



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. 1627/2013

In the matter between:

LUTHANDO CINGO

1^s Plaintiff

YONWABA MESATYWA

2nd Plaintiff

And

SQ RISK SECURITY SERVICES

Defendant

JUDGMENT

JOLWANA J:

Introduction.

[1] This matter came before this Court for the determination of quantum, the issue of liability having been dealt with and determined in favour of the plaintiffs in a judgement

handed down on 25 March 2022. In her judgement, my colleague Majiki J found the arrest, detention and assault of the plaintiffs unlawful. She thereupon ordered that the defendant is liable for all the damages the plaintiffs may prove. That court was charged with determining whether that arrest, detention, and assault on the then two young tertiary institution students by the employees of the defendant were unlawful and wrongful and whether the defendant was liable for the damages they suffered as a result.

The first plaintiff's evidence

[2] The first plaintiff testified that in February 2013 he was a student at a technical college in Cape Town pursuing building and civil engineering studies. Subsequent to the events of the early morning on 05 February 2013 he experienced a serious drop in his studies. He started by indulging in alcohol and not studying as he should. He used to drink occasionally before the incident. It was the incident of the 5 February 2013 that caused him to drink heavily. During the academic year in which this incident occurred he returned to school after the incident to continue with his studies. However, he lost focus resulting in him failing some modules. He had to repeat those modules the following year.

[3] He testified that during his arrest he was handcuffed and made to sit outside during the night. He was not allowed to communicate with his family during that period. His co-plaintiff was made to eat dog faeces while pointed with a gun. The events of 05 February 2013 lowered his dignity as the whole incident was reported in the media including the SABC. It was a painful experience for him which made front-page news in the newspapers and was widely publicised even on radio. He was not a top student. He was just an average student, but his academic performance dropped to below average after the incident. He was now trying to rebuild his life and forget about the incident. However,

when he has to testify, he is reminded of the pain that he suffered. Before the incident he was a joyful person, watching soccer matches on television. He has lost confidence as a person.

[4] Under cross-examination the first plaintiff testified that the media which reported on the incident did not say that he had done anything wrong. However, his dignity was lowered by the fact that he was wronged in how he was treated. The media published that they were alleged to have broken a glass at Ink Spot stationery shop that night. The media reports on the incident caused him to be viewed in a negative way by members of the public due to the wide publicity the incident received. On the day of the incident when the media came, they found them tied up to a trailer. The court that dealt with the merits found that they were detained from 1:00 in the morning and were released at 16:00 in the afternoon. He testified that he was not assaulted. It was his cousin, the second plaintiff who was assaulted. It was also the second plaintiff who was caused to eat dog faeces, not him.

[5] Before the incident he had failed one module at school. He had told Dr Botha whom he had seen who prepared his medico-legal neuropsychological report about his academic studies. He saw the second plaintiff being assaulted by about five black security officers in his presence. They assaulted him with a sjambok and was also kicked while he was outside the vehicle. They then threw him to the back of their bakkie and continued assaulting him. He testified that they were not undressed or physically exposed to the female farm workers at Goodman Farm. On Dr Botha's report about him having been involved with gangs, he disputed that saying it was not a gang but a pantsula dance group

that he was involved with. There were various pantsula groups which would sometimes quarrel about music competitions.

[6] Before the incident he had been charged with assault with intent to do grievous bodily harm. He was arrested for that incident but released as that matter was discussed and resolved within the family. However, that happened a long time before the incident of the 05 February 2013. He described that fight as having been a youthful fight which happened as part of growing up. His involvement in smoking also happened while he was still at high school long before the incident. He never received any counselling subsequent to the incident because there was no money for him for counselling sessions. He was not aware that there were State facilities in which he could get counselling for free. He testified that the symptoms related to the trauma of the incident had abated but they had not completely ended. They still manifest themselves when the incident is raised like when he has to testify in court.

[7] He previously did not believe that there was still racism in this country until the experience he went through during the events of the 05 February 2013. The ill-treatment he got was when white men tied him to a trailer outside, when he asked for water and they poured cold water over him; when those white men asked why a criminal should be allowed to sit comfortably. He was abused in addition to being wrongfully arrested and detained. He testified that police were not involved in his arrest. When the police arrived, they were chased away by the defendant's officials. His shame as a result of the incident came from the fact that he was tied to a trailer outside. Everybody who came found him looking like a criminal for something he did not do.

[8] In re-examination he was referred to a newspaper article in which it was reported that *“as the three accused were loaded into the back of the police van they mocked the police and the media saying ‘oh, we are famous, the SAP and the daily dispatch is here, viva democracy viva, viva police’, with Mr Scheepers showing a V sign laughing out loudly”*. The first plaintiff explained that that was part of the reasons he said that he did not believe that racism was still alive in this country until he went through what he experienced during the incident. He said that he thought those officials of the defendant were insulting the police when they said those things.

The second plaintiff's evidence

[9] The second plaintiff testified that during the year in which the incident took place he was at university doing his second year of his studies in social sciences. During the night of 05 February 2013 he was in the company of the first plaintiff together with their other friends. They had attended a funeral in Qumbu on that day. On their return back to Mthatha they decided to go and enjoy themselves in what is called an “after tears” at the pool club. He explained that in an “after tears” they sit around and reminisce about the person who had just been buried. It was his grandmother who had just been buried on that occasion. Alcoholic drinks are served at an “after tears” gathering.

[10] They left the Pool Club where they had held the “after tears” carrying their alcoholic drinks going home. He was close to his place of residence when people driving a bakkie that did not have a canopy came and took him. He did not know those people. They were three men, one was the driver and the other two threw him to the back of the bakkie. Before they threw him to the back of the bakkie they said something about a glass at Ink Spot stationary shop which he was not sure whether they said it was broken or what

exactly. He was then taken to Ink Spot. On arrival there he was shown a cracked glass while he was at the back of the bakkie and in handcuffs. They asked if he knew anything about the cracked glass and he said he knew nothing. One of those security officers went to the front of the bakkie and took out something that stretched and looked like a belt and used it to assault him all over his body. He could not ward off the assaults as he was handcuffed. He was assaulted for quite some time. He asked those men take him to the police. However they continued assaulting him. He was made to lie down on his stomach with his hands cuffed behind his back.

[11] The vehicle drove off at some stage, but he did not know where they were going but he realised that they were outside of town. They reached a place which he later learned was called Goodman Farm. He was tied to a chair that was on the veranda at the farm. A certain grown-up man came and said that criminals cannot sit comfortably on a chair. That man tied them to a panel trailer. It was difficult to sit while tied in that way. When they needed to go to the toilet, they were required to call out but if they just wanted to pass water they were told to pass it where they were while tied to the trailer. They were not given food. They were not given water to drink. When they asked for water to drink, iced water was brought and poured over their bodies.

[12] At some stage he asked for food. He was loosed from the trailer, and he thought he was going to be given food. One of the men took him away around a fence to the back of those premises. When they reached there, he was pointed to dog excretions and told to eat them. He refused to eat dog faeces. That man produced a firearm and pointed it at him. He realised that he was being forced to eat dog faeces. He was afraid that the man would kill him as he pointed him with a firearm. He ate the faeces and was nauseated.

After he was done eating the dog faeces he was taken back to the trailer where he was tied up again. He told the first plaintiff about what happened behind the fence.

[13] After the incident of the 05 February 2013 he went back to school. However, the incident was public knowledge at school. He ended up discontinuing his studies. The newspaper article had published that he was forced to eat dog faeces. The newspaper also published the fact that he was called a K- word which he regarded as a degrading term which had been used during the time of oppression. When he went back to school in 2014, he went to the University of Fort Hare. The reason he changed school was because the incident was generally known at his previous school and other students would ask him about it. He lost confidence in himself and also lost interest in studying. Eventually he completed his studies and obtained a degree in social work. He is now employed as a social worker.

[14] He was now receiving psychological counselling. He could not do so before because he could not afford to pay for counselling sessions. He felt that drinking alcohol was therapeutic to him as it lessened his suffering. Before the incident he was an occasional drinker. After the incident he became a heavy drinker and would even drink a whole bottle of whiskey sometimes. At work when cases of traumatic abuse or experience came to him he would discuss such cases with his superiors so that such cases would not be allocated to him because they affected him.

[15] After the incident his character changed totally. Even a minor incident would cause him to become very angry to such an extent that he would lose control. He testified that this could be one of the reasons he resorted to heavy drinking. He would go to school without having taken a bath or not having slept and having consumed alcohol. At some

stage he stole his aunt's vehicle and went out with friends. He had never done those things before the incident which was why he said it changed his character. He had never gone to class drunk or unkempt before the incident. He had never had an altercation with his mother or sworn at her before the incident.

[16] Under cross-examination the second plaintiff confirmed that he was approached by journalists and he told them what happened. He, however, rejected the proposition that the publicity that attracted the incident was his own doing. He confirmed that he was assaulted by the black security officers that arrested him. They also made him to lie down on his stomach and drove him out of town to the Goodman Farm. They were the ones who also handcuffed him to a chair on the veranda at the farm. He was then handcuffed to a trailer where he had to sit outside through the night. However, sitting while handcuffed to a trailer was with difficulty and discomfort. He was taken behind the house and at that time the sun was already up, and the visibility was good. He was able to see what he was made to eat, that it was dog excretions. A gun was taken out, pointed at him and he was told to eat the dog faeces. When he refused that man produced a firearm. He took the dog faeces and tried to eat it but it nauseated him. The dog faeces eating episode took more or less about a minute.

[17] After the incident of the 05 February 2013, he went back to Walter Sisulu University where he remained for the rest of 2013. He passed his studies that year. What helped him to pass that year was that one of his lecturers was a psychologist. That lecturer got to know about his ordeal. He would give him counselling sessions in his office which really helped him. He then went to the University of Fort Hare to do social work. He changed courses to do social work because of what he experienced during the incident. He realised

that what he went through could be experienced by another person. He wanted to be in a position to help people who go through the same or similar trauma.

[18] The evidence of the second plaintiff brought to the end the oral testimony of all evidence presented. The plaintiffs closed their cases after which the defendant closed its case without any witness being called. There was an agreement between the parties' legal representatives about the handling of the evidence of the expert witnesses, Dr Botha and Dr Magula. Their expert reports had been prepared and filed in terms of Rule 36(9) and (b)¹ of the Uniform Rules of Court. The terms of that agreement are the following:

“1. The medico–legal reports prepared by Dr Botha and Dr Magula can be admitted into evidence, without the necessity of formal proof.

2.It is agreed that the said reports are what they purport to be, and that the legal representatives of the parties will make submissions in regard to the probative value of the reports, or otherwise if so advised”.

As a result, Dr Botha and Dr Magula were, by agreement between the parties, not called to testify. The defendant had not filed any opposing expert reports of its own, did not call any expert witnesses and did not any witness at all.

The findings of the court on liability.

¹ Rule 36(9)(a) and (b) read:

No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall-

- (a) not less than fifteen days before the trial, have delivered notice of his intention to do so; and
- (b) not less than ten days before the trial have delivered a summary of such expert's opinion and his reason therefor.

[19] As indicated hereinbefore, at the conclusion of the merits trial, the court found the defendant liable for the arrest and detention of the plaintiffs which it found to have been unlawful and wrongful. It also found the plaintiffs to have been assaulted and found the assault to have been unlawful and wrongful. The court thereupon held the defendant liable for all damages that the plaintiffs may prove. To contextualise these findings by court and most importantly to give context to the evidence that was given in respect of the quantum trial, I consider the following paragraphs in that court's judgment to be very significant:

"[49] ...[T]he plaintiff were kept handcuffed to the trailer from early hours of the morning until 14h00 when police arrived. At what point would they have been released if police had not arrived. This goes against the probability that there was ever an intent to deal with the plaintiffs according to law. The plaintiffs were detained from the time they were apprehended. The second plaintiff's mother and Beef said they were informed of the incident around 02h00. This was after the inspection at Ink Spot. The plaintiffs said the Pools Club closed at 24h00. Despite the fact that the video recording indicates that their arrival at the defendant's premises was around 05h00, they had been under the control of Nontsolo long before that. The police could have arrived before 14h00, but the plaintiffs were not instantly released, their release happened after the arrival of the re-enforcement and the media. I accept that they were held from 01h00 to 16h00 the next day.

[50] Furthermore, their relatives were not allowed to speak or interact with them. If it were to be believed that they had asked to be kept until their mother came, why tie them to the trailer, why not release them when the police came, instead resist that instruction until more police back up is called to the scene. Would it not have been sufficient to handcuff

them and left them to sit comfortably, just to ensure that they do not leave or interfere with the lady who was on duty.

[51]....

[52] The probabilities favour the plaintiffs that all the alleged ill-treatment, they were indeed subjected to. They said they were tied by Myburg to the trailer. The video observations as agreed to by the parties, show that he was there at 06h19. The defendant's versions, that the plaintiffs were sprinkled with water from broken pipe was not testified by the defendant's witnesses as was suggested to the plaintiffs. The plaintiffs insisted that Du Toit poured them with water. The handcuffing of the plaintiffs in the trailer is common cause, it is unlawful. I find no reason not to accept that the second plaintiff was taken to the back behind the building. The video recording records that Myburg did so. Beef also confirmed that he did ask to be taken to the toilet but not by Scheepers. If the video recording is to be believed, the plaintiffs could be mistaken as to the timing or the identity of the white man who took him and the one who tied them. The recording shows Du Toit as the one who arrived before Nontsolo left. They were adamant that they were not tied by black males. The second plaintiff's demeanour did not present as someone who did not speak the truth. When he testified about eating dog faeces, he still broke down, five (5) years after the occurrence. The attack against his evidence is that he was not consistent as to how many times and by how many people he was assaulted. I am satisfied with his evidence in this regard and find that he was indeed assaulted. He testified at length about his injuries".

[20] The evidence of the plaintiffs in respect of the quantum and the submissions made on behalf of either party must be considered and assessed with the backdrop of the whole judgement. I consider it better to approach the plaintiffs' evidence on quantum having due

regard to the defendant's submissions about it. The importance of this approach lies in the fact that most, if not all the evidence that the plaintiffs gave in the merits trial was accepted by that court. Furthermore, the defendant closed its case without calling any witness on quantum as I said before, thus leaving the plaintiffs' evidence not having been gainsaid at the conclusion of the quantum trial.

[21] It was submitted on behalf of the defendant that the plaintiffs' claims were grossly exaggerated with falsified allegations. This is mainly with reference to their particulars of claim. For instance, in the first plaintiff's particulars of claim it was alleged that he was physically assaulted as a result of which he sustained numerous physical injuries. It was further alleged that he was subjected to ill-treatment by being forced to eat dog faeces. Counsel for the defendant submitted that none of that was true as the first plaintiff was neither assaulted nor forced to eat dog faeces. Indeed, the evidence of the first plaintiff was that he was not assaulted or caused to eat dog faeces. He testified that it was the second plaintiff who was assaulted and caused to eat dog faeces. Reference was also made to the allegations in the particulars of claim that he was detained for twenty-four hours which was also not true as the merits trial court found him to have been arrested at about 1:00 in the morning and released at about 16:00 in the afternoon.

[22] It was further submitted that the arrest and detention of the plaintiffs' and the second plaintiff's assault were the run of the mill wrongful arrest, detention and assault. They were however, sensationalised by the issue of the second plaintiff being forced to eat dog faeces. It was argued that the first plaintiff and his attorneys made common cause to plead that the first plaintiff was also caused to eat dog faeces and was also assaulted. It was submitted that this was done to generate maximum sympathy. The article in the Daily

Dispatch newspaper article was also said to be part of this sensationalist agenda. In that article it was reported that:

“The two young men-Yonwaba Mesatywa, 22 and Luthando Cingo 23 alleged they spent the better part of Monday and Tuesday handcuffed. They claim icy water had been poured on them and they had been forced to eat dog faeces”.

The submission in relation to the Daily Dispatch newspaper article was that it was attributed to both plaintiffs as its reading suggested.

[23] Some excerpts from the first plaintiff’s interview with Dr Botha were referred to. For instance, the fact he was not forced to eat dog faeces, but it was the second plaintiff who was forced to do so. He was allegedly involved with gangs as a youth and that he carries many regrets about that period in his life. According to Dr Botha’s report he recounted forms of premorbid psychological distress that he encountered during his involvement with gangs as a youth. He smelled alcohol on the day of the assessment and reported that he drank alcohol on weekends and smoked cigarettes. Dr Botha reported that the intensity of the symptoms of the trauma would have abated approximately three to four months following the incident. His stimulation seeking behaviour with liquor and drugs reflected a long-standing clinical pattern and was not the result of the trauma of this incident. His situation was compounded by a number of difficult experiences which predated the incident.

[24] On the basis of his particulars of claim and the report of Dr Botha, the main submission was that the first plaintiff exaggerated his claim by saying that he was assaulted when he was not. His alleged being detained for twenty-four hours and the

pleaded physical injuries which he did not suffer were cited as examples of exaggeration. Therefore, the first plaintiff was prone to exaggeration, so went the submission. In the final analysis it was submitted that the first plaintiff was entitled to no more than compensation for wrongful arrest and wrongful detention of about fourteen hours. It was further submitted that even if he had been detained in a prison cell, the essence of the compensation would still be for the deprivation of liberty. Therefore, the deprivations that both plaintiffs endured were not markedly different from what is generally encountered by any detainee in a police cell. It was submitted that there are no creature comforts, there are no cell phones, there is no immediate access to food, and there are no comfortable chairs even in police cells. On this basis, it was contended that arrest and detention decided cases against the South African Police Service should help in determining the amount of the award of damages that should be granted by this Court.

[25] With specific reference to the second plaintiff it was submitted that he, together with the first plaintiff were arrested. They were detained together and endured detention for about fourteen hours. However, the second plaintiff was assaulted by being struck on the back with a sjambok. The court that determined the merits said that he endured weals causing discomfort for about a week. It was contended that the second plaintiff's reference in his particulars of claim to physical injuries in his right eye, the right side of the nose, a 1.8cm cut to his lips and bruised testicles was an exaggeration. The very fact that bruising to private parts was introduced was an aspect of sensationalism as it did not happen which was raised to exaggerate the claims.

[26] Counsel for the defendant went on to submit that the second plaintiff, just like the first plaintiff, was handcuffed to a trailer and when asked for water, water was instead

sprinkled on him. He was also forced to eat dog faeces at gunpoint as the merit judgment found. The defendant's counsel emphasised that subsequent to their release from the unlawful detention neither plaintiff received any medical treatment. It was further argued that the consumption of dog faeces must, by its very nature, have been of a very short duration. The plaintiff would have been forced to place dog excrement in his mouth. He would have gagged and resisted and felt nauseated and attempted to vomit after which the whole episode would come to an end. This would not have endured for longer than one minute, it could have been even shorter, so submitted counsel for the defendant.

[27] It was suggested that the dog faeces incident could be equated to being sprayed in the face with pepper spray which would be similarly unpleasant but would have had a more long-lasting effect. In the final analysis it was submitted that there is no hard and fast rule. Therefore, the court would have to decide how to put value to such an incident for purposes of determining an appropriate compensation. However, the quantification of the detention should be assessed by considering the duration of the detention which is fourteen hours on the basis of parallel decided cases. The surcharge or solatium could be added to the quantum to cater for the dog faeces incident as an aggravating feature of the assault, submitted counsel for the defendant.

The analysis

[28] The starting is the court's judgment on the merits. In its judgment that court analysed the evidence after which it concluded that the defendant is liable for damages as may be proven by the plaintiffs for their wrongful arrest, detention and assault. The finding of the court that dealt with the merits trail are binding on this Court. The avenue that was available to the defendant, if it had any difficulty with that court's analysis of the evidence

and the conclusions reached was the appeal process. That process was followed, and it was unsuccessful and was consequently aborted. There can be no second guessing of that court's analysis and findings on evidence and indeed its conclusions by this Court. The main reason I consider it necessary to emphasise this is that the defendant in its heads of argument has sought to introduce what is apparently an amendment to the order of court on the merits in a manner that is beyond pointing out an innocuous typographical error. This, counsel has done by suggesting a rewording of the merit trial's court order. In its order that court, inter alia, ordered that "the assault on the plaintiffs is held to be unlawful". The rewording that is now being suggested by counsel for the defendant is that that court order should be understood to mean that "the assault on the second plaintiff is held to be unlawful". This is said to be on the basis that it was common cause that the first plaintiff was not assaulted.

[29] The difficulty with this proposition is that to the extent that it could be said that that court made an error in referring to the assault on the plaintiffs as against the second plaintiff, the defendant had a number of remedies. There was an appeal process which I referred to earlier or even a simple rule 42 process which needs no explanation as to what it would have entailed in this matter. The attempt to seek to make this fundamental change to the court order is problematic and unprocedural. Essentially this Court is being asked to exercise a jurisdiction it does not have by going beyond assessing the merits in the suggested rewording of that court's court order. The issue of whether or not the plaintiffs were assaulted is not for this Court to revisit. This Court must just determine the quantum of damages payable to both plaintiffs. I will revert to this issue later in this judgment.

[30] The facts relating to the arrest, detention and assault are largely common cause, conclusions and certain relevant factual findings having been made by the merit trial court. The defendant elected not to call any witnesses on quantum including witness that could have provided some factual basis undergirding some of the defendant's contentions. It contented itself with the cross-examination of the plaintiffs and what its counsel calls contradictions between what is alleged in the particulars of claim and the evidence that the plaintiffs gave on quantum. Counsel for the defendant also raised quite strongly what he called the propensity of the plaintiffs to exaggerate their claims. I do need to point out that beyond the contradictions in the particulars of claim on whether or not the first plaintiff was assaulted as alleged and the injuries he allegedly suffered as a result, the period of detention and him being allegedly made to eat dog faeces, no contradictions were pointed out in his evidence.

[31] The other issue raised very strongly was with regard to some of the contents of the expert witness reports. It is not clear to me why the defendant agreed to forgo the opportunity to have these witnesses testify and thus spurned the opportunity to cross-examine them on any issue raised in their reports. Even worse, it did not prepare its own expert reports so that it may satisfy itself about the condition or aftereffects of the incident. The opposing experts would have had to enter into joint minutes which would have made navigating the reports of witnesses who did not testify less treacherous. This is important because while the issue of an exaggeration is mentioned in the report, there is no suggestion, let alone conclusion in the reports that the plaintiffs were not traumatised by the incident. In fact, both reports make recommendations for appropriate treatment protocols. This has not been gainsaid even though there is a submission that the first

plaintiff should only be entitled to damages for arrest and detention while in respect of the second plaintiff the defendant simply adds what it calls solatium to cater for the dog faeces incident.

Was the first plaintiff assaulted?

[32] At paragraph 48 of its judgment that court deals with assault at length and also deals with how the second plaintiff was assaulted. The court then concludes by saying that “I am of the view that the second plaintiff proved that he was assaulted.” This is after dealing extensively with the injuries that the second plaintiff sustained as a result of the physical assault. However, the court did not deal with any injuries in respect of the first plaintiff. I can only assume that the first plaintiff’s evidence was not different from the one he gave in this Court. That evidence was that he was not assaulted. However, before it concluded the issue of assault the court said that “[t]he first plaintiff being handcuffed until released by police at 14h00 is common cause, so was the second plaintiff.”

[33] This brings me to the legal definition of assault. *Snyman’s Criminal Law*² gives the following definition of assault:

“Assault consists in any unlawful and intentional act or omission.

- (a) which results in another person’s bodily integrity being directly or indirectly impaired, or
- (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place.”

² Snyman’s Criminal Law: Seventh edition by Lexis Nexis at page 395.

[34] In addition to some of the findings of the court that dealt with the merits, there is uncontroverted evidence which was given in this Court by the first plaintiff that he was, together with the second plaintiff, handcuffed to a chair on a verandah. At some stage during that night a white employee of the defendant told them that criminals should not sit comfortably in chairs. He thereupon tied them to a trailer that was in the premises. During the entire period of being literally chained to a trailer, they were forced to pee or pass water right there. They were not taken to a toilet. The acts of being handcuffed, being kept in handcuffs for hours; having iced water poured on a person are in my view, consistent with assault, physical assault I might add. *Snyman's Criminal Law*³ is again of assistance with the correct understanding of physical assault. He says:

“(ii) Indirect application: Force can also be applied indirectly. This happens if X does not use a part of her body to apply force to a part of Y’s body, but uses an instrument or other strategy for this purpose, such as when X hits Y with a stick, throws stones at Y, causes a train to derail in order to harm the passengers, lets a vicious dog loose on Y, snatches away a chair that Y was going to sit on from under Y so that Y falls to the floor, spits in Y’s face, empties a glass of water (or beer) on Y or when Y, a hiker, gets lost in thick mist, asks X the way, and X then deliberately shows Y a way that will cause her (Y) to fall over a precipice. Since the slightest touch may amount to assault, it is not a requirement of the crime that X actually injure Y. It is not even required that Y be conscious of the application of force upon her, because assault can be committed even in respect of somebody who is unconscious, extremely drunk or asleep, as when X cuts off some Y’s hair while Y asleep.”

³ Note 2 supra at page 396-397

[35] There are many other examples that *Snyman* deals with in explaining the wide reach of what constitutes an assault. I am of the view that assault is conceptually not capable of an exact or exhaustive definition or one that is a closed list. It seems to me that whether or not a person was assaulted will depend on the facts of that particular case. In this case it is clear from Majiki J's judgment that both plaintiffs were assaulted in various ways including being kept in handcuffs for hours unlawfully, and for no reason other than to humiliate, torture and impair their bodily integrity. In the process, their humanness was assailed and degraded. For all this treatment they must both be compensated. However, the second plaintiff is also entitled to a further compensation for the additional physical assault that resulted in his injuries. Majiki J must have had the considerations of what the first plaintiff also went through in mind when she said that *"this treatment was in utter disrespect of the plaintiffs' rights. They were subjected to utmost ill-treatment, when their arrest was not lawful in the first place. There would have been no reason not to take the plaintiffs to the police station as the law demands."*⁴

The dog faeces incident.

[36] The second plaintiff gave evidence in which he expressed how he felt after being forced, at gunpoint, to eat dog faeces. There can be no debate that that was a dehumanising treatment meted out to him by one of the defendant's employees who it is apparent, had made up their minds that none of their rights that even the most heinous of criminals take for granted. Such criminals are not excluded from the rights that all detained prisoners routinely enjoy. There are many such rights which are enjoyable even

⁴ Paragraph 50 of Majiki J's judgment.

by the worst in our society. These rights include the rights provided for in section 35 (2) (e) of the Constitution⁵. These include the right to conditions of detention that are consistent with human dignity.

[37] With our Constitution in mind, it was disheartening, to say the least, to hear counsel for the defendant arguing passionately that the detention to which the plaintiffs were subjected to is not markedly different from the ordinary unlawful detention in police cells. He said this was because detention in police cells has no creature comforts like cell phones, immediate access to food and there are no comfortable chairs. This was a rather shocking submission made on the face of the facts of this case which in the case of the second plaintiff included being forced, at gunpoint, to eat dog faeces. Counsel went on to draw a very strange parallel between a human being, being forced at gunpoint to eat dog faeces with having pepper spray sprayed to one's eyes. In my view, these are vastly different, the one being irritating and the other dehumanising. Counsel for the defendant made light of a very inhuman and downright horrible treatment meted out to the second plaintiff by the employees of the defendant. This is how counsel for the defendant expressed his own personal imagination of what would have happened in his heads of argument:

“42. The incident of consumption of dog faeces, in whatever way it occurred, must, by its very nature have been of very short duration. One can imagine the plaintiff being forced to place dog excrement in his mouth, gagging and resisting, feeling nauseated and

⁵ Constitution of the Republic public of South Africa,1996, which reads in section 35(2)(e).

“Everyone who is detained, including every sentenced prisoner, has a right he right- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.”

attempting to vomit, etc., whereupon the incident would be over. It is submitted that it could not have endured for more than one minute, and probably a lot shorter than that”.

[38] In a situation in which the second plaintiff’s humanity was literally shredded in being forced to eat dog faeces, this submission was inappropriate to say the least. It sought to trivialise what is clearly a very seriously dehumanising experience that is actually difficult to comprehend how anybody who goes through what the second plaintiff went through could actually feel.

The racial issue

[39] The plaintiffs testified to the effect that they attributed some of the ill-treatment they received from the defendant’s white employees to racism. The relevant facts are worth repeating. The plaintiffs were arrested by black security officers who were in the employ of the defendant on alleged suspicion of having attempted to break into Ink Spot stationery shop. They were handcuffed and driven to Goodman Farm in the outskirts of Mthatha. On arrival at that farm they were tied to a chair on the veranda of a building in that property. At some point a white man came and said that criminals should not sit comfortably in chairs. He thereupon chained them to a trailer. They were not taken to a toilet so that they could pass water in a toilet when it became necessary. Instead, they had to pee where they were cuffed to the trailer. The logical consequence of this was that they had to spend long hours in the same place in which they peed. The second plaintiff asked for food. Instead of being given food he was taken to the back or behind a fence where he was forced to eat dog faeces at gunpoint. When they asked for water, iced water was poured on them. They would have remained in that wet condition until they were released by police some hours later.

[40] A person made to eat dog faeces and chained like an unwanted dog paint the whole incident very differently. The fact that the following utterances were attributed to the white employees of the defendant who included Mr Scheepers who is the owner of the defendant is not without significance.

Mr Scheepers is reported to have said:

“Oh we are famous-the SABC and the Dail Dispatch is here. Viva democracy, viva police said Scheepers showing a V-sign and laughing loudly.”

No evidence was presented by the defendant to challenge the suggestions that these utterances were attributed to them and the treatment meted out to the plaintiffs was racially motivated.

[41] The utterances were attributed to Mr Scheepers as he and Mr Myburg and Mr Du Toit were led to a police vehicle after they had been arrested on charges of kidnapping the plaintiffs. The police who initially went to Goodman Farm encountered resistance from the defendant's white employees hence they had to call for backup which, according to media reports included about 10 police vehicles including a Nyala and a dozen of armed officers. The plaintiffs' feeling that there was a racial tone to their abuse and ill-treatment cannot be said to be unfounded in my view. We all have a duty to cajole, if not force each other to align our behavior to the Constitution. Perhaps a part of the preamble to our Constitution must be invoked lest we become complacent and forgetful of our ugly past. It reads:

“We, the people of South Africa, Recognise the injustices of our past: Honour those who suffered for justice and freedom in our land, Respect those who have worked to build and

develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic....”

[42] Some aspects of this case have reminded me of words of the late Mohamed J in *Makwanyane*⁶ during the nascent days of our constitutional being as a nation in which he expressed himself as follows:

“All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people and which discipline its government and its national institutions, the basic premises upon which judicial, legislative and executive power is to wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past, which is gracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos expressly articulated in the Constitution. The contrasts between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalised and legitimised racism.”

⁶ S v Makwanyane and Another 1995(3) SA391 at 487 (CC) G-J

[43] The incident of 5 February 2013 occurred almost eighteen years after *Makwanyane*. Courts should not sit in ivory towers when instances of our constitutional democracy and our Constitution are being trashed and denuded of any real and intrinsic value come before them. They have a role to play, and they must play it decisively and unflinchingly. Those who sacrificed life and limb and indeed future generations expect no less from our courts. Besides, these kinds of behavior do not represent who are we as a diverse nation. Having carefully read the judgement of Majiki J, heard and considered all the evidence, there can be no plausible explanation for the behavior of Mr Scheepers and his two other white colleagues other than it being racially motivated. They chose not to come to this Court to testify and give their own explanation, if they wanted the issue of racism raised by the plaintiffs in their evidence understood differently. This is a hugely aggravating feature of this matter. The plaintiffs were dehumanised. This country's police force was chased away and undermined and mocked when they went to the farm to secure the release of the plaintiffs until they had to call for reinforcement. Our constitutional framework was openly trashed with Mr Scheepers as owner of the defendant apparently leading from the front in that regard.

The assessment of the quantum.

[44] I have considered some decided cases which I found very useful on how these types of damages that are applicable in this matter should be assessed. Each case depends on its own peculiar factual matrix and a court must be guided by the facts of each case

and the similar cases already decided on the specific issue being a useful guide. In the case of *Tyulu*⁷ the legal position was stated 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 and award 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 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”.

[45] This matter has a number of unique and distinguishing features and is marked by a number of aggravating factors. They include the fact that in arresting the plaintiffs the employees of the defendant had no intention of subjecting them to any form of legal process. They were subjected to the law of the jungle and vigilante justice which included not releasing them to the police even when police arrived. Assuming that the security guards who arrested the plaintiffs genuinely suspected them of being the criminals who broke the glass at the Ink Spot stationery shop, I find it strange that they did not take them to the police station down the road which is less than a kilometer away. Instead, they

⁷ Minister of Safety and Security v Tyulu 2009 (5) SA (SCA); 2009 (2) SACR282(SCA); [2009]4 All SA 38 (SCA)

drove them out of town to a farm in the outskirts of the city. They were abused there in the most horrific and odious manner possible.

[46] The assessment of damages to be awarded is not an easy task with competing interests and a rather very complex balancing act to be embarked upon. In *Seria*⁸ the court said:

“There is no fixed formula for the assessment of damages for non- patrimonial loss. It is recognised that a court has the power to estimate an amount *ex aequo et bono* and consequently enjoys a wide discretion, with fairness as a dominant norm.”

The sentiments expressed by Holmes J in *Pitt*⁹ are as valid today as they were more than 60 years ago. He said:

“I have only to add that the court must take care to see that its award is fair to both sides- it must give just compensation to the plaintiffs, but it must not pour our largesse from the horn of plenty at the defendant’s expense.”

[47] The case of *Tyulu* cautioned courts to ensure that the awards they make in the assessment of damages for arrest and detention reflect the importance of the right to personal liberty and the seriousness with which any deprivation of personal liberty is viewed in our law. However, this case is about much more than the deprivation of Mr Cingo and Mr Mesatywa’s right to personal liberty. It is also about the rule of law. It is about the right to human dignity especially that of black people which has been neglected since time immemorial. In *Smith*¹⁰ Madala J had this to say:

⁸ *Seria v Minister of Safety and Security and Others* (5) SA 130 (C) at 148 I-J

⁹ *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at 287 E-F.

¹⁰ *NM and Others v Smith and Others* 2007 (5) SA 250 (CC); 2007 (7) BCLR 751(CC) para 50.

“If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected. As this Court held in *Dawood and Another v Minister of Home Affairs*, *Shalabi and Another v Minister of Home Affairs and Others*, *Thomas and Another v Minister of Home Affairs and Others*:

‘The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.’

Conclusion

[48] On the common cause facts, the plaintiffs were not only unlawfully arrested and detained, they were also subjected to inhumane and degrading treatment in which their human dignity and therefore their intrinsic worth as human beings was unashamedly undermined. They are before this Court to assert their humanity and they must be appropriately compensated. The two doctors referred to earlier made recommendations that some treatment protocol was necessary which they recommended and priced. Counsel for the plaintiffs suggested an amount of R 25 000.00 for the plaintiffs in respect

of future medical expenses. It was never suggested that in the event that this Court found that the plaintiffs should be paid for future medical expenses, that figure was inappropriate or somehow exaggerated. I accept the amount of R 25 000.00 for each plaintiff in respect of future medical expenses.

[49] For the unlawful arrest and detention for the 15-hour period, I am of the view that an amount of R 75 000.00 per plaintiff is justified. In respect of the assault the first plaintiff is awarded R50 000.00. The second plaintiff is awarded R100 000.00 for assault. In respect of the second plaintiff being dehumanised further in being forced to eat dog faeces he is awarded R150 000.00.

Costs

[50] While the total of award in respect of each plaintiff is within the jurisdiction of the magistrates' court, I am of the view that the magistrates' court scale contended for on behalf of the defendant would be inappropriate for this matter. Contrary to counsel for the defendant's submission, this case is not a run of the mill arrest and detention as well as assault case. It has a number of peculiarities that make the magistrates' court scale of costs totally inappropriate.

[51] In the result, the following order shall issue:

1. The plaintiffs are each awarded R25 000.00 in respect of future medical expenses.
2. The plaintiffs are each awarded R75 000.00 for unlawful arrest and detention.
3. The first plaintiff is awarded R50 000.00 for the assault.
4. The second plaintiff is awarded R100 000.00 for the assault.
5. The second plaintiff is awarded R150 000.00 for being made to eat dog faeces.

6. The defendant is ordered to pay costs.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances :

Counsel for the plaintiffs : M.S. Manganye

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Mthatha

Counsel for the defendant : S.H. Cole SC

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Mthatha

Date Heard : 13 -14 November 2023

Date delivered : 01 February 2024