REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case no: 51/2010
Date heard: 7 November 2016
Date delivered: 22 November 2016

In the matter between

ANDRE PIETER SMIT **Plaintiff**

vs

THE MINISTER OF SAFETY AND SECURITY FOR SOUTH AFRICA **Defendant**

JUDGMENT

PICKERING J:

[1] On the night of 8th May 2008 plaintiff discovered for himself the truth of the adage that brandy and depression make bad bedfellows. Late that night plaintiff was sitting disconsolately at the bar of the Bermuda Night Club in Jeffreys Bay nursing the latest in a long succession of alcoholic drinks, as well as nursing an ego badly battered in the aftermath of a bruising divorce, when a number of policemen entered the premises and ordered him to leave. In a less fraught situation plaintiff would no doubt have informed them that it was actually his brother who they were looking for, it having been his unruly conduct at the other end of the bar which had caused the owner of the club to call the police.

[2] Things being as they were, however, he did not do so. Instead, secure in the knowledge that he was innocent of any wrongdoing, he refused to leave and swore at the police, advising them impolitely to leave him alone. Tensions escalated from there culminating in plaintiff, a white ex-police captain, swearing at the police, who were all coloured persons, in what plaintiff himself conceded were unacceptable racial terms. The police then left the premises. Plaintiff finished his drink and, after calling his brother to accompany him, left the club.

[3] As appears from my judgment on the merits of this matter, the issues of liability and quantum having been separated by agreement, the police, wounded by the racial epithets hurled at them by plaintiff, had in the mean time called for reinforcements from the Jeffreys Bay police station. In an extraordinary step, the police station was closed and locked and all the policemen on duty there rushed to support their colleagues who were waiting outside the club premises for plaintiff to emerge. As plaintiff made his somewhat unsteady way down the stairs in the dark to the car park he was set upon by the police and assaulted, in consequence whereof he suffered severe injuries including the loss of sight in one eye.

[4] In my judgment I found that the police had deliberately ambushed the plaintiff on the stairs, their motive being to exact revenge for his crude, racial slurs which had humiliated and angered them. I rejected as false the evidence adduced by the relevant police officers to the effect that whatever injuries plaintiff had suffered were sustained by him in the course of his resisting arrest. I also rejected the submission advanced on behalf of defendant that because of plaintiff's provocative conduct which gave rise to the assault he was not entitled to any damages and that his action should be dismissed. In this regard I stated as follows:

> "*[94] This submission cannot be upheld. A similar submission was rejected 101 years ago in Blou v Rose Innes 1914 TPD 102 where, at 104, de Villiers JP stated succinctly:*
>
> > 'But none of the authorities, except one to which Mr. Tindall has referred, in Cons. 183, vol.5, go so far as to say that a verbal injury can be set off by an assault. All the authorities are clear, I think, that it cannot be done. I think the reason is perfectly clear. We may differ upon the advisability of extending the rule allowing a man to repel force by force. But we cannot doubt that it is entirely illegal ... although perhaps under the circumstances perfectly natural ... for a man to give another a slap in the face because the other has called him a thief. It is natural, but it is against the law.'

[95] More recently in Winterbach v Masters 1989 (1) SA 922 (ECD) the same conclusion was reached by Zietsman JP, the headnote of which reads as follows:

> 'In a case where self-defence is not involved, to hold that provocation which does not affect the defendant's mental capacity may render lawful an otherwise unlawful assault is tantamount to accepting the principle of an eye for an eye and a tooth for a tooth, and is contrary to our legal principles. Provocation on the part of the plaintiff will, however, mitigate his damages, and in a proper case it may be held that his provocation was such as to reduce to nothing the damages recoverable by him, or that it was such as to justify an award to him of nominal damages only coupled perhaps with an order that he be deprived of his costs, or even that he pay the defendant's costs.'"

[5] I therefore found that the defendant was liable to pay to plaintiff such damages as he might thereafter succeed in proving he had suffered in consequence of the assault upon him. I should mention that defendant did not seek leave to appeal against my judgment and order.

[6] The trial in respect of quantum was originally set down for hearing on 20 June 2016 but was postponed with the issue of the wasted costs occasioned thereby being reserved. I will revert hereunder to this issue.

[7] The matter was again set down for hearing on 7 November 2016 on which date I was informed by counsel that the quantum of damages had been settled in the sum of R600 000,00 made up as follows:

(a) Past Medical expenses	R122 954,30
(b) Future Medical expenses	R197 045,70
(c) General Damages	R280 000,00

[8] I was advised that in settling the quantum of plaintiff's general damages the parties had agreed upon a 20% reduction thereof in mitigation of plaintiff's damages

in order to take into account plaintiff's provocative behaviour which had occasioned the assault upon him. See in this regard: Winterbach v Masters *supra*.

[9] The settlement was reached pursuant to the payment of R600 000,00 into Court in terms of Rule 34 on 28 October 2016, which payment was accepted by plaintiff on Thursday 3 November 2016. Although costs were tendered up to and including 28 October 2016 there was, however, no tender in respect of interest on the damages.

[10] Accordingly two issues were argued before me on 7 November; namely, the issue of the previously reserved costs and the issue relating to interest.

THE RESERVED COSTS

[11] It will be convenient to deal firstly with the issue of the reserved costs.

[12] In paragraph 8.6 of his original particulars of claim plaintiff alleged that he had sustained a "*bleeding perforation of the right eardrum*". On 10 June 2016, however, five court days before the trial was due to commence on 20 June 2016, plaintiff filed a notice of intention to amend paragraph 8.6 by including after the word "*eardrum"* the words "*and a 2x2 painful swelling behind the left ear*" and by adding the following new sub-paragraphs as paragraph 9.1 and 16.10 namely:

> "*9.6 Total deafness of the right ear and partial deafness of the left ear.*
> *16.10 Plaintiff has a mild to moderate sensory hearing loss in the right ear and a mild hearing loss in the low and middle frequencies of the left ear slopes into a steep moderate to severe high frequency hearing loss which loss is permanent.*"

[13] These proposed amendments were accompanied by a concomitant upwards adjustment of the damages claimed by plaintiff.

[14] The amendments were sought in order to give effect to a report by an Ear, Nose and Throat Specialist, Dr. Nel, pursuant to his examination of plaintiff.

Defendant did not object to the proposed amendment but indicated that he required a postponement of the trial in order for plaintiff to be examined by his own expert. The trial was then postponed by agreement with the costs reserved.

[15] In arguing that those costs should be paid by plaintiff Mr. Nepgen, who appeared for defendant throughout the trial, submitted, correctly, that despite plaintiff having testified in some detail during the trial on the merits as to the nature and sequelae of the injury to his eye, there was no mention made in his evidence, nor indeed in the evidence of Dr. Domingo who also testified as to plaintiff's injuries, of plaintiff having suffered an impairment of his hearing in consequence of the assault.

[16] It is so, as was stressed by Mr. Frost, who appeared throughout for plaintiff, that during October 2015 plaintiff had filed a report compiled by an Audiologist, Renee Verson, wherein she stated that she had assessed plaintiff as having a "*mild to moderate sensory hearing loss in the right ear*" as well as the hearing loss detailed in paragraph 16.10 of the proposed amendment, as set out above. Nowhere in her report, however, does Ms. Verson deal with the cause of such loss and whether there was in fact any causal connection between that loss and the assault. It was only in the report of Dr. Nel, filed on 13 June 2016, that the opinion was expressed for the first time that plaintiff's hearing loss was "*as a direct result of the injuries*" plaintiff had sustained.

[17] Mr. Frost submitted, however, that it must have been obvious to defendant prior to the filing of Dr. Nel's report, that plaintiff had suffered a serious injury to his eardrum and that the loss of hearing alluded to in Ms. Verson's report could only have been in consequence of the assault. In these circumstances, so he submitted, it was incumbent on the defendant, if he disputed the causal nexus between the deafness and the assault to have taken steps to investigate the matter.

[18] I disagree. The onus was on plaintiff to prove his damages. Until such time as Dr. Nel's report was filed and the amendment of the particulars of claim was sought no causal nexus was pleaded and there was no reason whatsoever for defendant to have undertaken any such investigation. The fact that according to Ms.

Verson's report the plaintiff had a hearing loss was, in the absence of any evidence linking that loss to the assault, irrelevant to the issue of plaintiff's damages.

[19] In those circumstances it was, in my view, entirely reasonable for defendant, upon receipt of the report and the proposed amendment, to have required plaintiff to be examined by his own medical expert and a postponement of the trial was accordingly inevitable.

[20] The plaintiff must therefore bear the wasted costs occasioned by the postponement of the trial on 20 June 2016.

INTEREST

[21] As I have stated above the parties could not agree on the date from which interest on plaintiff's damages should run. In this regard Mr. Nepgen, with reference to Solomon N.O and Others v Spur Cool Corporation (Pty) Ltd and Others 2002 (5) SA 214 (C) at para 65 submitted that a distinction should be drawn between the three different components of plaintiff's damages. He submitted that no order of interest should be made in respect of plaintiff's past medical expenses inasmuch as these had been paid by plaintiff's medical aid scheme; that interest on future medical expenses should be ordered to run only from 4 November 2016 when plaintiff accepted the offer; and that there should be no order of interest on general damages. I proceed then to deal with each of these components in turn.

(a) *Past Medical Expenses*

[22] Mr. Nepgen correctly did not submit that such portion of plaintiff's claim for past medical expenses as was paid by plaintiff's medical aid scheme was deductible from plaintiff's claim. See D'Ambrosi v Bane and Others [2007] 1 All SA 570 (CC); Hendricks v Minister of Safety and Security and Another, unreported ECD case no 331/2005 dated 17 May 2010.

[23] Whatever payments were made by plaintiff's medical aid scheme (apparently Discovery Health) were clearly *res inter alios acta.* In paragraph 13 of Hendricks supra, Roberson J stated as follows:

> "*In D'Ambrosi v Bane and Others* [supra] *in which the plaintiff's claim was for damages arising from medical negligence, a medical aid scheme was found to be a form of indemnity insurance and payments in terms of the scheme were found not to be deductible from the plaintiff's claim. Van Zyl J referred to the following passage in the judgment of Gautschi AJ in Thomson v Thomson 2002 (5) SA 541 (W) at 547 H – I (not a claim for damages):*
>
> > 'A medical aid scheme is, if not in law then in substance a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums or claims which far exceed the value of the premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme.'
>
> *I am in respectful agreement with this reasoning."*

[24] In D'Ambrosi *supra* van Zyl J stressed that a medical aid scheme was "*no different from any other form of indemnity insurance which offers cover against injury or damage in return for premium payments.*" It is clear therefore, that such benefits and obligations which may arise from plaintiff's membership of his medical aid scheme are matters between him and the scheme alone. In these circumstances I can conceive of no reason in principle why plaintiff should not be entitled to interest on his past medical expenses.

(b) *Future Medical Expenses*

[25] I agree with the submission by Mr. Nepgen that inasmuch as this debt consists of the present value of a future loss, plaintiff is entitled to interest only from 4 November 2016, the settlement date. See s 2A(3) of the Prescribed Rate of Interest Act 55 of 1975.

(c) *General Damages*

[26] Section 2A of the Prescribed Rate of Interest Act 55 of 1975 ("*the Act*") is relevant. Section 2A, which is headed "*Interest on unliquidated debts*" reads as follows:

> "*(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law. ... shall bear interest as contemplated in s 1.*
>
> *(2)(a) Subject to any other agreement between the parties the interest contemplated in ss(1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.*
>
> *...*
>
> *(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law .. may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.*"

[27] In this regard what was stated by EM Grosskopf JA in SA Eagle Insurance Co Ltd v Hartley 1990 (4) SA 833 (A) at 841 B – F is relevant:

> "*Then reference was made to awards of general damages. As stated by Lord Diplock in Wright v Railways Board [1983] 2 All ER 698 (HL) at 699j, non-economic loss is not susceptible of measurement in money. Any figure which is awarded cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncracies of the assessor, the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases' (Ward v James [1965] 1 All ER 563 (CA) at 576 E). The need for even-handedness requires that, when comparing awards in comparable cases, regard must be had to the purchasing power of the currency at the time when such cases*

were decided, otherwise one would not be comparing comparables. This does not offend against the principle of currency nominalism. In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss. Such a valuation must obviously be made in terms of currency values as they are at the time of valuation, and not in terms of the values of an earlier time. In the same way, as it was put in argument, a valuer determining the present value of a farm would not use the currency values of the past. A monetary debt is not, however, subject to a similar type of valuation. It has to be paid according to its nominal value."

[28] During 1997 the Act was duly amended to introduce section 2A. With regard to this section Mpati J, as he then was, stated as follows in Adel Builders (Pty) Ltd v Thompson 1999 (1) SA 680 (SECLD) at 689 G – H:

"*This section came into operation on 5 April 1997 and is clearly aimed at alleviating the plight of a plaintiff as referred to by EM Grosskopf JA in SA Eagle supra that a plaintiff who has to wait a substantial period of time to establish his claim through no fault of his own is paid in depreciated currency. The section confers a right on a party to be paid* mora *interest, to which he was not entitled before the amendment, on an unliquidated debt.*"

[29] See too: Adel Builders (Pty) Ltd v Hartley 2000 (4) SA 1027 (SCA); Du Plooy v Venter Joubert Inc and Another 2013 (2) SA 522 (NCK) where the following is stated at 528D, para 27:

"*The purpose of s 2A is therefore, in my view, not to compensate a creditor for his patrimonial loss, but to compensate the creditor's patrimonial loss in real monetary value and not in depreciated currency.*"

[30] As stated in Adel Builders (Pty) Ltd v Thompson (SCA) *supra,* s 2A(2)(a) lays down what is the general position, namely that interest runs from the date of demand or service of summons. At 1032 G – I Howie JA stated that if a Court resolved to order interest pursuant to ss(5) and not ss(2)(a) "*it was open to the Court, in fixing*

the date from which interest was to run, to give effect to its own view of what was just in all the circumstances" and that no question of any onus arose.

The learned Judge stated further that:

> "*The discretion afforded by s 2A(5) was of the nature referred to in a long line of cases in this Court from ex parte Neethling and Others 1950 (4) SA 331 (A) onwards. Plainly, if parties wish certain facts and circumstances to be weighed in the exercise of such a discretion they must establish them. But there are no facta probanda. No enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. Indeed, there are no evidential issues to attract any onus.*"

[31] In submitting that I should exercise my discretion in terms of ss(5) to order the running of interest from a date other than the date of demand or service of summons Mr. Nepgen stressed the rationale underlying the enactment of s 2A namely, to alleviate the hardship suffered by a plaintiff who had to wait a substantial period of time to establish his claim and in the end had been paid in depreciated currency. See Adel Builders case *supra*.

[32] Mr. Nepgen submitted that such rationale was not present in a case where a plaintiff was awarded general damages as there was no question of such plaintiff being paid in depreciated currency inasmuch as such award was calculated in terms of present values. There would accordingly be no loss of value which required to be compensated for by an order that interest should run from a date earlier than the date of judgment.

[33] Mr. Frost submitted it would be grossly unjust to plaintiff not to order interest to run at least from the date of service of the summons. He submitted that it had been obvious from that date that defendant had never had any intention of paying plaintiff's claimed damages but had instead hotly contested the merits in a trial lasting a number of days in the course of which it had become apparent that the evidence adduced by defendant's witnesses was false and the defence entirely

spurious. Because of this plaintiff was deprived of the use of the money owing to him for nearly 7 years.

[34] He relied in particular on two matters emanating from this Division.

[35] In Zealand v Minister of Justice and Constitutional Development and Another [2009] JOL 23423 (SE), dated 29 October 2008, the plaintiff was awarded general damages of R2 million arising from his prolonged unlawful detention. Van der Byl AJ stated as follows at para 19:

> "*This brings me to the question of interest on any amount awarded. In terms of section 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975, interest runs from the date of demand or summons.*
> *The purpose of this section is obviously to alleviate the hardship suffered by a plaintiff who had to wait a substantial period of time to establish his claim and in the end had been paid in depreciated currency.*
> *There is, in my view, no reason why I should adhere to the submission on behalf of the defendants that interest should run from the date of judgment on appeal. The court has a discretion in terms of subsection (5) of that section to determine, notwithstanding the provisions of subsection (2), an order as appears just in respect of the payment of interest on an unliquidated debt, another date from which interest shall run. The court must, however, be satisfied that there are sufficient facts which justify deviation from the provisions of subsection (2). I am not so satisfied.*"

The learned Judge accordingly granted an order that interest on the damages run from the date of service of the summons. It is noteworthy that, despite the learned Judge having acknowledged the purpose of the section and despite the plaintiff not being paid in depreciated currency, he proceeded to find without any further reference to the section that there was no reason why interest should not run from date of service of summons.

[36] In Maart v The Minister of Police, unreported case no 3049/2011, dated 9 April 2013, Goosen J stated as follows:

"*[34] Two final aspects require consideration. Mr. Mouton, relying on the provisions of section s 2A(2)(a) of the Prescribed Rate of Interest Act, Act 55 of 1975 argued that interest payable on the damages to be awarded should be ordered from the date of service of the summons upon the defendant.*

[35] In support of this it was argued that the defendant did not plead a substantive defence to the merits of the plaintiff's claim yet the merits of the claim were conceded only on the morning before the trial date. In the light of this, it was submitted that the matter could have been resolved at a stage far earlier than when it was and that it would be appropriate to order interest on the damages to run from the date of service of summons, being 29 September 2011.

[36] Mr. Jooste argued that, notwithstanding that the merits were conceded shortly before the commencement of the trial, the determination of the lion's share of the plaintiff's damages, namely loss of earnings and general damages, were matters that could not, given the circumstances of the matter, be resolved without resort to trial. Accordingly interest should be ordered only from date of judgment of the matter.

[37] Section 2A(2)(a) of the Act lays down the general principle that interest accrues from the date of demand or date of service of summons whichever is the earlier date. In this instance the plaintiff does not seek an order that interest runs from a date earlier than that contemplated in section 2A(2)(a) and accordingly that aspect need not be considered in the context of sub-section (5). Subsection (5) confers on the court a discretion to make such order as to it appears just in respect of payment of interest on an un-liquidated claim for damages.

[38] In the view I take of the matter, the plaintiff seeks no more than the application of the general principle in regard to the payment of interest. It was not suggested that such an order would bring about an injustice to the defendant. In the light of the circumstances giving rise to the plaintiff's claim that cannot, in any event, be so."

[37] It would appear from the Maart judgment that the submissions advanced in the present matter were not advanced before Goosen J and were accordingly not considered by him in the exercise of his discretion.

[38] Mr. Frost referred as well to a number of cases involving the award of general damages, including Woji v The Minister of Police [2014] ZASCA 108, in which interest was ordered to run from date of demand without, however, any reference to s 2A(2)(a) of the Act and the rationale for its introduction into the Act. It does not appear from any of the matters referred to by Mr. Frost that the issue of the various plaintiffs therein not being paid in depreciated currency was raised.

[39] In Du Plooy's case supra it would appear from paragraph 36 thereof that the damages awarded to plaintiff were not calculated according to present values, hence the remark of Coetzee AJ that "*it would not be just to pay her in depreciated currency and to deprive her of being paid in real monetary value.*"

[40] Each case must obviously be decided on its own facts and circumstances. I have a broad discretion to make such order as to me appears to be just. In the determination of this issue I am of the view that due regard must be given to the purpose of the legislation. In my view the concerns raised by Mr. Frost are met by the fact that plaintiff's general damages have been calculated according to present values and not in depreciated currency. He has accordingly suffered no loss which requires that as a matter of justice he be compensated by an order that interest should run from date of service of the summons. In my view therefore interest on such damages should be ordered to run from the date of acceptance by plaintiff of defendant's offer of settlement, namely 4 November 2016. I am satisfied having regard to all the circumstances that it would be unjust to defendant to order him to pay interest from date of service of the summons.

COSTS

[42] In defendant's notice of payment into court in terms of Rule 34 the defendant tendered to pay plaintiff's costs to the date of service of the notice, namely 28 October 2016. There was no tender in respect of any of the qualifying expenses of

plaintiff's experts in respect of the trial on quantum. In this regard I was informed by Mr. Nepgen that neither he nor his instructing attorney had instructions to concede either this issue or the reasonable costs of certain photographs.

[43] Plaintiff was accordingly obliged to proceed to court on 7 November despite the quantum of the damages having been settled. Plaintiff was further obliged to seek an order concerning the payment of interest. Although plaintiff has been unsuccessful in respect of the interest payable on his general damages he has succeeded in respect thereof on his past medical expenses.

[44] In these circumstances I am satisfied that defendant should be ordered to pay the costs occasioned by the hearing on 7 November 2016.

[45] The following order will issue:

1. Defendant is to pay to plaintiff the sum of R600 000,00 in full and final settlement of plaintiff's claim for damages.

2.(a) Defendant is to pay interest at the legal rate on the sum of R122 954,30 in respect of past medical expenses from date of service of the summons on defendant to date of payment.

(b) Defendant is to pay interest at the legal rate on the sum of R197 045,70 in respect of future medical expenses from 4 November 2016 to date of payment.

(c) Defendant is to pay interest at the legal rate on the sum of R280 000,00 in respect of general damages from 4 November 2016 to date of payment.

3. Plaintiff is to pay the wasted costs occasioned by the postponement of the trial on 20 June 2016.

4. Defendant is to pay plaintiff's costs in respect of the trial on quantum including the costs of the proceedings on 7 November 2016 with interest thereon at the legal rate from a date fourteen (14) days after allocator to date of payment. Such costs are to include:

4.1 The qualifying fees and expenses of:

4.1.1 Dr. R.W. Domingo in respect of the trial on merits.

4.2 The qualifying fees and expenses in respect of the trial on quantum, if any, of:

4.2.1 Dr. R.W. Domingo;

4.2.2 Mr. J. Potgieter;

4.2.3 Dr. G. Nel;

4.2.4 Dr. V.B. Gardiner;

4.2.5 Ms. R. Verson

4.3 Costs of the photographs.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. Frost
Instructed by: Friedman Scheckter Attorneys, Mr. Scheckter

Appearing on behalf of Defendant: Adv. Nepgen
Instructed by: State Attorney, Port Elizabeth