

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: 676/11

IN THE MATTER BETWEEN:

BABALWA NOGQALA

PLAINTIFF

and

MINISTER OF SAFETY & SECURITY

DEFENDANT

Coram: Pillay J

Date Heard: 15 May 2012

Date Delivered:

Nature of matter: Action - for damages arising out of rape by policeman - occurred at the police station

Order: The respondent is ordered to pay damages to the plaintiff in an amount of R375 000-00; The respondent is ordered to pay plaintiff an amount of R47 590.00 as and for future medical costs; and costs of suit

JUDGMENT

PILLAY, J:

[1] This is an action for damages arising out of an incident which occurred at the police station, Kenton-on-Sea. Plaintiff has sued the defendant for R1 000 000-00, interest thereon and costs of suit.

[2] At the outset of the hearing, I was informed that the merits had been settled and that only quantum was required to be determined. The defendant accepted that he is vicariously liable for damages flowing from the acts of one Inspector Amos ('Amos'). The claim is made up as follows:

- (a) R100 000-00 as and for future medical expenses, and
- (b) R900 000-00 as and for general damages which include claims for *contumelia*, injury to her dignity and reputation, psychological shock due to infringement of her bodily integrity and privacy.

[3] On or about 18 January 2009 the plaintiff was arrested and detained at the police station, Kenton-on- Sea at the instance of her father. The cause of the latter's complaint was apparently an altercation he was having with his daughter, the plaintiff, who was slightly intoxicated at the time.

[4] While in detention, plaintiff was raped by Amos in one of the small offices at the said police station.

[5] Plaintiff was approximately 22 years old at the time of the said rape and had passed grade 6. She left school during the time she was attempting grade 7.

[6] She testified that she lives in Ekuphumeleni, Kenton-on-Sea. She has been living with her boyfriend for quite some time. She had gone to visit her father when the argument with him occurred. She confirmed that she was slightly intoxicated the time and the argument with her father concerned her consumption of intoxicating liquor.

[7] She described how Amos manipulated her out of the cell and how he took her to an office where he raped her on the office carpet in the early hours of that morning. After the rape, she was released and went home to her boyfriend. She said that she did not respond to his enquiry as to why she had returned so late.

[8] Her boyfriend nonetheless wanted to indulge in sex. She refused to co-operate as a result of her being raped. Despite him wanting an explanation for her refusal, she did not tell him of the situation. She explained that she did not tell him what had happened to her at the police station because she feared that he might leave her and/or not respect her as a result.

[9] However, approximately three days later she again went to visit her father. On the way there, she again consumed intoxicating liquor. When she arrived at her father's house, he realized that she was again intoxicated and another argument between them ensued.

[10] He again threatened to call the police. It was at that stage that she burst out crying and told him what had happened when he last caused her to be arrested.

[11] After she told him that she had been raped by Amos, the two of them went to report the matter to a senior police official. After investigations, Amos was arrested on a charge of rape. She does not know what has happened to the criminal case or whether it has been completed. She however testified at an internal hearing in relation to the rape.

[12] Plaintiff testified that her parents were divorced when she was very young and lived with her maternal grandmother and then with other relatives including her paternal aunt until she was 11 years old. Thereafter she saw more of her mother who was often intoxicated and had contracted Human Immunodeficiency Virus ('HIV'). Her mother later died as a result. She did not enjoy her situation and resorted to consuming liquor at a very young age to "make her feel better".

[13] When she was about 15 years old, she was diagnosed with type 1 diabetes. This precipitated chronic major depression disorder ('MDD'). She

was told that she might not be able to bear children as a result. This is a further aspect which affects what she considers a wretched life.

[14] In 2006, at the age of 17 years, she was raped at knife point by a person known to her. She reported it to her mother and a charge of rape was laid at the police station. The culprit was arrested thereafter and she was told that she would be informed when she would be required to testify in that matter. A few days later she saw that accused on the streets again. She was never informed that she was to testify in the case and she heard nothing of it again. This led to her losing faith in the police force and she became more depressed.

[15] A few months later she also was diagnosed with HIV. She suspected that she contracted the virus from her first rapist because she was friends with his girlfriend who died from the virus some time later. Her depression worsened because of this. Life became so unbearable that she attempted to commit suicide.

[16] Her experience of being raped by Amos served to exacerbate her depression and worsened her negative views of life. It also negatively

affected herself image. This led to her once again attempting to kill herself. As she explained, she found it unfair that all this was happening to her and that she was the 'chosen victim' as it were.

[17] She has not been able to rid herself of the memories of her unfortunate experience with Amos. This is partly because she has had to repeat the tale of the experience for a third time now. She described the emotional pains she has to endure in doing so. She explained that everytime she has to repeat the version, she relives the whole experience.

[18] She is continuously reminded of it when told of a rape victim even when such matters are referred to over television.

[19] Her self image was made even darker when she and her boyfriend was given a lift by a policeman who referred to her as 'Amos's wife'.

[20] After continuous invitations to do so by counsel for the defendant, she accepted an apology from the defendant. She was clearly reluctant to do so and added that she would never again trust members of the police force.

[21] She explained that she had been staying with her boyfriend since the age of 20. She further explained that engaging in sexual intercourse with her boyfriend is generally no different than before the rape by Amos but sometimes she remembers Amos on top of her. When this happens she either refuses to engage in sex with her boyfriend or does not continue to do so.

[22] Dr Anita Padmanabhauunni, ('the psychologist') a counselling psychologist testified on behalf of plaintiff. She had interviewed plaintiff to assess the extent of her psychological trauma flowing from being raped by Amos. The credentials of the psychologist were accepted by the defendant.

[23] According to the psychologist, plaintiff was affected by her experience of the first rape. This precipitated chronic post-traumatic stress disorder (PTSD) with characteristic symptoms of intrusive re-experiencing the rape, avoidance of people, places or situations which served as reminders of her the rape and apparent uneasiness in the public domain.

[24] However by the time plaintiff had struck up a relationship with her present boyfriend she comfortably and regularly indulged in sex. She seemed to have overcome the primary symptoms of the trauma related to the first rape. However the psychologist pointed out that, in theory, the symptoms never really go away – especially without treatment and counseling. In her assessment the traumatic effects of the first rape were in remission but conceded that they might have been completely resolved by the time she entered into the relationship with her present boyfriend.

[25] However the rape by Amos definitely facilitated the re-emergence of the traumatic symptoms of the first rape. These complimented the trauma she experienced as a result of the Amos rape.

[26] According to the psychologist, she again developed almost the same symptomatic reactions to an already well-established PTSD as a result of the Amos rape. These include intrusive re-experience - brought on by the sight of a gun carrying policeman, small rooms, the sight of similar carpets as the one on which she was raped by Amos and sometimes when she engages in sexual intercourse with her boyfriend; avoidance – plaintiff did not take up a job offer at an Addo farm because Amos lived in the area; physiological

hyper-arousal – plaintiff is overly alert and nervous especially at the sight of a policeman.

[27] Prior to the Amos rape, plaintiff still felt that a police station is a place of safety. This belief has obviously been shattered and now she feels that even policemen are not to be trusted and that policemen are indifferent to her wellbeing and would not protect her.

[28] The Amos rape led to her having negative perceptions of living in an orderly and meaningful community.

[29] All these views and conclusions of the psychologist are undisputed as are the facts upon which they are based.

[30] The psychologist has recommended treatment to assist the plaintiff to address these symptoms. However, it is suggested that the first segment of treatment is dealing with her alcohol dependence because, as I understand, this would interfere with the treatment related to her symptoms of PTSD. It is noteworthy that subsequent to the diagnoses of diabetes, she also

contracted HIV. These two disorders are major and interwoven with an already established depressive state and low self-image. Though not initially brought about by the rape by Amos, they were worsened by it and an holistic and comprehensive regime of treatment of the sequelae of the Amos rape cannot be dealt with in isolation.

[31] In her assessment, the psychiatrist was of the view that plaintiff would require about fifty one-hour sessions at her rooms in Grahamstown. The costs of R651.80 per hourly session was agreed upon by the parties. This would amount to R32 590.00 for future medical treatment.

[32] In light of the fact that plaintiff would have to travel from Kenton-on-Sea to Grahamstown for the sessions, allowance would have to be made for the costs of travelling in order to obtain the said treatment. She is unemployed and if she was unable to attend the sessions regularly on account of not having travelling fare, then the necessary treatment would not be completed. Counsel were in agreement that travelling costs should be factored in as part the treatment costs and estimated such costs at R300-00 per return trip. That would amount to R15 000-00 (R300 x 50).

[33] While travel costs were not specifically claimed, I think it was fair of counsel to agree that such costs be factored into the future medical costs.

[34] Consequently the 'agreed amount' for future medical costs amount to R47 590-00. In the circumstances I would allow that amount for future medical expenses.

[35] The plaintiff then closed her case and the defendant also did so without presenting any evidence.

[36] I accept the evidence of the psychologist without any reservation. Indeed it was not suggested in any way that I should not.

[37] Rape must rank as the most violent intrusion to the bodily integrity and dignity of a woman. Moreover, the plaintiff's position is worsened by the fact that she was raped by a policemen at a police station. It was committed through an extreme abuse of authority and facilitated by the attendant control over the incarcerated plaintiff Amos obviously had. The act of a policeman raping an incarcerated person defies the norms of society which the police are charged to protect. These include society's values, fundamental rights and the imperatives contained in the constitution of the

Republic of South Africa. This view finds support in the relevant comments made in **K v Minister of Safety and Security 2005 (6) SA 419 CC**.

[38] Mr Sandi suggested in argument that the plaintiff's present condition is not solely attributable to the Amos rape but is substantially brought about by the first rape. This argument cannot be sustained simply because the uncontested evidence of the psychologist is that even if the symptoms of the trauma related to the first rape had possibly resolved themselves, they clearly re-emerged as a result of the Amos rape. Consequently, the first rape cannot serve to mitigate the damages in so far as the present symptoms are concerned. This is a clear case in which damages must be assessed on the basis of the plaintiff's present condition.

[39] She clearly suffers from PTSD and this is complimented by a low self-image brought on by the other disorders she unfortunately suffers from.

[40] It is in this context that her general damages must be assessed.

[41] The general damages included a claim for *contumelia*. Counsel agreed that a globular amount, in which an award for *contumelia* is included, should be made. While this is not a regular rule and the notion of *contumelia* could be determined separately, I am prepared to ultimately make an order so as to include it.

[42] I could not locate any recent cases in which factors such as constitutional imperatives and the spirit of the Constitution served as a guide in arriving at an appropriate award.

[43] Being raped by a policeman at police station while under his control could not but lead to undoubted shock, trauma, humiliation, distress and a negative effect on her dignity. The act of a policeman raping the plaintiff illustrates his disregard for the plaintiff and can only be described as disgraceful.

[44] Mr Sandi valiantly argued that her character was such at the material time, that it should also serve to mitigate the damages. He referred to her indulging in sexual intercourse at a very young age and that she had also involved herself in consuming liquor at a young age and still does. He

argued that her station in life is such that a lower amount, then would otherwise be justified, should be awarded.

[45] I do not think that her station in life carries much weight. It must be remembered that even if the factors mentioned by Mr Sandi were focal, these were not brought on by considered and voluntary efforts on the part of the plaintiff. She was virtually an unguided orphan without parental leadership and she could hardly be blamed for being raped. Her habit of consuming liquor is primarily to help her deal with the PTSD and the situation she finds herself in. It nonetheless does not reduce the degree of repugnance society, and indeed the plaintiff, feels about Amos 's conduct. Neither does it reduce the the effect on her dignity. Her degradation goes far beyond that which is normally associated with rape. In the circumstances, with regard to the *contumelia* segment of the award, a punitive element should also be factored into the equation.

[46] In measuring the present condition of the plaintiff, and what led to it, against the values of society and the spirit of Constitution, I would award an amount of R225 000-00 in respect of damages for *contumelia*.

[47] The plaintiff suffers from PTSD. As I understand, it is acute and has had the effect of the plaintiff trying to take her own life on more than one occasion. She is reliving the first rape as well as the Amos rape again and again. Her sex life has once again been negatively affected by her experiences. She has undergone a personality change in being alert, nervous of people around her and distrustful of especially policemen in uniform. Her social cohesion has therefore been seriously impaired.

[48] The memories of the rapes will always be with her but the resultant effects of the traumatic symptoms will resolve with professional treatment.

[49] The pain and suffering she endured as a result of Amos 's action will probably always be underestimated but as far as this is capable of being appreciated by another person, it should be reflected in the amount of damages awarded.

[50] In the absence of any reported cases of a similar nature, I am guided by the approach adopted in **Minister of Safety and Security v Seymour 2006 (6) SA 320 SCA at para 17** wherein it is, correctly in my view, stated that each case need to be assessed on its own facts and reference to awards in previous cases should not be relied upon as if they are tariffs or

tables by which awards are made. They should be regarded as guides and are nothing more than that.

[51] The Seymour case dealt with unlawful arrest and detention. There are a number of other similar cases such as Seymour. All deal with unlawful arrest and detention. One or two deal further with additional damages flowing from assault.

[52] In this case, the revolting idea of being raped while in custody runs against the import of the Constitution. It is a delict which must be visited by an award for damages which reflects not only rejection of actions which strain the spirit of the Constitution but also, and more importantly, the pain, both physical and psychological, suffered by plaintiff.

[53] Upon an appraisal of all the relevant facts, I consider an amount of R150 000-00 for the general damages appropriate in the circumstances.

[54] In total therefore, the plaintiff is entitled to R375 000-00 general damages as envisaged in the claim and to an amount of R47 590-00 as and for future medical costs.

[55] In the result I make the following order:

1. The respondent is ordered to pay damages to the plaintiff in an amount of R375 000-00;
2. The respondent is ordered to pay plaintiff an amount of R47 590.00 as and for future medical costs.
3. The respondent is ordered to pay the costs of suit, including the qualifying fees of Dr Anita Padmanabhauunni.

R. PILLAY

JUDGE OF THE HIGH COURT

Obo the Plaintiff: Adv Sandi

Instructed by: N.N. Dullabh & Co
P.O. Box 469
GRAHAMSTOWN
6140

Obo the Defendant: Adv Koekemoer

Instructed by: Mili Attorneys
P.O. Box 326
GRAHAMSTOWN
6140