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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 9676/2013

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

In the matter between:

T A M[...]	First Plaintiff
J R[...]	Second Plaintiff
T P M[...]	Third Plaintiff
and	

MINISTER OF POLICE	First Defendant
NTSIKELELO AND OTHER POLICE OFFICER/S	Second Defendant

Delivered. This judgment is being handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 8 June 2021.

JUDGMENT

RANCHOD, J

Introduction

[1] This is a consolidated damages action instituted by the three plaintiffs. The first defendant is sought to be held vicariously liable for certain allegedly unlawful actions of the second defendants.

[2] According to the amended particulars of claim, the first plaintiff, Mr A M (M[.]), claims damages with regard to two separate incidents – one in November 2010 and another in January 2012:

- Claim '1A' is for his abduction, unlawful extradition (rendition), unlawful arrest, assault and unlawful detention in November 2010 for which he claims a total of R10 400 000.
- Claim '2A' is for his unlawful arrest, unlawful detention, unlawful extradition or rendition and assault in January 2012 for which he claims a total of R6 500 000.
- Claim 'D' is for malicious proceedings against him in November 2010 for which he claims R6 500 000.

[3] The second plaintiff, Mr J R[...] (R[...]), claims R2 500 000 for his unlawful arrest and detention and assault by the second defendants in January 2012. It is claim 'B' in the particulars of claim.

[4] The third plaintiff, Mr T M[...] (M[...]) claims R3 900 000 for his unlawful arrest and detention and assault by the second defendants in January 2012. It is claim 'C'.

[5] The defendants oppose the claims. After filing a plea the defendants amended it in terms of Rule 28 of the Uniform Rules of Court. Thereafter, the plaintiffs amended their particulars of claim after the defendants raised an exception to them.

[6] The trial is in respect of the issue of liability only. The parties had agreed to separate the issues of liability and quantum in terms of Rule 33(4). I deemed it appropriate to do so and ruled accordingly.

[7] The trial commenced on 6 November 2017. On 16 November 2017 it was postponed. The defendants brought an interlocutory application to amend the plea as they had omitted to plead to Claim D of the plaintiffs' particulars of claim. I granted the application. Subsequently, the defendants applied for a further amendment to the plea, which I refused.

[8] The trial continued from 29 July 2019 up to 8 August 2019 then resumed in September 2019. The defendants again brought an interlocutory application to amend the plea – this time to amend several admissions, which, they said, they had made in error. I granted the amendment. The trial continued from 3 November 2019 to 10 November 2019.

[9] I will refer to the plaintiffs by their surnames, i.e., first plaintiff as M[...], second plaintiff as R[...] and the third plaintiff as M[...] for the sake of convenience.

Factual background

The first plaintiff

Ad claim 1A: Abduction, unlawful extradition (rendition), unlawful arrest and detention and assault

[10] M[...] alleges that on 25th November 2010, whilst at home in N[...], which is situated at M[...], at about 23:00 he was abducted by a police officer known to him as Colonel Anele Ntsikelelo (Tsikelele) of the Beit Bridge Border Post South African Police Services (SAPS) and the latter was accompanied by other members of the second defendant. (It is common cause, or not in dispute that the correct spelling of 'Ntsikelelo' is Tsikelele.)

[11] M[...] alleges further that he was assaulted by the police officers in his home. After he was assaulted, he was put inside a Mercedes Benz Vito motor vehicle and driven to the Beit Bridge Border Post on the Zimbabwean side. He says he was unlawfully detained for a period of five days at the Zimbabwean Beit Bridge Border Post and was assaulted by the Zimbabwean police officers daily during the detention.

[12] On 2nd December 2010 he appeared at the Zimbabwe Beit Bridge Border Post Magistrates' Court on a charge of robbery and was denied bail. He was remanded to the Beit Bridge Border Post Remand Prison. He alleges that he was unlawfully detained in the Remand Prison from 2 December 2010 up until 9 March 2011. Prior to his release, on 8 March 2011 the state of Zimbabwe withdrew the charges levelled against him and he was released from detention. Hence the claim for damages.

Ad claim 1B: Unlawful extradition (rendition), unlawful arrest and detention and assault

[13] For this claim, M[...] alleges that on 3rd January 2012 at 01:00 am he was at his home asleep. He was woken by his mother's voice and he was there and then unlawfully arrested by Colonel Tsikelele who was in the company of other members of the SAPS and Zimbabwean police. M[...] testified further that he was assaulted by the police at his home, his head was covered with his trouser and was put at the back of a van. He was only in his underwear. The police were using a baton and a 'knopkierie' (a cane) to assault him. He was then driven to the Beit Bridge Border Post charge office on the South African side. He says he was further assaulted by the police there.

[14] He was thereafter driven to Zimbabwean Beit Bridge Border Post charge office where he was further severely assaulted by the police. He testified that a bag was used to cover his head. He was placed in the middle of two iron tables and a piece of iron rod was placed under his knees. He was hanging with his head down. He was assaulted with a cane under his feet and on the top of his feet until he fainted. The assault continued after he regained consciousness.

He was then driven back to South Africa by the police officers. They then took him to a farm known as J[...]’s Farm where the assault continued. A police officer assaulted him on his cuffed hands to tighten the cuffs by using a 'knopkierie'. After the assault at J[...]’s Farm he was taken in a Ford Focus

motor vehicle by the police officers and dumped next to a drain some distance from his home.

[15] In both claims '1A' and '1B', the first plaintiff alleges that the members of the SAPS acted unlawfully and that these unlawful acts are contrary to the provisions of the South African Constitution¹ ("the Constitution"), the Extradition Act² and the Criminal Procedure Act³ ("CPA").

Ad claim D: Malicious proceedings

[16] This claim is linked to the events that took place on 25 November 2010 (claim '1A'). M[...] alleges that the members of SAPS wrongfully and maliciously set the law in motion by arresting or abducting him. He says they illegally removed him from his home in South Africa and extradited him to Zimbabwe without proper due legal processes. In the particulars of claim, he pleaded that he was detained for a period of six days at the Zimbabwean Beit Bridge police holding cells and thereafter was detained at the Beit Bridge Border Post Remand Prison from 2 December 2010 up until 9 March 2011. M[...] alleges that he has spent 105 days in total in Zimbabwean detention facilities.

Ad claim 'B': Second plaintiff: Unlawful arrest and detention and assault

[17] The second plaintiff, Mr. R[...] alleges that on 3 January 2012 he was near his home at a place called M[...] in L[...]. He was telephoned by

¹ Constitution of the Republic of South Africa, Act 108 of 1996.

² Act 67 of 1962.

³ Act 51 of 1977.

members of the SAPS who instructed him to meet them at the garage near his home. He says he was arrested and handcuffed, was severely kicked, slapped, 'sjamboked' (whipped) and assaulted with the butt of a rifle and knopkierie by Tsikelele and other police officers before and during the arrest.

[18] He says he was put inside a van and driven to a farm known as J[...]’s Farm. While he was still handcuffed the police officers lifted him off the ground then dropped him. His pants were unzipped and his private parts were pepper-sprayed. He was thereafter undressed by police officers and water was poured onto his genitals. He alleges that the next day he was pulled over whilst driving and he was there and then assaulted by members of the SAPS. He was then told by the police officers that he must drop the charges he laid against the members of SAPS, an apparent reference to the assault the previous day.

[19] R[...] alleges that his arrest, detention and assault were unlawful and contrary to certain provisions contained in the Constitution and the CPA.

Ad claim ‘C’: Third plaintiff: Unlawful arrest and detention and assault

[20] Mr M[...] alleges that on 3 January 2012 at about 17:00 he was at a place called M[...], L[...]. He was at his house when the police surrounded him and a police officer known to him as Colonel Tsikelele began to assault him with clenched fists. He was also assaulted with bare fists by a female police officer. He was thereafter put in a police motor vehicle and driven to a place called M[...] where a man known to him as J[...] R[...] was arrested.

[21] M[...] alleges further that he was assaulted under his feet, his hands were handcuffed behind his back, he was lifted up in the air and dropped on his face and his genitals were pepper-sprayed. He claims that the arrest, detention and assault by members of the SAPS was unlawful and contravened the prescripts contained in the Constitution and the CPA.

Arrest without warrant

[22] All three plaintiffs say they were arrested without warrants and, in the case of M[...], that the time of his arrest there were no warrants of arrest outstanding from both the Zimbabwean and South African Police.

Defendants

[23] In their plea, the defendants dispute the plaintiffs' claims. In fact the plea as amended may be characterised as a bare denial of all the allegations of the plaintiffs.

[24] In their amended plea the defendants admitted the arrests of the plaintiffs. During the course of the trial, the defendants applied to again amend their plea - this time to the effect that they denied the arrests of the plaintiffs.⁴ This application was granted.

[25] The defendants also applied for an amendment of the plea to claim D of the plaintiffs' claim. This was the claim with respect to malicious

⁴ Defendants' application to amend their plea: Bundle L page 1.

prosecution of M[...] in Zimbabwe.⁵ This application too was granted. The amendment to claim D was to the effect that the defendants:

25.1 Denied the unlawful handing over of M[...] to the Zimbabwe Police;

25.2 Pleaded that in the event that it is found that the defendants were liable for the unlawful handing over of M[...] to the Zimbabwe Police, then the defendants were:

25.2.1 not instrumental or involved in the unlawful prosecution;

25.2.2 could not reasonably foresee that the malicious prosecution of M[...] could be instituted and conducted in the courts in Zimbabwe;

25.2.3 there was no causal connection between any unlawful conduct of the defendants, if so found by the court, and any malicious prosecution instituted and conducted in the courts in Zimbabwe; and

25.2.4 if it is found that the defendants are liable for the rendition of M[...], then the defendants are in law not liable for any malicious prosecution of M[...] in Zimbabwe.

[26] The defendants initially bore the burden of providing justification for arrest. When they brought, and were granted the application to withdraw the admission of an arrest in their plea an evidentiary burden lay on the plaintiffs to prove their arrests. The granting of the application resulted in the reversal of the onus of proof to the plaintiffs.

⁵ Notice of amendment of defendants' plea: Bundle L page 9.

[27] All the plaintiffs led evidence in respect of their respective claims. The first plaintiff also led the evidence of his mother, Mrs M[...], in support of his claims. The defendants led a number of witnesses, who were made up of the second defendants. Counsel for the plaintiffs submitted that their evidence was a collusion to mislead the court about the arrests and claims of the plaintiffs and that they were simply not candid with the court in their testimony. I will revert to this aspect later on in this judgment.

The legal position

[28] It is necessary to first deal with the legal principles applicable to each of the claims as would be applied to the facts of this matter.

Unlawful arrest and detention

[29] The plaintiffs' claim is one based in delict. A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote. When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* to claim compensation for the non-patrimonial harm suffered.

[30] Any arrest without a warrant which is not specifically authorised by law is *prima facie* unlawful. Our courts have therefore deemed it fair and just to

require the arrestor to bear the onus of proving that his or her arrest was justified in law. In *Minister of Justice v Hofmeyr*⁶ (per Hoexter JA) it was held:

‘The plain and fundamental rule is that every individual’s person is inviolable. In actions for damages for wrongful arrest or imprisonment our courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds of justification of the infraction.’

[31] The requirements for a lawful arrest without a warrant are set out in section 40(1)(a) and (b) of the CPA:

- ‘(1) A peace officer may without warrant arrest any person –
 - (a) who commits or attempts any offence in his presence;
 - (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;’

[32] In *Duncan v Minister of Law and Order*⁷ Van Heerden JA explained the jurisdictional facts that must be established for a successful defence under section 40(1)(b) as being that:

- 32.1 The arrestor must be a peace officer;
- 32.2 The arrestor must entertain a suspicion;
- 32.3 The suspicion must be that the arrestee committed an offence referred to in Schedule 1, other than an escape from lawful custody; and
- 32.4 The suspicion must rest on reasonable grounds.

⁶ *Minister of Justice v Hofmeyr* (952/2016) [2019] ZAECHMC 9 (26 February 2019).

⁷ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

[33] Schedule 1 to the CPA refers to a number of offences in respect of which an arrest could be made without a warrant, one of which is robbery. Before the arrestor can arrest the arrestee, he or she must have reasonable grounds for suspecting that the arrestee has committed an offence in Schedule 1. In *Mabona and Another v Minister of Law and Order and Others*⁸ the court held that the information upon which the reasonable suspicion is based that a Schedule 1 offence has been committed must be at the arrestor's disposal at the time of arrest. The arrestor will critically analyse and assess the quality of that information and will not accept it without checking it where it can be checked.

[34] The test as to whether the arresting officer's suspicion is reasonable is to be assessed objectively. This principle was explored in *Duncan* where it was held that the suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion. Once the required suspicion exists, an arresting officer is vested with a discretion to arrest, which he must exercise rationally.

[35] Section 50 of the CPA comes into play after an arrest is made. It reads:

‘Procedure after arrest

- (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an

⁸ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 G-H.

arrest by warrant, to any other place which is expressly mentioned in the warrant.'

[36] In *Woji v Minister of Police*⁹ Swain JA said:

'The Constitutional Court in Zealand did not require the decisions of the respective magistrates to be set aside, before the lawfulness of the appellant's detention could be determined. Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of s 12(1)(a) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the individual's detention unlawful for the purposes of a delictual claim for damages.'

[37] The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty.¹⁰

Assault

[38] An assault is a violation of a person's bodily integrity. The cause of action is the *action iniuriarum*. It is trite law that every infringement of the bodily integrity of another is *prima facie* unlawful. In an assault claim, the onus to establish the assault, and damages related thereto, is on the plaintiff. An allegation of assault implies wrongfulness.

⁹ *Woji v Minister of Police* 2015 (1) SACR 409 (SCA).

¹⁰ *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA) (2004) (2) BCLR 133; [2003] 4 All (SA) 565 paras 34-38 and 43.

[39] Section 49 of the CPA, regulates a sensitive subject, namely, the use of force, which police and private persons may employ in order to arrest suspects who offer resistance or flee. The concern of our courts is about the overzealous use of force, and especially firearms. This concern is borne out by the fact that until recently it was lawful to kill a person suspected of a relatively minor offence who offered resistance to arrest or fled, under certain circumstances.

[40] Section 49 of the CPA, reads as follows:

Use of force in effecting arrest

- ‘(1) For the purposes of this section –
- (a) ‘arrestor’ means any person authorised under this Act to arrest or to assist in arresting a suspect;
 - (b) ‘suspect’ means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
 - (c) ‘deadly force’ means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

- (a) The suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

[41] Because of the danger of misuse of the statutory authorisation to employ force when effecting arrest, the courts will examine carefully whether the requirements were complied with and for this purpose the provisions of section 49 will be strictly interpreted by the courts.

[42] The requirements of section 49 will become relevant in circumstances where a police official allegedly used more force than was necessary to overcome resistance or to restrain a person who had tried to escape. The police official will have to prove on a balance of probabilities that he complied with the requirements before his conduct may be statutorily justified.

[43] In *Sebogodi v Minister of Police*, the court in dealing with issues of police assault stated as follows:

'I fully agree with the submissions by the plaintiff's Counsel that although the arrest and the use of force are two concepts, they are so interwoven in the circumstances of this matter that it will justify the proposition that where the balance of probability proves that the arrest was unlawful, the use of force will automatically also be unlawful in that the grounds for the use of such force (to arrest) are non-existent. The defendant's use of force will thus automatically constitute assault on

the person of the plaintiff in the event of defendant's failure to prove the lawfulness of such assault. Physical interference, which affects a person's bodily integrity constitutes assault.'

[44] It has been held that if excessive force is used in the performance of an otherwise lawful act, such as the lawful arrest of the plaintiff, and the plaintiff is injured, the plaintiff would be entitled to damages for the assault.¹¹

[45] A defendant may be vicariously liable for an assault committed by another. A typical example is the liability of the State for an assault committed by a policeman in the course and scope of his employment. In such a case, the relevant Minister is the nominal defendant representing the State and the policeman involved is usually cited as the second defendant.

Rendition or unlawful handing over

[46] Extradition is one of the modalities of co-operation in criminal matters between states. As such, it is a function of international relations between sovereign states. It is, however, also a function of the criminal justice system. Extradition is thus a bilateral act of mutual legal assistance between a requesting and a requested state with the aim of securing a suspect's presence at trial in the requesting state.

[47] In *President of the Republic of South Africa v Quaglini*¹², the Constitutional Court pronounced on the nature of extradition, recognising that it involved more than international relations or reciprocity:

¹¹ *Manamela v Minister of Justice* 1960 (2) SA 395 (A).

‘It involves three elements: acts of sovereignty on the part of two States; a request by one State to another State for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting State. Extradition law thus straddles the divide between State sovereignty and comity between States and functions at the intersection of domestic law and international law.’

[48] The extradition process (the request and surrender) is governed by international and domestic law. A general duty on the part of states to surrender criminals does not exist in customary international law.

[49] After the end of apartheid, South Africa and the other states in the Southern African region have enjoyed generally good relations. This, together with more pragmatic considerations, makes possible the fact that a more expeditious procedure is followed with respect to extradition requests between South Africa and its neighbours in the region. The SADC Protocol on Extradition, 2002¹³ (“the Protocol”), encourages greater co-operation between states in the region.

[50] Thus, the Extradition Act provides that the requesting state does not have to submit an extradition request via political or diplomatic channels. Rather, a warrant for the arrest of the relevant individual (fugitive, suspect or accused person) can be submitted directly to the Director of Public

¹² *President of the Republic of South Africa v Quaglini* 2009 2 SA 466 (CC) at paragraph 1.

¹³ The Protocol was signed in 2002 and entered into force on 1 September 2006. In *Minister of Home Affairs and Another v Tsebe and Others* 2012 (5) SA 467 (CC), the Constitutional Court took note of the fact that South Africa is a party to the SADC Extradition Protocol.

Prosecutions having jurisdiction. The request must be accompanied by a statement with details about the crime and *prima facie* evidence of the individual's guilt. A magistrate then has the statutory authority to endorse the warrant for execution in South Africa. The individual has the right to appeal to the High Court before the surrender to the associated state.

[51] According to Article 2 of the Protocol titled "*Obligation to extradite*", when a request for extradition is made the following applies:

'Each State Party agrees to extradite to the other, in accordance with the provisions of this Protocol and their respective domestic law, any person within its jurisdiction who is wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence.'

[52] In contrast, rendition to justice is a technique by which a suspected person is forcibly abducted from another state, with the ultimate aim of criminal adjudication in the abducting state. The forcible abduction may be executed unilaterally by agents of the foreign state or with the cooperation of agents of the state from where the person is abducted. However, the practice is condemned as it deprives a person of the rights he would have enjoyed during the extradition process.

[53] In *S v Ebrahim*¹⁴ the then South African Appellate Division held that a South African court has no competence to try a person kidnapped from another state by agents of South Africa. The court relied on the Roman-Dutch

¹⁴ *S v Ebrahim* 1991 (2) SA 553 (A).

law in stating that the rule prohibiting the exercise of jurisdiction over a kidnapped person was premised on considerations of good inter-state relations, respect for territorial sovereignty, and the promotion of human rights.

[54] The Zimbabwean courts hold a similar view to that of the South African courts with regard to the illegal abduction of suspects from foreign countries to stand trial in Zimbabwe. The Zimbabwe Supreme Court gave its approval to *Ebrahim* in *S v Beahan*¹⁵ where Gubbay CJ held that:

‘There is an inherent objection to [exercising jurisdiction over an abductee] both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become lawbreakers in order to secure the conviction of a private individual.’

[55] In the matter of *Minister of Law and Order v Thandani* the court dealt with a situation where members of the security branch of the South African police service unlawfully arrested the respondent where after they handed him over to the Ciskei police, who detained the respondent for a period of 59 days. Albeit that he learned Judge expressed an opinion as to the unlawfulness of the respondent’s detention subsequent to him being handed over to the Ciskei police, such lawfulness or unlawfulness was regarded as irrelevant. The

¹⁵ 1989 (2) ZLR 20 (SC).

appellant was found liable for the entire period of detention, including the period subsequent to the respondent being handed over to the Ciskei police.

The evidence

[56] I turn then, to deal with the evidence and the facts emanating therefrom.

Unlawful arrest and detention

The 2010 incident

[57] In examination-in-chief, M[...] testified at length regarding the two incidents (2010 and 2012), relating to his unlawful arrest, assault, rendition and malicious prosecution. He testified that from February to November 2010, he was stationed at tavern in M[...] called "*E[...]’s Tavern*" where he was employed as a security guard. Whilst stationed there, he never went to the taxi rank or Beit-Bridge where Tsikelele was stationed. On 26 November 2010, a contingent of about ten police officers led by Tsikelele, pounced on him whilst he was on duty at E[...]’s Tavern. M[...] testified that just prior to his arrest while sitting at his place of employment, a gentleman by the name of T[...] came running to him saying that he (M[...]) was being sought by the police. Whilst talking to Thapelo, the police, who included Tsikelele, Mandla, Makamu, Welcome and Segoa arrived and pulled guns on him and they put him into the back of a Mercedes Benz Vito ("the Vito"). He knew these police officers because they lived in the township where he lived. The Vito had been parked outside the tavern at the time. They then drove off to the Zimbabwean Police Station at Beit Bridge border post. Before he alighted, the police put a

sack over his head and assaulted him and took him to an office where he found two brothers (I[...] and N[...] M[...]), whom he called the M[...] brothers. They were assaulted and questioned about firearms. The assault lasted until 2 – 3 am and they were thereafter put into police cells at the Zimbabwe Police Station. M[...] testified that he told both the South African and Zimbabwean police that he did not have any firearms. He said the Sunday night, Tsikelele came to the police station and took him and the M[...]s out of the cells and assaulted them. Tsikelele told them that if they did not release or point out the firearms, he would leave them in Zimbabwe. He testified that they told Tsikelele and the Zimbabwean Police that they did not have any firearms.

[58] M[...] further testified that they were told they were suspected of robbing a certain place, which he did not know of, of money and that during the commission of the robbery, they assaulted a security guard. They were then taken back to the police cells where they remained until the Wednesday to participate in an identity parade. However, he was not identified in the parade. The Criminal Investigation Division officers told him that even though he was not identified he would still go to jail. He was thereafter charged with armed robbery¹⁶ by one Detective Sergeant Gutsa of the Zimbabwean Police.

[59] M[...] testified that he was remanded from 2 December 2010 for a period of over three months, until the court discharged him. He testified that on his discharge his identity book was requested. Because he did not have it he was taken back to the prison. He was only released after a further two

¹⁶ Bundle A (Plaintiff's bundle) page 45.

days when his mother brought his identity book to the prison. He was taken back to South Africa.

[60] M[...] further testified that the other detainees were allowed to make phone calls to their relatives and loved ones but he, as a South African, was refused this privilege. Only the Zimbabwean nationals were given this privilege. However, Mr. M[...] also testified that he had telephoned his mother and had told her that he was calling from the Zimbabwean police station.

[61] During cross examination the defendant's counsel, Mr. Maritz SC, put the defendants' version to M[...] that they will deny that the police assaulted him or arrested him. However, the defendants did not call the second defendants to testify and bolster the defendants' version with regard to both claims A and D respectively. The only witnesses for the defendants who testified about the 2010 incident were Tsikelele and Colonel Radzilana who denied that M[...] was arrested and assaulted. They testified that they came to know about this incident only because they were called by an Advocate Bopape who alleged that he had been instructed by Mrs. M[...] to enquire about M[...]’s whereabouts as he had been arrested by Tsikelele the previous night and had taken him away in the police Vito.

[62] This version does not appear to be probable as Mrs. M[...] had testified in chief that in 2010, she got to know about M[...]’s whereabouts when M[...] called her from the Zimbabwean Police Station. There was no testimony of any involvement of any legal practitioner on the instructions of Mrs. M[...].

This testimony left M[...]’s testimony largely undisputed with regard to both claim A and D.

[63] It is telling that the defendants did not put a version to M[...] in cross examination relating to his testimony about the 2010 and 2012 incidents, this despite their amendments being allowed by the court. No evidence was led in the defendants’ case (which was put by them to M[...] in cross examination) to contradict his testimony as well as that of his mother. Despite certain versions having been put to the plaintiffs about the incidents on the farm the witnesses called by the defendants merely denied having arrested and or assaulted the plaintiffs and denied that the second plaintiff was among them.

[64] The failure by the defendants to lead evidence challenging the plaintiffs’ testimony, is of significance with regard to the purpose of cross-examination and the resultant failure to challenge evidence, as was summed up by the Constitutional Court in *President of the RSA v South African Rugby Football Union*¹⁷ as follows:

‘The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential. When it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the

¹⁷ 2000 (1) SA 1 CC at para [61].

unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[65] M[...] testified that Tsikelele arrested him at the tavern on Wednesday 26 November 2010 and took him to the Zimbabwean Police Station at the Beit Bridge Border Post. The police deny this arrest.

[66] Defence counsel relies on the case of *Gumede v Minister of Safety and Security*¹⁸ for the submission that the police did not arrest the plaintiffs. In my view this reliance is misplaced as the facts in *Gumede* can be distinguished from the present case.

[67] The facts, briefly, are that Mr Gumede sued the defendant for his unlawful arrest, detention and assault by members of the SAPS during September 2006. The plaintiff was employed by SBV Services (Pty) Ltd (SBV) as a protection officer in the cash-in-transit department. On 23 September he was the subject of an armed robbery whilst he was seated in the driver's seat of an SBV motor vehicle which he parked at a shopping centre for the purpose of on-loading or off-loading cash. The vehicle was hijacked with Mr Gumede inside it and it was subsequently abandoned nearby with its doors left wide open. The police arrived and Mr Gumede was interviewed then and there and a statement was taken from him. At the time, he was not a suspect. His employer took him away. His employer subsequently questioned him and his fellow employees and entertained suspicions about their involvement in the

¹⁸ Case Number: 5571/2007 [2019] ZAKZPHC 47; [2020] 1 All SA 188 (KZD) (19 July 2019).

robbery. These were suspicions of his employer and not the police. Mr Gumede and his co-workers failed a polygraph test administered at the request of the employer. It was only then that they were taken by the employer to the police to be further interviewed. This further assistance of the police was sought by Mr Gumede's employer to *inter alia* clarify how the robbery occurred. Mr Gumede willingly accompanied his employer to the police station. He was not arrested or detained nor were any charges put to him. 'From the evidence presented, he could have asked to leave at any stage.'¹⁹ The court held:²⁰ 'On the facts of this matter the plaintiff voluntarily provided an initial statement at the scene, and, at that stage it was a witness statement.' Further:²¹ 'In my view although the witnesses did not specifically say so the plaintiff's employer considered him a suspect and based on this, so did the police. He was interviewed at the police station and not arrested as there was no evidence to support that he was arrested. He was not issued with a SAP14 A, and he was not held in the police cells. The interaction between the plaintiff and the defendant's officers was limited to purposes of questioning and when it became clear that there was no evidence against him in order for him to be charged for the commission of the offence, he was released. As such, on the totality of the evidence, the plaintiff was not arrested nor detained.'

[68] The Defendants submit in their main heads of argument that, in the *Gumede* case, the Court stated that "*should the police take a person into*

¹⁹ *Gumede at para [107]*.

²⁰ *Ibid at para [110]*.

²¹ *Ibid at para [111]*.

custody and treat them as a suspect for purposes of questioning, such would not be an arrest.”. This quotation has three elements, which are that the police take a person into custody; the person is treated as a suspect; and the taking into custody is for purposes of questioning.

[69] The present case is distinguishable from the *Gumede* case in that Gumede’s presence at the police station was at the instance of the employer; he was not “*taken into custody*”; and he was treated as a witness to the crime, not as a suspect.

[70] Whether an arrest is lawful, is closely connected to the facts of each matter.²²

[71] Similarly, whether the police “*assumed control over a person*” with the intention to arrest, is a factual one.²³ In *Khan v S*²⁴, Swain J said the following:

“On the facts of this case, it cannot be said that the police at the relevant time, had assumed control over the movement of the appellant ... with the intention to arrest her.”

[72] In *Minister of Safety and Security v Van Niekerk*²⁵ the Constitutional Court held:

²² *Gumede* (supra) at [86]

²³ *Gumede* (supra) at [89]

²⁴ 2010 JOL 25782 (KZP) at [12]

²⁵ 2008 (1) SACR 56 (CC) at [20]

“I conclude therefore that nuanced guidelines already exist. In the circumstances, it would not be desirable for this Court to attend in an abstract way, divorced from the facts of this case, to articulate a blanket, all-purpose test for constitutionally acceptable arrests. Older guidelines themselves underline, the lawfulness of an arrest will be closely connected to the facts of the situation.”

[73] The facts must be examined in line with the principle that:

*“A person is under arrest as soon as the police assume control over his movements.”*²⁶

[74] Once an arrestor has formed a view or a suspicion that the person has committed a crime, and the police assume control over the person’s movements, then an arrest has taken place. It is irrelevant whether, in the process, the arrestor starts with an interrogation, or subjects him or her to an identification parade, or blood tests *“in order to confirm, strengthen or dispel the suspicion”*.²⁷

[75] In this case before me the police had formed the view or suspicion that the plaintiffs had committed the alleged crimes and the police had the intention to bring them to trial. They assumed control over their movements for varying periods of time each. That the interrogations dispelled their suspicions, is irrelevant to the fact that they did assume control over their movement. They had not been invited to report to the police station for purposes of answering some questions, nor were they taken to the police

²⁶ *Rex v Mazema* 1948 (2) SA 152 (E)

²⁷ *Minister of Safety and Security v Sekhoto and Another* [2011] 2 All SA 157 (SCA) at [31]

station for this purpose. The amount of resources used, including the deployment of a very senior officer, Tsikelelo, and his task force indicate the intention to arrest, not to seek the cooperation of a potential witness.

[76] In this matter before me there was no intention to bring the plaintiffs before court to be tried and convicted, but to deter them from involving themselves in unlawful conduct.

[77] In *Tsose v Minister of Justice and Others*²⁸, Schreiner JA stated the following:

“If the object of the arrest, though professedly to bring the arrested person before court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful.”

[78] Therefore, once the police assumed control over the plaintiffs’ movements, arrests had taken place. Whether the intention was to bring them before court or to frighten or harass them is immaterial.

[79] In my view, the overwhelming probabilities are that Mr M[...] was first arrested by the SAPS members and handed over to their counterparts in Zimbabwe and that all the plaintiffs were arrested separately and were all transported to J[...]’s Farm where the police deprived them of freedom by assuming control over their movements. Each of them was handcuffed at the time of arrest and during the interrogation on the farm. They were not

²⁸ 1951 (3) SA 10 (A) at 17C-D

requested to accompany the police to the police station in order to answer some questions and that they agreed.

[80] The defendants contend that Mrs. M[...] lied under oath about when Mr M[...] was arrested and fabricated a story with her son. The submission is without merit as neither Mrs M[...] nor Mr M[...] were cross examined on this fabrication allegation. The purpose of cross examination, which is to put propositions to witnesses so that they may respond thereto, was not utilised by the defendants.

[81] Ntsikelelo's Task Team received information that there were suspects who had escaped from police custody in Zimbabwe and crossed the river into South Africa. The inference to be drawn is that the task Team was out on a mission to arrest. Defendants' witnesses testified that the suspects had committed robberies and had weapons. They were regarded as suspects. The mission was therefore to arrest them, interrogate them and subject them to identification parades, if necessary. The facts point out to an assumption of control over the plaintiffs' movements from the different places of arrest. They were all immediately handcuffed and manhandled.

[82] Ntsikelelo testified that Welsh Nyakunga identified the first and third plaintiffs as the escapees. He therefore had reason to arrest the suspects and interrogate them. This is what happened at J[...]s Farm. The defendants submit that the plaintiffs had already been assaulted by the Zimbabwean police when they found them on J[...]s Farm. However, Nyakunga was not

called to testify. I draw an adverse inference against the defendants for not calling Nyakunga, Edmore or any Zimbabwean police officer to corroborate this allegation of an escape from Zimbabwe.

[83] No charges were proffered against him but he was interrogated and assaulted with reference to firearms. This arrest could not have been lawful as M[...] was arrested and taken straight to Zimbabwe for alleged crimes committed in Zimbabwe. Tsikelele had no jurisdiction to investigate crimes committed in Zimbabwe and arrest suspects in South Africa without a formal request from Zimbabwe to apprehend the suspects.

[84] The power to effect an arrest without warrant must be exercised in good faith, rationally and not arbitrarily.²⁹ The decision to arrest M[...] was objectively irrational and arbitrary. No reasonable police officer could reasonably have determined, in the exercise of his discretion to arrest or not to arrest, that there were reasonable grounds that warranted the arrest of M[...]. This is all the more irrational when regard is had to the uncontested evidence of M[...] that there was no warrant of arrest presented to him; there was no warrant of arrest from Zimbabwe; the Zimbabwean Police were still investigating the crime for which he was later charged; and there were no reasonable and lawful grounds to charge him with an offence for which he was arrested when he was not even identified at the identity parade. If Tsikelele had reasonable cause to arrest M[...], he would have done so and

²⁹ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at paragraph 38.

charged him upon his arrest and detained him at a South African Police Station.

[85] Section 50 of the CPA, requires that once an arrest has been effected, the police must detain the suspect at a South African Police Station. This was not done, but instead M[...] was detained at a Zimbabwean Police Station. Section 50 further requires that the arrested person shall be allowed to apply for bail. This too was not done. Section 50 further requires that should the arrestee not be released by reason of him having no charges brought against him or had bail refused, the arrestee shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after his arrest. This too was not done.

[86] In terms of the Zimbabwe Court records,³⁰ M[...] made his first appearance on 2nd December 2010 under a charge of robbery which is Section 126 of the Criminal Code Chapter 9:23 of Zimbabwe. The 2nd December 2010, was exactly six days after the arrest M[...] testified about. The court record further states that charges against M[...] were withdrawn on 8 March 2011, a date which is consistent with the period that M[...] said he had been detained. This is further corroborated by M[...]’s mother (“Mrs. M[...]”) who testified that she got a call towards the end of the year in 2010 from her son who informed her that he had been detained at a charge office in Zimbabwe.

³⁰ Page 45 of Bundle A (Plaintiffs’ bundle).

[87] She enquired from M[...] as to how he had come to be in Zimbabwe as he had no passport. She testified that M[...] told her that he had been brought to Zimbabwe in the boot of a police vehicle. When she had finished speaking to M [...], she enquired from the Zimbabwean police how her son came to be in Zimbabwe and they told her that he had been brought by the South African Police.

[88] When M[...] testified about the 2012 incident, he stated that after Tsikelele had violently arrested him from his home and taken him to the Beit-Bridge Police Station, the Zimbabwean CID Police came to Tsikelele's office where they were being detained. He testified that the Zimbabwe Police took pictures of him using a camera. They then said "*this boy he was once brought to Zimbabwe by Tsikelele and he was not found guilty and they said they cannot go with him to Zimbabwe, they do not see any case against me*". This lends credence to M[...]’s version that he was indeed arrested by Tsikelele and brought to the Zimbabwean Police in 2010.

[89] The evidence of M[...] and Mrs. M[...] could not be shaken in cross-examination. The arrest of M[...] could not have been rational or lawful in the circumstances of the evidence. The defendants' failed to give a version on this matter and merely made a denial of ever arresting M[...].

[90] The probabilities favour the view that the arrest of M[...] in 2010 was unlawful and without any legal justification and in violation of the Bill of Rights

enshrined in the Constitution. I accordingly find that Mr M[...] was in fact arrested and detained by the second defendants in 2010.

Rendition and malicious prosecution

[91] I have found that the arrest and detention of M[...] in South Africa and Zimbabwe were unlawful. Compensation for damages suffered in South Africa is not an issue. The issue in this case is the granting of compensation to a person who suffered damages in a foreign territory as a result of acts performed by his own government. The unlawful conduct by the South African police will extend to the unlawful conduct of the servants of the state to which the South African police unlawfully deliver an arrestee. See *Ebrahim*³¹ and *Thandani*³² case.

[92] The defendants, in their amended plea to claim D plead that there are two distinct causes of action – one involving the alleged arrest and detention by the defendants and the other being the detention by the Zimbabwean police coupled with the malicious prosecution of M[...] in Zimbabwe. Hence, they argue, they are not liable for any unlawful acts committed in Zimbabwe as this was not foreseeable by the defendants. Furthermore, the defendants contend, if M[...] seeks to hold them liable it was necessary for him to show that his detention in Zimbabwe was unlawful and that it was effected by someone acting on behalf of, or as an agent for, the defendants.

³¹ Supra.

³² Supra.

[93] However, it is apparent that M[...]’s claim is not based on any wrongful acts committed by the Zimbabwean police. It is based on two wrongful acts committed by the second defendants in that they unlawfully arrested and detained him in South Africa and thereafter handed him over to the Zimbabwean police.

[94] Tsikelele denied the arrest. However as I said, the evidence establishes that M[...] was unlawfully arrested by him and the officers who accompanied him. This was contrary to the provisions of the Protocol and the Extradition Act 67 of 1962. Tsikelele, a senior police officer, must have known that it was unlawful to hand over M[...] to the Zimbabwean police without following the proper procedure.

[95] The evidence is that there were no criminal charges pending against him at the time of his arrest and eventual handing over to the Zimbabwean police.

[96] The loss of liberty and dignity, assault, detention without trial and being treated in an inhumane and degrading way, was occasioned by the defendants’ wrongful and unlawful acts. But for Tsikelele’s actions, M[...] would have remained in South Africa and would have been out of reach of the Zimbabwean police.

[97] When questioned about what the team did once they had found someone who had committed a crime in Zimbabwe, Tsikelele, startlingly,

testified that this was a secret and he could not testify about it in court. This deliberate failure to reveal what happened to suspects who had been arrested and were wanted by the Zimbabwean police, point to the *mala fides* and malice of Tsikelele in handing over M[...] to the Zimbabwean police.

[98] In my view there is sufficient connection between the unlawful acts of the defendants and the loss of liberty and other constitutional rights for which damages are claimed by M[...].

[99] The defence raised in the plea to claim D that the detention in Zimbabwe was an unforeseeable event and therefore contributed a *novus actus interveniens* cannot, on the evidence, be sustained. It seems to me that a supervening act which is foreseen as a likely consequence of the unlawful act does not break the chain of causation and may be taken into account in assessing damages.

[100] In *De Klerk v Minister of Police*³³ a majority judgment penned by Theron J (Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurring), the Constitutional Court held that on the facts of the case, the Magistrate's unlawful remand decision did not render the harm that arose from De Klerk's subsequent unlawful detention too remote from the unlawful arrest. The majority reasoned that the liability of the police for the detention after the court appearance should not be determined solely on the basis of whether the

³³ *De Klerk v Minister of Police* (329/17) [2018] ZASCA 45; [2018] 2 All SA 597 (SCA); 2018 (2) SACR 28 (SCA) (28 March 2018).

further detention was lawful, although that is a relevant consideration. Instead, liability should be determined in accordance with the flexible principles of legal causation. Including constitutionally infused considerations of public policy.

[101] In my view, a case has been made out in relation to the claims of unlawful rendition and malicious prosecution.

Assault

[102] The onus to establish assault, and damages related thereto, rests on the claimant. M[...] testified that when he was arrested in 2010 he was forcefully handcuffed and put in the back of the Vito. A sackcloth was put over his head and he was assaulted. He did not give much detail. However, Mrs. M[...] testified that M[...] had told her that he had been injured under the soles of his feet and that he had been beaten by the police. The defendants merely denied the assaults.

[103] In my view, M[...] has made out a case for the assault that occurred in 2010 at the hands of the second defendants and the Zimbabwean Police.

The 2012 incident – all three plaintiffs

The evidence

Mr M[...]

[104] M[...] was the first witness for the plaintiffs. His testimony covered the period 2 – 3 January 2012, being the date of his unlawful arrest and detention, and rendition to Zimbabwe. It also covered the assaults on him at J[...]’s Farm

in South Africa, to several days later towards the end of January 2012, when he was called to a police identity parade to identify his assailants or arrestors.

[105] M[...] testified that on the 2 January 2012, he had been to a bar in M[...], called the "Cocktail Bar". He then left for home and during the night around midnight to 01:00 hours. The police came to his home, broke the door, assaulted and handcuffed on him and placed him in a police van.³⁴

[106] He testified that Tsikelele, in the company of the police officers he identified in his 2010 arrest, as well as others whom he did not know, who included Zimbabwean police officers, arrested him. He could distinguish the Zimbabwean police by the fact that they wore the Zimbabwean Police uniform.³⁵

[107] When he was arrested at home, he was with his mother, his younger brother, his toddler son, as well as friend by the name of M[...]. There were also tenants at his house who lived in the backrooms within the yard. He heard the external door into the sitting room being broken down and some persons coming in. At this point in time he was in the passage and that is where they met him. He testified that he met Tsikelele who pushed his mother against the fridge, then grabbed him and took him to his bedroom, which was searched. The search yielded nothing.

³⁴ Page 179 Transcript Vol. 1 paragraph 1.

³⁵ Page 23 Transcript Vol. 1 paragraph 1.

[108] Tsikelele and Mandla then started assaulting him saying they were looking for a firearm and he should give it to them. Tsikelele was the one leading the charge. He was then taken out of the house and put in the back of a van.

[109] His mother enquired of the police as to why they were doing what they were doing, Tsikelele responded by saying that he was a “*tsotsi*” and said there was a person who was arrested in Zimbabwe in possession of a firearm and that unnamed person had said the firearm belonged to M[...]. His mother asked them not to beat him up but take him and lock him up if he was indeed a “*tsotsi*”. This all happened without a search warrant or a warrant of arrest either from the South African or Zimbabwean Police.

[110] Inside the van, he found another young man by the name of M[...] whom he knew. They were taken to the South African Beit-Bridge Police Station. Once there, he was taken to Tsikelele’s office and on the way there he was being assaulted.

[111] M[...] testified that once inside Tsikelele’s office, the Zimbabwean police officers took photos of him and said, “*this boy he was brought to Zimbabwe by Tsikelele and was not found guilty’ referring to me.*”

[112] He testified that the Zimbabwean police officers had said “*they cannot go with me to Zimbabwe, they did not see any case against me*”³⁶, and left me at the South African Police Station seated there. The Zimbabwean police took Michael along with them to Zimbabwe. M[...] estimated the time to be around 02:00 – 03:00 hours on the morning of 3 January 2012.³⁷

[113] He testified that at about 12 noon, both Tsikelele and Mandla accompanied by other police officers came to the police station and started to assault him for about 15 minutes using a ‘*donkey pie*’ (apparently a baton carried by police officers and security guards) and said they were taking him through to Zimbabwe.³⁸ He was put into the boot of the police Vito with his hands handcuffed behind his back. He was then taken across the border into Zimbabwe by the South African police. On arrival he was made to sit in the sun for about 20 minutes³⁹ and it was a very hot day.⁴⁰ He described the temperature as being “*too hot*”.⁴¹ Tsikelele and the other South African officers all sat in the shade. This happened within the premises of the Zimbabwean Police Station.

[114] M[...] testified⁴² that inside the police offices he found two iron tables placed side by side. He was still handcuffed with his hands behind his back. An iron rod was placed between his knees and he was in a bending position.

³⁶ Page 30 Transcript Vol. 1 paragraph 1.

³⁷ Page 30 Transcript Vol. 1 line 18.

³⁸ Page 31 Transcript Vol. 1 line 23.

³⁹ Page 35 Transcript Vol. 1 line 16.

⁴⁰ Page 33 Transcript Vol. 1 line 18.

⁴¹ Page 36 Transcript Vol. 1 line 3.

⁴² Page 38 Transcript Vol. 1 line 3-24, page 39 line 1-25, page 40 line 1.

He was made to hang in the air between the tables and a bag was put over his head and the police fastened it under his chin. The bag covered his whole head. He was now hanging in mid-air between the tables. His face was facing downwards. His feet were now facing up and he could not move. He was beaten under his feet and at the same time the police were pouring water over his head. They were beating him on the top of his foot with a cane. He was assaulted until he lost consciousness and water was poured on him to regain consciousness. On gaining consciousness, Tsikelele made him to trot in one spot so that his blood could circulate. That is when he discovered he had a broken leg and told the police that he could no longer trot in one spot as he was in excruciating pain.⁴³ The assaults continued despite the broken leg and the loss of consciousness.

[115] He was then told that he was being taken back to M[...], South Africa to go in search of R[...], M[...] and one E M[...].⁴⁴ This was the first time these names were mentioned to him. He was once again placed in the boot of the Vito. They arrived in Musina at around 16:00 hours. E[...] was the first to be fetched and thereafter they fetched the two other plaintiffs and they were then taken to a local farm called J[...]’s Farm. M[...] was found at M[...]’s house and they then went to R[...]’s house. The house belonged to R[...]’s mother. They broke down the door looking for R[...] but did not find him.

⁴³ Page 40 Transcript Vol. 1 line 3-18.

⁴⁴ Page 43 Transcript Vol. 1 line 3.

[116] M[...] further testified that Tsikelele called R[...] and enquired as to his whereabouts. R[...] said he was at a scrap yard called “Copper Pot”. They then moved in the police convoy to Copper Pot.⁴⁵ They found R[...] there with grease on his hands. Mandla told him to wash his hands and then assaulted R[...] with the back of a “long gun” on his head.

[117] The police convoy then drove off with the three plaintiffs and E[...] to J[...]’s Farm which was located about three kilometres away. Once at the farm, they stopped under a big Baobab tree. They let R[...], M[...] and E[...] alight from the vehicle.

[118] M[...] testified that because of his injuries he could not alight from the vehicle on his own. The police dragged him out of the car and placed him on the ground. He lay there as he was unable to sit. Tsikelele told him to “*sit up as this was not his home where he can lie down*”.⁴⁶ He was all this time being beaten with a cane to make him sit up when he was in pain from the assault in Zimbabwe and could not do so. In frustration and anger M[...] testified that he told Tsikelele that rather than sit up, “*he would rather kill him*”.⁴⁷

[119] He could not see properly as to what was happening to the other plaintiffs as he was in pain and lying on the ground but could hear that they were being assaulted. The assaults on him by Tsikelele continued while he was on the ground.

⁴⁵ Page 49 Transcript Vol. 1 line 1-9.

⁴⁶ Page 53 Transcript Vol. 1 line 4.

⁴⁷ Page 53 Transcript Vol. 1 line 11.

[120] He testified that he told the police that he was thirsty. Tsikelele made a phone call to his colleagues that they should bring some water and mageu. (Apparently, mageu is a drinkable sour porridge which is a thirst quencher and a meal all in one.) The reason the mageu was requested was because he was weak and hungry, as he had not eaten the previous night before the unlawful arrest by the defendants. After about thirty minutes, two police officers (Welcome and Sekgowa) brought the water and the mageu which were given to him. In the meantime, M[...] testified, that they were being assaulted with open hands and a cane under their feet. He testified that he had to be assisted to drink the water and the mageu as he was very weak.⁴⁸

[121] The beatings eventually came to an end and he was transported in a police Ford Focus by officers Maumela and Jeffrey from the farm to his home on the instruction of Tsikelele. M[...] testified that the police officers assigned to transport him home, dumped him near a water drainage which was about one hundred metres from his home. It was dark and the time was around 21:00 to 22:00 hours. He was in pain and could not walk. He was screaming for help. A young man, M[...], came to his assistance and carried him to his house where he found his mother watching television. When she saw him she immediately called an ambulance to take him to hospital.⁴⁹ He arrived in hospital with his bloodied clothes and he was examined by a doctor. The blood had been coming through his mouth, nose, hands and through his head

⁴⁸ Page 56 Transcript Vol. 1 line 7 and 17.

⁴⁹ Page 59 Transcript Vol. 1 line 10-20.

as a result of the assaults.⁵⁰ He was discharged and returned home by taxi the same night.

[122] In the following days, he consulted another doctor due to his injuries. His leg was X-rayed and found to have been broken and a Plaster of Paris (“POP”) was put on it. He could not relieve himself and had no appetite. He could neither urinate or pass stools nor eat for fourteen days after the assault.⁵¹

[123] M[...] then showed the court a newspaper clipping which had his photograph. He was in a Plaster of Paris and had marks or scars on his hands and wrists which he testified were from when he was hit with a knopkierie on top of the handcuffs on his hands.⁵²

Mr R[...]

[124] R[...] testified that on 3 January 2012, he was employed as a mechanic at a place called “Copper Pot”. He testified further that he received a telephone call from E[...], who said the police wanted to speak to him. Tsikelele then came on the phone and told him he was looking for him. Tsikelele instructed him to remain where he was and shortly thereafter, the phone rang again. It was a call from E[...]’s number. A police officer told him that they were at Copper Pot and he could come out. He came from the back

⁵⁰ Page 64 Transcript Vol. 1 line 18.

⁵¹ Page 65 Transcript Vol. 1 line 1-16.

⁵² Page 44 Transcript Vol. 1 lines 15 to page 45 line 15.

of the shop and found many police officers there. He was instructed to go and wash his hands and was escorted by two police officers. One of the officers who was carrying a “big gun” assaulted him with the back of the gun on the back of his head and told him to hurry up. He identified this officer as Mandla Msengi. He could not identify the second police officer, but knew him by sight. He was made to sit at the back of a police double cab vehicle with an officer guarding him with a gun pointed at him. He testified that Tsikelele instructed the police officer who was guarding him to keep his weapon ready to fire and remove it from safety mode. He further testified that he saw M[...] in the Police Ford Focus vehicle while at Copper Pot.

Mr M[...]

[125] M[...] testified that he was born in 1970 and worked with a group of professional hunters and after the incidents relating to this matter he never returned to do his work with them due to ill health and injuries he sustained in the assaults by the defendants.

[126] The testified that he recalled the incident where he was assaulted by a group of police officers for no reason. He could not recall the date as he was illiterate. He testified that he was at his brother-in-law’s house, when he heard cars pull up outside the yard. A female police officer named Tshimagadzo, came up to him and slapped him with an open hand across his face. She then called a certain police officer by the name of Tsikelele. He said Tsikelele approached him and also slapped him three times across the face. He was then dragged to a police vehicle, being a Ford Focus sedan. Inside the vehicle was a friend of his who was part of the police force and his name was Jeff. He

testified that the police convoy headed to a place called M[...] to look for R[...]. At M[...] they were told he was not there but at Copper Pot. The convoy then headed for Copper Pot. On arrival at Copper Pot, R[...] was called and he came out with oily hands. He was told to wash his hands and on the way to wash his hands he was assaulted by a police officer at the back of the head with a “big gun”. The officer who hit him held the firearm with both hands. They then headed for J[...]’s Farm which he knew as he had been there before with hunters to hunt.

[127] The testimony of R[...] and M[...] regarding what transpired at the farm is very similar. They both testified that they were told to alight from the vehicles and sit on the ground with their legs stretched out. M[...] was then brought out of the Vito. He was being dragged from the Vito while on his back. M[...] was being assaulted on his back with a sjambok (a cane) and told to sit up. He just lay there on his side. M[...] could not sit up and told the police officers that they “*should rather kill him*”. This evidence is similar to that of M[...] in his examination in chief. Tsikelele then said mageu and water must be brought for M[...]. The mageu and water was brought for M[...] and thereafter Tsikelele gave the instruction that M[...] be taken back to the township where he lived. Two police officers picked him up and put him in the car and left.

[128] R[...] testified that he saw E[...] being led out of the Vito and handcuffed with his hands behind his back. (This evidence was also supported by M[...] who testified that he was in the Vito with E[...].) He testified that Tsikelele told him that he (Tsikelele), had arrested a person in Zimbabwe in possession of a

firearm and that the arrested person said the firearm belonged to R[...]. Tsikelele then told the Zimbabwean police officers (two males and two females) who were present on the farm to take R[...] along with them back to Zimbabwe because the firearm found in Zimbabwe belonged to R[...]. He identified them as being Zimbabwean as they introduced themselves as such and told him they had come to take him to Zimbabwe as his friend had been arrested in Zimbabwe with a firearm.

[129] R[...] said he asked Tsikelele whether he could be arrested in this country for a firearm found on another person in a different country. Tsikelele did not answer. Instead, Mandla rebuked him for asking Tsikelele such “*shit*” and he was slapped across his face close to his left ear, causing permanent damage to his eardrum. They were assaulted under the feet in the same manner that M[...] had testified he had been assaulted by the defendants.

[130] He testified further that whilst on the way to Zimbabwe they arrived at a farm called Toffee Farm and that is when M[...] started vomiting several times. Sekgowa ordered the vehicle to stop. Makamu then came and said they must be taken back. Sekgowa said that they were seriously injured and if they died in their hands, the other police officers who had assaulted them, would deny that they assaulted them. M[...] was then taken back to his shack and he testified that he was placed at the door of his shack. It was dark and he could not see inside the shack but he knew where his bed was and he just climbed on top of it and slept.

[131] R[...], who was now left with E[...] and the police, complained to Sekgowa that his private parts were burning because of the pepper spray which had been sprayed on them by the police. M[...] testified that he was also sprayed on his private parts with a pepper spray. (This is also recorded in the J88 forms.)

[132] R[...] testified that he later went with M[...] and a friend (M[...]) to the police station. They found R[...]’s mother already there. They were handed some J88 forms and were told to go to the hospital. At the hospital, they were given injections and pills and told to come back the next day once the forms had been completed.

[133] The next day they went to the police station and handed over their J88 forms. On their way out they were accosted by the police in the Vito and R[...] was told to stop and that they must all alight from the car. They were made to stand in a line. Makamu took photos of them and then slapped R[...] twice on the face and told him *“return to the police station and report another case”*.

[134] R[...] testified that they returned to the police station to report the matter and a Captain Ringani told him that he should tell all this to the CID officers who would come and take their statements. M[...] testified that some police officers came and took statements from them. He said his statement was never read back to him. He further testified that an identity parade was held for the complainants to identify the police officers who assaulted them. He testified that only Maumela was at the parade.

Discussion regarding the 2012 incident

Unlawful arrest and detention (M[...] and M[...]); rendition (M[...])

[135] The witnesses for the defendants testified that M[...] and M[...] were found on J[...]’s Farm after being pointed out by Welsh Nyakunga. This is the version given by the defendants in all the claims relating to M[...] and M[...] and to a certain extent R[...]. In my view, the probabilities favour the version of the plaintiffs.

[136] M[...] testified about his arrest at home. This evidence was fully corroborated by his mother in all respects including the type of assaults that took place, the voices of ladies outside the home, the breaking down of the door, calling M[...] a “*tsotsi*” as well as pushing his mother against the fridge.

[137] The evidence of M[...] was not discredited in cross-examination. Mrs. M[...] was a credible and honest witness. She did not embellish her evidence and her anguish at recalling these events was clear to the court.

[138] In cross-examination Tsikelele testified that officers Mercy and Maluleke (who were both not called to testify) had been to M[...]’s house on 3 January 2012 and were told by Mrs. M[...] that M[...] had not been home and had been missing for a number of days. This version was never put to M[...] or Mrs. M[...] in cross-examination by the defendants’ counsel. Tsikelele’s evidence was clearly a fabrication considering the undisturbed evidence of M[...] and Mrs. M[...].

[139] I am of the view that the evidence of M[...] and his mother the more probable version of the events that took place on 3 January 2012.

[140] Tsikelele testified that he left in a motor vehicle driven by Sekgoa and this evidence was supported by Sekgoa. Sekgoa further testified that he was never at the farm. Tsikelele was waiting for him outside of the farm on the N1 National Road and this is where he picked him up and that he (Sekgoa) was in the company of Makamu at the time.

[141] The plaintiffs testified that both Makamu and Sekgoa were the ones who came in a double-cab bakkie to bring mageu and water to the farm. The plaintiffs could not finger Sekgoa and Makamu if they had not entered the farm as testified by the defendants. The probabilities of the plaintiffs knowing that Sekgoa and Makamu were together on that day would be non-existent had Sekgoa and Makamu not entered the farm and simply picked up Tsikelele from outside the farm and the N1.

[142] When Tsikelele was asked in cross-examination about other officers that joined them at the farm, he testified that Sekgoa and Makamu came there later. He testified that there was information that was being pursued (about the firearms), and he spoke to them regarding the information. Tsikelele, however in re-examination, changed his testimony about why Sekgoa and Makamu were there and now testified that they only came to pick him up as he needed transport. In my view, Sekgoa was dishonest when he testified that he and Makamu did not enter J[...]’s Farm.

[143] Maumela testified that he was part of Crime Intelligence and received a call past 13:00 hours from Maluleke to go to the farm. He testified that he found Tsikelele and Msengi already there. On the other hand, Tsikelele, in chief, testified that he left the farm between 12:00 – 13:00 hours. Part of Maumela's evidence was that after the others had been pointed out by Welsh Nyakunga, he then went to question them. However, prior to questioning them, they had to be secured and this was done by officer Sekgoa. He then testified that Maluleke and Ramaite came later on to the farm. Tsikelele, in contradiction to Maumela's evidence, testified that he found Maluleke already on the farm and that Sekgoa came later on to the farm.

[144] Further, in chief, Tsikelele testified that when Edmore was arrested in Zimbabwe, he had informed them that the people who were committing the crimes were at the weigh bridge, which was next to the farm. These people had been identified by Edmore as M[...], E[...], M[...] and Welsh. Mercy Netshiavha ("Mercy"), in her affidavit stated that she and Maluleke went to M[...]’s house to look for him and were told by Mrs. M[...] that he had been missing from home for a number of days. This evidence is not plausible. The critical question would be why would the intelligence police officers go to M[...]’s house to look for him when clearly Edmore had told them that M[...] was left next to the weigh bridge. This was further compounded by the fact that Tsikelele testified that he left the farm between 12:00 – 13:00 hours, yet Mercy's affidavit says she and Maluleke went to M[...]’s house at 12:00 hours. Why would they go to his house when they knew where he was, as Tsikelele testified that Maluleke was already at the farm when he (Tsikelele) arrived.

[145] Tsikelele further testified that when he left the farm (12:00 – 13:00 hours), they all dispersed from the farm, yet, Mercy in her affidavit stated that, at about 15:00 hours, she left her colleagues at the farm for her office as she had work to do there. This is contradictory to Tsikelele's evidence. Mercy further states, in her affidavit, that she left for her office after leaving M[...]’s house and then received a call from Maluleke to say they must go to the farm. She went further to state that they then left in a convoy and found four men there.

[146] This version, supports the plaintiffs' evidence that they were taken to the farm in a convoy of vehicles. This meant that they went to the farm in the convoy after 12:00 hours, being the time she and Maluleke had gone to check on M[...] at his home. This evidence is contradictory to the time that Tsikelele testified about his leaving the farm and further supports M[...]’s evidence that he was taken to Zimbabwe at around 13:00 hours from Tsikelele's office.

[147] Mercy, in her affidavit, further stated that she arrived at work after 09:00 hours and was briefed about Edmore's wife and the wife was questioned about Edmore's whereabouts. Tsikelele testified that they went to Edmore's wife at 02:00 hours, questioned her and then followed her to Zimbabwe. Further Mercy's affidavit stated that she was with Msengi at 09:00 hours and left with him for Pont Drift where she found other members of 'CIG Musina' (the Task Team). The Task team then went to Edmore's house and found his wife there. This purportedly happened after 09:00 hours, in

contradiction to Tsikelele and Msengi's evidence that this happened in the early hours of the day (01:00 – 02:00 hours).

[148] Msengi, in cross-examination, refuted this evidence and said that at all times he was with Tsikelele from 02:00 hours when the operation started. In cross-examination Tsikelele testified that he was the leader of the Task Team. This means that Tsikelele was there at Pont Drift where Mercy was directed to go by Maluleke. This is borne out by Msengi who testified that he was at all times with Tsikelele. Tsikelele himself testified that they travelled in a convoy and that Mercy's vehicle was also there. However, Tsikelele testified in cross-examination that he did not know a place called Pont Drift. This in my view is part of the fabrication of the evidence by the witnesses for the defence.

[149] The evidence, in my view, points to one reasonable inference, being, that M[...] was unlawfully arrested by Tsikelele at his home in the presence of his family, taken to Beit-Bridge Police Station and renditioned to Zimbabwe and later taken to J[...]’s Farm. The evidence of both M[...] and M[...] as to the circumstances of them being on the farm is the most probable in this matter.

[150] Furthermore, they could not have been pointed out by Welsh Nyakunga, as M[...] was taken from his home in the presence of his family. The version of Welsh Nyakunga was not put to M[...] in cross-examination. The evidence of M[...] and M[...] regarding the arrest and detention of R[...] are corroborated by each other. The evidence of all three plaintiffs from the unlawful arrest of R[...] to reaching the farm is also corroborative of each other

as all the plaintiffs were together at the same time only from the time of the arrest of R[...].

[151] The probabilities are that all three plaintiffs were taken to the farm by Tsikelele and others of the second defendant and could not have been pointed out by Welsh Nyakunga as suggested by the defendants. The evidence of M[...] regarding his rendition to Zimbabwe is also the only probable version that has been presented to the court.

[152] I find that a proper case has been made out for the claim for the unlawful arrest and detention of both M[...] and M[...] and the rendition of M[...].

Unlawful arrest and detention (R[...])

[153] The defendants denied arresting R[...] and his presence at J[...]’s Farm where most of the assaults and the unlawful detention took place. It was put to R[...] in cross-examination that Tsikelele would testify that he was at J[...]’s Farm on the date and time that R[...] claims to have been arrested and assaulted and that he would further testify that R[...] was never at J[...]’s Farm.

[154] It was further put to R[...] that Msengi will deny ever hitting R[...] with an open hand and with a gun on the back of his head and that all police officers will deny that anyone was arrested or assaulted. Tsikelele testified that Msengi is so short that he could not have reached R[...]’s head with the back

of a rifle. (My observation was that Msengi is of average height and could probably use a rifle or even a pistol that way.)

[155] M[...] testified that he was with E[...] in the Vito and that there was talk of going to arrest R[...] at his home and that is where the convoy headed (M[...]). This was corroborated by M[...] who was in another police vehicle and could hear and see what the police were doing. When he was not found in M[...], Tsikelele instructed E[...] to make a call to R[...] enquiring as to his whereabouts. E[...] called R[...] and reported to Tsikelele that R[...] was at Copper Pot. M[...] and M[...], testified that the police officers then said that R[...] is at Copper Pot and that they should go there. Clearly, there was no need to go to Copper Pot if there was no need to arrest R[...]. M[...] could not have known that the convoy was taking the direction of Copper Pot because the call was made in another vehicle which carried only M[...] and E[...]. He therefore could not have been privy to this information.

[156] The assault on R[...] by Mandla was corroborated by both M[...] and M[...]. Even under cross-examination their versions were similar as to the events of the day. M[...] testified that he did not see in which vehicle R[...] was put in and so did M[...]. They did not add to their evidence things that they did not see.

[157] The testimony of R[...], M[...] and M[...], as to how M[...] was removed from the Vito corroborated each other. The injuries sustained by M[...] are

consistent with this testimony as well. The fact that M[...] went as far as saying that “*they should rather kill him*”, is corroborated in this evidence.

[158] Tskilele testified that he left the farm in a car of a colleague and then went to the border to book in Welsh Nyakunga at Musina Police Station before 14:15 hours. Msengi, on the other hand, testified in chief that he was the one that took Welsh Nyakunga and the rifle to the Musina Police Station to book him in.

[159] All the plaintiffs testified to the arrest. Their versions are credible and are accepted by this court. From the totality of the evidence before court, I find that R[...] was indeed unlawfully arrested and detained by the defendants on 3 January 2012.

Assault (M[...], M[...] and R[...])

[160] The plaintiffs testified about the horrific and degrading assaults inflicted on them by the police officers led by Tsikelele.

[161] M[...] testified about how he was arrested whilst still in his underwear at his home in January 2012. His evidence was corroborated by his mother in all respects. M[...] testified that he was assaulted inside his house by a group of about ten police officers. He was bundled into the boot of the Vito. This all transpired in the presence of his toddler son, who it was testified “cried bitterly” at the scene of his father being manhandled and paraded naked in

front of his mother, younger brother, toddler son as well as neighbours and tenants.

[162] He testified that the police broke down the door to his house, entered and pushed his mother against the fridge. They then got hold of him and started assaulting him insisting they were looking for a gun. This was done without a warrant or any reasonable suspicion for the presence of a firearm on his person or in the house.

[163] M[...] further testified that he was still in his underwear when they dragged him outside of the house. They put his trousers over his head and took him to the boot of the Vito which was parked on the road outside. When his mother sent his younger brother to give him a second pair of trousers, the police refused to let him wear them and said he would wear those that were covering his head.

[164] M[...] testified that whilst leading him to the police vehicle he was still being assaulted. They assaulted him with a *donkey piel* (baton). He was later taken to Zimbabwe, where the assaults and humiliation continued. He testified that when the police were bringing him back to South Africa from Zimbabwe, they handcuffed him and hit the top of the handcuffs with a *knopkierie* until they sunk deep into his flesh. He showed these scars on his hands to the court.

[165] M[...] testified that whilst in Zimbabwe, he was assaulted mainly on his feet until he sustained a broken leg. The evidence of this was shown to the court in the form of hospital records and a newspaper article on his assault by the police.

[166] Maumela, who was a defence witness, testified that when he was at the farm, he found M[...] and M[...] with minor injuries. He further testified that he later found M[...] walking away from the farm after they were let go and gave him a lift. This evidence is rejected as false. It is highly unlikely that M[...] could walk on his own two feet as it was testified by all the plaintiffs that he could barely sit on his own. The hospital records also show that he was carried into the hospital⁵³ and he testified that he was carried into the taxi when he left the hospital.⁵⁴ The medical and documentary evidence, shows that M[...] had sustained a broken leg. He was carried into the house by M[...] and later taken to hospital by ambulance and his leg was put in a Plaster of Paris cast. M[...] further testified that despite all these injuries, the police continued to assault him at the farm.

[167] The assaults on R[...] and M[...] were almost similar save in certain respects. I have already referred to most of them. What is most striking about their assaults and injuries is that where they testified about being assaulted at the same time (i.e. at the farm), their injuries were similar. This leads to one

⁵³ Hospital record.

⁵⁴ Transcript.

reasonable inference under the circumstances, and that is that they were at the farm and assaulted at the same time.

[168] It is clear that the most humiliating aspect of their assault, was being sprayed with pepper spray on the genitals and face. Both R[...] and M[...] testified that when they were taken away from the farm in the bakkie M[...] started vomiting after being affected by the teargas in his eyes, to the point that it led to Sekgoa saying that *“let’s take these people back to their homes, as we do not want them to die in our hands and that the other shift would deny that they assaulted them”*.

[169] This is a far cry from the minor injuries that both Maumela and Tsikelele testified to have observed on the plaintiffs when they purportedly found them on the farm.

[170] The testimony about that day, brought tears to M[...] whilst giving evidence in chief. When the court enquired as to whether he needed time to regain composure, M[...] stated that *“when I recall that day, I remember that day and my tears just flow”* and implored the court to proceed with his testimony as giving him time to regain his composure would be a waste of time. This, he said, was due to the fact that he would always cry when recounting this episode of his life. It demonstrates the intensity of the assaults on the plaintiffs by the police. No evidence was led by the police to disturb the plaintiffs’ evidence. They all gave contrived and concocted stories and sought the court to believe the most improbable, that is, that the police simply found

the plaintiffs on the farm and asked them if they had knowledge of the robberies allegedly carried out by them and whether the guns found on two other persons belonged to them. When the plaintiffs denied any knowledge of these allegations, they simply let them go and the police left the farm. This is highly improbable in the face of what information the police allege they already had on the plaintiffs.

[171] I find that the claims for assault on each of the plaintiffs has been established.

Costs

[172] Mr Malindi SC and Mr Mofokeng, who appeared for the plaintiffs, submitted in their heads of argument that the plaintiffs seek an order for costs on the attorney and client scale, in order for the court to mark its disapproval of the conduct of the defendants. It was submitted that the plaintiffs should not be out of pocket for the costs of the litigation as a result of the egregious behaviour of the second defendants.

[173] On 8 June 2017 the plaintiffs' attorneys delivered Rule 37 enquiries to the defendants seeking admissions and also making extensive enquiries regarding claim 1A and claim D which were relevant to the first plaintiff. Fifteen questions were posed to the defendants, the gist of which was to

establish the defendants' liability for acts against the first plaintiff by the Zimbabwean police.

[174] When Colonel Tsikelele signed the affidavit in support of the application to amend the plea on 6 August 2019 he did so knowing that his instructions to his legal team were a fabrication of a new version and *mala fide*. He, together with a number of other defence witnesses who testified during the trial, was mendacious and it became apparent that they colluded with one another to cover up the facts.

[175] The trial, which should have been concluded in November 2017, only finished in June 2020 and then too, only on the question of liability.

[176] In my view a special costs order is called for to mark this court's disapproval of their conduct. They acted with impunity and in total disregard of the plaintiff's rights, which find protection in the Bill of Rights. The plaintiffs should not be out of pocket for vindicating their rights.

[177] In all the circumstances I make the following order:

1. The defendants are held liable for the amended pleaded claims of the plaintiffs.
2. The issue of the quantum of the damages is postponed *sine die*.
3. The defendants are to pay the costs of the trial on the issue of liability jointly and severally, the one paying the other to be absolved on the attorney and client scale. The costs are to include the costs

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