

SOUTH AFRICA / JUDGMENT

Julius v McKenzie t/a Peter McKenzie Attorneys (1117/2019) [2024] ZAECQBHC 87 (23 May 2024)

[2024] ZAECQBHC 87

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M Makaula

CASE / FILE NUMBER

1117/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE

DIVISION, GQEBERHA

CASE

NO: 1117/2019

In the matter between:

TARQUIN
JULIUS
Plaintiff
and
PETER MCKENZIE t/a
PETER MCKENZIE
ATTORNEYS
Defendant

JUDGMENT

MAKAULA J:

A.

Introduction

- [1] The merits of the matter were settled by my brother, Eksteen J, on 7 September 2021. He ordered the defendant to pay the plaintiff such damages as the plaintiff can prove that he has suffered in consequence of the shooting that occurred on 6 December 2008. The matter serves before me in respect of the general damages that the plaintiff suffered because of the shooting. The parties closed their cases without calling for evidence.
- [2] The plaintiff was shot in the face on 16 December 2008, by a member of the South African Police Services (SAPS). In consequence thereof, he lost his right eye and partial vision in the other. He instructed Masimla attorneys (Masimla) to institute action against the Minister of Police for damages that he had sustained because of the injuries occasioned by the shooting. Masimla accepted the mandate but failed to issue summons timeously, thus resulting in the claim being prescribed. The plaintiff thereafter instructed the defendant to issue summons against Masimla for damages that he had sustained as a consequence of prescription of his claim against the Minister. The defendant accepted the mandate but also allowed the claim to prescribe, hence the present action against the defendant.

B. Background Facts.

- [3] The following are common cause facts. In dealing with them, I find it apposite to deal with plaintiff's educational background and personal circumstances first. These were succinctly dealt with in the

judgment

on the merits by Eksteen J as follows:

[3] Mr. Julies, who was 25 years old at the time of the shooting, is an unsophisticated man who grew up in northern suburbs of Gqeberha where he had successfully completed Grade 7 at school. He terminated his education due to financial constraints, and he holds no other qualification. He lived with his mother at 1[...] A[...] Drive in Gelvandale, Gqeberha (his home) and he said that he had been employed as a handyman before the shooting.

[4]. On Saturday, 6 December 2008, Mr. Julies, and a few friends had been drinking at his home when two unmarked police vehicles arrived and parked in the street, in front of his home. Two policemen in civilian clothes alighted from the cars, whilst at least one, identified as Sergeant De Maar, remained in one of the police vehicles. The two policemen entered his home. It is unclear what they did inside, but shortly after entering they again emerged and proceeded to walk down

the driveway to their cars. Mr. Julies, standing outside in front of his home, demanded an explanation for their conduct inside the house and, as he did so, one of his friends threw a beer bottle at the police, which struck one of their vehicles. Mr. Julies said that Sergeant De Maar had then alighted from the vehicle carrying a shotgun and shot at him, without uttering a word. He was struck in the face, which instantly rendered him unconscious and only regained consciousness in hospital. Mr. Julius is unaware of the events that occurred immediately after the shooting,'

- [4] The medical records reveal that the plaintiff was initially admitted to Livingstone Hospital, and then transferred to Port Elizabeth Provincial Hospital three days after the shooting. He was found to have a disorganized right eye with no perception of light vision and a left eye with scleral laceration and vitreous hemorrhage with possible retinal detachment and light perception vision. He underwent surgery the following day, with a right scleral laceration repair, and a posterior vitrectomy. It was noted that a cataract was developing in the left eye. On 11 March 2009, the left cataract was removed to avoid retinal detachment. The plaintiff experienced pain and discomfort in the right eye, and it was found to be blind, resulting in it being removed in August 2009. It is noteworthy that subsequently, the plaintiff suffered loss of vision in his remaining left eye to an extent that he experienced total retinal detachment, which had to be repaired on more than two occasions. Dr O. Read, an Ophthalmologist, has opined that the plaintiff had irreversible blindness in his eyes. This should be viewed against the backdrop that his right eye has since been removed.
- [5] Dr Read, an ophthalmologist, consulted with the plaintiff and made recommendations that the plaintiff use intra-ocular pressure lowering medication daily which would delay or prevent the onset of no light perception in the left eye as it reduces the damage that raised pressure causes to the optic nerve. She suggested that the plaintiff should get an artificial right eye for aesthetic purposes. She recommended that he see an ophthalmologist at six month's intervals. He found that the plaintiff will depend on another individual to assist him with most activities of daily living as well as shopping, a role that his girlfriend is currently doing. Mr. Annandale, a clinical psychologist, also consulted with the plaintiff and made clinical findings, which are dealt with below.

C. The issue.

- [7] The issue is the amount to be awarded for general damages. The plaintiff suggested an amount of R2 750 000.00 whereas the defendant offered an amount of R1 500 000. 00.

D. Argument.

- [8] In argument, the parties relied on similar case precedents but differed in their application thereof. Both parties referred me to the matters of *Nepgen NO v Raf* (*Nepgen NO*)[1] and *Pietersen v MEC for Health Gauteng* (*Pietersen*)[2]; *Naidoo v City of Johannesburg Metropolitan Municipality*[3] (*Naidoo*). The plaintiff distinguished *Nepgen NO* from the present matter in that in the former case, the neurosurgeon Dr Kelly

who examined the plaintiff, opined that the latter accepted his blindness, and was living a normal life compared to the plaintiff in the present matter, whose life has changed drastically due to him being aware of his blindness which causes emotional anguish i.e. depression and post-traumatic stress disorder. In sum, the plaintiff submitted that the current value in monetary terms of R1 571

000. 00 awarded to the plaintiff in Nepgen N.O is woefully inadequate in the circumstances of this matter. Mr. Niekerk, for the plaintiff, submitted that what could have influenced the court in coming to that conclusion is what was said by Dr Kelly that the plaintiff was not invalidated because of his post-traumatic dimension, but as far as his wife Georgina was concerned, he is living a normal life subject to his blindness, which is not the case in the present matter. Further, in distinguishing Nepgen N.O, the plaintiff submitted that the court would also have considered the fact that the plaintiff was unable to understand litigation, hence the appointment of Adv Nepgen as a curator and therefore his cognitive reasoning was compromised, and he had less insight into the impact of his blindness.

[9] In dealing with Pietersen, the plaintiff acknowledged that the injuries sustained by Miss Pietersen were more severe than they are in the present matter. Miss Pietersen was negligently prescribed the medication Tegretol by a doctor, which resulted in her developing Stevens-Johnson syndrome with associated blindness. Her right eye was irreversibly determined to be permanently blind; she lost her senses of smell and hearing. The plaintiff accepted that the injuries sustained by Miss Pietersen were too severe and necessitated that the award be more than would be awarded to the plaintiff in this matter.

However, the submission is that the amount of R1 500 000. 00 offered by the defendant is insufficient to compensate the plaintiff for the injuries he sustained.

[10] The plaintiff further distinguished Naidoo. Briefly, the facts are that a 16-year-old pregnant woman stepped into an uncovered manhole because of which she sustained, among other injuries, a brain injury that led to permanent cortical blindness. In awarding damages, the court stated that it had to award the amount of R1,000,000 asked for by the plaintiff. The plaintiff argued that had the plaintiff not asked for a fixed amount, the court would, in its discretion, have awarded more than R1,000,000. The plaintiff reasoned that this matter is distinguishable for that reason.

[11] Mr. Paterson, Counsel for the defendant, argued that the injuries sustained by the plaintiff are less serious than those sustained by the plaintiffs in the various matters referred to above, resulting in more amounts being awarded to the plaintiffs in those matters. He submitted that the amount sought by the plaintiff in this matter is way out of proportion with the current day awards. Regarding the Nepgen NO, the defendant distinguished it in the sense that the plaintiff in that matter sustained a closed brain injury which contributed to his blindness. Furthermore, as argued by the defendant, the injuries in that matter, were more severe than in the present matter and the court awarded R1 500 000.00

- [12] Similarly, in respect of the Naidoo, the defendant submitted that the plaintiff sustained a traumatic brain injury that caused permanent blindness (and other sequelae some weeks later after she gave birth), constant headaches and seizures. Therefore, the injuries were more severe than the present matter, hence the award given was more.
- [13] In differentiating the Pietersen, the defendant submitted that her injuries were too severe in that she lost four of her senses, post-traumatic stress disorder, a major depressive mood, a disfigured face that led her to be the issue of being teased and called a monster, and other injuries dealt with above. In that regard, the injuries are not comparable to the present matter, and therefore a lesser amount should be awarded.

E. Discussion.

- [14] The issue of how to approach an award for general damages is now settled. In *Road Accident Fund v Marunga*[4], Navsa JA had the following to say:

‘This court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement,

permanent disability, and loss of amenities of life arises, a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.’

- [15] Regarding an award based on previous cases, the Appellate Division, now the SCA, as far back as 1971 dealt succinctly with the way previous awards should be approached as an aid to arriving at an appropriate award. Potgieter JA in *Protea Assurance Co. Ltd. V Lamb*[5] said:

‘The above quoted passages from decisions of this court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial court or the court of appeal, as the case may be, pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of meticulous examination of award made in other cases in order to fix the amount of compensation; nor should the process be allowed to dominate the inquiry as to become a fetter upon the court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in general way, towards assisting the court in arriving at an award which is not substantially out of general accord with the previous awards in broadly similar cases, regard had to all the factors which are considered to be relevant in assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae injuries may have been either more serious or less than those in the case under consideration.’

[16] In determining an appropriate award, it is prudent for courts to have regard to and take into consideration the inflation rate on the value of the rand/money in current years. In doing so, however, courts should be cognisant of the balancing act and not overcompensate the victim at the expense of the defendant. The amount that I have to award should be an amount that is fair and reasonable to both parties. In *Bay Passenger Transport Ltd v Franzen* [6] Trollip JA said:

‘In other words, in striving to determine an amount that will be fair in all the circumstances, the court should act conservatively rather than liberally towards the plaintiff lest some injustice be perpetrated on the defendant.’

[17] In this instance, the defendant’s practice was lax and negligent in handling the claim of the plaintiff by allowing it to prescribe under its watch. Be that as it may, the defendant remains liable to the extent to which the plaintiff would have been entitled against the erstwhile defendant. Put differently, the plaintiff is entitled to the same award that he would have proven had the claim not prescribed.

[18] As aforesaid, I must have regard to the previous awards referred to in the matters relied upon by the parties. Suffice to state that there is no matter that is in all fours with the other. Previous awards would seldom, if at all, be identical to future matters, as in this instance.

[19] As previously stated, no evidence was led by the plaintiff. I rely on the transcript and the judgment on the merits. The injuries and treatment are further postulated by Doctor Read, an ophthalmologist and neuropsychologist named Mr. Annandale who consulted with him and filed reports on behalf of the plaintiff.

[20] The injuries sustained by the plaintiff are captured above. In his testimony under cross examination on the merits, the plaintiff testified that in the year 2009 his right eye was removed and he remained with his left eye, regarding which he said, “I had low vision”. Dr Read further refers to this as follows:

(i) “5/10/2009: right eye was removed (eviscerated) as it was blind and painful.

(ii) October 2009-9/04/2014: patient was not seen between these dates, did not attend follow up over this five year period. ... Unfortunately, following the second and third retinal detachments, there was a fair delay in seeking treatment according to the notes. Patient denies this. This has likely contributed somewhat to the poor outcome.” (emphasis added)

[21] The prognosis of Mr. Annandale is as follows:

“Prognosis

His prognosis is guarded. The following positive prognostic factors were considered:

(i) There was a gradual improvement in his emotional adjustment over the years i.e. (even therapeutic intervention).

(ii) Major Depressive Disorder is regarded as a treatable condition with a combination of mainly psychotherapy, as well as psychotropic medication.

(iii) His partner is extremely supportive and he benefits from having her as his carer.

(iv) He will likely benefit from an emotional perspective if he receives compensation for damages, enabling him to improve his home and living circumstances.”

[22] The report by Dr Read suggests that the plaintiff’s condition was exacerbated by him not attending treatment for a period of five years. Even though the plaintiff denied it, the medical records bear that out. There is no medical history noted during that period. Furthermore, Mr Annadale, as reflected in paragraph 21, opined that major Depressive Disorder is treatable and that his emotional condition would improve if he received compensation, which would allow him to improve his home and living circumstances.

[23] Having regard to the injuries, the current rate of inflation, and the previous awards, the amount I find to be fair and reasonable is R1.800 000.00 (One million eight hundred thousand rand).

[24] At the beginning of the trial the parties advised me that the following heads of damages are settled in the amounts reflected, by agreement.

24.1 Loss of earnings

R2 058 843

24.2 Costs of carer

R1 869 616

24.3 Optometric treatment

R 108 744

24.4 Physiological treatment

R 74 032

Sub-total

R 4 111 235

An interim payment of R 1 562 500 was made to the plaintiff. Outstanding therefore is the award of general damages which are R1 800 000,00. Therefore, the defendant is liable to pay the plaintiff an amount of R5 911 235 less the interim payment of R1 562 500.

[25] Consequently, I make the following order:

1. The Defendant shall pay to the Plaintiff the sum of R4 348 735,00 (four million three hundred and forty eight thousand and seven hundred and thirty five rands) payment to be made to the plaintiff's

attorneys of record, Vic Skelton Inc. whose trust account details are as follows:

Account name : Vic Skelton

STANDARD BANK :

Account no :

0[...]

Branch code : 0500117

2. The defendant shall be liable for interest on the aforesaid amount at prescribed legal rate of interest from date of judgment to date of payment.
3. The defendant shall pay the plaintiff's taxed party and party costs, such costs to include the reasonable and necessary qualifying fees and expenses of the following expert witnesses, if any:

2.1 Dr Read;

2.2 Willem Annandale;

2.3 Jean du Rand; and

2.4 Willem Boshoff (Munro Forensic Actuaries)

4. The defendant shall liable for interest on the taxed costs at the prescribed legal rate of interest from the date of allocatur to date of payment.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff

: Adv D Niekerk

Instructed by

: VIC SKELTON INC.

18 Gipson Street

GQEBERHA

For the Defendant : Adv N Paterson

Instructed by

: PETER McKENZIE ATTORNEYS

39 Beetlestone Street

Date heard

: 23 November 2022, 8 November 2023

Judgment

delivered : 23 May 2024

[1]

[2012] ZAECPEHC 17 (15 March 2012); [2013] JOL 30071 (ECP)

[2]

[2021] ZAGPJHC 807 (2 August 2021); [2021] JOL 52568 (GJ).

[3][2020] ZALCJHB 264 (27 July 2020), 2023 JOL 59784 (GJ)

[4] 2003 (5) SA 164 (SCA) para 23

[5] 1971 (1) SA 530 (SCA) at 535 A to 536 B-C

[6] 1975 (1) SA 269 (A) 274

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECQBHC/2024/87.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/julius-v-mckenzie-unknown-topic-aecqbhc-2024--6a3ea5143b1caa912980bfd6>

Prepared on 12 October 2026 · Esheria