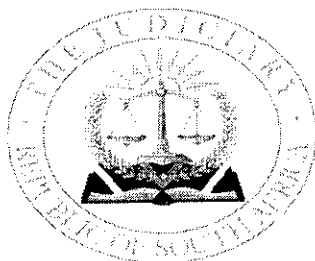


## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

## GAUTENG DIVISION, PRETORIA

CASE NO: 37287/2012

29/3/2016

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

A handwritten signature in black ink, appearing to read "AC Basson".

SIGNATURE

29.03.2016

DATE

KENIAS NDLALA MATSANA

Plaintiff

and

MINISTER OF POLICE

First Defendant

MATOME GUNSTON HLAKO

Second Defendant

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JUDGMENT

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AC BASSON, J

- [1] On 8 October 2014 Semenya, AJ granted judgement in favour of the plaintiff (Mr Matsana) in respect of the merits of the matter and held that the first and second defendants are jointly and severally liable to pay the plaintiff's proved or agreed damages arising from the injuries sustained by the plaintiff on 30 October 2011.
- [2] Is common cause that the plaintiff suffered a gunshot wound to his right foot and that he had received treatment for his degloving injury at Kalafong Hospital where a K-wire fixation of the 4<sup>th</sup> and 5<sup>th</sup> metatarsals of his right foot was done. This wiring was later removed but the injury caused unsightly scarring on his right foot.
- [3] Initially in 2011 the plaintiff was employed as a Community Patroller. He was still engaged as such when the incident occurred on 30 October 2011. Post-incident he was on sick leave for two months during which he received his normal income of R 1 500.00 per month. He returned to his work as patroller. In September 2012 he was appointed as coordinator. He was paid R 2 000.00 per month in this position. He continued working in this capacity until March 2015 when his contract ended. After the contract ended the plaintiff started to work as a hawker.
- [4] This trial is for the determination of the issue of quantum of damages caused to the plaintiff arising from the injury sustained on 30 October 2011.

[5] According to the plaintiff he continues to suffer from bullet shrapnel which remains in his foot; pain in his right foot; scarring to his right foot where the split skin graft was tethered to the underlying tendons and bones of the foot; and scarring of the right thigh which was the donor area of the skin graft. According to the plaintiff he has impaired function of the right foot and can no longer perform the same physical activities as he used to prior to the shooting. This, according to the plaintiff, has negatively affected his prospects of employment and his quality of life. More in particular, he claims that he cannot partake in his formally usual social activities such as soccer and gardening. He also claims that he is self-conscious about the scarring on his foot.

[6] At the outset I should point out that whereas the plaintiff has filed various expert reports, the defendant has filed no expert reports. I will firstly deal with the issue of future medical expenses as this appears to be a non-contentious issue. In any event the defendant has elected not to file any medico-legal reports.

#### Future medical expenses

[7] Dr Heymans (an orthopaedic surgeon) stated that on examination the plaintiff walked with a normal gait. Both ankles movements are recorded as full and stable. Dr Heymans recorded that the plaintiff complained about pain and discomfort in his right foot. He recommended a conservative and nonsurgical treatment consisting of non-steroidal anti-inflammatories. Dr Heymans sets out the costs involved in this treatment in today's terms to

amount to R 18 937.00. He also notes that: "With the recommended treatment the patient's orthopaedic symptoms should clear up to such an extent that he will be able to do his normal duties as a security officer until normal retirement. For the scarring of his right foot, a plastic and reconstructive surgical report is recommended." He also noted that whilst the plaintiff complains about pain in his right foot, on full examination the right ankle movements are full and movement of the toes of his right foot is full.

- [8] Dr Heymans, however, deferred to the expert opinion of a plastic and reconstructive surgeon for further assessment and recommendations regarding the plaintiff's scarring.
- [9] Dr Annandale (a plastic and reconstructive surgeon) also assessed the plaintiff and concluded that the tethered skin graft on the right foot is impairing the function of the right foot and causes pain when the plaintiff walks long distances. He also indicated that the donor scar is "not acceptable".
- [10] Dr Annandale recommended that, in order to improve the functioning of the right foot and to relieve the painful symptoms experienced by the plaintiff, the plaintiff should undergo a two-stage surgical procedure roughly one month apart in order to remove the skin graft and to effect a placement of a dermal substitute and another skin graft on top of that. The total cost of this procedure in today's terms is estimated at R 123 776.00.

[11] A few sessions of occupational therapy is also recommended by Mrs Caga - a registered occupational therapist. She also recommended that the plaintiff be supplied with pain relieving heat packs, a low bench, a trolley/dolly (once-off) and pressure garments for the foot scar. The total amount in respect of the services in today's terms is estimated at R 20 105.00. I have not allowed for the amount of R 35 773.00 claimed in respect of future garden services. In my view no proper case has been made out warranting gardening services for the lifetime of the plaintiff.

[12] The above-mentioned future medical expenses have been recalculated by Mr Potgieter, a Fellow of the Actuarial Society of South Africa, in order to estimate the present value of the plaintiff's future medical expenses to be awarded. In summary the present value of the plaintiff's future medical expenses are as follows:

1. Conservative treatment recommended by the orthopaedic surgeon Dr Heymans: R 18 937.00.
2. Treatment recommended by the plastic and reconstructive surgeon Dr Annandale: R 123 776.00.
3. Treatment recommended by the occupational therapist Ms Caga: R 20 105.00.

The total amount in respect of future medical expenses awarded to the plaintiff is R 162 815.00.

### General Damages

- [13] It is common cause that the plaintiff sustained a gunshot wound from a high-powered rifle to the right foot when he was inside a police van with two other police officers. It is common cause that he underwent two operations to his foot. It is also evident from the report of the plastic and reconstructive surgeon that two further operations are recommended to relieve the painful symptoms experienced by the plaintiff in his right foot.
- [14] The wound also left some unsightly scars on his right foot and his right thigh. Dr Annandale describes the cosmetic appearance of the donor scar for the skin graft as "unacceptable" whilst Dr Heymans describes the scar as a "large unsightly skin graft scar". According to the plaintiff he can no longer play soccer and work in his garden at home due to his injured foot.
- [15] I have already referred to the reports of Dr Heymans and Dr Annandale. According to Dr Heymans the movement of the right ankle is full and the ankle is stable. The plaintiff only complains about pain in his foot which, according to Dr Annandale, can be alleviated by two further operations.
- [16] On behalf of the plaintiff it was submitted that an award of R 180 000.00 is justified in the circumstances. On behalf of the defendant it was submitted that this court should not order more than R 100 000.00 in respect of general damages.

- [17] Although reference may be made to case law, it is trite that such cases can only be guidance as each case will depend on its own unique factual basis. In this regard both parties referred the court to various cases that may be seen as being comparable and may be of assistance to the court.<sup>1</sup> In *Saunders v Union Government*<sup>2</sup> a woman was wounded in both feet by a rifle shot fired by a sergeant in the National Volunteer Brigade. The court awarded her general damage. The equivalent rand value of this award in 2016 is an amount of R200 000.00.
- [18] In *Minister of Justice v Auxiliary Insurance Corporation Ltd*<sup>3</sup> the plaintiff sustained a potts fracture of the ankle that resulted in the likelihood of flat foot and an inability to partake in sport to any serious degree. The court awarded him general damages. The equivalent rand value of this award in 2016 is an amount of R158 000.00.
- [19] In *Road Accident Fund v Azwindini Marunga*<sup>4</sup> the court confirmed the dictum in *Wright v Multilateral Vehicle Accident Fund* where the following was stated:

"I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of changes in society, the recognition of great individual freedom and opportunity,

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<sup>1</sup> *Protea Assurance Co Ltd v Lamb* (1971) 1 SA 530.

<sup>2</sup> 1947 (1) SA 100 (W).

<sup>3</sup> 1963 (1E8) QOD 509 (D).

<sup>4</sup> [2003] 2 ALL SA 148 (SCA).

rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."

- [20] In *Adams v Cape fabricated metals Pty Ltd*<sup>5</sup> the court awarded the plaintiff for a fracture of the right foot resulting in permanent disablement and future pain and discomfort general damage in today's value of R 95 000.00.
- [21] In *Havenga v Parker*<sup>6</sup> the plaintiff suffered a fracture of his left elbow caused by a shot from a .38 revolver. He suffered acute pain which subsequently subsided. Ultimately the plaintiff suffered no permanent loss of amenities of life. Today's value of the ward is R 40 000.00.
- [22] In *Nxumalo v SA Eagle Insurance*<sup>7</sup> the plaintiff suffered an extensive degloving injury of his right lower limb with severe scars on his thigh and lower leg. This plaintiff also suffered a permanent deformity disability with disfigurement of his knee and upper leg and suffered loss of mobility with impairment of muscle power. Today's value of the ward is R305 000.00.
- [23] Having regard to the case law referred to, it would seem that the injuries sustained by the plaintiff are to some extent comparable to the injuries sustained by the plaintiffs in the *Adams* and *Havenga*- cases. I have also considered the report by the plastic and reconstructive surgeon who states in his report that, although little can be done about the appearance of the donor scar the right foot, surgery to the foot will improve the functioning of the right

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<sup>5</sup> 1954 (1E9) QOD 519 (C).

<sup>6</sup> 1993 (4E5) QOD 18 (T).

<sup>7</sup> 1995 4 C7B G 5-1.



foot and that the painful symptoms that he currently experiences in his right foot will be improved. Although the orthopaedic surgeon deferred to the opinion of the plastic and reconstructive surgeon, I have taken note of the fact that in his opinion, apart from complaints about pain and discomfort in his right foot, a full range of movement of the right ankle and the toes of the right foot was possible and that in his view the patient should be treated conservatively.

- [24] Although the incident undoubtedly was painful to the plaintiff and although he continues to suffer pain to date, I am of the view that in respect of general damages and amount of R 100,000.00 is justified in the circumstances.

#### Future loss of income

- [25] The plaintiff is a 46-year-old male. He is currently self-employed as a hawker. He finished grade 10 and has worked as an unskilled person in various capacities for most of his adult life.
- [26] The GRS Actuarial Report presented this court with two possible employment scenarios: the first is as a hawker (as the plaintiff currently trades) and the second is that of a general worker.
- [27] I have already referred to the plaintiff's previous occupation as patroller and thereafter as coordinator. The plaintiff confirmed to Mr Van Niekerk (an industrial psychologist) that he was only entitled to work as a co-ordinator and patroller for a period of three years. After his contract came to an end in

April 2015, he started to work as a hawker. According to the industrial psychologist he is of the view, with reference to the report of the orthopaedic surgeon, that the plaintiff's orthopaedic symptoms should clear up to such an extent that he will be able to do his normal duties as a security officer up until his normal retirement. He also referred to the report of Dr Allendale where it is noted that surgery (as recommended by him) will improve the functioning of the right foot and will alleviate the pain symptoms. Mr Van Niekerk also referred to the report of the occupational therapist (Ms Caga) where it is noted that the plaintiff has a slightly reduced inward and outward turning movement of the right foot and that he walks with a slight limp and has a decrease walking speed. According to the occupational therapist the plaintiff is suited for sedentary to light work but notes that his current physical problems are also associated with a weakness in his right wrist which is unrelated to the incident in question. It is also noted that the plaintiff's chances to obtain sedentary jobs are limited mainly due to his level of education and past work experience.

- [28] According to Mr Van Niekerk there is no evidence that the plaintiff's career thus far has been negatively impacted by the injury sustained particular in light of the fact that he had continued with his duties as patroller and later as coordinator from September 2012 until March 2015 when the contract came to an end. He concluded that it is unlikely that the plaintiff would have been able to secure a physical type of work after the contract came to an end considering the significant grip strength of deficiency in his right hand as supported by the occupational therapist. It should, however, again be

emphasised that the wrist deficiency is unrelated to the incident and cannot therefore be taken into consideration in deciding whether to award damages for future loss of earnings.

- [29] Mr Van Niekerk postulates that - even disregarding the incident - the plaintiff would have started working as a self-employed hawker. It is therefore the conclusion of the industrial psychologist regarding the plaintiff's post morbid functioning that there is no evidence that the incident had any restrictive impact on his functioning and that the situation is viewed to be unchanged from the premorbid scenario.
- [30] I have considered the reports of the orthopaedic surgeon, the plastic and reconstructive surgeon, the occupational therapist and that of the industrial psychologist. I am particularly persuaded by the view of the industrial psychologist that there is no evidence that the incident had any restrictive impact on the plaintiff's functioning post-accident. This conclusion is strengthened by the fact that the plaintiff was able to continue with his work as a patroller. He was even later promoted to coordinator. He worked for a period of approximately three years after the incident. I have also taken note of the fact that in the expert opinion of the plastic and reconstructive surgeon, the two surgeries proposed will improve the function of the foot and will also relieve the painful symptoms that he experiences in this area. Taking all of this into account I am of the view that the plaintiff has not succeeded in persuading this court that he is entitled any compensation for future loss of income.

[31] In the event the following order is made:

The first and second defendants are ordered, jointly and severally, to make payment to the plaintiff of:

31.1 The sum of is R 162 815.00 in respect of future medical expenses;

31.2 The sum of R 100 000.00 in respect of general damages;

31.3 The reasonable preparation, qualification and reservation fees of the following experts:

- (i) Ms Caga
- (ii) Dr JJL Heymans
- (iii) Dr ZF Allendale
- (iv) Mr Johan Potgieter

31.4 The plaintiff's costs of suit.



AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff	:	Adv C Woodrow
Instructed by	:	Nel, Van der Merwe and Smalman Inc.
For the 1 <sup>st</sup> and 2 <sup>nd</sup> Defendant	:	Adv SJ Coetzee
Instructed by	:	The State Attorney