

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE : YES/ NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED

12/10/2016
DATE

SIGNATURE

GAUTENG DIVISION, PRETORIA

CASE NO.:4783/2011

12/10/2016

In the matter between:

LEBOGANG CHUENA MATSHIRA

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

First Defendant

CAPTAIN NGOAKO LEDWABA

Second Defendant

JUDGMENT

Hughes J:

[1] On 8 September 2008, Lebogang Chuene Matshira, the plaintiff was a passenger in a vehicle on Mabopane Highway (R80). A member of the South African Police Services in a police vehicle with flashing blue lights approached their vehicle from behind. The driver of Ms Matshira's vehicle pulled over. The police vehicle pulled up next to their vehicle and the second defendant, Captain Ledwaba, armed with an automatic R5 rifle opened fire on the occupants.

[2] The plaintiff was then handcuffed while in pain and bleeding from the gunshot wound she had sustained. She was taken to Kalafong Hospital, admitted to ICU and later underwent emergency surgery. She remained under police guard and cuffed to the hospital bed for eight days. On 16 September 2008 she was discharge from hospital and taken to Soshanguve Police Station where she was detained for one night. The following day she made her first appearance in court and was granted bail. Subsequently the case was dismissed as the docket went missing.

[3] An interim payment of R500 000.00 in terms of Rule 34A of the Uniform Rules of Court was made to the plaintiff after the defendants conceded liability. In addition an offer was made of R236 690.00 in respect of future medical expenses which were also accepted by the plaintiff. I am now tasked with the adjudication of general damages, past and future loss of income.

[4] The gunshot entry wound of the plaintiff is on the left side of her back and the exit wound on her right lower abdomen. The plaintiff underwent laparotomy surgery to remove the bullet and was left with an obvious large scar on the left side of her back as well as a vertical scar extending from her abdomen down to her pelvic bone. Her abdominal muscles are weak but she has normal activation of the abdominal muscles. It was also established that she has untreated severe high blood pressure arising from a pregnancy prior to the shooting. She states that since the shooting she drank alcohol regularly to forget. She stated that she becomes startled when she

hears loud banging noises or sirens. The plaintiff also complained of back pain, neck pain and her right hand becoming painful if she works with it too long.

[5] Ms Van der Walt, the occupational therapist, sets out the plaintiff's work ability eloquently in her report. I have extracted same and it appears below:

"Ms Matshira said that she completed grade 12 at school in 1997. Soon after school she started working as a waitress for a year before she worked as a temporary worker doing stock taking at Mr Price in Menlyn. She worked for approximately a year. She said that she studied office administration and computer work at ATTI College in 2005 for a year and she completed her studies. After her studies were completed she managed to secure work as a personal assistant and she worked for a number of employers including BIZ Africa Engineering, SASSA and National Treasury. At the time of the shooting incident, she was working for CIPRO who delivered services for DTI where companies registered for tenders. She said she was employed in an open position with the option to obtain permanent employment. Following the shooting incident she did not return to work until 2009. I determined that her work at the time would have entailed sedentary strength tasks and mainly office work. Ms Matshira indicated to me that in 2009 she again attempted to work as a personal assistant at the Tshwane University of Technology. She said that she worked for five days but due to having too much backache and difficulties with concentrating in meetings she decided to resign after the five days. Ms Matshira told me that she made an attempt to return to work in 2011. She was working as a volunteer for Macbeth Attorneys for a month. She had to do a lot of typing and encountered neck and backache and right hand pain when she was working for long. She struggled with her endurance and she stopped after a month. She said that she registered for a course in project management at UNISA in 2012 but she did not cope with the study demands and discontinued her participation. She complained of inability to concentrate and she had memory difficulties. She has not worked during 2013 and 2014. She told me that she aspired to work again".

[6] The circumstances of the plaintiff's injuries, surgery, hospitalisation and detention warrant that the plaintiff be compensated for damages arising from her arrest, detention, injury and surgery. Even after the plaintiff was shot and surgery was conducted to remove the bullet the plaintiff remained handcuffed to her hospital bed under police guard for eight full days; when released from hospital she spent the night in a police cell thereafter she appeared in court and was released on bail. Subsequently, the case was dismissed as the docket went missing.

[7] It was placed on record by the respondent's counsel that an offer of R500 000.00 had been offered to the plaintiff for general damages. This offer was accordingly accepted by the plaintiff. The plaintiff contends that the amount not provided for is an award for her unlawful arrest and detention. The defendants contend that the award for general damages is one that encompasses a globular effect of the unlawful arrest and detention. Thus that which was offered and accepted as general damages is sufficient in these circumstances and this head of damages, the offer made having been accepted by dispenses of that issue.

[8] The plaintiff contends that over and above that offered and accepted by the plaintiff an appropriate amount to be awarded in addition to the general damages, for the arrest and detention specifically, would be an award of R180 000.00 which would bring the figure for general damages inclusive of her arrest and detention to an amount of R680 000.00.

[9] In this instance I am mindful that the arrest of the plaintiff brought about an injury to the plaintiff in the form of a gunshot wound. I am further mindful that she had to be operated upon and hospitalised. During her hospitalisation she was "incarcerated" so to speak as she was under police guard handcuffed to her hospital bed. Even after she had been hospitalised for eight day she was imprisoned for one night and released on bail after her first appearance in court. From the medical

reports it is evident that the sequelae resultant from her injuries, arrest and detention are serious.

[10] I concur with the defendant's counsel that the particulars of this case need to be looked at as a whole and in doing so there are no comparable cases that are on point with this case. See *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at page 325 B - C:

"The assessment of awards for general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that..."

[11] With the above dictum in mind I think that it's prudent to have cognizance of the fact that the plaintiff also claims for loss of earnings for past and the future. The incident with its resultant sequelae has had an effect on the plaintiff's employability and competitiveness in the open labour market.

[12] I am guided by the dictum above in *Seymour* and that stated by Swain JA in *Woji v Minister of Police* 2015 (7K6) QOD at [38]. In the circumstances, to my mind, a suitable award for general damages in these circumstances is the amount of R500 000.00. This amount is sufficient for the injuries sustained together with the unlawful arrest and detention of the plaintiff.

[13] Turning to deal with past and future loss of earnings, I take heed of the fact that the Clinical Psychologist, Monique Kok, noted that the plaintiff "since the incident started consuming large amounts of alcohol on a daily basis." Further, that the plaintiff consumes cough mixture daily to assist her in sleeping. Ms Kok concluded that plaintiff suffered from major depressive disorders (MDD) and posttraumatic stress disorder (PTSD). She found that the plaintiff's clinical presentation "has

affected her daily functioning and inhibited her ability to perform her daily tasks. It has also robbed her of the ability to engage with others and to actively seek and maintain employment. Furthermore, these symptoms have prevented from successfully achieving in her studies and therefore further aggravated her deep feelings of being a failure."

[14] The joint minute of the two Industrial Psychologists, Dr W. Pretorius and Ms JC White depicts the following agreements:

Pre – Incident:

[14.1] "We note that she was employed by CIPRO as a personal assistant for a director on a contract basis. We agree the claimant was reportedly remunerated at a rate of R60 per hour for 40 hours per week, probably R124 800 per annum. We agree if she was successful with her application for permanent employment then she could have secured employment at Paterson B4 comparable job grade (median guaranteed package) end 2008. Alternatively she would have been able to grow her earnings at least from her earnings level at the time of the accident to reach as a probable earnings pinnacle a Paterson C3 (median guaranteed package) comparable level at around age 45. We agree to inflationary increases to retirement age probably at age 65 pending on her health and retirement age policy of her employer at the time."

Post – Incident:

[14.2] "We note that as per a contract of employment she secured temporary employment through Marang Human Capital Solutions at TUT as a Personal Assistant (employment from 01 March 2009 with pay rate of R60.00 per hour). We also note that she was unable to cope and resigned the post after 5 days. JW was also informed that she secured employment in 2010 working on a

voluntary basis for one month until was unable to cope with the work. We agree that she has reportedly been unemployed since.

We agree that at the moment it seems that the majority of her work capacity limitations are of a psychological and psychiatrist nature. Based on her work history these symptoms presented strong enough that she was not able to perform her work as a personal assistant. The clinical psychologist remarked that her clinical presentation has affected her daily functioning and inhibited her ability to perform her daily tasks. The incident and its sequelae thus directly impacted on her employability, work choices, competitiveness as well as work performance (productivity and effectiveness). Ms Matshira with her scarring and current psychological deficits will experience significant difficulty to secure and sustain employment and will probably remain unemployed. In this regard we agree to defer to the clinical psychologist and psychiatrist with regards to post-incident diagnosis, prognosis and employability with successful treatment.

We agree at the moment it seems probable that at least her career has been delayed from the time of the incident to date. We agree considering the information at hand that as the most probable scenario that with successful treatment Ms Matshira may attempt to secure employment at the Paterson B3 Secretary 1 level on a contract basis and will earn basic salary only. However, employment will probably be of an intermittent nature. We agree to defer to the relevant experts with regard to post-incident retirement age.

We agree to propose actuarial calculations to quantify the extent of past and future loss of earnings considering the above agreed 'but for the incident' and 'having regard to the incident' earning scenarios."

[15] The plaintiff has filed a calculation from actuary Johan Sauer. However this calculation is not along the lines agreed upon by the Industrial Psychologist in their joint minute, it is purely based on the report of Dr W Pretorius who compiled this report to advance the case of the plaintiff. I am of the view that what appears in the

joint minute of the Industrial Psychologist, based on the medical reports on hand and on the work history set out above, is more realistic than that suggested by Dr W Pretorius. The age of retirement on both accounts, as there is nothing in the reports to indicate the contrary, is to remain at 65.

[16] The intermittent nature of the employment of the plaintiff will be factored in with the applicable contingencies to be applied to the actuarial calculations. Turning to the issue of contingencies I am mindful of what Nicholas JA stated in *Southern Insurance Association v Bailey* NO 1984(1) 98 AD about the two approaches which can be used to establish future loss of earnings as discussed on page 113:

"One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent."

At page 114C-D to state:

"In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess" it has the advantage of a logical basis". In addition refer to in Smit NO v The Road Accident Fund, The Quantum of Damages, Corbett and Honey, Volume 5, B4-251.

[17] I also take heed of that stated by Robert J Kock in his book *"The Quantum Year book"* that there are no fixed rules as regards general contingencies and one of his helpful guidelines is that of the sliding scale contingency theory set out here after is usually preferred:

"Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age".

[18] The scenario set out above as regards the pre-incident loss of earnings is not one which is contentious. I am mindful that due to the sporadic employment record of the plaintiff I should factor a contingency in over and above the general contingency to be applied.

[19] In this matter I am fortified in my belief that the Industrial Psychologists state that the plaintiff would encounter a delay in attaining employment which is factored in the 'having regard' post – incident scenario. The latter occurs from the date of the incident to the date of the actuarial calculation. Thereafter, she would attain employment, on Paterson B3 Secretary 1 level on a contract basis and will earn basic salary only. She would work on an intermittent basis, but work she could with the correct treatment in place. Nothing is advanced by any of the experts that her age of retire post incident has been affected in anyway thus this will remain at age 65.

[20] Actuary Johan Sauer, on the instruction of this court, causes an actuarial calculation to be drawn up along the lines of the joint minute of the two Industrial Psychologists. I have also received a calculation conducted by MUNR Forensic Actuaries dated 17 September 2015 and 25 September 2015. The calculation of 17 September 2015 is structured along the assumption of the joint minute of the two Industrial Psychologist, the difference in the eventual total figure is the use of the 2016 figures from Robert Kock as regards the rate of earnings and the fact that the entire package was regarded as taxable whilst Johan Sauer only regarded 10% of

the package as being taxable. I am informed not much turns on these two aspects as the basis is ultimately the same and minimal differences arise. Having this knowledge at hand I am convinced without a doubt that the calculation showing the plaintiff's pre – incident commencing at Paterson B4 with gradual progression to Paterson C3 is the most realistic in these circumstances.

[21] Having regard to the above the calculation applicable is set out below without any contingency deductions having been applied:

Pre-morbid: Gradual growth to C3

	Had the incident not happened	Now that the incident has happened	Difference: Loss
Total loss of past earnings	1 389 424	1 536	1 387 888
Total loss of future earnings	6 384 330	2 505 972	3 878 358
Total loss of earnings			5 246 247

[22] The plaintiff, prior to the incident, had been employed at four different companies from 2006 when she had completed her course at ATTI in 2005. Thus in a space of three years she worked for four different companies. The last place of employment at CIPRO was on a contract basis and it is not clear that she would have remained there to eventually be employed on a permanent basis. My view is that a higher than normal contingency needs to be applicable in these circumstances and to this end I believe that a contingency of 20%/20% be applied to the past loss of earnings 'but for' and 'having regard' to the incident. The total past loss of earnings after the application of the contingency I have suggested equates to R1 094 310.40.

[23] After the incident the plaintiff was, in my view, not sure of her career path as she dabbled from this course to the next, without a clear directive of her chosen career path. This as well as her fetish to up and leave her job in but a few days after employment is telling of the plaintiff's employment ethos. Another factor that does

not assist the plaintiff's case is her dependency on alcohol, taking into account that she has a pre-existing untreated high blood pressure condition. It is well documented that this will have an effect on her ability to secure and sustain employment and her employability in the open labour market. Here a higher than normal contingency is warranted and as such I am inclined to apply 20%/40% on the future loss of earning 'but for' and 'having regard' to the incident. Likewise the total future loss of earnings after the suggested contingencies equates to R3 603 880.80.

[24] In the result the total loss of earning amounts to R4 698 191.20.

[25] Consequently an order is made for general damages at R500 000.00, future medical expenses as agreed at R236 690.00 and past and future loss of earnings of R4 698 191.20. From the total of these amounts a deduction of R500 000.00 must be made for the interim payment already received by the plaintiff, ultimately the plaintiff will receive a payment of R4 934 881.20 from the defendants.

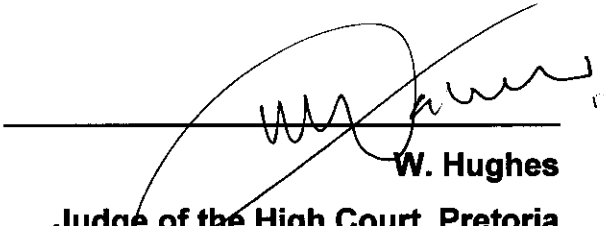
[26] The costs are to follow the result on a party and party scale.

[27] Wherefore the following order is made:

[27.1] Judgment is granted in favour of the plaintiff, Lebogang Chuene Matshira, in the sum of R4 934 881.20 to be paid by the defendants jointly and severally the one paying the other to be absolved.

[27.2] The defendants are ordered to pay interest on the foresaid amount at the prescribe rate of 15.5% per annum a *tempora morae* from date of demand to date of payment.

[27.2] The defendants are ordered to pay the plaintiff's costs on a party and party scale jointly and severally the one paying the other to be absolved, together with interest thereupon at the rate of 9% per annum a *temperore morae* from fourteen days after the taxation of the plaintiff's costs to date of payment.



W. Hughes
Judge of the High Court, Pretoria

Appearances:

For the Plaintiff: Adv N Davis SC
Instructed by: Modzuka and Magolego

For the Defendant: Adv H.P Joubert
Instructed by: State Attorney

Date heard: 11 August 2016
Date delivered: 12 October 2016