

SOUTH AFRICA / JUDGMENT

Philander v Minister of Safety and Security (473/2011) [2013] ZANWHC 51 (6 June 2013)

[2013] ZANWHC 51

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

473/2011

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REPORTABLE

NORTH

WEST HIGH COURT, MAFIKENG

CASE

NO. 473/2011

In

the matter between:

MIMI

MARGRET PHILANDER

.....PLAINTIFF

and

MINISTER

OF SAFETY & SECURITY

.....DEFENDANT

—
CIVIL

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The plaintiff, Mimi Margret Philander, issued summons against the defendant, the Minister of Safety and Security, on two claims. In the first claim, it is alleged that on 27 February 2010, at Huhudi Police Station, Vryburg, the plaintiff was unlawfully assaulted by members of the South African Police (“SAPS”) and as a result of the assault she sustained bruises, suffered contumelia and psychological damage.

[2] On claim 2, it is alleged that on 28 February 2010, at Huhudi, members of the SAPS unlawfully and intentionally raped the plaintiff

twice and assaulted her as a result of which she sustained bruises, suffered contumelia and psychological damage.

[3] At the commencement of the proceedings, the parties placed the following on record:

3.1 The defendant conceded the merits as follows:

3.1.1. in claim 1, the defendant admitted that the plaintiff was assaulted by three policemen;

3.1.2. in claim 2, the defendant admitted that Constable Modupe raped the plaintiff twice and that the plaintiff was assaulted by Constables Modupe and Mochwari.

3.2. The only issue for the Court to determine is the quantum on both claim 1 and claim 2.

3.3. The parties agreed that no witnesses will be called to prove the quantum and the parties will rely on the bundle of documents handed in by agreement, marked “A”.

3.4. Bundle “A” consists of the following documents:

3.4.1. the plaintiff’s notice in terms of Rule 36(9)(b), consisting of a summary of the opinion and reasons of Dr Jago Bandhu Dam (“Dr Dam”), a general practitioner;

3.4.2. the plaintiff’s notice in terms of Rule 36(9)(a) and (b) of a counseling psychologist, JJF de Wit;

3.4.3 the counseling psychologist, Johann de Wit’s report;

3.4.4. the defendant’s clinical psychologist, Lenmarie Stanton’s report;

3.4.5. the report by an authorised medical practitioner on the completion of a medico-legal examination, J88 form;

3.4.6. a sworn affidavit made by the plaintiff on 04 May 2010.

3.5. Under claim 1, the plaintiff claimed damages in the amount of R200 000.00, which amount is quantified as follows:

3.5.1 Special Damages - R20 000.00

3.5.1.1 future hospital and medical costs;

3.5.2 General Damages – R180 000.00

3.5.2.1 pain, inconvenience and suffering;

3.5.2.2 loss of enjoyment of life;

3.5.2.3 violation;

3.5.2.4 contumelia.

3.6. Under claim 2, the plaintiff claimed damages under the following heads:

3.6.1 Special Damages

Future medical costs – R20 000.00

3.6.2 General Damages

R280 000.00

B. EVIDENCE

[4] The plaintiff, in her statement made to the police, briefly stated the following:

4.1. On Saturday, 27 February 2010, at approximately 23h30 in Huhudi, she was in the company of her brother on their way home when her brother touched her inappropriately and suggested that they have an affair. She stated that she went to report her brother to the police at the police station so that they could reprimand him.

4.2. After, she reported her brother, who was in her company, to three police officers at the Huhudi police station, the police officers assaulted her brother. She requested the police officers to stop assaulting him.

4.3. Thereafter, the police officers assaulted her and she sustained injuries on her mouth, on her face and right upper arm.

4.4. She then left the police station to go home. On her way, a police bakkie drove behind her and a police officer instructed her to climb into the vehicle because it was not safe for a woman to walk in the street alone.

4.5. She climbed into the vehicle and they drove and passed her residential street to a field next to the Taung road. There were two policemen and one lady in the vehicle.

4.6. She realised that it was the same two policemen who assaulted her. The police officers stopped the vehicle near a veld and had sexual intercourse with her without her consent, and thereafter took her home.

[5] In the summary of Dr Dam, it is stated that:

“3. Since 1983 he have being [sic] involved with examining patients with injuries relating to assault and rape, the treatment of the patients, the completion of J88 forms, as well as testifying in Court relating to the injuries sustained by these patients. Due to the experience obtained he considers himself an expert in this regard;

4. That on 28 February 2010 and 2 March 2010 he examined the Plaintiff on investigation of a charge of alleged rape and assault. During the examination he found the following injuries:

4.1 swollen bruises on right arm, upper lip and on the head;

4.2 swollen left arm and both breasts;

4.3 bruises on vagina (fossa navicularis);

4.4. that the mental and emotional status was sound and that she was not under the influence of drugs or alcohol.”

[6] The counseling psychologist, in his report, firstly gave a brief outline of the events that occurred at the police station where she and her brother were assaulted by the policemen. He says:

“Sy was erg geskok deur die gebeure soveel so dat sy tot vandag nog steeds bang is vir die polisie.”

[7] He then describes the rape. He says that:

“Me Philander was erg getraumatiseer deur die aanranding en nog voor sy daarvoor kon besin was sy verkrag. Dit het haar angsbevange gemaak en sy het besef sy sal moet versigtig wees anders kan iets nog erger met haar gebeur. . . . Die trauma van die aanranding en daaropvolgende verkragting het tot gevolg dat sy aan Post Traumatiese Stres Versteuring lei. . . . Die aanranding was genoeg om haar toestand te bring, maar die daaropvolgende verkragting het dit net vererger en laat eskaleer. Hiermee saam is die tydperk van traumatisering aansienlik verleng wat dan die toestand aansienlik vererger. . . . Mense met Post Traumatiese Stres Versteurings word dikwels gekenmerk deur: Dit is nie OF ons gaan vermoor word nie, net wanneer! Hulle leef in konstante vrees van verwagte geweld teen hulle”

[8] He recommended 08 to 10 sessions of psychotherapy for 60 minutes at R681.00 per session. This amount excludes the cost for evaluation.

[9] Lenmarie Stanton, the clinical psychologist, conducted an emotional assessment of the plaintiff and stated that the plaintiff meets the criteria for a diagnosis of Post Traumatic Stress Disorder, namely:

“• Ms Philander have experienced and was confronted with an event that involved actual or threatened injury, or a threat to their [sic] physical integrity, i.e. rape.

- Ms Philander showed symptoms of intense fear, helplessness or horror.
- Ms Philander experiences distressing recollections of the event, i.e. flashbacks.
- Ms Philander persistently avoids things that remind them [sic] of the event, i.e. triggers.
- Ms Philander appears to show significant distress or impairment by the event, either in their [sic] social occupational or other important areas of functioning.
- Persistent symptoms of increased arousal (not present before the trauma) as indicated by the following: difficulty falling or staying asleep; irritability or outbursts of anger; difficulty concentrating; hyper vigilance; exaggerated startle response are present.
- Symptoms have lasted at least one month.”

[10] In her summary, she stated that the plaintiff is a 36 years old female presenting post traumatic stress symptoms, possibly stemming from a traumatic assault and rape. Under the heading ‘pain and suffering’, she stated that the plaintiff experienced physical pain and suffering for the first few weeks after the incident.

[11] Under the heading ‘psychological functioning and enjoyment of life’, she stated that the plaintiff is less able to participate in leisure activities. Severe emotional problems have been reported.

[12] She concluded that based on the history as well as clinical assessment, there is 10% whole person impairment as a result of the incident and subsequent psychological sequelae.

[13] On the J88 form completed by the medical practitioner on the completion of the medico-legal examination, the doctor’s

clinical findings were the following:

13.1 swollen bruises on right arm, upper lip and on the head;

13.2 swollen left arm and both breasts;

13.3 bruises on the vagina were also noted in the picture.

C.

SUBMISSIONS

[14] Counsel for the plaintiff, Mr Strydom, submitted that the Court should consider the trauma that the plaintiff endured, that she went to the police for protection but was assaulted and raped by police officers.

[15] The only relevant cases that Mr Strydom referred to were the cases of M v N 1981

(1) SA 136 (Tk); G Q v Yedwa & Others 1996

- (2) SA 437 (TK); N v T 1994 (1) SA 862 (C); and Minister of Safety and Security & Another v Madyib 2010 (2) SA 356 (SCA).

[16] These cases were also referred to by counsel for the defendant.

[17] In M v N supra, the plaintiff was a married woman raped by a relative of her husband when she was alone at home with her young children, an amount of R1 500.00 was awarded for shock, pain and suffering and contumelia. The value of the award adjusted for inflation in 2013

according to Robert J Koch in The Quantum Yearbook is the amount of R29 000.00.

[18] In N v T supra, a child of eight years was raped, the Court at 864 said:

“Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims. Any award of damages in a situation of this kind should be substantial.”

The Court ordered an amount of R30 000.00, the equivalent for 2013 is the amount of R103 000.00.

[19] The other case referred to by Mr Strydom is G Q v Yedwa & Others supra, where the plaintiff claimed damages for shock, pain and suffering and injuria arising out of a wrongful assault and circumcision of the plaintiff. The Court considered the contumelia (insult) to be the more serious part of the assault and at 439 held that:

“The first aggravating feature was the very nature of the assault. To have his trousers removed, his legs forced open and then to be circumcised, was manifestly an extremely degrading experience.”

[20] Mr Strydom in his submission amended claim 1 from R200 000.00 to R100 000.00 and in respect of claim 2, from R300 000.00 to R250 000.00. Ms Moagi, for the defendant, submitted that a quantum of R50 000.00 and R110 000.00 for claim 1 and claim 2, respectively, is reasonable compensation.

[21] She further submitted that the two incidents of rape occurred on the same day, one after the other, and they should not be treated as separate events.

D. EVALUATION

[22] It is trite that a Court, when determining the quantum for general damages, is exercising a broad discretion when considering what is fair and adequate compensation. The Court considers the facts and circumstances and the injuries suffered by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life. The Court must also bear in mind the recent tendency by Courts to award higher damages. See Peterson v Minister of Safety and Security 2011 (6k6) QOD 1 (ECG) at 13 paragraph [7]; Road Accident Fund v Marunga 2003

- (5) SA 164 (SCA) at paras 23–25, 27–29.

[23] Courts are generally guided by similar cases when quantifying the award for general damages. See *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA) para 64, where Brand JA succinctly dealt with the approach taken by Courts when comparing awards in similar cases.

[24] What cannot be overlooked in casu, is that the plaintiff was assaulted and raped by members of the SAPS.

[25] In *Carmichele v Minister Safety and Security & Another* (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001

(4) SA 938 (CC) at paragraph 62, it was held that:

“In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the amicus curiae:

‘Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.’

...

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.”

[26] The Constitutional Court in the case of *K v Minister of Safety and Security* [2005] ZACC 8; 2005

(6) SA 419 (CC) at paragraph [18] at 430A–B, held that:

“... the protection of the applicant’s fundamental rights (to security of the person, dignity, privacy and substantive equality)

were of profound constitutional importance. It was also part of the duties of every police officer to ensure the safety and security of the public and to prevent crime. These were constitutional obligations affirmed by the Police Act 68 of 1995.”

[27] The Constitutional Court in the above matter considered the connection between the conduct of the policemen and the business of their employer (which enquiry is not relevant in casu, but is mentioned herein as it stresses the responsibility of the police officers), at paragraph 51, 52 and 53, also held that:

“[51] . . . First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty is a duty which also rests on their employer and they were employed by their employer to perform that obligation. Secondly, in addition to the general duty to protect the public, the police here had offered to assist the applicant and she had accepted their offer. In so doing, she placed her trust in the policemen although she did not know them personally. One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance.

- [52] Our Constitution mandates members of the police to protect members of the community and to prevent crime. It is an important mandate which should quite legitimately and reasonably result in the trust of the police by members of the community. Where such trust is established, the achievement of the tasks of the police will be facilitated. In determining whether the Minister is liable in these circumstances, courts must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her.
- [53] Thirdly, the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case. In my view, these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficient close to render the respondent liable.”
- [28] In casu, the police officers failed to perform the job and function for which they are employed to do. Instead they abused their power and violated the plaintiff by assaulting and raping her. They behaved as if they were a law unto themselves. The police should lead by example and behave responsibly so that they are respected and not feared by ordinary citizens of this country.
- [29] A plaintiff who was assaulted by a group of policemen by punching him in the face and spraying him with pepper spray, kicking him on the jaw and on his back several times with a baton or stick and locking him in a cell, was awarded an amount of R120 000.00 for damages for the assault. The equivalent in 2013, according to Robert Koch is R146 000.00. See *Peterson v Minister of Safety and Security supra*.
- [30] In *King NO v Minister of Police 2012 (6G3) QOD 11 (ECM)*, the plaintiff initiated an action against the Minister of Police for damages suffered as a result of an assault upon her by members of the SAPS who used a stick or baton. She was injured in full view of members of the public and the media. She sustained abrasions on her elbow, thigh, breast, chest, back,

hands, arms, left eye, haematomae on her left back, lacerations on the scalp, the left eye and lower leg, which required suturing. She suffered headaches for 18 months thereafter. The Court regarded the conduct of the police officers as reprehensible and repulsive and ordered general damages in the amount of R140 000.00.

- [31] The aforesaid cases are useful guides in awarding quantum of damages, bearing in mind that the plaintiff's rights in terms of the Bill of Rights, namely, privacy, bodily integrity and dignity, have been grossly violated.
- [32] It is surprising that with the high incident of rape in South Africa there are only two reported cases for damage for rape, namely, *M v N* supra; and *N v T* supra. The most obvious reason could be that the rapists are prosecuted and incarcerated after the trial. However, the reality in South Africa is that many cases of rape go unreported. This is unfortunate when considering the violation and infringement of rape victims' bodily and personal integrity and the psychological trauma endured by a woman who is raped.
- [33] Counsel for the plaintiff did not, save for the rape, distinguish what injuries the plaintiff suffered as a result of the assault in claims 1 and 2 and for claim 1 I have relied on the plaintiff's affidavit, wherein she stated that she sustained injuries on her mouth, face and upper arm. The plaintiff did not claim any psychological trauma under claim 1.
- [34] Under claim 2, the plaintiff claims general damages broadly without specifying under separate heads. Accordingly, I am of the view that in respect of claim 2, this Court considers general damages to include damages for physical, mental and psychological pain and suffering and contumelia.
- [35] The injuries sustained from the assaults under both claim 1 and claim 2 were bruises and swelling which did not require hospitalization..
- [36] The plaintiff did not suffer serious injuries from the assault and the rape, and as the plaintiff's clinical psychologist,

Lenmarie Stanton, stated, the pain and suffering was for the first few weeks after the incident.

- [37] What is more significant, taking into consideration the emotional assessment and diagnosis of Lenmarie Stanton and the plaintiff's

psychologist, Johann de Wit, is the contumelia (insult), and psychological impact both the assault and more especially the rape

had on the plaintiff which was committed by members of the SAPS whose core function is to provide safety and protect members of the public.

- [38] Contumelia is awarded for a direct and serious invasion of the plaintiff's bodily integrity and personal dignity. These

damages should not be confused with damages for mental pain or anguish or psychological illness and its consequences.

[39] The plaintiff, as a result of the rapes and assault, suffered a serious invasion of her person, her integrity, dignity and

self-worth, which is the contumelia element and in addition thereto suffered physical mental and psychological damages.

[40] In respect of claim 1, an amount of R60 000.00 is fair and reasonable in the circumstances.

[41] Having considered the cases cited supra and the medical reports, I am of the view that the combined effect of the physical, mental and psychological consequences and contumelia, justified an award of R180 000.00 under claim 2.

E. ORDER

[42] In the result, judgment is granted in favour of the plaintiff as follows:

1. Claim 1

1.1 Payment in the amount of R60 000.00;

1.2. Interest thereon at the prescribed rate from a date 14 days from the date of judgment.

2. Claim 2

2.1 Payment in the amount of R180 000.00;

2.2. Interest thereon at the prescribed rate from a date 14 days from the date of judgment.

3. Costs on a party and party scale.

4. The costs are to include:

4.1 Costs of counsel;

4.2 Qualifying expenses, if any, of:

4.2.1 Dr Jago Bandhu Dam;

4.2.2 Johann de Wit.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 15 MAY 2013

DATE OF JUDGMENT : 06 JUNE 2013

COUNSEL FOR PLAINTIFF : ADV STRYDOM

COUNSEL FOR DEFENDANT : ADV MOAGI

ATTORNEYS FOR PLAINTIFF : VAN ROOYEN TLHAPI WESSELS INC.

(Instructed by ABEL BESTER INC.)

ATTORNEYS FOR DEFENDANT : THE STATE ATTORNEY

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