



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 656/2004

In the matter between:

THANDOKHWAKHE ZULU

Plaintiff

And

THE GOVERNMENT OF SWAZILAND

1st Defendant

THE COMMISSIONER OF POLICE

2nd Defendant

Neutral citation: *Thandokwakhe Zulu vs The Government of Swaziland and Another (656/2004) [SZHC] 99 24th June, 2016)*

Coram: **MAPHALALA PJ**

Heard: **6th April, 2016**

Delivered: **24th June, 2016**

For Plaintiff: **Advocate M. Mabila
(of Mabila Attorneys)**

For Respondents: **Mr. M. Nxumalo (Crown Council)
(from Attorney General's Chambers)**

Summary: *Civil Procedure – before court presently is for quantum of damages – after the court has found Defendant liable to pay Plaintiff’s damages – the parties advanced arguments to and fro – citing various authorities – the court has determined the quantum of damages as stated in paragraph [56] of this judgment.*

JUDGMENT

Introduction

[1] As a prelude to this judgment I wish to cite a very useful **dictum** in the South African case of **Sigournay vs Guill Banks 1960 (2) S.A 552 at 572** where the learned **Judge Schreiner JA** stated the two objective considerations that act as framework for assessment of damages, thusly:

1. **The collective judicial consciousness of a country harbours a notion of scale of compensation appropriate to the socio economic status of that country; and**
2. **Within this scale, justice requires that like injuries receive like compensation. This implies that regard should had to previous awards in similar cases (with due allowance for the declining value of money) to maintain continuity.**

[2] The Consulting Actuaries **Clemans, Murfin & Rolland** in their letter of the 11th January, 2016 to the Commissioner of Police stated the following at paragraph 2:

2. General principle of the assessment

The basic principle underlying this award of damages is that Mr. Zulu should be place in the same position financially speaking after the alleged delict as before.

The issue for decision

[3] Before court are action proceedings for **quantum** of damages after this court found in its judgment of the 30 April, 2015 that Plaintiff has proved liability as averred in the Particulars of Claim. The said judgment forms part of the record.

[4] In his Particulars of Claim, the Plaintiff has sought damages in the sum of E5 Million (Five Million Emalangen) made up as follows:

(a)	Medical and hospital expenses	E15 000 00
(b)	Loss of earnings to date	E56 640 00
(c)	Future medical expenses (artificial leg replacement)	E17 000 00
(d)	General damages for temporary pain and suffering	E1000 000 00

The arguments

[5] On the 1st March, 2016 the attorneys of the parties advanced their arguments on the question of damages where they indicated to the court that they had agreed on a number of points I shall refer to later on in the judgment.

[6] The attorney for the Plaintiff Advocate M. Mabila advanced arguments for the Plaintiff and later filed comprehensive Heads of Arguments.

[7] The attorney for the Swaziland Government agreed in the main with the arguments of Advocate M. Mabila and later filed Heads of Arguments.

[8] I shall in brief outline the salient features of these Heads of Arguments and then my analysis and conclusions later in the judgment.

(i) The Plaintiff's arguments

[9] As I have stated above in paragraph [5] the attorney for the Plaintiff filed comprehensive Heads of Arguments covering a number of topics on the subject. First being the topic on **“general damages”** in paragraph 5 to 9; the topic of **“loss of income”** in paragraphs 10 to 13; the topic of **“future medical expenses, permanent disfigurement, disability and loss of amenities of life due to loss of leg vis medico-legal report”** in paragraphs 14 to 17, the topic on **“unlawful arrest and detention”** in paragraphs 18 to 20; the topic of **“temporary pain and suffering”** in paragraphs 21 to 27 thereof.

[10] In paragraph 24 thereof the attorney for the Plaintiff contended as follows:

With respect the manner in which he was treated in as indictment to the Kingdom of Swaziland and its morals. It is not in dispute that our country frowns upon treating people in an inhumane and degrading manner as the Plaintiff was subjected to such that the country included a provision in our Constitution which prohibits treating of people in a degrading and inhumane manner.

[11] Further in paragraph 25 of the said Heads of Arguments the attorney for the Plaintiff cited the provisions of section 14(1) of the Constitution of Swaziland to the following:

“The fundamental human right and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely-protection from inhumane or degrading treatment, slavery and forced labour, arbitrary search and entry...”

[12] That in this country, in pursuit of ensuring compliance with the Constitution went to the extent of enacting an enforcement provision of the rights granted in the Kingdom as is contained in section 35 of the Constitution.

[13] Furthermore in paragraph 27 of the said Heads of Arguments states the following:

In view of the inhumane and degrading treatment the Plaintiff was subjected to and the violations of the constitution the court must mark its disapproval of such conduct on the part of the Defendants by awarding the quantum, being the sum of E3 711 360 (Three Million Hundred and Eleven Thousand Three Hundred and Sixty Emalangeni) as claimed by the Plaintiff particularly because the same are justified in the circumstances.

[14] Finally, it is contended for the Plaintiff that the claim of E5,000 000.00 (Five Million Emalangeni) made by the Plaintiff, and due to lapse of time as to when it was instituted and now, is justified if not on the low side and clearly the court will be justified in dealing with the same in terms of Rule 28 of the Rules amending the claims to E19,000 000.00 (Nineteen Million Emalangeni). Therefore, Plaintiff prays for judgment in his favour in respect of the quantum of damages be granted in the sum of E19,000 00.00 (Nineteen Million Emalangeni)

[15] I must further add that the attorney for the Plaintiff cited in the legal authority of **Koch's Actuarial Report** and the South African cases of **Van Deventer vs Premier of Gauteng 2004 5 QOD E2-1** and that of **Gallant vs Road Accident Fund 2004 5 QOD E2-29 AF** in support of his arguments.

(ii) Defendant's Arguments

- [16] As I have stated above the attorney for the Defendants Mr Nxumalo aligned himself with the submissions of the Plaintiff but only differed on the compensation based on the South African legal authorities. I then ordered both attorneys of the parties to file comprehensive arguments on this point of difference.
- [17] The attorney for the Defendant has filed his Heads of Arguments on this point. I shall in brief outline such arguments for one to understand the issues for decision by this court.
- [18] The attorney for the Defendant in his written submissions outlined the position of his client in a number of topics being **“general damages”** in paragraphs 4, 4.1, 4.2, 4.3, 4.4, 4.5 citing pertinent cases in support of these arguments.
- [19] Secondly, the attorney for the Defendant dealt with topic of **“loss of earnings”** in paragraphs 5, 5.1, 5.2 and 5.3 citing cases of **Collen Muzi Langwenya vs Commissioner of Police and the Attorney General Civil Case No. 2267/2001, Lazarus vs Rand Steam Laundries (Pty) Ltd 1958(3) SA 49, Odendaalsrust Golden General Investments & Extensions Ltd vs Nande N.O. 1958(1) 134 1958 (1) SA 381** and the case of **Rangeland Ltd vs Henerson 1955 (3) 134.**
- [20] In respect of the **Actuarial Report by Clemans, Murfin, & Rolland Consulting Actuaries** it is contended for the Defendant that the report is just a guide to the court to arrive to a just decision and in this respect canvassed arguments in paragraph 5.3 of Mr Nxumalo's Heads of Arguments.

- [21] Further at paragraph 5.4 thereof that Defendant by providing the **Actuarial Report**, were not making an offer but providing same for purposes of assisting the court to come to a just decision in the matter.
- [22] In paragraph 6 of the Defendant's Heads of Arguments dealt with the subject of **"future medical expenses, permanent disfigurement, disability and loss of amenities of life due to loss of leg."**
- [23] In paragraphs 7 to 8 dealt with the subjects of **"unlawful arrest and detention and temporary pain and suffering"**, respectively citing decided cases in support of those contentions.
- [24] Furthermore, the attorney for the Defendant then made his concluding arguments at paragraphs 9, 9.1, 9.2 and 9.3 also citing legal authorities.
- [25] Finally Defendants pray that the Plaintiff's claim of (E19 000 000.00 be dismissed, but the court award damages in consideration of the current economic state of the country.

The Court's analysis and conclusions thereon

- [26] On the 30th April, 2015 this court found that the Defendant had unlawfully shot the Plaintiff and consequently the Defendant was delictually liable to compensate the Plaintiff for the damages suffered as a result of the shooting and directed that the appropriate measure of damages would be dealt with at a later stage.

[27] The two attorneys of the parties have advanced their comprehensive Heads of Arguments on both sides. A number of useful legal authorities have been filed by the attorney for the Defendant being a text from **Koch Consulting Actuaries cc** and that by **Clement Murfin, & Rolland**. Further, in arguments before me on the aspect of the matter which made common cause were regarded by the court.

[28] In his Summons as set out in the Particulars of Claim, the Plaintiff had sought damages of the sum of E5 000 000.00 (Five Million Emalangeneni) made up as follows:

(a)	Medical and hospital expenses	E15 000.00
(b)	Loss of earnings to date	E56640.00
(c)	Future medical expenses (artificial leg replacement)	E17 000.00
(d)	General damages for temporary pain and suffering	E1000 000.00
(e)	Permanent disfigurement, disability and loss amenities of life due to loss of leg	E3 711360.00
(f)	Unlawful arrest and detention	E22 000.00

[29] I shall consider the above headings one after the other in **pari passu** with the attorneys arguments on each Head of Argument as firstly **“General damages”**, secondly **“loss of income”**, thirdly **“future medical expenses, permanent disfigurement, disability and loss of amenities of life due to loss of leg”**

fourthly, “**unlawful arrest and detention**”, fifthly, “**temporary pain and sufferings.**”

[30] I shall, therefore, proceed **ad seriatim** as follows:

(i) General damages

[31] On this aspect of the matter the attorney for the Plaintiff Mr Mabila contended that in respect of **general damages**, the Plaintiff obtained and provided Defendant with an **actuarial Report** prepared by “**Koch Consulting Actuaries**” cc which stated that using their expertise the appropriate quantum in respect of **general damages** was the sum of E575 000.00 (Five Hundred and Seventy Five Thousand Emalangen).

[32] The attorney for the Plaintiff contended that regard must be had to the fact that the Defendant has not provided any **Actuarial Report** controverting and / or providing any contrasting quantum in respect of **general damages** to the one provided by “**Koch Consulting Actuaries cc**”.

[33] On the other hand on this point the attorney for the Defendant Mr Nxumalo contended that his client have not submitted a report on this aspect of the matter but cited a plethora of decided cases to assist the court in determining damages under this Head. These cases being the case of **Wagner vs Scottish Union and National Insurance Co. Ltd 1967 91 QOD820 (W)**; in case of **Botha vs Minister of Transport 1956 91 QOD 264 (C)**; the case of **Hutchings vs General Accident Insurance 1986 (3) QOD 787 (C)**; and that **Southern Insurance Association vs Bailey NO 1984 (1) 98 (AD)** at page 116 where the following **dictum** was propounded:

“Where the method of actuarial computation is adopted, it does not mean the trial Judge is ‘tied down by inexorable actuarial calculations’. He has a large discretion to award what he considers right.”

[34] The attorney for the Defendant, finally contended that the court should use its inherent discretionary powers to award **general damages** as it deems fit and consider also the country’s economy.

[35] During the arguments before me on the 6th April , 2016 the attorneys of the parties in order to expedite the determination of the quantum of damages the parties have reached an agreement of some of the damages claimed to the following which was then recorded as an order of this court:

- (i) That unlawful arrest and detention be awarded at E1000 000.00; and
- (ii) That Defendant will provided the Plaintiff a change of a leg prostheses as and when is required in accordance with Dr SK Ragoos Medical Report of the 17th December 2014 attached in Plaintiff’s being actuaries (Koch) Consulting Actuaries cc.

[36] Therefore, for decision by this court in the circumstances are the following Heads of damages:

- (a) General damages;
- (b) Loss of income;
- (c) Future medical expenses, permanent disfigurement, disability and loss of amenities of life due to loss of leg or vis medico legal report;
- (d) Unlawful arrest and detention.

[37] In respect of the first Head mentioned above in paragraph [29] on **general damages** the attorney of the parties agreed that a sum of E575.000.00 as damages under this Head as opposed to the sum E480.000.00 contended by the Defendant. Therefore on this basis the Plaintiff is granted a sum of E575 000.00 in respect of “**general damages**”.

(ii) Loss of income

[38] I now proceed to consider this Head of damages itemised as (b) above in paragraph [36] of this judgment.

[39] In this respect it is contended for the Plaintiff that evidence was led which was uncontroverted, to the effect that at the time Plaintiff was shot and subsequently incapacitated, and / or disfigured he was employed by Durban Ceiling World as a carpenter and earning a weekly wage of E590.00 (Five Hundred and Ninety Emalangi). The Plaintiff did not provide expert evidence on the appropriate quantum for damages in respect of loss of income but relied on the evidence he gave in court which was not disputed by the Defendant.

[40] However, the Defendant provided a comprehensive report (supported by authorities) on the assessment of compensation due to the Plaintiff which was prepared by **Clemens, Murfin R Rolland Consulting Actuaries**. Starting at pages 2 to 3 of their report, specifically paragraph 5 thereof, the experts state that they assessed value of accrued loss of income to the Plaintiff is the sum of E641 911.00 and a sum of E1 147 684.00 for prospective loss of income.

[41] It is contended for the Plaintiff that there is no reason not to accept the assessment of damages for loss of income as actuarised by **Clemens, Marfin and Rolland** more so because the same has been obtained and provided by the Defendants themselves.

[42] In my assessment of all the arguments of the attorneys in this respect and I am inclined to adopt the expert's opinion in this respect of the matter. I have relied on such expert testimony on account that this is a highly specialized field that the evidence of an expert carries a lot of weight against that of a laymen. It will not be proper for this court to reject the testimony of an experts unless such expert has been discredited. In law therefore I am obliged to follow the expert testimony in this respect. So it is ordered in this respect.

(ii) Future medical expenses, permanent disfigurement, disability and loss of amenities of life due to loss of leg vis Medico – Legal report.

[43] In evidence before this court the Plaintiff gave evidence which was not controverted by the Defendants to the effect that prior to his being unlawfully shot he was a footballer and a jogger. As a result of the unlawful shooting he could no longer pursue his recreational and sporting activities and to that extent he is entitled to be compensated. That one may say that in actual fact in these modern days engaging in sports is no longer a recreational activity but a health necessity.

[44] The attorney for the Plaintiff advanced further arguments in paragraphs 14, 15, 46 and 17 to the argument in paragraph [17] thereof that the doctor further stated that a good functional "light weight prosthesis" is in the rage of

E120,000.00. That there is no reason for this court not to accept **Dr DK Ragoos Medico – legal report** as there is no other evidence controverting it.

[45] In my assessment of the above submissions above paragraphs I grant an order as recommended by the good doctor as stated above.

(iii) Unlawful arrest and detention

[46] In this regard it is contended for the Plaintiff that this court has already found that Plaintiff was unlawfully arrested and detained. That it must be recalled that in evidence it was stated that Plaintiff spent (9) months in prison and his trial never took off as there was no evidence linking him to the offence. That this was consequent to some postponements of the trial.

[47] According to the Plaintiff's attorney the Defendants tried to give flimsy reasons of not proceeding with the Plaintiff's criminal trial and stated that their witness had died. However, the Defendant failed to produce, at the very least, a statement recorded from the alleged deceased witness. That, it is clear that such a witness never existed.

[48] It is contended for the Plaintiff that the amount of E200 000.00 claimed for unlawful arrest and detention is justified in the circumstances, particularly having regard to the manner in which Plaintiff was treated after being shot and subsequently arrested i.e the failure to give him urgent medical attention and him not being admitted to bail.

[49] On the other hand, it is contended for the Defendant, that they are comfortable with an award of E100 000.00. That in this connection, contends the principle that “like cases should be treated alike” seems appropriate under the circumstances.

[50] I have considered the competing arguments of the parties in this regard and I am inclined to agree with the Plaintiff’s view that a sum of E200 000.00 would be justified in the circumstances particularly having regard to the manner in which Plaintiff was treated after being shot and subsequently arrested, i.e the failure to give him urgent medical attention. Therefore, under this Head of damages the Defendants are to pay a sum of **E200 000.00** in respect of unlawful arrest and detention.

[51] In respect of **temporary pain and suffering** the Plaintiff abandoned paragraph 8.2 in the Defendant’s written Heads of Arguments at page 9. In this regard it is contended for the Defendant as follows:

With regard to amending the claim, we submit that the application as per the Notice in terms of Rule 28 of the Rules of this Honourable Court, amending the claim of 5,000,000.00 to E19,000,000.00 has be accordingly abandoned in open court on the 2nd March, 2016. For that reason, we submit that the court should base its judgment on the original claim.

[52] According to prayer (d) of the Combined Summons for “**general damages**” for temporary pain and suffering for at E1 000 000.00.

[53] In assessing the arguments of the parties I would exercise my discretion and award an amount of E800,000.00 under this Head of Damages.

[54] I wish to comment **en passant** that the manner the Plaintiff was treated was shoddy and should not be tolerated in our constitutional dispensation. Plaintiff was treated in an inhumane and degrading manner countenanced by our Constitution which provides in section 14(1) the following:

“The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely- protection from inhumane or degrading treatment, slavery and forced labour, arbitrary search and entry---”.

[55] The Kingdom of Swaziland, in pursuit of ensuring compliance with the Constitution to the extent of enacting an enforcement provision of the rights guaranteed in the Kingdom and these are contained in section 35 of the Constitution.

[56] In that result, for the foregoing reasons I order damages in this case as follows:

- (i) For general damages a sum of E800.000.00
- (ii) For loss of income a sum of E641,911.00 and
a sum of E1,147,684.00 for
prospective loss of income

(iii) For future medical expenses;

The Defendant shall provide the Plaintiff with leg prosthesis by Dr. S. Ragoos after every two (2) years

- (iv) For unlawful arrest a sum of E200.000.00

- (v) Defendants to pay costs inclusive of costs of Counsel to be certified in terms of Rule 68 (2) of the High Court Rule.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

