

**HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No. 10932/13

In the matter between:

SIFISO MSIMANGA

Plaintiff

And

MINISTER OF POLICE

Defendant

Case Summary: Unlawful arrest and detention - defendant discharged the onus of proving that the arrest and subsequent detention of the plaintiff were lawful. Assault – plaintiff discharged onus of proving assault - given the nature and extent of the assault, the injuries suffered by the plaintiff and their physical and emotional effects on him a globular award of R130 000, which includes the sum claimed for medical treatment, appropriate.

JUDGMENT

MEYER, J

[1] The plaintiff was arrested without warrant in the vicinity of the Southgate Shopping Centre, Johannesburg at about 10.00 am on Wednesday, 19 December

2012. He was taken to the Mondeor SAPS where he was detained until he was taken to the Johannesburg Magistrates' Court at 8.45 am on Friday, 21 December 2012. A charge of trespass with intent to commit an offence with which he had been charged while he was detained was withdrawn against him and he was released at about 4.00 pm that afternoon.

[2] The plaintiff claims that his arrest and subsequent detention were unlawful and that he was assaulted by two policemen at the time of his arrest and again upon his arrival at the Mondeor SAPS where he, so he claims, was also tortured by another policeman. Arising from his alleged unlawful arrest and detention the plaintiff claims damages in the sum of R300 000.00 from the defendant, the Minister of Police as the nominal defendant representing the state, and arising from the alleged infringement of his bodily integrity a further sum of R339 000.00.

[3] The defendant denies that the arrest and detention were unlawful. The plaintiff, so it is averred, was arrested and detained in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), which provides that a peace officer may without warrant arrest any person 'whom he reasonably suspects of having committed an offence referred to in Schedule 1' and, although trespass is not an offence referred to in Schedule 1, the plaintiff, so it is contended, was suspected of having committed trespass with intent to commit housebreaking. Entering any premises with intent to commit an offence is an offence referred to in Schedule 1. The alleged acts of assault and torture by the police officers are denied and no defence of justification is raised.

[4] The onus, therefore, is on the defendant to prove that the arrest and detention were lawful (*Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (4) SA 458 (CC) paras 24 and 25; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) para 14). The onus to prove that the alleged assaults and torture took place is on the plaintiff.

[5] The plaintiff testified and he called the following witnesses: his aunt, Ms Lucy Siyaphi; a medical general practitioner, Dr Stan Tenzer; and a psychiatrist, Dr Leon Fine. The defendant led the evidence of the two arresting officers, Constables Zwane and Moloi, who the plaintiff alleges assaulted him at the time of his arrest and upon his arrival at the Mondeor SAPS; Captain Naidoo, who the plaintiff alleges thereafter tortured him at the Mondeor SAPS; Warrant Officer Botha, the investigating officer; Warrant Officer Magasha, who was on night shift duty as the charge office commanding officer and supervisor of the cells at the Mondeor SAPS on 19 December 2012; Captain Madaray, who during the period of the plaintiff's detention was a senior officer in charge of the cells at Mondeor SAPS; and Sergeant Munjedzi, who transported the plaintiff from the Mondeor SAPS to the Johannesburg Magistrates' Court on Friday, 21 December 2012.

[6] Constables Zwane and Moloi were performing patrol duty during the morning on 19 December 2012 when they received a radio message that there was 'a housebreaking in progress' at No 1..... M..... Street, A..... (the premises). Alan Manor is said to be a quiet suburb with a high incidence of housebreaking. When they were about a block away from the premises, the two policemen noticed two men that they testified appeared suspicious to them. Their suspicion was exacerbated when the two

men started to run in different directions. Constables Zwane and Moloi chased after one of them and managed to catch him, a Mr Tshepo Nzimande. They arrested him, put him in the back of the police van in which they were travelling and took him along to the premises. There they found another police van and the police officers whom they were called upon to back up.

[7] The domestic worker at the premises, Ms Kebogile Mothibe, was interviewed upon their arrival. She reported that she had noticed a person walking around the yard outside the house on the premises at about 08.30 that morning. She screamed and the person then ran away and jumped over the perimeter wall. She identified Mr Nzimande as the person whom she had seen. (Cst Moloi's evidence that Ms Mothibe identified Mr Nzimande as one of two persons who were present on the premises and who jumped over the wall is contradicted by the evidence of Cst Zwane, and more importantly the contents of an affidavit deposed to by Ms Mothibe at the Mondeor SAPS later on that morning to which I return. I accordingly accept the evidence of Cst Zwane that Ms Mothibe reported the presence of one person on the premises and that she identified that person as being Mr Nzimande.) The police investigation at the premises did not reveal any evidence of housebreaking.

[8] Constables Zwane and Moloi placed Mr Nzimande into the back of the police van in order to take him to the Mondeor SAPS. En route while they were travelling on Columbine Avenue in the immediate vicinity of the Southgate Shopping Centre, Mr Nzimande knocked from the back of the police van. (The plaintiff disputes this evidence of constables Zwane and Moloi.) Cst Zwane, who was the driver, then stopped. This was at a place where vendors were selling merchandise next to the road and where

people were waiting for taxis. When Cst Zwane opened the back door of the police van Mr Nzimande pointed out a person standing next to the road as the person who had been with him on the premises. That person is the plaintiff in these proceedings, Mr Sifiso Msimanga. Cst Zwane asked the plaintiff whether he knew the person who was in the back of the police van and he responded that he did not know him. (The plaintiff testified that the person in the back of the police van was also asked whether he knew the plaintiff and his response too was that he did not know him.) Constable Zwane then took the plaintiff's cell phone and dialed the last number stored in its call list, which turned out to be Mr Nzimande's cell phone number. (The plaintiff disputes this evidence of Constables Zwane and Moloi.) The plaintiff was asked where he resides and it turned out that he too resided in Orlando. Constable Zwane had already ascertained from Mr Nzimande that he (Mr Nzimande) resided in Orlando. The plaintiff was arrested and put into the back of the police van whereafter they drove to the Mondeor SAPS.

[9] The plaintiff and Mr Nzimande were taken to the 'crime office' at the Mondeor SAPS. It is an office adjacent to the community service centre or charge office (the CSC) where arrested persons are booked in, dockets are opened, statements are taken from arrested persons and of other members of the public and where police officers also make their own statements. The process of booking in an arrested person for purposes of detention inter alia entails warning them of their constitutional rights and completing the various registers, such as the SAPS 14 register (a register of all arrested persons), the SAPS 14A register (a register of the written notices of rights in terms of the Constitution issued to detainees), the SAPS 13 register (a register of exhibits that are

handed in) and the SAPS 22 register (a register of personal items belonging to an arrested person that are handed in for safe keeping). The final step is the making of an entry in the occurrence book to the effect that an arrested person has been detained.

[10] The process of booking in the plaintiff for detention commenced at about 10.34 am on 19 December 2012 in the Mondeor SAPS crime office. That is the time that was recorded in the SAPS 14A register as the time when the plaintiff as detainee was informed of his Constitutional rights. The plaintiff's cell phone was booked into the SAPS 13 register and a receipt thereof was given to him. A witness statement was taken from Ms Mothibi and it was sworn to before Cst Zwane at 10.57 am. It appears from the plaintiff's evidence that her employer's son was also present with her in the crime office. Arrest statements were completed by Constables Zwane and Moloi. A case docket of 'trespassing with an intention to commit a crime' was opened. At 11.35 am Cst Moloi made an entry in the occurrence book that the plaintiff and Mr Nzimande were detained by Cst Zwane 'for trespassing on Mondeor cas 444/12/2012'. They were then taken to the cells.

[11] The docket was allocated to Warrant Officer Botha as the investigating officer on the case. She was assisted by Warrant Officer Thomas. WO Botha testified that there had indeed been a burglary on the same premises a week earlier than the incident that gave rise to the arrests and detention of Mr Nzimande and of the plaintiff (the housebreaking case). WO Botha read the docket that essentially contained the witness statement of Ms Mothibi and the arrest statements of Constables Zwane and Moloi.

[12] Ms Mothibi stated the following in her witness statement:

‘On Wednesday 2012-12-19 at around 08:30 I was busy with my daily work at No 1..... M..... Street, A..... I then saw a black male jumping on the gate towards the outside of the yard. While jumping he then fall down. He stood up and run away to the street.

The male guy is unknown to me and I then call my employer to tell him what I saw. The suspect was wearing a black trouser, red t-shirt and a black jacket. The police were called. On the arrival of the police they came with the black male guy I saw jumping the gate, getting away. I then pointed him to the police as the one who was jumping.’

[13] In his arrest statement Cst Zwane stated the following concerning the arrest of the plaintiff:

‘... on our way to the station Tshepo [Mr Nzimande] started to hit the van at the back. We then stopped the car, he then pointed out another black male wearing a striped golf shirt, blue jeans and black shoes as another suspect who was with him at number 1..... M..... Street, Alan M..... We then also went to him and arrested him also for trespassing. The second suspect was later known to me as Sifiso Msimango of number 1..... M..... street O..... We also arrested him. We took them both to Mondeor for further detention. The suspects were detained without any injuries.

The suspects were arrested due to evidence that they were pointed out, they ran away before we even talked to them and the modus operandi of house breaking is that suspect jumped the walls then they check around if there is someone inside then they break into people’s house. And the area they were at is known for high crime of house-breaking and house robberies.’

[14] Cst Moloi’s full statement was not included in the bundle of documents that were handed in as exhibits at the trial. He stated the following about the arrest of the plaintiff:

‘The suspect was later known to me as Tshepo Nzimande. We then took him at the back of the van for detention. As we were driving Columbine Avenue, Mondeor, heading to the station, then

the suspect hit at the back of the van and stopped us. We then stopped to find out what's happening. He then pointed

It is clear from the evidence given by Cst Moloi that what he too wrote in his statement was that the plaintiff was arrested because Mr Nzimande pointed him out as someone who had been with him on the premises.

[15] It is recorded in the occurrence book that WO Thomas booked the plaintiff and Mr Nzimande out 'for further investigation' at 11.50 am on Wednesday, 19 December 2012. WO Botha took their finger prints in order to ascertain whether they could be linked to the housebreaking case or to any other housebreaking. Housebreakings, also according to WO Botha, are prevalent in that area. They went to the address in Orlando that had been furnished by Mr Nzimande in order to confirm his residential address. The complainant in the housebreaking case (the complainant) also arrived at Mr Nzimande's place of residence. There they discovered items that the complainant claimed belonged to her. WO Botha testified that as a result of that discovery they arrested a lady who was present at Mr Nzimande's place of residence in connection with the housebreaking case. The plaintiff's evidence on this aspect differs from that of WO Botha. He testified that upon the discovery of items at Mr Nzimande's place of residence, WO Thomas hit Mr Nzimande with his fist in the stomach and demanded that he take them to the residence of the other man they were looking for. Mr Nzimande complied and directed the police officers to a house where they found the 'girlfriend of that man they were looking for.' The complainant claimed that the ear-rings and bracelet that that woman was wearing belonged to her (the complainant). The police

officers also searched the woman's room and they inter alia found the identity document of the man who had run away. The woman, Ms Sandiswa Dlamini, was then arrested.

[16] The plaintiff also took Warrant Officers Botha and Thomas to the house where he had said he resided. There the plaintiff's aunt, Ms Lucy Siyaphi, confirmed to WO Botha that the plaintiff resides there with her, but, according to WO Botha, she also mentioned that the plaintiff sometimes absent himself for periods of time. (Ms Siyaphi denied that she discussed anything with the police officers.) The plaintiff's room was searched and, according to WO Botha, the only personal item found (to confirm that he indeed resided there) was a pair of jeans that the plaintiff's aunt said belonged to him. The plaintiff testified that the police officers also found other items of clothing that belonged to him as well as his identity document. He testified that WO Thomas handed to him one of his t-shirts found there and instructed him to put it on over the golf shirt that he was wearing in order to conceal the blood on that shirt. (WO Botha denied this evidence of the plaintiff.) They then returned to the Mondeor SAPS.

[17] WO Botha testified that it takes about 24 hours to obtain finger print results from the Local Criminal Record Centre at the Johannesburg Central SAPS where the finger prints that she had taken from the plaintiff and Mr Nzimande were analysed. She could not recall when she received the results, but testified that it was probably on Thursday, 20 December 2012. The results did not link the plaintiff to the housebreaking case nor to any other housebreaking case. According to an entry made by WO Botha in the occurrence book, she charged the plaintiff and Mr Nzimande with the offence of 'trespassing with the intention to commit a crime' at 17.58 on Thursday, 20 December 2012. A bundle of photographs (exhibit 'B') was admitted into evidence by consent

between the parties and they agreed that the bundle comprises photographs that were taken of the plaintiff while he was in detention at the Mondeor SAPS on 20 December 2012 shortly after 17.58.

[18] It is recorded in the occurrence book that Sgt Munjedzi took the plaintiff, Mr Nzimande, Ms Dlamini and other detainees to the Johannesburg Magistrates' Court at 8.45 am on Friday, 21 December 2012. The charge against the plaintiff was withdrawn. He was released sometime during that afternoon.

[19] I now turn to the lawfulness or otherwise of the arrest and subsequent detention. It is averred in the defendant's plea that the plaintiff was arrested in terms of s 40(1) of the CPA on a charge of trespassing. That offence in itself is not an offence referred to in Schedule 1. The plaintiff contends that the defendant is therefore precluded from relying on the protection afforded by s 40(1)(b). But the question about the suspicion of the commission of which offence the plaintiff was arrested has been fully canvassed in the evidence. It has been established that he was arrested because the arresting officers suspected that he had committed the offence of trespass with intent to commit the offence of housebreaking. I have referred to the arrest statement of Cst Zwane in which he stated that the suspects were arrested inter alia because Alan Manor has a high incidence of housebreaking and the modus operandi of those committing that offence is that they jump over perimeter walls, check around the premises to see if there is someone present and then break into the house. Cst Zwane testified that the information obtained from Ms Mothibi prior to the arrest of the plaintiff was that she saw someone walking outside the house in the yard and when she screamed he ran away and jumped over the perimeter wall. She identified that person as Mr Nzimande. This

evidence has not been refuted. The case docket that was opened was for ‘trespassing with an intention to commit a crime’ and the plaintiff and Mr Nzimande were indeed subsequently charged with the commission of that offence. There is accordingly no merit in the plaintiff’s belated objection to the defendant’s plea.

[20] The plaintiff further contends that it has not been proved that at the time of the arrest the arresting officers had a reasonable belief (a suspicion that rests on reasonable grounds) that the plaintiff had committed the offence of trespass with intent to commit the offence of housebreaking. (See *Duncan v Minister of law and Order* 1986 (2) SA 805 (A) at 818G-H; *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-G.)

[21] The plaintiff disputes the evidence of Constables Zwane and Moloi that Cst Zwane stopped the police van because Mr Nzimande had knocked or ‘banged’ from the back and that Mr Nzimande then pointed the plaintiff out as the person who had been with him on the premises. In this regard the plaintiff testified that it was not possible for Mr Nzimande to have seen the plaintiff from inside the back of the police van, because canvass covered the back side windows and they were not rolled up, nor was it possible for Mr Nzimande to knock from the back, because he was handcuffed. The plaintiff testified that Mr Nzimande was unknown to him and he told the policemen tso. Mr Nzimande was also asked whether he knew him (the plaintiff) and his response too was that he did not know him. The plaintiff testified that his cell phone rang when he was pulled towards the police van and the policemen then grabbed it from him. His cell phone rang for a second time after he had been thrown into the police van, but Cst

Zwane, who took possession of it, ignored the ringing and the policemen closed the back door of the police van.

[22] I find the evidence of Constables Zwane and Moloi that Mr Nzimande was not handcuffed in all the circumstances to be improbable. The circumstances were: Alan Manor has a high incidence of housebreaking; Constables Zwane and Moloi were called upon to render back-up in respect of 'a housebreaking in progress'; they suspected that Mr Nzimande had been involved in the commission of that serious offence; they had to chase after him in order to arrest him; and they took him to the premises where he was taken out of the police van. But in my view the evidence does not establish that a person in the position of Mr Nzimande, because he was handcuffed, would be unable to attract the attention of the policemen sitting in the front of the police van.

[23] The probabilities favour the accounts of constables Zwane and Moloi that Mr Nzimande pointed out the plaintiff, who was standing next to the road on which they were travelling at the time, as the person who had been with him on the premises. I find it improbable that Constables Zwane and Moloi would simply by themselves have picked the plaintiff amongst vendors and people waiting for taxis. The plaintiff's appearance and clothing, it is undisputed, were very different from that of the man who ran away when Mr Nzimande was arrested. Furthermore, their evidence that the last number stored in the call list of the plaintiff's cell phone was that of Mr Nzimande's cell phone, is supported by the fact that the cell phones of both the plaintiff and of Mr Nzimande were retained and booked into the SAPS 13 register, which is the register of exhibits seized by the police and not into the SAPS 22 register, which is the register of

personal items belonging to an arrested person that are handed in for safe keeping while the person is being detained.

[24] I am of the view, therefore, that it has been proved that Constables Zwane and Moloi suspected the plaintiff of having committed the offence of trespass with intent to commit housebreaking on the following grounds: (a) the high incidence of housebreaking in Alan Manor; (b) the *modus operandi* of inspecting the premises and breaking in if there is no-one present in the experience of Constables Zwane and Moloi generally followed by those who commit housebreakings in Alan Manor; (c) the person who was seen by Ms Mothibe followed the same *modus operandi*; (d) Ms Mothibe identified Mr Nzimande as the person whom she had seen on the premises; (e) Mr Nzimande in turn identified the plaintiff as the person who had been with him on the premises; (f) both Mr Nzimande and the plaintiff reside in Orlando; (g) and the plaintiff's denial to Constables Zwane and Moloi that he and Mr Nzimande knew each other that was *prima facie* refuted when Cst Zwane dialed the last number stored in the call list of the plaintiff's cell phone, which turned out to be Mr Nzimande's cell phone number. These grounds upon which their suspicion rested were in my view reasonable and it has been proved that constables Zwane and Moloi had a reasonable belief at the time of the plaintiff's arrest that he had committed the offence of trespass with intent to commit the offence of housebreaking.

[25] The defendant accordingly discharged the onus of proving on a balance of probabilities that the arrest and subsequent detention of the plaintiff were lawful. He was brought to the Mondeor SAPS immediately after his arrest and he was brought before a lower court not later than 48 hours after his arrest as required in terms of s 50

of the CPA. It has been held that the arrest or subsequent detention of a suspect is not rendered unlawful if the arrest is made in terms of s 40(1)(a) rather than using alternative measures to obtain the attendance of the suspect at court (*National Commissioner of Police & another v Coetzee* 2013 (1) SACR 358 (SCA) para 13.) The same holds true, in principle and in logic, where the arrest is made in terms of s 40(1)(b) of the CPA.

[26] This brings me to the plaintiff's claim arising from the alleged infringement of his bodily integrity. The plaintiff testified that Constables Zwane and Moloi pulled him roughly towards the police van from where he was standing next to Columbine Road. He resisted when they tried to force him into the back of the police van. Cst Zwane slapped him several times on his left ear and Cst Moloi, who was standing to his right, also slapped him a few times on the right side of his head. His arms were twisted to his back and he was handcuffed. The handcuffs were tight and painful. He was thrown into the back of the police van by Cst Zwane which caused him to bump against the spare wheel that was lying in the back. The journey to the police station was characterized by such driving causing the plaintiff and Mr Nzimande to be thrown around. When they arrived in the crime office the plaintiff was made to kneel. Cst Zwane slapped him several times again on the left ear when he refused to provide his name. He kicked him in the back which caused the plaintiff to fall forward onto his stomach. Cst Moloi also slapped him a few times on his right ear.

[27] Cpt Naidoo arrived in the crime office. He asked Constables Zwane and Moloi 'are these the ones' to which they replied 'yes'. Cpt Naidoo then grabbed the plaintiff and made him kneel. He dismantled a broom and hit the plaintiff with the broomstick

with force continuously against his left ear until the broomstick broke. His left ear was bleeding and the blood dripped onto his golf shirt. The plaintiff fell. Cpt Naidoo turned him around so that he was lying on his chest on the floor. Cpt Naidoo 'rode' on his back by placing his one knee on the plaintiff's back and balancing himself with his other knee on the floor. Cpt Naidoo smothered him with a rubber glove that was held over his nose and mouth and pulled back. He questioned him about 'the stolen goods'. The plaintiff tried to explain to him that he did not know anything. Cpt Naidoo smothered him with a rubber glove for a second time and when he took it off swore at him he saying to him that he was going to point out the articles. Cpt Naidoo smothered him for a third time. During the torture the plaintiff's neck was scratched by Cpt Naidoo's nails.

[28] The plaintiff testified that he had suffered the following injuries by the time he was placed in a cell: his left cheek was swollen; his lower lip was injured; there was dry blood on his left ear lobe; he had scratch marks on his left elbow and hip and his left hip was swollen as a result of carpet friction during the struggle on the carpet; he had an injury on his back where he had been kicked; and his wrists were injured as a result of the handcuffs. Ms Lucy Siyaphi testified that the left side of the plaintiff's face was swollen at the time when he and the police officers had attended at her house.

[29] Constables Zwane and Moloi deny that they assaulted the plaintiff or that they witnessed any assault upon him, either when he was arrested or in the crime office. They also denied that Cst Zwane drove the police van to the Mondeor SAPS in a manner that would have caused the plaintiff and Mr Nzimande to be thrown around in the back. After the plaintiff had been booked in at 11.35 am on Wednesday, 19 December 2012, they had no further dealings with him. Cpt Naidoo denied the

allegations against him and he testified that he bears no knowledge of the plaintiff's arrest and detention.

[30] The investigating officer, WO Botha, testified that she did not notice any swelling or injuries on the plaintiff on the two occasions that he was booked out nor did he complain of any assault upon him by any police officer. She did not notice any blood on his shirt and she denied that her colleague, WO Thomas, handed the plaintiff a t-shirt to wear over his golf shirt in order to conceal blood on the shirt. She testified that she would not book out a suspect who is full of blood or injured.

[31] Warrant Officer Magasha, who was on night duty as the charge office commanding officer and supervisor of the cells at the Mondeor SAPS on 19 December 2012, testified that an arrested person who has been injured would not be accepted into the cells. An ambulance would be summoned and the injured person would be examined by the paramedics and be taken to hospital if they so recommend. He testified that he received no complaint of injury from any detainee during the course of his duty that night nor did he observe any injury on any detainee.

[32] Cpt Madaray, who during the period of the plaintiff's detention was a senior officer in charge of the cells at Mondeor SAPS, testified that upon her arrival at work she goes to each cell and she asks the detainees whether they have any complaints or injuries. Any complaint is then addressed by her personally. She testified that if a detainee wants to open a case of assault she assists the detainee in opening one. A detainee who is injured will be taken for medical treatment. She did not receive any complaint from the plaintiff during the time of his detention.

[33] Sergeant Munjedzi, who transported the plaintiff from the Mondeor SAPS to the Johannesburg Magistrates' Court on Friday, 21 December 2012, testified that he did not observe any injuries on the plaintiff nor did the plaintiff raise any complaint with him. He testified that it is impermissible to transport injured detainees to court. It is undisputed that Sgt Munjedzi and the plaintiff's aunt were known to each other.

[34] The plaintiff consulted Dr Stan Tenzer, a general practitioner, on 18 January 2013 for the purposes of lodging the claim and not for medical treatment. Dr Tenzer's examination of the plaintiff revealed that he presented with multiple contusions, lacerations and injuries to both ears. According to Dr Tenzer the plaintiff presented with a deep laceration of the lower lip; an abrasion of the left fore-arm; abrasions of both wrists which, in Dr Tenzer's opinion, are consistent with the tight application of handcuffs and significant pressure brought to bear on them; an abrasion of the left elbow; and an abrasion and scar of the left hip and pelvis. Dr Tenzer testified that the photographs that were taken of the plaintiff at the Mondeor SAPS shortly after 17.58 pm on 20 December 2012 (exhibit 'B') show that the plaintiff's left cheek was red, inflamed and swollen; fresh dried blood on the lobe of the left ear that is consistent with the injury to that ear which Dr Tenzer observed when he examined him; redness of the pinna of the right ear; redness below the right eye maxilla; redness of the medial aspect of the lower lip; and an abrasion, swelling and redness on the lower left forearm. Dr Tenzer is of the opinion that the injuries noted by him during his examination of the plaintiff on 18 January 2013 correlate well with those visible on the photographs taken of the plaintiff the day after his arrest. The plaintiff's injuries, in the opinion of Dr Tenzer,

are consistent with his account of the assaults upon him, except for his account of having been hit on the left ear with a broomstick.

[35] The plaintiff's ears were examined digitally and photographed with a 'Digital Welch Allyn Otoscope'. That examination, according to Dr Tenzer, revealed that the left tympanic membrane was red and inflamed and the external auditory meatus tender. The right tympanic membrane was also inflamed, but was affected less than the left one. An audiogram was also performed on 21 January 2012, which, according to Dr Tenzer, revealed bilateral impairment in the higher frequencies of both ears, left more than right.

[36] Dr Leon Fine, a psychiatrist, interviewed the plaintiff on 1 October 2013. Based on the plaintiff's account of his history (including that he had never been arrested before the incident in question, which is blatantly false), his arrest and detention and the physical and emotional effects thereof on him, Dr Fine diagnosed the plaintiff as presenting 'with features of a Post-Traumatic Stress Disorder with Depression due to the trauma of the Actual Incident and also it's Sequelae.' Dr Fine explains that post-traumatic stress disorder is an anxiety disorder that may occur when a person was traumatised by an incident. The fact that the plaintiff lied to him in saying that he had never been arrested before (it being common cause that he indeed had been arrested on more than one previous occasion), according to Dr Fine, does not affect his diagnosis of the plaintiff. The injustice and unfairness (as perceived by the plaintiff) of having been wrongly arrested and assaulted on the occasion in question, in the opinion of Dr Fine, was particularly traumatic for him. (In his medico-legal report Dr Tenzer also expressed the opinion that the plaintiff presented with post-traumatic stress syndrome

when he examined him on 18 January 2013. His reasons for this diagnosis are not stated nor were they canvassed when he testified. His opinion on this aspect, therefore, does not assist.)

[37] Despite the contradictions between the evidence of the plaintiff and that of his aunt, Ms Siaphi, their uncontroverted evidence supports the opinion of Dr Fine that the plaintiff has been suffering from a psychological condition since the incident under consideration. The plaintiff testified that he was suffering from fearfulness and anxiety since the incident and he does not sleep properly. It appears from the evidence of the plaintiff and of Ms Siaphi that he undertook much less piece jobs than before and finds excuses for not going out to work. He contributed much less financially to the household and to his girlfriend and children. He isolates himself and prefers to stay at home and sleep. The relationship between him and his girlfriend deteriorated to an extent that she eventually left him and took their children along. Ms Siaphi testified that the reason proffered by the plaintiff's girlfriend for leaving the plaintiff was that she could not '... carry on with a person that was sick.' Ms Siaphi finally required him to leave her house during March this year and to go and stay with his uncle. In this regard she testified:

'I told him I can no longer stay with him because of his mental state. He was always in fear and I decided since I am young he should go and stay with older people.'

[39] Dr Fine is of the opinion that the plaintiff requires present and future psychiatric treatment consisting of the use of medication and of psychotherapy of the specific trauma counseling type, extending over two years. He further is of the opinion that the sums of R10 000 per year for medication and R12 000 per year for psychotherapy

would be sufficient for the two years and that an additional sum of R15 000 is required for treatment of future relapse, the chance of which in the case of the plaintiff in his view is high. Dr Fine is of the opinion that given such optimal treatment the plaintiff's prognosis can be anticipated to be good.

[40] I accept the evidence of Cpt Naidoo rather than that of the plaintiff relating to the alleged torture of the plaintiff at his hands. Cpt Naidoo was an impressive witness and neither his credibility as a witness nor the reliability of his evidence was in any way affected when he was cross-examined. This was conceded by the plaintiff's counsel in argument. In my view, the concession was correct. The evidence of the plaintiff, on the other hand, has various difficulties. But, more importantly, the probabilities favour the account of Cpt Naidoo that he did not torture the plaintiff and that he was not in any way involved with the plaintiff's arrest and detention.

[41] Cpt Naidoo was the Group Commander of the Serious and Violent Crime Unit at the time of the plaintiff's arrest and detention. Cases of trespass and housebreaking did not fall under his unit. The group under his command dealt with more serious and violent crimes, such as residential and business robberies, truck and car hijackings, ATM bombings, murders and sensational cases that drew media attention. Cpt Naidoo, by virtue of his position, mostly did not investigate case dockets; he supervised and gave guidance to the detectives who formed part of the unit that he commanded. The only case dockets that he investigated were those allocated to him by the station commander and they mostly involved police corruption. I accordingly find it improbable that Cpt Naidoo would in any way have involved himself in the criminal matter against the plaintiff.

[42] I also find it improbable that an officer of Cpt Naidoo's stature would have involved himself in the criminal conduct which the plaintiff wishes to lay at his door, openly and for all to see in a place that is not only frequented by police officers, but also open to members of the public. Indeed, it is the evidence of the plaintiff that Ms Mothibe and her employer's son walked into the crime office after Cpt Naidoo had smothered him for the third time. Moreover, the injury to the plaintiff's left ear is in the opinion of Dr Tenzer not consistent with having been assaulted repeatedly with a broomstick against the ear. Neither the photographs that were taken of the plaintiff on 20 December 2015 nor Dr Tenzer's examination of him on 18 January 2013 reveal any scratching of the plaintiff's neck, which injury he alleges he sustained while being tortured by Cpt Naidoo. The plaintiff is clearly untruthful in the embellishment of his account.

[43] But the defendant has not refuted the prima facie case put up by the plaintiff that he had indeed been assaulted, whether at the time of his arrest or soon thereafter. The expert opinion of Dr Tenzer stands unchallenged. I accept that most of the injuries depicted on the photographs that were taken of the plaintiff on 20 December 2012 (exhibit 'B') are not necessarily obvious and visible to the lay person or untrained eye. But at least the injuries to the plaintiff's left ear and cheek are clearly visible. These injuries, according to Dr Tenzer, are consistent with the plaintiff's version that he had been slapped on the left ear. It is not the defendant's case that these injuries preceded the time of the plaintiff's arrest or that force was necessary to effect the arrest.

[44] Furthermore, it is undisputed that the plaintiff wore a striped golf shirt at the time of his arrest on 19 December 2012. This is what Cst Zwane wrote in his arrest statement. But the photographs depict that the plaintiff was indeed wearing a t-shirt

over the golf shirt. Nobody suggests that the plaintiff carried the t-shirt with him at the time of his arrest. On the contrary, Cst Zwane testified that he carried nothing with him. It is also not suggested that anyone brought the t-shirt to him while he was detained. Even though the plaintiff's evidence that blood dripped onto his golf shirt while he was tortured at the hands of Cpt Naidoo is rejected, his evidence that because his golf shirt had been blood stained he was given the t-shirt and told to wear it over the golf shirt is to the greater extent objectively supported by the common cause photographic evidence, and accepted.

[45] As a result of being assaulted (and allegedly tortured) the plaintiff claims damages in the sum of R339 000, which is made up as follows: (a) R200 000 for pain and suffering, shock and psychological harm; (b) R80 000 for contumelia; and (c) R59 000 for medical expenses. The question is what damages should be awarded for infringement of his bodily integrity. Counsel referred me to previous awards, but the facts of each case must be evaluated on its own merits, because few cases are directly comparable. (See *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 20.) Given the nature and extent of the assault, the injuries suffered by the plaintiff and their physical and emotional effects on him it seems to me that a globular award of R130 000, which amount includes the sum of R59 000 claimed in respect of medical treatment, is appropriate. In the light of the measure of damages costs should be limited to the magistrates' court scale. But such costs must in my view be on a punitive scale to mark this court's disapproval of any form of unlawful infringement of a person's bodily integrity.

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

Judgment is granted in favour of the plaintiff for:

- (a) Payment of the sum of R130 000.00;
- (b) Interest on the said sum at the rate of 15.5% per annum from 25 January 2013 to date of payment;
- (c) Costs of suit on the magistrates' court attorney and client scale, including the preparation, reservation and qualifying fees of the plaintiff's expert witnesses, Dr Stan Tenzer and of Dr Leon Fine, the interpreters' fees, and the costs of counsel and including his preparation.

P.A. MEYER
JUDGE OF THE HIGH COURT

DATE OF HEARING: 4 – 12 June 2015

DATE OF JUDGMENT: 15 September 2015

FOR PLAINTIFF: Adv HC Johnstone

INSTRUCTED BY: Wits Law Clinic, Braamfontein

FOR DEFENDANT: Adv Z Buthelezi

INSTRUCTED BY: The State Attorney, Johannesburg

