REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 8891/2011

In the matter between:

GERRIT CHRISTO MOUTON **PLAINTIFF**

and

PEDRO MOUTON **FIRST DEFENDANT**

CHARIEF MOUTON **SECOND DEFENDANT**

Neutral Citation*: Mouton v Mouton* (I 889/2011) [2021] NAHCMD 91 (26 February 2021)

CORAM: UEITELE J

Heard: **26 October 2020 – 30 October 2020**

Delivered: **26 February 2021**

Flynote: Delict — Action for damages — Delicts affecting plaintiff's personality and bodily integrity — Assault violates a person's bodily integrity and that every infringement of the bodily integrity of another is *prima facie* unlawful. Once infringement is proved, the *onus* moves to the wrongdoer to prove some ground of justification.

Delict – Assault – Assessment of damages – Plaintiff assaulted by the Defendants – No doubt in existence that assault took place at the hands of the Defendants – Defendants raising the position that assault was as a result of threats made by the Plaintiff – Court not convinced that justification existed in respect of the assault.

Summary: The plaintiff instituted proceedings against the defendants for patrimonial and non-patrimonial damages suffered as a result of a physical assault on him by the defendants, causing the plaintiff to have to undergo medical treatment, including undergoing an operation and suffered permanent damages and consequent disability to his left eye.

In his defence, the first defendant denied that he unlawfully assaulted the plaintiff and pleaded that the plaintiff insulted him, the second defendant and their mother and indicated that he will shoot them. The first defendant further pleaded that he attempted to stop the plaintiff from executing his threats and in that process, the plaintiff unlawfully assaulted the first defendant, who then acted in self-defence to repel the attack on him by the plaintiff.

The second defendant admitted having assaulted the plaintiff but denies that the assault was unlawful. He pleaded that he was provoked by the plaintiff who hurled disrespectful insults towards him and who threatened to shoot him and the first defendant. The second defendant thus pleaded that on account of the provocation, he was justified to assault the plaintiff.

Held that a defendant who raises the defence of provocation must lay a sound foundation.

Held that the Court must approach the defence of provocation with great care and scrutinize the evidence with great caution, because a person is expected to control his or her urges, emotions and passions. From a moral and ethical perspective, it is clear

that one is expected to control oneself, even under provocation or emotional stress. The community demands no less.

Held that the evidence by the defendants that they were insulted and threatened by the plaintiff is not only unconvincing but a fabrication, and was rejected. It thus followed that the defendants without any justification assaulted the plaintiff and such assault was thus unlawful.

Held furthermore that in assessing damages, reference to prior awards is a useful aid to assist a Court in determining what would be a fair and reasonable compensation, recourse being had to the specific circumstances of each case. The Court must consider the facts and the circumstances of the case, the injuries sustained by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life. Each case must, however, be determined on its own merits.

Held furthermore that the plaintiff has lost part of a vital function and faculty which would have enabled him to enjoy his life as he used to, before the assault. The Court was further satisfied that the plaintiff's self-sufficiency, happiness and dignity have all been reduced, he can no longer go about his daily tasks and activities in the same fashion and pace as he used to before the assault occurred.

Held furthermore that when considering the question of quantum in respect of general damages, the Court must be mindful of the fact that general damages are not a penalty but compensation. The award is designed to compensate the victim and not punish the wrongdoer.

ORDER

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1. The first and second defendants must, jointly and severally, the one paying the other to be absolved pay to the plaintiff:

(a) in respect of medical costs, the amount of N$ 13 102.38;
(b) in respect of shock, pain suffering and *contumelia*, N$ 100 000; and

(c) in respect of loss of amenities of life, N$ 400 000;

plus interest at the rate of 20% per annum on the above amounts reckoned from 27 February 2021 to date of payment.

2. The first and second defendant must, jointly and severally, the one paying the other to be absolved pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.

3. The matter is finalised and is removed from the roll.

JUDGMENT

UEITELE J

Introduction

[1] The plaintiff in this case is Gerrit Christo Mouton, who describes himself as a businessman and a resident of Windhoek, Namibia.

[2] The two defendants are brothers, the first defendant being Pedro Mouton and the second defendant being Charief Mouton.

[3] I do not intend any disrespect to the parties and will for convenience and ease of reference refer to the plaintiff as Gerrit, the first defendant as Pedro and the second defendant as Charief.

[4] On 12 January 2011 the plaintiff caused summons to be issued out of this Court against the defendants in which summons the plaintiff claimed an amount of N$ 1 784 819.12 in respect of both patrimonial and non-patrimonial damages that he alleges he suffered as a result of a physical assault on him by the defendants.

Background Facts

[5] During the year 2009 Gerrit through a Company (Ganthanri Properties (Proprietary) Limited) of which he is the sole shareholder, purchased an immovable property known as Farm Garies West No. 492, situated in the District of Rehoboth. The ownership in the Farm was transferred from the seller to Ganthanri Properties on 29 May 2009. Farm Garies West No. 492 borders a farm known as Tsabisis Ost, also situated in the District of Rehoboth.

[6] Approximately fourteen days (that is on 13 June 2009) after Gerrit took transfer of the Farm into the name Ganthanri Properties (Proprietary) Limited, he (Gerrit) went to Farm Garies West No. 492 for the purposes of checking out the boundary pegs of the Farm that he had just acquired. At approximately 10H00 on that day (that is, on 13 June 2009) Gerrit and two of his employees were on the neighbouring Farm Tsabisis Ost looking for the boundary pegs of Farm Garies West. It was at that moment that Pedro and Charief who were in the company of their mother a certain Ms Lilly Mouton (Ms Mouton), and their brother in law, a certain Mr Cloete approached Gerrit.

[7] Ms Mouton indicated to Gerrit that the previous owner of Farm Garies West No. 492, a certain Mr Groenewald concluded a sales agreement with her husband and that the Farm thus belonged to her husband. The content of the exchange between Ms Mouton and Gerrit is in dispute, but what is not in dispute is that shortly after Gerrit

replied to Ms Mouton, Charief attacked Gerrit by head butting him on the eye. Gerrit fell down and as he attempted to stand up, Pedro kicked him from behind. Ms Mouton intervened and instructed her sons to stop the attack on Gerrit. Ms Mouton took water and washed Gerrit's face.

[8] Gerrit left the scene where he was attacked and when he got to the farmstead, his wife cleaned his face and she drove him to Medi-Clinic Private Hospital, in Windhoek. On arrival at the Medi Clinic Hospital, Gerrit was admitted to the Hospital. After his open wounds to the eye and nose were treated and stitched, he was discharged from the hospital and was referred to a Maxilla-Facial and Oral Surgeon Specialist, certain Dr Werner Koëp and a Diagnostic Radiologist. After consultations with Dr Koëp, Gerrit was advised that the assault on him caused a blow-out fracture and that he thus need to undergo surgery. On 19 June 2009, Gerrit underwent surgery under general anaesthetics and a reconstruction of his left eye was carried out. He spent a total of two days in hospital.

[9] Gerrit alleged that the assault caused him great embarrassment as it took place in the presence of his employees with whom he had a close working relationship and mutual respect and that he has been stripped of his dignity and further that the assault caused him pain and suffering and loss of amenities of life, Gerrit, as I indicated earlier, instituted these proceedings. I will now briefly turn to the pleadings.

The Pleadings

[10] In the particulars of claim attached to the summons, Gerrit alleges that on 13 June 2009 and at Farm Tsabisis Ost, he was unlawfully assaulted by Pedro and Charief, by Pedro applying force with his head to him and by both Pedro and Charief punching and kicking him. Gerrit furthermore alleges that the assault took place in the presence of a family member of Pedro and Charief and also in the presence of his employees.

[11] As a result of the unlawful and wrongful assault, so Gerrit continues, he suffered shock, pain, and *contumelia*, had to undergo medical treatment including undergoing an operation and suffered permanent damages and consequent disability to his left eye.

[12] The plaintiff, as a consequence of the assault, is seeking compensation in the amount of N$ 1 784 819.12 from the defendants made up as follows:

(a) N$150 000 for shock, pain and suffering;

(b) N$ 9 819.12 for medical expenses; but this amount was at the trial after the plaintiff's evidence was led amended to N$ 13 102.38;

(c) N$ 125 000 for *contumelia;* and

(d) N$ 1 250 000 for disability in respect of loss of amenities of life.

[13] Pedro and Charief defended the action and on 09 September 2019 approximately eight years and 5 (five) months after the summons was issued, the defendants filed their pleas. The reasons for these delays were explained to the judge to which the matter was initially docket allocated.

[14] In his defence, Pedro denied that he unlawfully assaulted Gerrit and pleaded that Gerrit insulted him and his brother Charief and indicated that he will shoot the two brothers. Pedro further pleaded that he attempted to stop Gerrit from executing his threats and in that process, Gerrit unlawfully assaulted Pedro, who then acted in self-defence to repel the attack on him by Gerrit.

[15] Charief admitted having assaulted Gerrit but denies that the assault was unlawful. He pleaded that he was provoked by Gerrit who hurled disrespectful insults towards him and who threatened to shoot him and Pedro. Charief thus pleaded that on account of the provocation, he was justified to assault Gerrit.

Issues to be determined

[16] At the commencement of the hearing, the issues falling to be determined by the Court narrowed themselves to:

(a) Whether the assault on the plaintiff was unlawful; and

(b) In the event of a finding being in the affirmative, the quantum of damages to which the plaintiff is entitled.

The Evidence

[17] Gerrit testified that on 13 June 2009 and at farm 'Tsabisis Ost', he together with two of his employees were looking for the boundary pegs of Farm Garies West No. 492 when they were approached by the Pedro, Charief, their mother Lilly Mouton and their brother in law Mr Cloete. Ms Mouton and Charief were the ones who walked towards him while Pedro and Cloete were standing at their vehicle approximately 20 meters away. Upon reaching the plaintiff, Ms Mouton indicated to the plaintiff that her husband bought Farm Garies West No 492 from a certain J Groenewald and that the Farm thus belongs to her husband. He continued and testified that he politely replied to Ms Mouton indicating that he is in possession of the title Deed of the Farm and if Ms Mouton had qualms with the conduct of the seller, she must rather address her grievances with the seller.

[18] Gerrit continued and testified that it was at that moment when he replied to Ms Mouton that Charief, unprovoked, attacked him by head-butting him. He proceeded and testified that as a result of the assault, he lost his balance, fell down and was feeling dizzy. Whilst he was down, Pedro kicked him from behind. He continued and testified that Ms Mouton then intervened and stopped her sons from assaulting him.

[19] Gerrit further testified that the assault caused him great embarrassment as it took place in the presence of his employees with whom he had a close working relationship and mutual respect. He further submitted that his dignity had been stripped from him, adding a sense of hopelessness and degradation. He further testified that the assault left damages of a permanent nature to his left eye in that reading and writing has become very difficult and he cannot use stairs without the assistance of another person. He testified that he used to be an avid traveler sightseeing but this he can no longer do because of the damage to his left eye. The assault further rendered him being more dependent on others. He further testified that as a consequence of the assault, he suffers from double vision.

[20] In support of the damages to his left eye, Gerrit called two expert witnesses. The first was Dr. Talitha Magdalena Maritz who testified that she consulted with Gerrit on the day of the assault, being the 13th of June 2009 and confirmed that his left eye was bloodied and swollen. She further confirmed that during her consultation, she noted that the plaintiff could not look with the left eye to the left side and downwards. After concluding her observations and based on various other visitations throughout the years from 2009 to the time of the trial (that is, during October 2020), she testified that converting it to a percentage, Gerrit's visual impairment could be totaled to a value of eight per cent.

[21] The second expert to testify was a certain Dr. Jan Hartes Brand. In essence, he agreed and made the same findings as those of Dr. Maritz. He confirmed that Gerrit suffered a right orbital fracture with eye movement imbalance resulting in double vision. He opined that this was a very disturbing condition for the patient (Gerrit) which made reading and writing very difficult and it can also cause headaches. He confirmed that these symptoms are of a permanent nature. Where Dr. Brand did differ slightly with Dr. Maritz, was on the aspect of the plaintiff's visual impairment, suggesting to be rather around the percentage of 10 as opposed to 8 as suggested by Dr. Maritz

[22] Pedro testified that they found Gerrit and his workers at the boundary of Farm Garies West and Tsabisis Ost. He testified that his mother, Ms Mouton, approached Gerrit and asked him whether he was aware of the agreement that her husband had with Mr. Groenewald regarding the said piece of land. He testified that Gerrit's response to that question was that he does not talk to low class people and that she must sort out her issues with Mr. Groenewald. Pedro proceeded and testified that Gerrit proceeded and stated that he will "sommer" shoot them.

[23] Pedro continued and testified that Gerrit moved towards his vehicle, and that it was at that moment that Charief moved in front of Gerrit to stop Gerrit moving to his vehicle. Charief thus head-butted the plaintiff and as Gerrit was stumbling and attempting to run to his vehicle, Pedro came from behind and kicked Gerrit's ankle to prevent him from moving to his vehicle. He further testified that his mother intervened and ordered them to stop the assault on Gerrit. He continued his testimony and stated that his mother took a bottle of water, cleaned Gerrit's face and they drove away.

[24] Charief's testimony in many respects was similar to that of Pedro. He testified that the initial exchange was between his mother and Gerrit and further that he was angered by the manner in which Gerrit replied to his mother, namely that he does not speak to low class persons and the alleged threats that he will shoot them. He testified that it is at that moment that he moved forward and head butted the plaintiff.

[25] During cross-examination, Charief conceded that he was already "worked up" by the manner in which Gerrit purchased Farm Garies West from Mr. Groenewald. Charief further conceded under cross-examination that at the moment when Gerrit allegedly uttered the threats that he will shoot them, he (Gerrit) had no firearm on him. On a question from the Court whether Gerrit spoke to them that morning, both Pedro and Charief admitted that Gerrit never spoke to them on that day, he only had an exchange with their mother.

Findings

[26] The evidence of the plaintiff and the defendant is, in relation to the crucial facts that have a direct bearing on the question of who assaulted who, and why the assault took place, mutually destructive. The following legal principles are now well settled in our law namely that:

(a) where the evidence of the parties' presented to the court is mutually destructive, the court must decide as to which version to belief on probabilities;[1] and

(b) the approach that a court must adopt to determine which version is more probable, is to start from the undisputed facts which both sides accept, and add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses.[2]

[27] It is with those principles in mind that I now have to decide whether the assault likely happened in the way asserted by Gerrit or in the way described by Pedro and Charief. Mr Ravenscroft-Jones, who represented the plaintiff, urged the Court to accept the evidence of the plaintiff on the basis that the probabilities in the case favour the version of the plaintiff more than they favour the defendants' versions.

[28] Before I proceed to discuss the evidence, I find it appropriate to remind us of the following aspects regarding assault. In the Criminal Law context, assault is defined as the unlawful and intentional application of force directly or indirectly to the person of another or inspiring a belief in another person that force is immediately to be applied to her.[3] In the context of Delict, Neethling, Potgieter & Visser[4] argue that 'The *corpus*

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1. *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at H 440E – G: Also see *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR at 556.

2 . *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008 (unreported) at 39 - 17 para 51).

3. C R Snyman Criminal *Law* 4th ed, Butterworths at 430.

4. *The Law of Delict* 5th ed, LexisNexis Butterworths, 2006 at 301.

(bodily and psychological integrity) is protected against every factual infringement of the person's physique or *psyche.* The same authors[5] argue that infringements of the *corpus* are most often encountered in instances where physical harm is paramount and that such infringements may occur with or without violence and with our without pain and are regarded as *iniuriae* with regard to the *corpus*.

[29] In the matter of *Stoffberg v Elliott*[6] Watermeyer, J as he then was, instructed the jury as follows:

> 'I want first of all to explain to you what, in law, an assault is. In the eyes of the law, every person has certain absolute rights which the law protects. They are not dependent upon a statute or upon a contract, but they are rights to be respected, and one of those rights is the right of absolute security of the person. Nobody can interfere in any way with the person of another, except in certain circumstances which I will further explain to you. Any bodily interference with or restraint of a man's person which is not justified in law, or excused by law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he has suffered owing to that interference.'

[30] In the unreported judgment of *Lubilo and Others v Minister of Safety and Security,*[7] this Court[8] remarked that an assault violates a person's bodily integrity and that every infringement of the bodily integrity of another is *prima facie* unlawful. Once infringement is proved, the *onus* moves to the wrongdoer to prove some ground of justification. But before that duty arises, the plaintiff must allege and prove the fact of physical interference. It thus follows that in order to succeed in his claim the plaintiff carries the *onus* to prove the physical infringement of his body (by the application of

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[5]. In *Neethling's Law of Personality* 2nd edition, LexisNexis Butterworths, 2004 at 84.

[6]. *Stoffberg v Elliott* 1923 CPD 148.

[7]. *Lubilo and Others v Minister of Safety and Security* (I 1347/2001) [2012] NAHC 144 (delivered on 8 June 2012).

[8]. Per Damaseb JP at para [9].

force to his body) by the defendant. The *onus* to show justification for the infringement of the plaintiff's body is on the defendant.[9]

[31] Both Charief and Pedro admitted to the assault but raised the defence of provocation. In our law, the defence of provocation is not a full defence but only a partial defence. In the context of criminal law, Damaseb JP in the matter of *S v Ngoya*[10] extensively dealt with the defence of non-pathological incapacity and stated as follows:[11]

'The State bears the *onus* to disprove the defence of non-pathological incapacity beyond all reasonable doubt. But the accused must lay a foundation sufficient to create a reasonable doubt for the State to disprove it. I can do no better than once again refer to the following observations of Snyman (op cit) at 166 (with which I agree):

> "The Court will approach this defence with great care and scrutinize the evidence with great caution. The chances of X's succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in many of the cases in which the defence succeeded or in which the Court was at least prepared to consider it seriously, X's act was preceded by a very long period - months or years - in which his level of emotional stress increased progressively. The ultimate event which led to X's firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow. When assessing the evidence, it should be borne in mind that the mere fact <u>that X acted irrationally is not necessarily proof that he lacked the ability to direct his conduct in accordance with his insights into right and wrong</u>. <u>Neither does the mere fact that he cannot recall the events or that he experienced a loss of memory, necessarily afford such proof.</u> Loss of memory may for example be the result of post-traumatic shock which arises in X as a defence mechanism to protect him from the unpleasantness associated with the recalling of the gruesome events."'

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[9]. *Mabaso v Felix* 1981 (3) SA 865 (A).

[10]. *S v Ngoya 2006 (2) NR 643 (HC),*

[11]. *Supra* at at page 655 para [39].

[32] This approach was confirmed in *Hangue v The State*[12] where Maritz JA comprehensively discussed the defence of non-pathological criminal incapacity. In paragraph 36 of that judgment, Maritz A J restated the position as follow:

> 'It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:
>
> (i) in discharging the onus the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
>
> (ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
>
> *(iii) evidence in support of such a defence must be carefully scrutinised; and*
>
> *(iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period'* [my emphasis]

[33] In my view, in the civil context, a defendant who raises the defence of provocation must lay a sound foundation for that defence, sufficient at least to require the plaintiff to rebut the defence. I furthermore agree that the Court must approach this defence with great care and scrutinize the evidence with great caution. I hold this view for the reason that surely a person is expected to control his or her urges, emotions and passions. From a moral and ethical perspective, it is clear that one is expected to control oneself, even under provocation or emotional stress. The community demands no less.

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[12]. *Hangue v The State (*SA 29/2003) [2015] NASC 33 (15 December 2015).

[34] In the Zimbabwean case of *S v Zengeya,*[13] the Court argued that allowing provocation to function as a complete defence as opposed to a mitigating factor acknowledging human frailty, cannot be countenanced. The Court said:

> '[W]ere one to do otherwise then one would be giving credence to the belief that retaliation is justified in the eyes of the law in certain circumstances and it seems to me that his is the very thing our criminal law guards against; it does not allow people to take the law into their own hands, and it would be coming very close to that to allow provocation to operate as a complete defence.'

[35] I agree wholeheartedly with what the Court said in the *S v Zengeya* matter. In this matter, the provocation raised is that Gerrit allegedly stated that he does not '*speak to low class people'*. First these words were not said to either Pedro or Charief and even if those words were uttered (which, on the evidence before me, I do not belief were uttered), I fail to see how these words emotionally disturbed Charief, albeit for a brief period, before and during the assault on Gerrit. Secondly, the distance between Gerrit and Pedro was more than twenty meters so I doubt whether Pedro could from that distance hear the conversation between Gerrit and Ms Mouton. Thirdly, it is clear from the evidence that on the day in question (13 June 2009), Pedro, Charief, their mother and Mr Cloete set out to confront Gerrit regarding the manner in which he bought farm Garies West which they considered belonged to them. It is thus clear that the defendants were on a clear 'war path' against the plaintiff.

[36] Weighing up the versions of Gerrit, Pedro and Charief and taking into account the probabilities, I incline to lean more strongly to the view that Pedro and Charief were motivated by the fact that Gerrit bought Farm Garies West from under their '*father's nose'* and had planned and set out to confront and, if necessary, assault the plaintiff. I am so inclined for the following reasons: The evidence which is undisputed and which both the plaintiff and the defendants accept is that:

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[13]. *S v Zengeya* 1978 2 SA 319 (RAD) at 321 A.

(a) Pedro, Charief, their mother Ms Mouton and the brother in law, Mr Cloete, approached Gerrit on Farm Tsabisis where he was looking for the boundary pegs of the Farm, they did not greet him or engage him in a civil conversation. Ms Mouton simply aggressively confronted Gerrit.

(b) Charief assaulted the plaintiff (when the plaintiff did not even speak to him) by head-butting him on the eye whilst the plaintiff was wearing spectacles,

(c) Pedro kicked the plaintiff as the plaintiff was falling down;

(d) Charief was already “worked up” at the time he approached Gerrit,

(e) Gerrit did not speak to either Charief or Pedro, and

(f) at the time when Gerrit had the conversation with Ms Mouton, Pedro was more than 20 meters away from them (that is Ms Mouton, Charief and Gerrit);

(g) Pedro and Charief were arraigned and tried on criminal charges in the Magistrates Court for the District of Rehoboth. During that trial, both Pedro and Charief admitted that they unlawfully assaulted Gerrit.

[37] The evidence by Pedro and Charief that they were insulted and threatened by Gerrit is in my view not only unconvincing but a fabrication, and I therefore reject it. The evidence bore no confirmation of the fact that the plaintiff indeed had a gun on him or that the defendants were facing an imminent threat that required evasive manoeuvres. I therefore furthermore reject the evidence by the defendants as improbable. Having rejected the defence of provocation, it follows that Charief and Pedro assaulted Gerrit without any justification and such assault is unlawful. I furthermore find that the assault on Gerrit caused him permanent disability in his left eye as testified to by Dr Maritz and Dr Brandt.

[38] That the plaintiff was assaulted admittedly is of no doubt. Assault is an unconstitutional and degrading invasion of the bodily integrity of an individual and deserves a strongest possible form of censor by any Court of law. It is a form of corporal punishment that need to be discouraged by the Courts, as it flies in the face of the Constitution and also in the face of the common law principle that no one must take the law into their own hands.

[39] What is now left for me to determine is the damages which Gerrit as a sequel to the injuries he sustained is entitled to.

Quantum of Damages

For Medical Expenses:

[40] Corbett, Buchanan & Gauntlett[14] the authors state that:

> 'In the case of damages which are capable of exact mathematical computation, such as for example medical and hospital expenses, proper evidence establishing the loss and substantiating the precise amount of the claim must be tendered. Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then, provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order, absolution from the instance.'

[41] As regards the medical expenses which Gerrit incurred, he led evidence of the precise amounts he spent. As I indicated earlier, the sum total of the invoices that he

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[14]. Corbett, Buchanan & Gauntlett *The Quantum of Damages in Bodily and Fatal Injury cases*, 3 ed.

paid amounted to N$ 13 102.38. It thus follows that the defendants must, in respect of the plaintiff's medical expenses, jointly and several pay to the plaintiff the sum of N$ 13 102.28.

For shock, pain, suffering, contumelia and loss of amenities of life:

[42] The assessment of damages in personal injury cases is one of the most daunting tasks that can confront a judicial officer. Gubbay JA (as he then was) in the Zimbabwean case of *Minister of Defence and Anor* v *Jackson*[15] neatly summed up the challenge when he said:

'It must be recognized that translating personal injuries into money is equating the incommensurable, money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to decide'.

[43] Visser & Potgieter[16] make the following observations:

'In the assessment of fair compensation for pain and suffering the subjective experience of the plaintiff (which may be established through evidence by the plaintiff, the plaintiff's family and medical staff) is of paramount importance, while awards in previous cases should also be taken into account. A plaintiff's subjective experience is determined by the nature, duration and intensity of pain and suffering. The plaintiff's actual experience is decisive and the fact that he or she is, for example, more sensitive to pain does not imply that his compensation has to be based on the pain which an average person in the plaintiff's position would have experienced. Conversely, where a plaintiff is less sensitive to pain then the average person, his or her damages must also be calculated in respect of the plaintiff's personal experience. Someone's social or financial status or his race are irrelevant because it cannot give an indication of how much pain a person has suffered".

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[15]. *Minister of Defence and Anor* v *Jackson* 1990(2) ZLR 708 (SC).

[16] . Visser PJ, Potgieter JM, Steynberg L and Floyd TB*, Visser and Potgieter's Law of Damages* (2003) at p 507.

[44] Feltoe[17] argues as follows regarding the assessment of damages for pain and suffering:

'The plaintiff can claim for all pain, suffering and discomfort suffered, or to be suffered, by him as a result of the defendant's wrongful act. Account must be taken not only of the pain and suffering occurring as a direct consequence of the infliction of the injuries, but also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries.

The *quantum* of damages in this regard is extremely difficult to assess and here particular regard should be had to comparable past cases as a guide to assessment. In making an assessment, the prime considerations are the *duration* and *intensity* of the pain. These factors will turn upon the nature of the injuries, the medical evidence and the general circumstances of the case. The test is a subjective one. The thin skull rule would apply here. If the plaintiff is abnormally sensitive to pain he is entitled to greater damages than the normal person. Conversely, if the plaintiff is abnormally insensitive to pain, he cannot enhance his claim by advancing evidence that the normal person would have suffered extreme pain.'

[45] In assessing damages, reference to prior awards is a useful aid to assist a Court in determining what would be a fair and reasonable compensation, recourse being had to the specific circumstances of each case. The Court considers the facts and the circumstances of the case, the injuries sustained by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life.[18] Each case must, however, be determined on its own merits. This caution was eloquently stated as follows in the matter of *Minister of Safety and Security v Seymour:*[19]

'The assessment of awards of 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

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[17] . Feltoe G, *A Guide to the Zimbabwean Law of Delict* at p 93.

[18] *. De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA) paras 58-65.* Approved by this Court in the matter of *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCMD 409 (4 September 2020).

[19]. *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA) at 17:

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'.

[46] The non-pecuniary nature of general damages makes it difficult to assess with certainty an appropriate amount, leaving the Court with a discretion to award an amount that it may deem reasonable under the circumstances, depending on the peculiar circumstances of a particular case. In the matter of *Sandler v Wholesale & Coal Supplies Ltd* [20] *Watermeyer JA* stated that:

'… it must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case.' [My Underlining for emphasis].

[47] In the matter of *Nghilundwa v Maritz,*[21] this Court reaffirmed the principle that an assessment of an appropriate award of general damages is a discretionary matter and has its objective to fairly and adequately compensate an injured party.

[48] In this matter, the Court was, during arguments, not pointed to any authority that may be used as a baseline for its assessment of damages, but Mr Ravenscroft–Jones promised to provide the Court with some authorities that are relevant. Mr Jones kept his promise and the Court is indebted to his industry. I will now refer to some of the cases that will assist the Court to exercise its discretion.

Comparable cases in this jurisdiction:

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[20]. *Sandler v Wholesale & Coal Supplies Ltd* 1941 AD 194, at p 199.

[21]. *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCMD 409 (4 September 2020).

[49] In the matter of *Meyer v Scholtz,*[22] the defendant assaulted the plaintiff through the side window of his motor vehicle which was half open, pushed the window glass down with force and hit the plaintiff with his fists in his (plaintiff's) face a couple of times. The plaintiff was hit on his left ear, and as a result of the assault, the plaintiff's spectacles broke and his hearing apparatus got damaged and fell out of his left ear. The plaintiff claimed N$ 20 000 in general damages and the court awarded N$ 15 000 for pain, suffering and *contumelia.*

[50] In the matter of *Du Plessis v Katjimune,*[23] the plaintiff was assaulted by the defendant in the presence of the public. The plaintiff conducted a restaurant business in a small town and the defendant's assault on the plaintiff resulted in her losing consciousness for about 25 minutes. She sustained a fractured nose, as well as several bruises and also suffered emotional stress. The plaintiff claimed an amount of N$300 000 as general damages for pain and suffering and *contumelia*. During oral argument, counsel moved for an award of about N$60 000 and the Court awarded general damages for pain, suffering and *contumelia* in the amount of N$30 000, together with medical expenses.

[51] In the matter of *Nghilundwa v Maritz,*[24] the plaintiff was physical attacked in the presence of his employee by the defendant, causing him to sustain injuries. The plaintiff further pleaded that the defendant, without reasonable and probable cause, insulted him and in addition thereto damaged his truck. The losses and damages claimed by the plaintiff were among damages for pain and suffering; and infringing his right to dignity, in respect of which a global amount of N$ 674 053-89 was claimed. For the non-pecuniary damges for pain and suffering, the Court awarded damages in the amount ofN$ 50 000; and in respect of the claim for *contumelia*, the Court awarded damages in the amount of N$ 10 000.

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[22]. *Meyer v Scholtz* (I 3670/2012) [2014] NAHCMD 148 (25 March 2014).

[23]. *Du Plessis v Katjimune* 2006 (1) NR 259 (HC).

[24]. *Nghilundwa v Maritz* (HC-MD-CIV-ACT-DEL-2019/04292) [2020] NAHCMD 409 (4 September 2020)

[52] Another important case, albeit distinguishable from the one at hand, is the matter of *Gabrielsen v Crown Security CC*[25] where the plaintiff was shot and seriously injured. His lungs and liver were both partly destroyed and the injury to his spinal cord resulted in a T10 injury which rendered him wheelchair-bound and made him a paraplegic for life. He claimed damages in the amount of N$900 000-00 in respect of *contumelia*, pain and suffering and N$ 500 000 in respect of loss of amenities of life. For the non-pecuniary damges for *contumelia*, pain and suffering, the Court awarded damages in the amount of N$ 600 000; and in respect of the claim for loss of amenities of life, the Court awarded damages in the amount of N$400 000. The distinction is that in the *Gabrielsen* case, the Plaintiff was shot around the chest and there was evidence that the injury had reduced him to a paraplegic for the remainder of his life. This is not the case in the present matter

Comparable cases in other jurisdictions:

[53] In In the reported matter of *Strougar v Charlier*[26] that Court was faced with an instance where the plaintiff had, as a result of an assault, suffered damage to his eye when during the assault the plaintiff's glasses were broken in the causing a cut to his eye which eventually led to him losing his eye.[27] The plaintiff claimed an amount of R18 500 for general damages, pain and suffering together with loss of amenities of life. That Court accepted that the plaintiff's 'loss of amenities' where his capacity to inspect structures high off the ground (as part of his work) and that type of work having been handicapped. In addition, the plaintiff was only able to read and write with difficulty and his driving ability was impaired. Due to the loss of depth perception, binocular vision and fielder vision the plaintiff was unable to play and watch sports to the same extent as previously and had a limited ability to enjoy stage and cinema performances. The Court

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[25]. *Gabrielsen v Crown Security CC* (I 563/2007)[2013] NAHCMD124 (13 May 2013).

[26]. *Strougar v Charlier* 1974 (1) SA 225 (W).

[27]. At 227D-F.

accepted this evidence, and then awarded a total amount of R6 712-94 under all the heads of damages[28].

[54] In in the unreported matter of *Viljoen v The Road Accident Fund*[29] the plaintiff sustained the loss of sight in the left eye as a result of a motor vehicle accident. In this matter the court awarded R400 000 in respect to general damages.

[55] In *King NO v Minister of Police,*[30] the plaintiff initiated an action against the Minister of Police for damages suffered as a result of an assault upon her by members of the SAPS who used a stick or baton. She was injured in full view of members of the public and the media. She sustained abrasions on her elbow, thigh, breast, chest, back, hands, arms, left eye, *haematomae* on her left back, lacerations on the scalp, the left eye and lower leg, which required suturing. She suffered headaches for 18 months thereafter. The Court regarded the conduct of the police officers as reprehensible and repulsive and ordered general damages in the amount of R140 000.

[56] In *Nkosi v Minister of Safety and Security,*[31] the Plaintiff was awarded an amount of R100 000 for general damages in consequence of an assault which resulted in a cut lip and tenderness to his testicles.

[57] In argument, Mr Ravenscroft–Jones for the plaintiff and Mr Nangolo for the second defendant implored the Court to exercise its discretion but in a judicious manner. Mr Boesak for the first defendant had issues with the claim for the loss of amenities of life. He submitted that an amount of N$1 200 000 is too excessive in relation to the injuries sustained. I agree with him. He however did not suggest any amount that is fair and reasonable.

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[28] . Mr Ravenscroft –Jones converted that award (made in 1972) to today's values monetary terms, which talking into account inflation adjustment the value would amount to N$412 235-29

[29]. *Viljoen v The Road Accident Fund* 2019 JDR 1241 (FB). A copy of the unreported judgment is attached hereto.

[30]. *King NO v Minister of Police* 2012 (6G3) QOD 11 (ECM).

[31]. *Nkosi v Minister of Safety and Security* [2012] JOL 29147 (GSJ).

[58] The plaintiff claims an amount of N$275 000 in respect of pain and suffering. It is common cause that the plaintiff was head butted and seriously injured on his left eye. He suffered an orbit fracture and resulted in a permanent reduction (by 10% of his vision) and reading has become difficult. He experiences constant headaches and he cannot use stairs without the assistance of others. He spent time in hospital and he has been in and out of eye doctor consulting rooms for the better part of the last ten years. He underwent surgery for his left eye but this could still not fix his vision to the position it was prior to the assault. He endured pain, especially in the left side of his eye as a result of the assault. He further testified that the assault created fear in him and made him feel hopeless and incomplete and left him embarrassed. In my view, the plaintiff's self-sufficiency, happiness and dignity have all been reduced. In my view, an amount of N$ 100 000 in respect of shock, pain suffering and *contumelia* is fair and reasonable.

[59] The plaintiff claims an amount of N$ 1 200 000 in respect of damages relating to "*the loss of enjoyment of amenities of life."* The plaintiff testified that the assault has resulted in him having double vison. This testimony was confirmed by the plaintiff's expert witnesses, Dr Maritz and Dr Brandt. The plaintiff testified that he used to be an outgoing person and avid traveler always sightseeing, and that he usually went out for camping, farm tours and hunting. He further testified that he no longer read as he used to and reading has become a problem for him. He testified that he can no longer do all the activities (such as hunting, traveling, exercising, cycling and climbing stairs) that use to give him great pleasure in life.

[60] In the *Gabrielsen*[32] matter, this Court accepted the definition placed on the concept of loss of amenities as 'a diminution in the full pleasure of living'. The Court accepted that:

'…The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided;

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[32]. Supra footnote 25

the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self- sufficiency, happiness and dignity are undoubtedly highly dependent.'

[61] Factors that can influence the amount to be awarded include the age and sex of the injured person and the disfigurement and its influence on the plaintiff's personal and professional life. For instance, how many of the activities he was able to do or participate in is he still able to do or has he been in capacitated for and what did those activities mean in his life?

[62] In this matter, I have no doubt that the plaintiff has lost part of a vital function and faculty which would have enabled him to enjoy his life as he used to, before the assault. I am further satisfied that Gerrit's self-sufficiency, happiness and dignity have all been reduced, he can no longer go about his daily tasks and activities in the same fashion and pace as he used to before the assault occurred. In considering the question of quantum in respect of general damages, I am mindful of the fact that general damages are not a penalty but compensation. The award is designed to compensate the victim and not punish the wrongdoer.

[63] As I indicated earlier the amount of N$ 1 200 000 is rather on the high side. In my view, an amount of N$ 400 000 in respect of loss of amenities is fair and reasonable.

[64] This leaves me with the question of costs. I could not find any reason nor was I provided with any as to why I must deviate from the general principle that costs follow the result.

[65] In the result, I make the following orders:

1. The first and second defendants must, jointly and severally, the one paying the other to be absolved pay to the plaintiff:

(a) in respect of medical costs, the amount of N$ 13 102.38;

(b) in respect of shock, pain suffering and *contumelia*, N$ 100 000; and

(c) in respect of loss of amenities of life, N$ 400 000;

plus interest at the rate of 20% per annum on the above amounts reckoned from 27 February 2021 to date of payment.

2. The first and second defendant must, jointly and severally, the one paying the other to be absolved pay the plaintiff's costs of suit, such costs to include the costs of one instructing and one instructed counsel.

3. The matter is finalised and is removed from the roll.

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UEITELE SFI

Judge

APPEARANCES:

FOR THE PLAINTIFF:	J P JONES-RAVENSCROFT Instructed by Nambahu Associates
FOR THE FIRST DEFENDANT:	W BOESAK Instructed by Isaack's & Associates
FOR THE SECOND DEFENDANT:	E Nangolo Sisa Namandje & Inc.