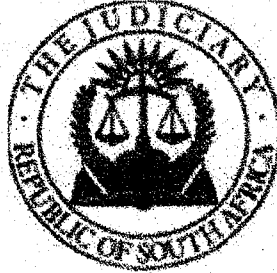
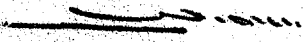


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33237/2010
APPEAL NO: A5054/2013

(1)	REPORTABLE: YES / <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO
(3)	REVISED.
 SIGNATURE	
11. 10. 2018 DATE	

In the matter between:

ZIPHO RICHARD NDLOVU

APPELLANT

And

MINISTER OF POLICE

RESPONDENT

JUDGMENT

Windell J:

INTRODUCTION

[1] This is an appeal against an award of damages. The appeal is brought on the basis that the award granted is shockingly low and disproportionate bearing in mind what the appellant went through at the hands of the servants of the respondent.

[2] The appellant instituted two separate claims against the respondent. The first claim pertained to his wrongful arrest and detention and the second resulted from his assault by the police officers.

[3] The court *a quo* ordered the respondent to pay damages to the appellant in the sum of R180, 000 comprising of R100, 000 for deprivation of liberty, R60, 000 for pain and suffering and R30, 000 for future medical expenses relating to psychiatric treatment¹. Costs were awarded on a party and party scale which included the qualifying fees of the appellant's experts.

THE FACTS

[4] The facts that led to the arrest and detention are as follows: The appellant, at the time of his arrest, was a 34 year old security controller at Imperial Security Solutions in Bedfordview. He passed matric and is a Grade B security officer. He earns a net salary of R3, 800 per month. He is married and is the father of three minor children.

[5] On Sunday 27 May 2010, at about 00:30, the appellant was arrested on a charge of 'business robbery'. He was arrested without a warrant by three police officers namely

¹ Though the judgment states the sum of R 180, 000, it is clear that the amount should read R190 000, together with interest at the rate of 15,5% *per annum* from date of demand to date of payment

Captain Minnaar ("Minnaar"), Warrant Officer Luvhimbi ("Luvhimbi") and a third unknown police officer. He was handcuffed and he felt 'pain in his heart' as he was being arrested for something he did not know anything about. The handcuffs were fastened tightly on his wrists and caused him pain. At the police station he was taken to the parade room where he was interrogated by Luvhimbi who told him to tell the truth and if he did not know anything about the robbery, *"what else he knew"*.

[6] Minnaar then arrived and ordered the appellant to sit on the floor. He was still handcuffed. The two officers then threaded a plank between his knees and arms so that he was unable to move. Luvhimbi was seated in front of him and Minnaar was seated behind him. Minnaar took the appellant's cap and covered his face. The appellant thought he was going to die and that he would never see his family again. Minnaar then put something on his ears. The appellant was not able to see what it was as Minnaar was still behind him. Minnaar then proceeded to shock the appellant. Minnaar also had another object with which he shocked the appellant's body. The object had a button or knob, which, if pressed would cause the appellant pain and his whole body would be shaking until the button was released. Appellant testified that each "procedure" would last for about 3 minutes, but he was unable to say how many times he was shocked. Both police officers kept on swearing at him. The whole incident lasted between 30 minutes to an hour. In between the sets of shocks, he was helpless and was unable to make the police officers stop.

[7] The appellant bit his lip and tongue during the torture and was bleeding. Before he was taken to the cells, he was told to wash off the blood. In the cell, there were many

people and he came across another person who had also been tortured. In the cell there were sponges, a toilet and a shower. It was filthy and there was no privacy and he had to use the toilet while the other people in the cell were watching him. He was not taken to court and was not afforded a lawyer to assist him. He was also not given proper food, nor did he receive any medical attention. The appellant was detained for 4 and a half days.

[9] On the day of his release he consulted with Dr Merusha Lindi. Upon examination, Dr Lindi noted two pinpoint scars on both his earlobes and found that they were burn marks. He concluded that the appellant was stunned with an electric device. The appellant also consulted with Dr Fine, a psychiatrist. He diagnosed the appellant with post-traumatic stress disorder and opined that the appellant required urgent and intensive psychiatric treatment, consisting of the use of medical and psychotherapy in the form of trauma counselling. He reported that the appellant's distressing symptoms were beginning to establish themselves in a chronic form which would make psychiatric prognosis less successful. Dr Perumal, a specialist forensic pathologist, examined the appellant and found that the injuries he sustained are consistent with an electrical burn resulting from application of electricity in the manner described by the appellant. He also found that the contractions experienced by the plaintiff during the assault are the result of involuntary contractions of the skeletal muscles upon the electrical insult and the bite marks on the appellant's lips and tongue are typically the result of uncontrolled biting from the contractions.

[10] The appellant testified that he is no longer the same person he was before the incident. He has a persistent painful headache, experiences bad dreams and developed high blood pressure.

[11] The respondent denied the torture but Minnaar admitted during cross-examination that he ordered appellant's continued detention to scare him in the hope that he will confess.

[12] The court *a quo* made an adverse credibility finding against the respondent's witnesses and found in favour of the appellant.

EVALUATION

[13] The appellant contends that, in assessing the *quantum* the court *a quo* misdirected itself by failing to take into account the severity of the assault, the conduct of the police officers, the ulterior motive for the arrest and detention and the long term effect the incident is having on the appellant. It submitted that in light of the circumstances the award is shockingly disproportionate with comparable case law.

[14] The test for interference on appeal was set out in *Minister of Safety and Security v Augustine and Others* (with reference to *Dikoko v Mokhatla* 2006 (6) SA 235 (CC))²:

"The test for interference on appeal is:

'(S)hould an appellate Court find that the trial Court had misdirected itself with regard to material facts or in its approach to the assessment, or, having

² 2017(2) SACR 332 (SCA) at [26].

considered all the facts and circumstances of the case, the trial Court's assessment of damages is markedly different to that of the appellate Court, . . .

The first of these requires analysis of the judgment to establish whether there have been misdirections regarding either the proper approach or the facts taken into account. The second requires the appeal court itself to broadly assess what it would have awarded, had it been sitting as a court of first instance. An appeal court must interfere if 'the damages are so high [or low] as to be manifestly unreasonable'. The underlying principle for this latter approach must be that the award is so disproportionate that the appeal court can infer that the discretion accorded the trial court was not properly exercised." (FOOTNOTES OMITTED).

[15] The appellant was arrested at work at or about 00h30 in the morning for no apparent reason. This signifies an ulterior motive and malice on the part of the police officers. He was detained for a period of four days and twelve hours under conditions inconsistent with human dignity. He was not brought before a court of law at any time during his detention and thereafter. He was subjected to torture with electric shocks and it has had a profound impact on him.

[16] The award made by the court *a quo* in relation to general damages is insufficient and does not reflect the value our constitutional society attaches to the right to liberty, physical and emotional integrity as well as the right to human dignity. The learned judge did not take account of the severity of the torture and the long duration for which the appellant was detained without being brought to court. The arrest and detention coupled with the torture was clearly aimed at achieving some objective other than bringing the appellant to court to stand trial. The respondents did not apologize and

gave no reasonable explanation for what happened.

[17] The general approach in the assessment of damages for unlawful arrest and detention was discussed in the matter of *Minister of Safety and Security v Tyulu*,³ where the Supreme Court of Appeal held as follows:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26–29.)"

[18] In *Masisi v Minister of Safety and Security*,⁴ the court recognized that where an arrest was malicious, the plaintiff would be entitled to a higher amount of damages than

³ 2009 (5) SA 85 (SCA) paragraph 26 at 93D-F.

⁴ 2011 (2) SACR 262 (GNP).

would be awarded, absent malice. An aggravating factor in this appeal is the appellant's arrest and detention was not only without probable cause, but also executed with the ulterior motive of torturing him to confess about his alleged complicities in the alleged robbery.

[19] In working towards a fair and reasonable award, previous comparable awards in similar cases (adjusted to take account of inflation) can serve as a useful guide to the court. As stated before the appellant instituted two separate claims against the respondent; the first claim is for the wrongful arrest and detention and the second for the assault. As far as the first claim is concerned the following cases proved helpful: In the matter of *Stoltz v Minister of Safety & Security*⁵ the plaintiff received an award of R 127, 942.22 (today worth R249, 000) for having been detained for a period of 2 and a half days on a charge of murder. In *Rudolph and Others v The Minister of Safety and Security and Another*⁶, the SCA awarded the appellants damages in the sum of R100, 000 each (today worth R196, 000) for an unlawful arrest and detention which lasted for a period of 3 days, 12 hours under similar circumstances as the appellant. In *Ngcobo v The Minister of Safety and Security*,⁷ the plaintiff, a 53 year old was awarded R130, 000 (today worth around R213, 000) as damages due to an unlawful arrest and detention for a period of just under 4 days. She was falsely accused of stealing her step child, whilst the facts borne out in court that in fact the child was with his father. Although she was arrested on a Thursday, she was not brought before court on the Friday, without explanation. The arrest and detention affected her adversely in that she could not eat the food provided and only ate the food her daughter brought. She slept on the

⁵ 2006 JDR 0163 (SE).

⁶ 2009 ZASCA 39.

⁷ (Unreported NPD 4327/2006), a judgment delivered on 19 March 2008 by Nicholson J.

concrete floor and the single blanket was so uncomfortable that she asked her daughter to bring her a towel to cover herself. The arrest was a source of humiliation for her and her work colleagues saw what happened. In *Minister of Safety and Security v Seymour*⁸, a 63 year old was awarded damages of R90, 000 (today's worth about R 180, 000) following an unlawful arrest and detention for a period of 5 days (of which he spent 24 hours in a police cell and the remainder in a bed at hospital where he had contact with his lawyer and family).

[20] In the assessment of damages relating to the assault (torture), the matter of *Themba, L & Pharamela, C v Minister of Safety and Security*⁹, is exactly in point. The facts were as follows: Both plaintiffs, whilst in detention, were suffocated by the placement of sponges in their mouths and electrocuted so that they both thought they were going to die. The electrocution left marks on their bodies and left them feeling deranged. Both suffered medical *sequelae* in the form of sleeplessness and anxiety which required medication. The two women were awarded R47 500 (today worth R160 500) each. In *Charlie And Another v Minister of Police*¹⁰, two plaintiffs (respectively 36 and 38 at the time of their arrest and detention and assault) were each awarded R230 000 (today worth R304, 000) for being assaulted and tortured by the police. First plaintiff was cuffed at the rear and his ankles were tied with rope. He was made to sit on the floor and the legs of the chair were made to be weaved through his cuffed wrists. A police officer had a blue glove in his hand which he stretched and pulled over first plaintiff's face from the top of his head down several times. The glove blocked his mouth and nose and he could not breathe and felt like he was suffocating and became

⁸ 2006 (6) SA 320 SCA.

⁹ Unreported 1997/14968 WLD.

¹⁰ Unreported 07189/2011 (judgment delivered on 2012-09-20) SGHC.

extremely weak. He was kept in custody in leg irons and cuffs and asked to confess, which he refused to do. He was released after 7 days in custody. Second Plaintiff was released after 8 days. The court found that they could have both died during the torture.

[21] During his intention the appellant in the present matter was subjected not only to assault, but to torture, and as a result suffers long term effects. The conduct of the police officers was shocking, cruel and inhumane and the award should reflect society's abhorrence.

COSTS

[22] The appellant seeks an order on an attorney and client scale.

[23] In *Van Rensburg v City of Johannesburg*,¹¹ the court showed its disapproval of the conduct of the traffic officials of the Johannesburg Metro by making awarding a punitive cost order where the conduct complained of was described as "high-handed" and not just neglectful. In *RA and Others v The Minister of Police*,¹² the court held that the matter dealt with the violation of important constitutional rights and rights of privacy and personal integrity of the appellants, and that the case also bears a public interest element. The full court awarded attorney client costs on the High Court scale.

[24] Counsel for appellant submitted that the court should take a dim view of this type of behavior, especially because the South African Police Service is the publicly appointed protectors and sentinels of our civilized democratic society. The police service forms a

¹¹ 2009 (1) SACR 32 (W).

¹² Unreported full bench appeal judgment, dated 21 April 2016, under Gauteng Division Case Number A315/2016.

critical part of ordered society as it is there to protect and serve its public. Instead the police officers conducted themselves in a most reprehensible manner.

[25] Costs are in the discretion of the court. The conduct of the police officers was shocking and goes against the very ethos of our constitutional society. In the circumstances of this case it is appropriate for the court to mark its disapproval of the conduct of the police officers by ordering a punitive costs order.

[26] In the result the following order is made:

[26.1] The appeal is upheld.

[26.2] The order is set aside and replaced with the following:

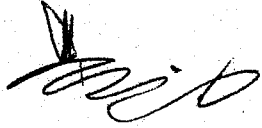
[26.2.1] The defendant is ordered to pay the plaintiff the amount of R390 000 (R160 000 for wrongful arrest and detention, R200 000 for assault and R30 000 for future medical expenses) together with interest at 9 % per annum from date of judgment to date of payment;

[26.2.2] Costs on an attorney client scale, including the qualifying fees of Dr. Lindi (Medical Doctor), Dr Perumal (Forensic Pathologist) and Dr. Fine (Psychiatrist).

L. WINDELL

JUDGE OF THE HIGH COURT

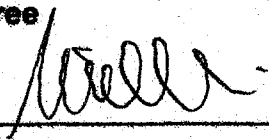
I agree



B. MASHILE

JUDGE OF THE HIGH COURT

I agree



W. VAN DER LINDE

JUDGE OF THE HIGH COURT

Counsel for appellant:

Advocate van Rooyen

Instructed by:

Wits Law Clinic

Counsel for respondent:

Advocate Ntunja

Instructed by:

Office of the State Attorney, Johannesburg

Date matter heard:

1 August 2018

Judgment date:

11 October 2018