unreported case number: case no: 13/30599 handed by the Honourable INGRID OPPERMAN J at para 42.

the 14th March 2012, which is 7 (seven) years before. His second report is dated the 19th of January 2015 which is almost 4 years before. The report by Dr. Anton H. Van den Bout, an Orthopedic surgeon, is dated the 20th of October 2015 which is almost 4 (four) years before the time of consideration.

[20] The Counsel for the Defendant also argued that the joint minutes are based on stale reports. The joint minutes were prepared on the 06th of February 2024 based on the stale reports. Due to the fact that the reports are stale, the best evidence is not before the court to assess the state of mind of the Plaintiff. If the Plaintiff's circumstances have improved then the Plaintiff will be over-compensated and if his circumstances have deteriorated then he would be under-compensated.

PLAINTIFF'S REPLY

[21] The Counsel for the Plaintiff replied as follows:

"I reply hereto to the Defendant's Heads of Argument, which has been uploaded on case lines on 4 March 2024, and not sent to Counsel of the Plaintiff.

2.

Plaintiff's and Defendant's Counsel agreed on the day of trial, that the Plaintiff, will present his evidence in court and that the parties will thereafter file a stated case in terms of Rule 33 (2) of the High Court Rules.

3.

This agreement was reached after the Plaintiff and the Defendant filed their expert reports and joint minutes was received from the Psychologists.

4.

It is common cause that there is no major discrepancies in both the findings of the Plaintiff's and Defendant's expert reports.

5.

The Defendant's legal representatives, by agreeing to argue from the expert reports and presenting the case via Rule 33.

6.

I tried to contact the Counsel of the Defendant to agree on the aspects that was required in terms of Rule 33(2). I could not get hold of Counsel and proceeded to state only the Plaintiff's case on the stated case.

7.

I was quite surprised, after my attorney send me the Heads of argument of the Defendant, and noticed that the Defendant does not agree on the expert reports and not on the contents thereto but because the Defendant argues that the reports are "stale".

8.

It seems as though the Defendant's Counsel is correct that if the parties cannot agree, on the evidence before court that a stated case cannot be presented to court.

9.

It is my suggestion that if the court cannot make a decision on the expert reports, as the parties cannot reach any agreement on the evidence before the court, the court is requested to refer the case for evidence of the experts before himself.

DATED AT PRETORIA ON THIS THE 08TH DAY OF MARCH 2024."

ANALYSIS

[22] The Counsel for the Defendant submitted heads raising the fact that the expert reports are stale. The Counsel for the Defendant also argued that the joint minutes are based on stale reports. The joint minutes were prepared on the 06th of February 2024 based on the stale reports. Due to the fact that the reports are stale, the best evidence is not before the court to assess the state of mind of the Plaintiff. If the Plaintiff's

circumstances have improved then the Plaintiff will be over-compensated and if his circumstances have deteriorated then he would be under-compensated.

[23] The Counsel for the Plaintiff suggested that *"if the court cannot make a decision on the expert reports, as the parties cannot reach any agreement on the evidence before the court, the court is requested to refer the case for evidence of the experts before himself."*

CONCLUSION

[24] In conclusion, I am persuaded by the argument from the Counsel for the Defendant that the joint minutes are based on stale reports as the joint minutes were prepared on the 06th of February 2024 based on the stale reports. I am also persuaded by his argument that due to the fact that the reports are stale, the best evidence is not before the court to assess the state of mind of the Plaintiff. He is correct that if the Plaintiff's circumstances have improved then the Plaintiff will be over-compensated and if his circumstances have deteriorated then he would be under-compensated.

[25] I am also persuaded by the argument and suggestion from the Counsel for the Plaintiff that *"if the court cannot make a decision on the expert reports, as the parties cannot reach any agreement on the evidence before the court, the court is requested to refer the case for evidence of the experts before himself."*

[26] It is therefore common cause that due to the fact that the reports are stale, the best evidence is not before Court to assess the state of mind of the Plaintiff. It is also correct that if the Plaintiff's circumstances have improved then the Plaintiff will be over-compensated and if his circumstances have deteriorated then he would be under-compensated. Therefore, the Court cannot make a decision on these expert reports. As the parties cannot reach any agreement on the evidence before the Court, the court is requested to refer the case to a court hearing of the evidence of the experts. In the best interest of justice, the request to refer the case to a court hearing of the evidence of the experts is granted and as such, it becomes a Court Order.

[27] In the circumstances, the following Order is made:

[27.1] The Plaintiff's request to refer the case to a court hearing of the evidence of the experts is granted.

[27.2] The parties shall bear their own costs.


T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Plaintiff:	Adv JJN Swart
Instructed by:	HM Erwee Attorneys Inc.
Counsel for the Defendant:	Adv M.E. Ngoetjana
Instructed by:	State Attorney Pretoria
Date of Hearing:	26 February 2024
Date of Judgment:	7 June 2024

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date of signing it off and time for the delivery is 7th of June 2024.