



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 551/16

the matter between:

**MANILAL RAJENDRA KUMAR
BLUE SECURITY**

**FIRST APPELLANT
SECOND APPELLANT**

and

MAKHUPARETSI MPAI

RESPONDENT

JUDGMENT

MNGADI AJ

[1] The appellants appeal against the judgement of the additional magistrate of Durban (Mr V.M. Mvambo) granting judgment in favour of the respondent for the payment of R45 0000 non-patrimonial general damages arising out of an assault on the respondent. The second appellant is Blue Light Monitoring & Armed Response (Pty) Limited a private company registered and incorporated in terms of the company laws of the Republic of South Africa, trading as Blue Security. The respondent, despite having been served with the necessary documents and notices has, for reasons unknown to us, not taken part in this appeal.

[2] The respondent instituted action in the magistrate's court against the appellants claiming that the first appellant whilst he was employed and acting in the course of his employment with the second appellant assaulted him by hitting him with a firearm and hands causing him certain injuries. As a result, he suffered damages in the sum of R100 000 for pain and suffering, cost of medication and legal fees.

[3] In the summons the respondent claimed that: 'the first appellant assaulted him with a firearm and with his hands and his legs. The assault caused him injuries recorded in the attached medical report (J88) to be lacerations in the facial area. The first appellant intentionally assaulted him without asking him anything. He acted negligently and failed to exercise the skill and care required of a trained security or reasonable man'.

[4] The appellants in the plea admitted that there was an altercation between the first appellant and the respondent; that the first appellant struck the respondent in the face with a portable radio but he was justified in doing so in that the respondent had struck him across the face and he was attempting to remove his firearm holstered on his hip and that his actions were necessary for his protection. At the hearing, the appellants' legal representative placed it on record that the appellants were admitting that at all material times the first appellant was in the employ of the second appellant and he was acting within the course and scope of his employment. It is trite that it is lawful for any person to use reasonable degree of force for the protection of himself or any other person against any unlawful use of force. (*Minister of Law and Order v Milne* 1998(1) SA 289 at 293A-C).

[5] In the hearing before the magistrate, the respondent testified and called Ms Chiliza (his girlfriend) as a witness. The appellants called the first appellant, Ms Padayachee an employee of the second appellant and one Dr Zeiciak an ear, nose and throat specialist (the expert). The documents relied ^{upon} in the bundle of documents were the medical report (J88); a medical certificate by Doctor Sali; a cover page of the police docket; the letter of demand; Blue Security alarm activity report; an e-mail from A Padayachee to B Jackson and the Dr Zeiciak's report.

[6] The respondent testified that he was a police officer. He was renting a place in the premises where the incident took place. He arrived on that morning with his girlfriend Ms Chiliza. He found the landlord outside in the premises. The landlord asked him why were the premises filled with rubbish. He replied that he did not know and he had not been around. The landlord said that he will call security. He left him and went to his room as it appeared to him that they might have an altercation. Thereafter the first appellant arrived. He was driving a marked security vehicle and he was in full security uniform. The first appellant went and spoke to the landlord. The landlord pointed at him. The first appellant approached his room and found him by the door and he asked him what was his problem. The first appellant slapped him on his face. He tried to block the blow but he could not see clearly. When he opened his eyes, the first appellant pulled out the firearm which was holstered in his bullet proof vest. He struck him with the butt of the firearm on his face. He went back and went down on his knee. The first appellant kicked him on his back with a booted foot. He noticed that he was bleeding from his face. He went inside the room and he phoned the police. The police arrived and they told the first appellant that he (the respondent) was also a police officer. The first appellant said he did not know that he was a law officer and he apologized. He went to the police station to open a case. He was given a form to take to hospital. He went to the hospital where he was treated and sutured on his face.

[7] The respondent testified that the first appellant had a firearm, a pepper spray, handcuffs and a two-way radio. The injuries left him with permanent scars on his face. He could not go to work for four days and for two years he was in pain. He could not eat properly. He and his girlfriend were from a friend they had visited the previous day. There was no party and they did not drink alcohol. Although the J88 recorded that he smelt of ethanol, he had not taken liquor that morning. He denied that when first appellant arrived he (the respondent) was obviously under the influence of liquor but it was the first appellant who was under the influence. He realized that when the first appellant said he did not know what he was doing and he was asking for forgiveness. He did not know that the landlord had called security and reported that a tenant had damaged his car and the tenant was trying to attack him. He denied that he had caused

any damage to the landlord's car and that he was trying to attack the landlord. He stated that no case was opened against him.

[8] The respondent testified that previously, they had had arguments with the landlord about dirt caused by the tenants. He was not focusing to the first appellant and the landlord. He was in and out of his room attending to his own things. When he was assaulted he was on the stoep in front of his room. He denied that he slapped the first appellant and he denied that he knocked the portable radio attached to the bulletproof vest which fell to the ground. He denied that he picked up the portable radio and the first appellant snatched it from his hand. He denied that whilst the first appellant was holding the portable radio in his right hand, he grabbed the bulletproof vest with his left hand and with his right hand tried to pull out the pistol from its holster. He denied that the first appellant then put his left hand over his right arm to stop the removal of the weapon and that the first appellant pushed out at him with the right hand with a portable radio to release from the grip and the maneuver resulted in the portable radio striking him on his face and he fell. He denied that when the first appellant arrived he was standing outside the front door speaking in a loud voice and in an aggressive fashion and using a vulgar language challenging the landlord and saying what Blue Security will do. He denied that the first appellant when he approached him initially, he said the landlord wanted him to leave. He denied that his eyes were blood shot and his breath had a strong smell of alcohol. He insisted that when the first appellant struck him with a firearm the first appellant was holding the firearm with the right hand. He admitted that the medical report (J88) recorded four lacerations and it did not show any bruises and in conclusion, the J88 records that the findings are in keeping with blunt force trauma. Although the letter of demand states that he was opening the door of his house when he was attacked, he was in fact going in and out of his house at the time he was attacked. By feeling pain for two years, he meant being worried about the scars for two years. He can't say how long it took feeling physical pain from the injuries. It took two weeks and the sutures were removed. He does not know whether the scars can be removed or not. He said the first appellant is lying in saying he did not kick him in his back. The first appellant first slapped him.

[9] Zandile Chiliza testified that she was the girlfriend of the respondent. She was on maternity leave. On the day in question, they arrived at about 9H00 and they found the landlord. She went into the house and the respondent was called by the landlord. She opened the windows. The respondent left the landlord. He was taking things out of the house and she heard a vehicle arriving in the premises. She went to stand by the window. The first appellant alighted from the vehicle. He approached the landlord and he asked whether this was the one or not. The landlord said yes. He left the landlord and approached the respondent who was in front of the house in the stoep. The first appellant hit the respondent with an open hand. The respondent tried to ward off the blows. The first appellant took out a firearm and hit him on his face with a firearm two or three times. The respondent fell to the ground. He thereafter kicked him on his back. The respondent went to the house to fetch a cellphone. He phoned the police. The police arrived and they told them what happened. The respondent did not fight back.

[10] Under cross-examination Ms Chiliza testified as follows. She was still the girlfriend of the respondent. It must have been a mistake she did not say that she was on maternity leave when she testified in chief. When they arrived the landlord was in a vehicle which was parked in the yard. She did not hear what the landlord said to the respondent. The respondent was collecting the dish and the bucket which were outside. She heard the first appellant talking to the landlord but she did not see the landlord showing damage in the vehicle to the first appellant. She could not hear the entire conversation between the landlord and the first appellant. She heard the first appellant saying 'is this the one' and there was no conversation. The stoep was about two meters from the window next to which she was standing. She did not hear the first appellant saying to the respondent what was the problem. The first appellant hit the respondent with the left hand on the cheek. He then took out a firearm with his right hand. He hit him with the back of the firearm two or three times. The respondent fell down and he kicked him. The respondent was not under the influence of liquor. He did not have a strong smell of alcohol on his breath and he eyes were not bloodshot.

[11] Dr Zeiciak testified that he is an ear, nose and throat specialist practicing as such and in private practice. He did not examine the respondent for the injuries sustained in the incident and he has not had access to any records or photographs relating to the injuries except the medical report(J88). He noticed that under clinical findings it is recorded four deep lacerations in the maxillary area. Deep lacerations mean penetration of the skin surface. The first was in the right maxillary area, the second in the nasal area bridge, the third in the glabella area and the fourth on the left forehead. The glabella area is the area between the eyebrows. The report under mental health records 'pain', and under clinical evidence of drugs or alcohol 'yes', And there is an ethanol odor'. Ethanol is alcohol. It records the last conclusion as 'findings in keeping with blunt and sharp trauma', which means findings are consistent with the injury causing lacerations of the skin and blunt injuries with some crushing of the tissue. Laceration is the cutting through the skin and blunt trauma is the crushing of the surrounding tissue.

[12] Dr Zeiciak testified that in his opinion the injuries sustained, the manner in which they were sustained as testified to by the respondent and his witness and the instrument used, are inconsistent. A heavy instrument used such as a butt of a gun wielded in a hammering manner would have caused more serious injury. A butt of a firearm weighing about half a kilogram would probably cause much more of a trauma to deep tissue, causing damage to muscles, subcutaneous tissue and tissue of muscles and probably bone. He testified that the fact that the patient was not referred to X-rays to determine whether there were any fractures to bones suggest that to the doctor the injuries did not seem severe. He opined that the instrument which caused the injuries had some kind of a sharp edge going across the face. He would expect the pain to be moderate to severe in the first week or two and after a month diminish to mild. It is a little bit too long to last for two years. Injury in the cheek bone would initially probably cause pain on chewing. The scars of the injuries can look sometimes very ugly and need to be referred to a plastic surgeon for correction. The scarring on the face of the respondent may be addressed through plastic surgery consisting of excision of the scars and re-stitching them. Under cross-examination Dr Zeiciak testified that a person

hit with the same object may sustain different injuries depending on the way the object is used, and the force applied.

[13] Dr Zeiciak testified that he could not rule out that a barrel of a gun was used. A person having consumed liquor the previous day can smell of liquor on the following day. He does not think one blow could cause the four lacerations, due to the position of the scars, the one in the glabella and the one on the forehead being about 30 cm apart; but if one blow was struck obliquely across the front of the face that blow could cause all four injuries.

[14] Ms Alveena Padayachee testified that she was employed by the second appellant as a professional assistant to the operations manager. She previously worked in the control room. The activation report reflects activities relating to the landlord as their customer. It shows that on 30 June 2012 an initial cellphone panic was received at 10:09:29 and it was logged as assault by her. The landlord was contacted and he reported that a tenant on site had damaged his vehicle and he was trying to attack him. A vehicle was dispatched and the police were contacted which was a standard procedure to avoid their security going on something they cannot handle. The call is listened to and contemporaneously recorded. The landlord cut the call without giving the details.

[15] The first appellant testified. He was on duty on that day patrolling in the Amanzimtoti area. He responded to a call. When he got into the property he met with the landlord. He was driving in a marked Blue Security Company vehicle and he was in full uniform. He was wearing a bulletproof vest, armed with a firearm and he was carrying a portable radio and a pepper spray and handcuffs. These items were in the pouches in the bullet proof vest. The portable radio was in a clip for a pen, it was clipped into a pen holder. The opening of the firearm holster is to the left of the bullet proof vest because he is left handed. He approached the landlord who explained what the situation was. The landlord said he was having a problem with a black male on his property that lives on his property. He asked what does he want him to do with the guy.

He said no he does not want to do anything, he wants him off his property. He then approached the respondent who was in the property in front of a driveway. He talked to him about the assault and the damage to the vehicle, and he went to look at the vehicle.

[16] The first appellant testified that the landlord did not say he was assaulted but he said he was being harassed many times by the same black male. In the vehicle, he saw that the front right-hand side rear-view mirror was damaged and on the driver's door and fender there were few scratches. He explained to him that the black guy was trying to jump on his vehicle and things like that as he tried to move out of the property. He told the landlord to stand where he was and he will approach the black male. He went to the respondent who was standing in front of the room he rents. He approached him face to face and before he could explain anything, the respondent gave him a slap on the left side with his right hand. The respondent hit him on the left cheek. The portable radio fell to the ground. As the respondent picked it up with his right hand, he grabbed it off his hand. The respondent grabbed hold of his firearm with the right hand in its holster. He also grabbed the bullet proof vest on the right hand side with his left hand. He placed his hand on the respondent's hand grabbing the firearm in the holster. He told the respondent to release him and to leave him alone. He did not want to release him. He turned left in order that he cannot force out of the holster. He turned right, left and the respondent did not want to release. He turned straight forward again. With the portable radio in his hand, he swung it towards the respondent. The respondent released the firearm and it fell to the ground. The respondent fell onto a pile of rubbish bags that had garbage in it. When he sort of pushed the respondent away with the portable radio still in his right hand, the firearm fell to the ground. He reached out for his firearm. He picked it up and re-holstered it. He picked it up with his left hand. The respondent got up and he was bleeding on his forehead and nose area. The respondent had not identified himself as a lawman and things like that. When he got up injured he was saying he is a member of the public and things like that. He then said he is a policeman and how can he assault a policeman. He then threatened that if he had his firearm he would have shot him and the landlord. The respondent then phoned other policemen. The police arrived and he explained to them.

[17] The first appellant testified that the portable radio is a small hand held rectangular shaped with square edges. He used it to fend off the respondent by pushing him off him. He pushed him away because he got a hold of his firearm. The respondent was smelling of some kind of alcohol. He admitted that after the respondent told him that he was a policeman, he said things were not supposed to get to this extent that he gets injured. He stated that he did not touch the respondent and he did not assault the respondent with a radio. He only pushed him away from him to release his firearm and the vest. He said it slipped his mind to tell his attorney that the respondent fell onto the garbage. He admitted that he asked the respondent what was the problem. He stated that the landlord's yard is a big yard and the respondent was next to his room at the far end of the yard. He asked the respondent a number of times to release his firearm and bullet proof vest and he refused. His only option was to push him away from him. He does not know what injured the respondent. He did not assault him.

[18] The learned magistrate considered the manner as testified to by the first appellant in which the respondent got injured, the expert evidence and he was not prepared to accept that account in preference to the version of the respondent and his witness. He found the discrepancies between the evidence of the respondent and that of his girlfriend, namely; whether it was right or left hand used; whether the holster is located in the chest or stomach area; the time of the incident and number of blows not to be significant to discredit their version. He found the respondent's witness to be an honest witness. He found that the four deep lacerations sustained by the respondent could not have been caused by being pushed as described by the first appellant. He found as the more probable version that the respondent was hit more than once on the face when it was not justifiable to do so. He found that the first appellant assaulted the respondent causing the four deep lacerations in the facial area and he was not justified to do so.

[19] It is contended on behalf of the appellants that the learned magistrate did not have proper regard to the fact that the first appellant is left handed and the position of the holster with a firearm in the bullet proof vest is for use by a left-handed person.

Therefore, it is argued, the respondent and his witness could not have been correct that the first appellant repeatedly used a right hand to strike the respondent. In my view, the first appellant in the plea having admitted that he inflicted the injuries, even if the evidence leaves some doubt whether it was the right or the left hand used, that does not, in my view, affect the substance of the evidence of the respondent and his witness of an unjustified assault on him by the first appellant. Secondly, it is argued that the learned magistrate erred in not attaching weight to the opinion evidence of the expert which indicated the injuries sustained are inconsistent with the version of the first respondent and his witness. In my view, it is significant that the doctor who carried out the physical examination of the first respondent and described them as described in the medical report was not called as a witness. His conclusion in the medical report were that the injuries were in keeping with the description provided by the respondent and his witness. The medical report (J88) and its contents were admitted by consent and relied upon by both parties. The expert, having not examined all the medical records relating to the respondent's injuries and without knowing the nature of the force used, and position and movement of the object struck at the material time, expresses an opinion as found by the learned magistrate that does not carry much weight.

[20] The first appellant in the plea, having claimed that he was justified in inflicting the injuries on the respondent, inexplicably failed to call the landlord as a witness. After all the landlord had called the first appellant, interacted with the respondent before the arrival of the first appellant and witnessed the interaction between the first appellant and the respondent. In Harms *Almer's Precedents of Pleadings* 8th ed page 47 it is stated: 'Once infringement is proved the onus rests on the wrongdoer to prove some ground of justification. The onus of alleging and proving an excuse or justification for the assault rests on the defendant.' The learned magistrate in my view was correct for criticizing the appellants for the failure to call the landlord as a witness. The onus was on the first appellant to prove that he acted in self-defense and therefore lawfully. (*Kgalenda v Minister of Safety and Security* [2001] 4 All SA 636 at 638-639).

[21] In my view, there are serious material inconsistencies in the appellants' account relating to the substance of the version. It was put to the respondent that when the first appellant arrived, the respondent was obviously under the influence of liquor with bloodshot eyes and strong smell of liquor but the first appellant only testified that he smelt alcohol in the breath of the respondent. It was put to the respondent that when the first appellant arrived in the premises, the respondent was shouting, he was aggressive and swearing, and threatening to assault the landlord but the evidence of the first appellant was that he arrived and went to speak to the landlord and he then went to approach the respondent. It is simply not his evidence that the respondent was in any manner misbehaving himself. The first appellant testified that the firearm fell from the holster and he picked it from the ground which was not put to the respondent and the witness. It was the essence of their evidence that the first appellant used the firearm to injure the respondent. It would have been expected that it be put to them that he could not have used the firearm because it had fallen to the ground. It was never put to the respondent or his witness that he got injured as a result of falling on the garbage. Comparing the version of the first appellant and that of Ms Chiliza, Ms Chiliza would not be mistaken but would be lying whereas the learned magistrate found her to be an honest witness.

[22] I am also of the view that probabilities in the sense of matters which might be expected to occur in the normal course of human affairs favour the version of the respondent. The first appellant was visibly armed with a firearm and a pepper spray. It is not clear why the respondent for no reason and with bare hands would attack him. If the respondent attacked the first appellant by slapping him on his face it is strange that he did not react to that. It is claimed that during the attack the portable radio fell to the ground and for some unknown reason the respondent stopped the attack and picked up the portable radio which is unlikely. The respondent then just clings to the first appellant and refuses to release him. It appears on the first appellant's account the respondent had an ample opportunity to remove the firearm which fell to the ground which indicates that it was not tightly secured but he inexplicable did not do so. The first appellant does not use or try to use the pepper spray. It is common cause that the respondent called

the police and when they arrived it is the first appellant who apologizes which indicates that he realized that he was on the wrong. I also found serious inconsistencies in the plea and the evidence of the first appellant. In the plea, it is unequivocally admitted that the first appellant inflicted the injuries but in his evidence, he is vacillating.

[23] The learned magistrate considered and found it insignificant that in evidence in chief Ms Chiliza is recorded having stated that she was on maternity leave which she said was not correct under cross examination. This was not shown not to be an error and it appears to be a matter on which she would have had no reason to lie about. I cannot see it as being impossible as suggested that the respondent having fallen he could be kicked on his backside. Likewise, it is not impossible that the kick would result in no injuries.

[24] It is for the appellants to show on appeal that the trial court came to a wrong conclusion. The respondent in the trial bore the onus of proof on the preponderance of probabilities. The learned magistrate bearing in mind the issues in dispute, and bearing in mind the totality of the evidence, considered the criticisms raised, evaluated the evidence and considered the probabilities, and he decided to accept some of the evidence and decided, for certain reasons, not to accept the other evidence. Findings of credibility based on demeanor and probabilities and the resulting conclusions drawn therefrom will not easily be disturbed on appeal unless the record of the proceedings reveal that the trial court gave insufficient consideration to the probabilities and their effect on the credibility of witnesses. The presumption is that the decision of the trial court on the facts is correct and where the appellants have merely succeeded in raising some doubt in the mind of the appellate court, without satisfying it of the wrongfulness of the decision, the appeal must fail. The appellants are required to show, not that the learned magistrate might have been wrong, but that he was wrong. In my view, they have failed to do so. In fact, having reconsidered the matter, I am satisfied that the learned magistrate came to the correct conclusion. (*S v Hadebe and others* 1997 (2) SACR 641 at 645e-f; *Rex v Dhlumayo and another* 1948 (2) SA 677 (A) at 690 para 3).

[25] The learned magistrate awarded the respondent general damages in the amount of R45 000. The appellants appeal on the basis that the award is extravagant and it induces shock. It is submitted that the magistrate erred in taking into account that the value of the rand has declined whereas the award is not based on foreign currency. In addition, it is submitted that the court awarded R45 000 on the basis that ~~that~~ he had scars on the forehead and must have experienced pain although the court indicated that it was not sure if the respondent had experienced pain for two years, and that the learned magistrate wrongly sought case law to justify the amount of R45 000 which he wished to award instead of allowing himself to be governed by case law which would have dictated a lesser amount. Finally, it is submitted in the notice of appeal that the appropriate amount is R11 000.

[26] It is not clear in the record whether the learned magistrate was referred to any relevant case law by any of the parties. In the heads of argument, no case law is referred to guide the court on the appropriate award. I regard the criticism regarding the use of case law by the learned magistrate to be unfounded. The use of awards in comparable decisions as a guide is a well-established practice, although the peculiar facts of each individual case and the loss in monetary value must be taken into consideration. It appears to me the failure by the learned magistrate to indicate in what manner the cases he referred he found to be of importance in the assessment of the award he arrived at, indicate that he might have been misguided by those cases. The distinguishing features of the individual case must be accounted for. The learned magistrate referred to *Viviers v Jentile* [2010] JOL 26564 (GMP) page 7 wherein the assault was a bruised the upper lip, bruised lower leg and shock. They were described as not serious. An award in the amount of R50 000-00 was made for pain and suffering. In the *Minister of Police v Dlwathi* below para18 it stated: 'An assessment of appropriate general damages with reference to awards made in previous cases is, as Nugent JA observed in *Minister of Safety and Security* 2006 (6) SA 320 (SCA) [2006] ZASCA 71 at para 17 'fraught with difficulty....(t)he facts of a particular case need to be looked at as a whole and

few cases are directly comparable...(t)hey are a useful guide to what other courts have considered to be appropriate but they have no higher value than that'.

[27] Damages is a monetary equivalent damage awarded to a person with the object of eliminating as fully as possible his past as well as future patrimonial as well as non-patrimonial damage. The non-patrimonial damage is the diminution because of a damage-causing event in the quality of the legally recognized personality interests, namely; physical-mental integrity, liberty, reputation, dignity, privacy etc. The injured person may claim compensation for all pain, suffering and discomfort flowing from the injury. It includes both physical and mental pain and suffering in the past and in the future. The aim of the award is to enable the injured party to achieve the object of compensation or satisfaction. It provides some psychological satisfaction for the injustice done. The nature and extent of the injustice must balance with the quantum of damages awarded. (Neethling, Potgieter, Visser *Law of Delict* 4th ed Chap 6 para 5; Joubert (ed) *The Law of South Africa* 2nd ed. Vol 7 para 104).

[28] The onus is on the respondent to prove on the balance of probabilities that he has suffered the damage and if so to what extent. Evidence may come from the defendant adding to the evidence adduced by the plaintiff. The plaintiff having placed the relevant evidence before the court, it becomes the duty of the court to assess the award to be made. The court exercises its judicial discretion to arrive at a fair award to compensate for the negative impact of the delict on the life of the injured party. The amount of the award is not susceptible of precise calculation. Assessing the quantum is acknowledged to be clearly difficult. (*Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194 at 199). It is arrived at in the exercise of a broad discretion, it depends on the judge's view of what is fair in all the circumstances of the case. (*Sandler v Wholesale Coal Supplies Ltd supra* 199; *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA) 169). The test for interference on appeal is: 'Should an appellate court find that the trial court had misdirected itself with regard to material facts or in its approach to the assessment, or, having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate court...' (*Minister of Safety and Security*

v Augustine (811/2016)[2017] ZASCA 59 (24 May 2017) paras 25-26; *Minister of Police v Dlwathi* 2016 (7G3)QOD 11 (SCA) para 8).

[29] The respondent was a 28-year-old police officer. His height was 1.6 meters and his weight was 50.5 kg and he was described as thin. He sustained four deep lacerations on his facial area. The first was on the right maxillary area, the second on the nasal bridge, the third on the glabella area and the fourth on the left forehead. The injuries were found to be in keeping with a blunt trauma and sharp trauma, and being consistent with injury causing lacerations of the skin and blunt injuries some crushing the tissue. The treatment for the injuries included suturing the injuries and the stitches removed on the third week after the injury. The pain being moderate to severe in the first or two weeks and after a month diminishing to mild. Initially the injured cheek bone could cause pain in chewing or swallowing. The lacerations would cause disfigurement in that they would result in scars and they would look ugly but be correctable through plastic surgery. The injuries were sustained in June 2012 and the ugly scars were still visible on January 2016. Plastic surgery would entail excision of scars and the re-stitching. There was no evidence of what would be the costs of the plastic surgery and whether such costs are within the means of the respondent.

[30] The respondent on the version found proved by the learned magistrate was assaulted by being slapped on his face, struck on his face with a firearm which caused him to fall to the ground and kicked on his body with booted foot. He did not retaliate. The assault was unprovoked. The assault on the respondent was witnessed by his girlfriend and his landlord. He bled from the injuries on his face. He was attended to by other police officers. He opened a criminal charge against the first appellant and he received the necessary medical treatment. There was no evidence of the nature, extent and duration of the psychological damage suffered by the respondent. However, such an assault would cause some mental anguish apart from physical pain.

[31] In *Damana O' Connell v 2000 5 QOD G3-1* (ECD) a 12-year-old boy was stripped naked and subjected to a sustained beating with a sjambok resulting in serious

lacerations and bruises to the body leaving scars still obvious after 12 months and confined to bed and unable to walk for two weeks. The appeal court overturning the magistrate's award of R8 000 general damages awarded R5 000 for *contumelia* and R12 000 for general damages. R12 000 is equivalent to R35 000 in 2017. (Robert J Koch *The Quantum Yearbook* (2017) page 10).

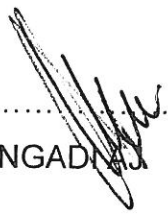
[32] I am of the view that on the evidence placed before the learned magistrate, the assessment of general damages in the amount of R45 000 is markedly different from the amount that I sitting as a court of first instance, would regard as appropriate, fair and just. The award is meant to fairly compensate the injured party but it should not disproportionately burden the wrongdoer. In my view, having considered all the facts and circumstances of the case, I assess the respondent's general damages in the amount of R25 000.

[33] The appellants appealed against both liability and quantum. They have not succeeded on liability and they have partly succeeded on quantum. I am of the view that each party on appeal should bear his/her own costs.

[34] In the result, the order I would make is the following:

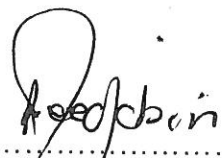
1. The appeal partly succeeds with no order as to costs.
2. The magistrate's order is set aside and the following is substituted therefor:
There shall be judgment for the plaintiff as follows:
 - (a) R25 000 for general damages in respect of shock, pain, suffering, loss of amenities of life, disfigurement and *contumelia*;
 - (b) interest on the amount specified in paragraph (a) above calculated at the legal rate as from a date 14 days after judgement to date of payment;

- (c) cost of suit together with interest thereon, calculated at the legal rate as from 14 days after allocatur to date of payment.



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MNGADI

I agree and it so ordered



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SEGOBIN J

APPEARANCES

Case Number : AR 551/16

For the Appellant : Adv. P. Jorgensen

Instructed by : Messrs. Millar & Reardon Attorneys, Durban

For the respondent :

Instructed by : Messrs Andile Dakela & Associates, Durban

Matter argued on : 18 September 2017

Judgment delivered on : 16 November 2017