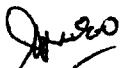




IN THE HIGH COURT OF SOUTH AFRICA /ES
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED ✓	
DATE 24/2/15	SIGNATURE 

CASE NO: 50047/2012
50055/2012
50049/2012
50050/2012

DATE: 26/2/15

IN THE MATTERS BETWEEN

JONATHAN DANIELS

1ST PLAINTIFF

JONATHAN CONSTABLE

2ND PLAINTIFF

EVERT FARO

3RD PLAINTIFF

ADAM FARO

4TH PLAINTIFF

AND

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

PRINSLOO, J

[1] The four plaintiffs, in separate actions, claim damages from the defendant Minister for alleged assaults on them by members of the police, acting within the course and scope of their employment with the defendant, during an incident which occurred in Porterville, in the Western Cape, on Friday 1 June 2012. At the commencement of the proceedings, I granted an application by the plaintiffs, which was unopposed, consolidating the four actions in terms of the Uniform Rules of Court. In terms of the order made, I would give one judgment disposing of all the matters and costs of the consolidation application would be costs in the cause.

[2] Before me, Mr De Beer appeared for the plaintiffs and Ms Cronje for the defendant.

Introduction and brief synopsis of what the case is about

[3] The first, third and fourth plaintiffs ("Daniels", "E Faro" and "A Faro") live in a house situated at 49 Eike Street, Porterville. It is a so-called "semi-detached" house or "skakelhuis". It is one house consisting of two units, separated by a wall with a door in.

[4] There is some uncertainty in the evidence, but it seems that the house belongs to E Faro who is the brother of A Faro.

When the trial came before me, E Faro was about 46 years old and A Faro about 44 years old. Daniels stays with them and he is about 27 years old.

[5] Constable, a friend of the other plaintiffs, stays in Piketberg where he lives with his mother at 104 Noupoot Street. When the incident, to which I have referred, took

place on Friday 1 June 2012, Constable was visiting his three friends in Porterville for the week-end which started on Friday 1 June 2012. At the time of the trial, Constable was about 44 years old.

[6] The four friends are all members of the so-called Rastafarian movement. Amongst other customs, they do not cut their hair, which they wear long and in so-called "dreadlocks".

[7] Without intending to offend the plaintiffs, it is fair to say that, on their own evidence, they were not big money earners. They worked in the informal sector, namely selling fruit and vegetables and scrap metal. With regard to the last-mentioned activity, A Faro, for example, registered a business as a scrap metal dealer.

Initially, the plaintiffs instituted modest claims for loss of earnings, but it appears that these claims have been abandoned, with the exception of a claim of some R2 000,00 by A Faro.

They also claimed compensation for medical expenses but, similarly, these claims have been abandoned and the plaintiffs, themselves, testified that they relied on their own mixtures of herbs and medication they bought over the counter at the pharmacy to treat themselves for the injuries sustained during the alleged assaults.

[8] During the trial, bundles were produced, notably in the form of exhibits "A", "C" and "D", showing pictures of the injured plaintiffs and also pictures of damages to the house at 49 Eike Street, allegedly caused by the police.

Exhibit "B" is a bundle produced by the defendant, containing relevant documentation, including statements to the police and J88 medical forms.

- [9] As to the evidence, which is, as I will explain, undisputed for practical purposes, all the plaintiffs testified that the police forcibly entered the house at 49 Eike Street at about 05:00 on Friday 1 June 2012, ostensibly in the process of conducting a raid or a search, mainly for drugs. According to all the plaintiffs, they were assaulted in the process. The assaults followed, generally, the same pattern: the bed on which the still sleeping plaintiff was lying, was overturned with the plaintiff. On the ground, the plaintiff was stamped upon, kicked and punched. Foul language was used and threats were uttered. The raid did not last much longer than about half an hour. E Faro, who occupied the separate "house" from that occupied by A Faro and Daniels, was also, forcibly, ejected from his house and forced to lie with his head between the legs of his brother A Faro. Derogatory language was used.
- [10] The injuries allegedly sustained included injured (swollen) limbs such as hands and legs, broken lips, swollen eyes and internal injuries caused by punches and kicks.
- [11] Charges were laid by all the plaintiffs on the same day, later on the Friday. The plaintiffs had difficulty getting medical treatment. At the hospital they were told that the resident doctor was on leave and private doctors in Porterville would not assist them. They only managed to have the medical forms (J88 forms) filled in about three weeks later, on about 19 June 2012. At that stage some of the injuries were no longer visible but others are noted on the J88 forms.

- [12] During the assaults, some of the plaintiffs had their dreadlocks forcibly cut off with scissors by the police officials. This was painful and humiliating. There is photographic evidence to support these allegations by the plaintiffs.
- [13] The defence only called one witness, Captain Marikus van den Heever ("Van den Heever"). He was the commander of a Tactical Response Team ("TRT") tasked with performing drug raids at a number of addresses including addresses in Porterville. He confirmed that the doors of 49 Eike Street were breached and the plaintiffs were accosted in their rooms and brought down to the floor. He was "roaming" the premises and did not witness everything that happened.
- [14] It is clear, and common cause, that the police were acting within the course and scope of their employment with the defendant when the raid took place.
- [15] At the commencement of the proceedings, I was also informed that earlier differences between the parties about whether or not the claims were timeously lodged in terms of the requirements of Act 40 of 2002 had been resolved.
- [16] The questions left for decision are whether or not the plaintiffs were assaulted so that they are entitled to claim compensation and, secondly, what the *quantum* of the claims ought to be.

Brief notes about the pleadings

- [17] The claims are, for practical purposes, crafted in identical terms in respect of the four cases. Details of the alleged unlawful assaults are pleaded, the allegation is made that the police acted within the course and scope of their employment and also that this court has jurisdiction to entertain the claims. Details of the *sequelae* are pleaded, eg that the particular plaintiff was unable to work for a certain time, incurred medical expenses and claims compensation for *contumelia* which is the bulk of the claim running to some R296 000,00 on average. In the latter regard, it can perhaps be argued, on a highly technical basis, that the term *contumelia* is too narrow for purposes of this action. *Contumelia* relates to the infringement of the plaintiff's right to privacy, dignity and reputation – see Harms, *Amler's Precedents of Pleadings* 7th ed p22 and the authorities there quoted. Of course, a claim for damages for *contumelia* is directly relevant to the circumstances of this case, as illustrated in the introduction, but, as I understand the position, the whole claim for compensation resorts under the *actio iniuriarum* which, in any event, encompasses not only an infringement of dignity or privacy or reputation but also an aggression upon the plaintiff's person – see *O'Keeffe v Argus Printing & Publishing Co Ltd* 1954 3 SA 244 (C) at 247C-E. See also, generally, Neethling, Potgieter & Visser *Law of Delict* 6th ed p12-15.

In any event, nothing turns on this. No argument was presented on behalf of the defendant to suggest that the particulars of claim may be crafted too narrowly.

- [18] The plea in each case is a very concise affair. In one case (that of Constable) there is a special plea relating to Act 40 of 2002 which issue, as I have pointed out, has been resolved.

[19] The plea on the merits is quite straightforward: formal issues such as details of the defendant and the question of jurisdiction are admitted. All the allegations relating to the alleged assault, the *sequelae* of the injuries and the *quantum* are met with a bare denial which reads as follows:

"The defendant denies the allegations contained in these paragraphs and accordingly puts plaintiff to the proof thereof."

No effort was made to, for example, offer a particular defence, ground of justification or the like.

Brief summary of the evidence

[20] I have already described the evidence of the plaintiffs by giving a broad outline of what, according to them, happened early in the morning on 1 June 2012. I have mentioned the location where it happened and the basic details of the alleged assaults. All the witnesses present, essentially, the same broad version and, to that extent, they corroborate each other.

[21] For purposes of this brief summary, I will not embark upon unnecessary repetition, but only mention brief details which may be of relevance in respect of each individual plaintiff. I will also, in slightly more detail, consider the evidence of Captain Van den Heever.

(i) Adam Faro (fourth plaintiff)

- [22] He was a fruit and vegetable hawker at the relevant time and he also owns the scrap metal business which is duly registered. He earns between R2 000,00 and R2 500,00 per week. Often he earns more than that.
- [23] Exhibit "A", photograph 5(a) depicts the kitchen door, the top portion of which was broken in half by the police when they entered. He is not claiming additional compensation for this damage. The door was broken into three pieces.
- [24] The police that came in were wearing black uniforms, helmets and balaclavas. Some wore blue uniforms. He saw no name-tags. After he was thrown to the ground he was ordered to lie flat on the ground, with his hands behind his head. They had firearms. He saw "short" and "long" weapons. After he fell, they stepped on him and kicked him. They told him that he was not allowed to look up. He had a great fright and he was anxious. They asked him where the dagga and the drugs were and he said he had none. He was kicked and trampled on continuously. One policeman stood on his neck with both feet. He was continuously kicked against his torso and had wounds in the rib area and he was also kicked on his private parts. They pulled up his head by grabbing his hair. He was crying like a child. It was his own hair which he had been growing, as a Rastafarian, for about fifteen years. He has been a Rastafarian for about twenty five years.
- [25] He saw no search warrant.
- [26] No dagga or drugs were found on his person or in his house or on any of the other plaintiffs. This is common cause.

- [27] The police also had torches which they flashed in his face to blind him.
- [28] He also recognised some of the local police of Porterville. There was a Constable Diedericks, female Constable Syster and Constables Abrahams and Swarts. Abrahams and Diedericks were in the house during the assault. Abrahams told him that he did have a search warrant but kept it back. It was signed by Captain Truter at the Saron police station. Abrahams told him (this of course, is hearsay and was not objected to) that he decided to hold back the warrant and will be prepared to testify on behalf of the plaintiffs. Other witnesses also said that Abrahams said he would testify for the plaintiffs.
- [29] Contents of cupboards were thrown out.
- [30] His brother Evert Faro (the third plaintiff) was brought in and ordered to lie down with his head between the legs of this witness in a "truck and trailer" fashion. He was hit and kicked on an ongoing basis. He was told to stay on the ground and the police said they did not want to hear him breathe.
- [31] They went to the police on the same day. Initially the police did not want to take their statements but did so later.
- [32] On the same day they went to the doctor and at the hospital they were told that the resident doctor was on leave for two weeks. The private doctors in the town would

not help them. The J88 forms were only completed after some weeks. X-rays were taken.

[33] He lives in fear. The police come to his house and threatened him. He thinks that he suffers from shock. He does not sleep well. He cried during the attack and he suffered pain for a long time. In cloudy weather the pain returns in certain areas.

[34] As to the *quantum* of his claim for loss of earnings, he testified that he could not work for two weeks because of the pain. He has two children that are dependant on him and that are school-going. He lost income to the tune of at least R2 000,00 during the period of inactivity.

[35] Exhibit "A", photo 1(a) shows the state of the kitchen after it had been searched by the police. Things are lying all over the place and it can be described as a total mess. None of these photos are disputed and it was agreed that they represent what they purport to be, without requiring any additional proof.

1(b) of exhibit "A" shows this witness with lengths of his dreadlocks that were cut off by the police. Photo 2(a) shows a mark on the right side of his ribs on the lower torso where he was kicked and 2(b) shows marks on his left side.

Photos 4(b) and 5(a) show the badly broken kitchen door.

[36] This witness was not discredited at all in cross-examination. He testified about the steps they took afterwards to lay charges and to get medical examination. He was

shown a search warrant (exhibit "B34") but insisted that this was not shown to them and that Constable Abrahams told him that it was held back.

[37] He repeated that he was not claiming compensation for the broken door which he repaired himself. He used his own herbs for treatment for the injuries and the pain and admitted, quite honestly, that he did not spend money on medication.

[38] In my view, this was a credible and impressive witness.

(ii) Jonathan Daniels (the first plaintiff)

[39] He confirmed that he stayed with the Faro brothers and helped them with the scrap metal and the fruit and the vegetables. He has no other employment. He is also a Rastafarian and he is not allowed to cut his hair, in terms of that particular religion.

[40] He heard a noise when the police broke the door and was thrown to the ground with his bed that was also overturned.

[41] He was told to lie with his hands behind his head. The search revealed nothing. He was trampled on and kicked. The police wore masks and police uniforms. He recognised the one Porterville police woman, Constable Antjie. He was asked about dagga, Tik, Mandrax and so forth. Nothing was found and he does not use those substances. He explained to them about the ground (minced) herbs that they found in a bag.

- [42] The police then found a pair of scissors and started cutting off his hair. The scissors broke. He was held down by three males and one female policemen. It was his own hair. It was painful when it was cut. He was crying and his scalp was burning. They told him to get up and shone the torches in his eyes. He was hit twice in the face with the fist. His mouth was broken on the inside. His left ankle was injured where he was stepped on. It was painful and he could not walk properly. They could only see the doctor after some time. The J88, B13 and further, dated 19 June 2012, still shows the bruise on the left leg. It was endorsed "injury probably due to blunt trauma".
- [43] He got a great fright. He lives in fear. He does not sleep well. The police had firearms. He still does not feel quite himself even at this stage years after the attack. The incident still repeats itself in his mind from time to time.
- [44] Exhibit "A" photos 3(a), 3(b) and 4(a) depict the witness carrying a handful of his hair that was removed by the police. He also illustrates the area on his head where the hair was cut off. He could not work for about two weeks. During that period he earned no income.
- [45] He was not discredited in cross-examination. The police initially would not entertain the charge. Later one Detective Esau came to the home and took statements. He repeated the evidence about being kicked and trampled upon and held down when his hair was cut. It was extremely painful when he was kicked. There was still a mark on his ankle. He again mentioned the two blows in the face with the fist. He was blinded with a torch. When the scissors broke, each policeman took one of the blades and used that to cut the hair. The private doctors would not help them.

[46] He impressed me as a credible witness.

(iii) Jonathan Constable (the second plaintiff)

[47] I have mentioned that he stays in Piketberg but was only visiting for the week-end. He has two children. He also sells fruit and vegetables, which he plants himself and earns about R1 000,00 per month.

[48] When he was thrown to the ground with his bed he was kicked and trampled upon. The police or some of them had masks on. He was told not to look up. The door was broken.

[49] His hand was injured and he was kicked a few times on his coccyx. It was the left hand that was injured and for a while he could not move the hand. The house was ransacked. He slept in the kitchen. On the floor was a drum containing warm coals from the previous evening. He was not burnt by the coals.

[50] The police initially would not help them neither could they get the J88 forms completed at the hospital. Exhibit "C1" is a photograph of his swollen hand.

[51] He is also a Rastafarian. He felt that his life was in danger. He was terrified. He is still in a state of panic at times. The incident repeats itself in his memory. For a month, he could not work.

[52] He was not discredited in cross-examination. He was honest enough to admit that a photo of his upper torso, "C2", may have been taken before the 1 June incident. He was kicked and trampled on repeatedly. Police walked over him. He had to protect his face with his hands. No search warrant was exhibited to him.

[53] He could not work because of the injury, particularly to the hand. He used his own herbs for medicine.

[54] He struck me as a satisfactory and honest witness.

(iv) Evert Faro (the third plaintiff)

[55] He has been a Rastafarian for about fifteen years and staying at the Eike Street address for about fifteen to sixteen years. As I mentioned, he lives in the back portion and his brother Adam and Daniels in the front portion.

[56] He heard the police making a noise at the door separating the two portions of the house. He opened the door and saw police with masks, wearing uniforms and holding torches and firearms. Some police were wearing black balaclavas. He was ordered to lie "on your stomach, mother fucker". They trampled him against his lower legs to force him to the ground. When he laid on his stomach, he was kicked and trampled on. He had to lie face downwards. He was sworn at and insulted. They referred to his mother's private parts.

[57] He was then taken to the front part of the house and told to lie behind his brother Adam with his head between Adam's legs. He was kicked against his side and they

stood on his lower legs and lower back ("kruis"). He was kicked on the mouth and on the eye. His mouth was broken and his eye was swollen. He was ordered to stay on his stomach. Exhibit "A5(b)" shows the badly broken lower lip and swollen left eye. There was blood on the ground where he was lying.

[58] "B29" is the J88 dated 19 June 2012. It still depicts abrasions of the leg and thigh and is endorsed "wounds at various stages of healing". The conclusion is "injuries probably due to blunt trauma".

[59] At the time, his only income was from the proceeds of the sale of the fruit and vegetables and scrap metal with his brother.

[60] He experienced this as a nightmare. Nothing like this had ever happened to him. It still comes back in his memory. He still lives in fear and wakes up at night in a sweat.

[61] He was not discredited in cross-examination. He described again how he was assaulted. The police dug their heels into his ribs and other soft portions of his torso when they kicked him. No warrant was shown to him. When he was lying behind his brother Adam the latter was also kicked very hard.

[62] After the plaintiffs had testified, they closed their consolidated cases.

(v) Captain Marikus van den Heever ("Van den Heever")

- [63] I have already referred to him briefly in the introduction. He was the commander of the Tactical Response Team ("TRT"). His team was assembled to penetrate certain houses in towns in the area including Ceres, Porterville and Piketberg.
- [64] Importantly, he confirmed that he sat in court the whole time while the plaintiffs were testifying.
- [65] He testified about the equipment used by his team. This includes crow-bars, a bolt-cutter, a "hooligan" tool, a "stompie", a hammer, a ladder and other articles. They also carry handcuffs, tie straps, torches and R5 firearms. At times also 9mm hand weapons.
- [66] He said they got the Porterville police to obtain a search warrant. This could be the one testified about which was allegedly held back by Constable Diedericks.
- [67] He confirmed that the doors were breached. He said the interlinking door to Evert was also breached although Evert said that he had opened it himself.
- [68] When it was put to him that all the plaintiffs testified that they were assaulted, kicked and punched he answered "I can't be everywhere at the same time. I have people with me. That's why I roam to see all the time, nothing illegal." He said he did not see any assaults being perpetrated.
- [69] He confirmed that nothing was found in the form of drugs and other unlawful substances.
-

- [70] He would not comment on the graphic photos in the bundles, particularly exhibit "A". All he said was that no assaults were reported to him. He conceded that, with his roaming, things may have happened which he did not see. When he was asked, in cross-examination, whether he disputed that injuries were perpetrated, he said it was possible, but it was not reported to him and he did not see anything. When it was put to him that all the plaintiffs were very fearful and scared he answered that he would also have been scared in their position.
- [71] He was not even present when the first door was breached. Generally, he seems to have been roaming quite a lot and seeing relatively little. He did not see the degrading action of making Evert put his head between Adam's legs. It is inherently improbable that they would have fabricated such an unusual state of affairs. At one stage he said "I don't personally search or breach, I am the commander".
- [72] Importantly, he was cross-examined about the fact that not one of the plaintiffs, in cross-examination, was confronted with the defence version, such as it is, neither was the version of any of the plaintiffs disputed in cross-examination. He was asked why he did not correct his counsel as he was sitting in court all the time. He said that he cannot speak for his counsel.
- [73] After Van den Heever testified, the defence case was closed.

Considering the applicable legal issues, including the question of *onus*

[74] In each of the four summonses, it is alleged by the particular plaintiff that he was "unlawfully assaulted" by members of the South African Police Services. Details of the assault are also pleaded.

[75] In her comprehensive heads of argument, Ms Cronje appears to submit, if I understand her correctly, that the plaintiffs have to prove that the policemen had the requisite intention to cause harm. It is not clear whether counsel argues that the pleadings are inadequate where only unlawful assault is alleged and not the necessary intention to cause harm. If that is the argument, then it is defeated, in my view, by counsel's own reference to *Mabaso and others v Minister of Police and another* 1980 4 SA 319 (W) where the following is said at 323H-324A:

"The characterisation of the alleged conduct of the second defendant as 'assaults' in the original particulars of claim clearly carries with it an implicit allegation of intentional conduct on the part of the second defendant."

I already touched briefly on the subject when dealing with the concepts of *contumelia* and the *actio-iniuriarum*.

Harms, *Amler's Precedents of Pleadings*, at 51, also points out that the allegation of an "assault" implies wrongfulness. The learned author refers to *Bennett v Minister of Police and another* 1980 3 SA 24 at 34H-35A where the following is said:

"*Prima facie* it seems to me that if a plaintiff alleges a violent assault upon him, he is alleging an unlawful and violent physical attack upon him which would in the normal course involve an element of *contumelia* deliberately inflicted."

The learned author also points out, at 51, that –

"It is trite law that every infringement of the bodily integrity of another is *prima facie* unlawful. Once infringement is proved the *onus* rests on the wrongdoer to prove some ground of justification."

- See *Moghamat v Centre Guards CC* [2004] 1 All SA 221 (C) at 224a.

The learned author also points out that –

"It is for the plaintiff to establish the fact of physical interference. Accordingly, the plaintiff must allege and prove facts which *prima facie* and objectively indicate such a wrongful act."

In my view, the plaintiffs succeeded in crossing this hurdle, both in their pleadings and in their uncontested evidence. The details of the assaults, uncontested in cross-examination, speak for themselves.

[76] As to *onus*, the learned author points out that "the *onus* of alleging and proving an excuse or justification for the assault rests on the defendant" – see the authorities referred to at 51. In this case, as I have pointed out, no such justification or excuse was pleaded and the defendant only offered a bare denial. No justification or excuse was put or suggested to any of the plaintiffs when they testified.

[77] Against this background, Mr De Beer, in his detailed heads of argument, submitted that once an infringement of the bodily integrity of the plaintiffs is established, it is

prima facie unlawful and intentional, and in the absence of any defence or grounds of justification should lead to a finding in favour of the plaintiffs in respect of the merits of each of the claims. With that submission I agree.

- [78] In this particular case, where no contesting version was put to any of the plaintiffs in cross-examination, and where their evidence on the assaults and the details thereof was not in any way challenged in cross-examination, Mr De Beer, correctly, referred to the well-known case of *Small v Smith* 1954 3 SA 434 (SWA) where the following was said at 438E-H:

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness' testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever."

In my view, these principles apply exactly to the present case.

With respect, efforts by Ms Cronje, in her heads of argument, to suggest that these principles can be overlooked for purposes of this case, are strained and artificial. Her submission that "in some respects the evidence of the plaintiffs was of so romancing a character that cross-examination thereon would prove futile" is unfounded and rejected out of hand.

[79] In all the circumstances, and for the reasons mentioned, I am satisfied that a proper case was made out by all the plaintiffs that they were unlawfully and intentionally assaulted by the police officers acting within the course and scope of their employment with the defendant. The defendant failed to discharge the *onus* resting upon him.

[80] The other outstanding formalities, initially the subject of a special plea, have also been resolved, as I pointed out. What is left, is to consider the *quantum* of the claims.

The *quantum* of the claims

[81] Determination of an appropriate award for non-patrimonial loss, as in this case, is in the discretion of the court.

However, courts have, over the years, taken account of corresponding awards made in comparable cases and used such awards as a guideline. Indeed, over decades, these awards have been recorded in the well-known work of Corbett and Buchanan (later Corbett and Honey) *The Quantum of Damages in Bodily and Fatal Injury Cases*.

[82] In *De Jongh v Du Pisanie NO* 2005 5 SA 457 (SCA) the following is said at 477A-D:

"Volgens hierdie benadering is die beginsel juis dat die vasstelling van nie-patrimoniële skade in die diskresie van die hof is. By die uitoefening van die hof se diskresie is vergelyking met toekennings in vorige sake 'n nuttige hulpmiddel omdat dit darem vir die hof die breë parameters ofte wel 'n patroon aandui waarbinne sy toekenning tuisgebring moet word. Dit is ook 'n nodige riglyn omdat konsekwentheid in toekennings 'n inherente vereiste van billikheid is. Nietemin bly dit steeds 'n riglyn. Dit vervang nie die hof se diskresie met 'n letterknegtige gebondenheid aan die aangepaste waarde van vorige toekennings nie."

[83] With regard to the "aangepaste waarde van vorige toekennings", it has become common practice to calculate and adjust earlier awards by taking inflation and other factors into account. For this purpose, the well-known author and actuary, Robert J Koch, issues his *Quantum Year-book* every year. This contains the up to date adjusted figures to reflect the present value of older awards.

[84] In addition, it has recently become recognised that courts are now inclined to make more generous awards than in earlier years. This tendency and approach were recognised in *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA) at paragraphs [27] and [34].

In *De Jongh*, at 477D-G, the learned Judge of Appeal, with reference to *Marunga*, cautions that this tendency to make more liberal awards cannot be applied with mathematical precision. The learned Judge of Appeal says the following:

"Die stygende tendens van toekennings in die onlangse verlede is, soos ek alreeds gesê het, duidelik waarneembaar. Die effek daarvan is egter weer eens nie met matematiese presiesheid bepaalbaar nie. Dit is nie seker presies wanneer die tendens begin het en wanneer dit sal eindig nie. Dit het bes moontlik reeds tot 'n einde gekom. 'n Bepaalde toekenning uit die verlede waarna verwys word kon dus reeds met inagneming van die tendens geskied het. As die vorige beslissing wat as maatstaf dien reeds met inagneming van die stygende tendens gemaak is, kan dit nouliks geregverdig word om op grond van dieselfde oorwegings sonder enige bykomstige rede 'n verdere styging toe te laat. Daarbenewens verg die tendens klaarblyklik nie die vermenigvuldiging van vroeëre toekennings met 'n vooraf bepaalde of bepaalbare faktor nie. Op die ou end is die tendens maar net nog 'n oorweging wat die hof geregverdig is om in ag te neem wanneer hy, by die uitoefening van sy diskresie, na vorige toekennings, veral in ouer sake, as riglyn verwys."

Despite these cautionary remarks, it is clear that it is now recognised that the court, in determining an appropriate award, can properly take earlier comparable awards into account as a guideline and also recognise the tendency to make more liberal awards as a further consideration to put into the scale.

- [85] With the foregoing in mind, I take some of the comparable awards into account which I was referred to by counsel.

- [86] An appropriate case, which, in my view, ought to be considered, is that of *Peterson v Minister of Safety and Security* recorded in Corbett and Honey, *op cit*, volume 6 at K6-1 (judgment in the Eastern Cape High Court on 23 September 2009).

The injured person was a 33 year old male seasonal fruit picker.

The synopsis of the injuries sustained and after-effects are summarised as follows by the learned authors:

"Unlawful arrest and detention. Also: assault. The plaintiff was assaulted in his home by a group of policemen having forcibly entered the house. He was punched in the face and had pepper-spray sprayed in his face. He was then dragged from his house in only a pair of shorts and taken to the police station. No steps were taken, either at his home or at the police station, to decontaminate his face from the effects of the pepper-spray. At the police station he was assaulted again by a policeman who punched him in the face, kicked him on the jaw and hit him on the back a number of times with a baton or stick. He was ordered to clean up his own blood from the floor but refused to do this. The policeman, while pushing the plaintiff to the cells, kicked him in the back. He was locked in the cell with three other men. He was forced to sleep on a slab of concrete without a mattress and without blankets. At about 04:00 the next day he was released. He walked home and was examined at hospital the same day. The form completed by the examining doctor reflected a wound on the upper left side of the head that was bruised and tender as well as a wound on the upper left jaw that was tender. 'Wide-spread tram-like

abrasions' of varying sizes were found on his back from the shoulder blades down to the buttocks. Pain-killers and sleeping pills were prescribed. The plaintiff suffered severe pain for a few days. Even though the pain began to dissipate, he remained in pain for a few weeks, requiring him to obtain more pain-killers from the local clinic."

In his judgment, the learned Judge recorded that there was no indication that the plaintiff had suffered any permanent injury.

[87] In damages for the unlawful arrest and detention, the plaintiff was awarded R60 000,00.

In damages for the assaults the plaintiff was awarded R120 000,00.

In terms of the *Quantum Year-book* for 2014 by Robert Kogh, the award of R120 000,00 for assault is now adjusted to an amount of R156 000,00.

[88] There is some resemblance between the injuries sustained by plaintiff Peterson and those sustained by the plaintiffs: in both cases the victims were punched and kicked repeatedly. In both cases injuries were sustained, be it bruises to the head and jaw (Peterson) or a swollen hand, broken lip, swollen eye, dislocated ankle and other bruises (in the case of the plaintiffs). In neither case was there an indication of permanent injury. Mr Peterson also said that he was disillusioned with the police. The same applies to the other plaintiffs. In both cases the homes of the victims were

broken open by the police and they were assaulted in their homes. Peterson also at the cells.

A difference between the two situations appears to be an absence of evidence in the *Peterson* case of psychological *sequelae* such as constant fear, nightmares, reliving the incident and so on. In the case of *Peterson* there is also the pepper-spray that was used. Peterson did not have the added misery of having his Rastafarian dreadlocks forcibly cut off.

In both cases there are signs of humiliation: Peterson was asked to wipe up his own blood and, for example, Evert Faro was asked to lie with his head between the legs of his brother Adam. In the case of the plaintiffs before me, there appears to be more evidence of ongoing swearing and foul language used including the humiliation of references to the private parts of the mother of some of the plaintiffs. It should be borne in mind that the *contumelia*, also resorting under the *actio iniuriarum*, as explained, includes the infringement of the plaintiffs' right to privacy, dignity and reputation. All this, in my view, should be taken into account for purposes of assessing a realistic damages award.

- [89] Inasmuch as I may take comparable awards into account, it seems to me, for the reasons mentioned, that there are substantial areas of similarity between the present case and that of Mr Peterson. For purposes of this judgment, I take the view that the awards of the four plaintiffs ought to fall roughly within the same parameters. Perhaps an amount of R2 000,00 can be added to the claim of Mr A Faro in respect of his loss of income.

On balance, it can perhaps be said that the *Peterson* case was more severe, if one bears in mind that he was attacked with pepper-spray and also that he was assaulted both at home and at the police station. It is true that he was also unlawfully arrested and detained, but he was compensated separately for that. The award of R120 000,00 (now R156 000,00) was only in respect of the assaults.

[90] I was also referred by Mr De Beer to a more recent case, that of *Marwana v Minister of Police*, decided on 28 August 2012, in the Eastern Cape High Court, Port Elizabeth. It was reported in *Corbett and Honey*, volume 6, at K6-154.

[91] The injured person was a 46 year old female domestic worker.

[92] The synopsis of injuries and after-effects, as crafted by the learned authors, reads as follows:

"Unlawful arrest and detention. Also: assault and unauthorised entry. The plaintiff was arrested and detained for about 30 hours. During her detention the police manhandled and assaulted her by striking her with a wooden plank and strangling her with a plastic bag. She sustained the following injuries: excessive bruises on the back and upper arms; abrasions both wrist joints; bruises both knees. She was strangled with a plastic over the mouth and nose such that she soiled herself. During the period of her arrest and detention there was an occasion when the members of the police took her to her home for further investigation. She never legally authorised the police to enter and search her premises. The court decided that the assault constituted a serious

violation of the plaintiff's right to dignity. She had done nothing to merit such humiliation, shock and trauma. There is no doubt that she suffered pain which could not be justified even by any stretch of the imagination."

[93] This plaintiff was compensated as follows:

damages for unlawful arrest and detention	R 55 000,00
damages for assault	R 90 000,00
damages for unlawful entry	<u>R 10 000,00</u>
	R155 000,00

In terms of the 2014 *Quantum Year-book*, the R90 000,00 award for the assault now increases to an amount of R101 000,00. It must be borne in mind that the plaintiff received separate awards for the arrest and detention and the unlawful entry.

[94] On balance, it would appear as though Ms Marwana was assaulted in a more serious fashion than were the four plaintiffs. Nevertheless, I see no indication of permanent injury having been sustained by this plaintiff and there is no clear evidence of psychological trauma after the event such as that experienced by the four plaintiffs in the present case.

[95] Ms Cronje also went to some trouble to refer me to a number of cases and awards that were made. These include the cases of *Peterson* and *Marwana*. In *King NO v Minister of Police Corbett and Honey* volume 6 at G3-11 (2012) an amount of R140 000,00 was awarded (current value R157 000,00) following a serious and degrading assault of a woman with a stick and a baton by a court orderly and a

member of the police. The assault took place in humiliating fashion in front of members of the public and the media. The injuries included abrasions on the right elbow and thigh, bruises on her right breast, chest, back and right hand, open wounds on her arm, *haematomae* on the left back and left eye and lacerations on the scalp, left eye and lower leg. In the summary presented by Ms Cronje, there is no indication of permanent injury or serious psychological *sequelae* although, one must assume, that such consequences probably manifested itself.

[96] There are other awards too, some considerably lower than the three I have mentioned and I do not consider it necessary to deal with all the cases.

[97] After due consideration, and as already indicated, I consider that it would be unrealistic to attempt an analysis of the injuries suffered by the four plaintiffs, with the view to suggesting a slight difference here and there between a realistic award for the one as compared to the others. By and large, the four plaintiffs went through the same horrendous experience. They were all injured, humiliated and, to an extent, psychologically traumatised.

[98] In all the circumstances, I am of the view that a realistic award in damages for the assault (including *contumelia*) for each of the plaintiffs would be an amount of R90 000,00.

[99] In the case of plaintiff Adam Faro, I propose awarding an additional amount of R2 000,00 for loss of earnings. It is true that he did not submit any supporting documentation in support of this claim, but, given the nature of his business, one

would generally not expect much by way of documentation. In any event, he was not cross-examined on this point neither was his evidence placed in dispute in cross-examination.

[100] In the result, I will make the following awards:

- | | | |
|-----|----------------|------------|
| (1) | to J Daniels | R90 000,00 |
| (2) | to J Constable | R90 000,00 |
| (3) | to E Faro | R90 000,00 |
| (4) | to A Faro | R92 000,00 |

Is this an appropriate case to award costs on the High Court scale, given the fact that the awards do not exceed the magistrates courts jurisdiction of R100 000,00?

[101] In *Mvu v Minister of Safety and Security and another* 2009 6 SA 82 (GSJ) the plaintiff was awarded R30 000,00 for unlawful detention following upon a lawful arrest.

[102] Before awarding costs on the High Court scale, the learned Judge referred to the following cases where the awards fell inside the jurisdiction of the magistrate's court but the costs were awarded on the High Court scale:

Minister of Justice v Hofmeyr 1993 3 SA 131 (A);

Seria v Minister of Safety and Security 2005 5 SA 130 (C) at 151D;

Louw v Minister of Safety and Security and others 2006[2] SACR 178 (T) at 189;

Olivier v Minister of Safety and Security 2008[2] SACR 387 (W) at 399h-400b; and

Van Rensburg v City of Johannesburg 2009[1] SACR 32 (W) at 41i-j.

In *Mvu*, the learned Judge said, at 93E, that "the underlying principle would appear to be the importance which the courts attach to questions of unlawful arrest and detention". I find it difficult to distinguish, when considering what costs scale to apply, between a case of unlawful arrest and detention, and a case, such as the present, where the plaintiffs were traumatised, assaulted and insulted in their own home. In both cases, the aggressor is the police.

[103] In *Marwana*, at K6-159, the learned Judge, although she had already made three awards which, in total, exceeded the jurisdiction of the magistrate's court, still dealt with the question of the High Court scale in the following terms:

"In my view, any violation of the rights of a human being should be viewed as serious. This is so especially the right to dignity, privacy and more so in circumstances where the plaintiff suffers emotional shock, humiliation and trauma by reason of having been assaulted by the law enforcement agents. To litigate in the High Court with a view to protect and enforce your rights is not uncommon in our constitutional democracy and will always justify the award of costs even on the High Court scale. This is more so when the defendant is one of the state organs who should have ensured that the rights of the plaintiff should be respected. I have no reason to believe that the plaintiff herein should not be awarded costs on the High Court scale. For that reason the costs herein shall be taxed at the High Court scale."

[104] It is also, in my view, fair to consider that a plaintiff in the position of the present litigants, given the uncertainty of what award is likely to be made, and the perceived tendency of courts to make higher awards, may, in any event, be on the horns of a

dilemma to decide whether or not to litigate in the High Court. This is not a case so obviously insignificant that the award inevitably has to fall inside the jurisdiction of the magistrate's court.

[105] In all these circumstances, I consider it appropriate that costs should be awarded on the High Court scale.

Associated expenses and fees – declaration of plaintiffs as necessary witnesses

[106] Allowances paid to witnesses and which are prescribed pursuant to section 42 of the Supreme Court Act, no 59 of 1959 (now pursuant to section 37 of the Superior Courts Act 10 of 2013) may be claimed on taxation in respect of any witness, lay or expert – see *Transnet Ltd t/a Metro Rail and another v Witter* 2008 6 SA 549 (SCA) at 559B-D.

[107] Inasmuch as it may be necessary, I would respectfully suggest to the taxing master that these plaintiff witnesses qualify for, at least, the prescribed allowance and, in the discretion of the taxing master, a higher allowance, as intended by the provisions of section 37(2) of Act 10 of 2013. The plaintiffs had to travel a long distance to come to court, and they are not men of means.

[108] In *Transnet, supra*, the following is said at 560G:

"In all cases therefore a declaration that a witness was a necessary witness is not necessary so a court should not usurp the function of the taxing master by making one, and the taxing master is not entitled to require one ... It is of

course open to a court to give any indication to the taxing master it considers may be useful."

In deference to these guidelines, I will refrain from making an order declaring the plaintiffs to be necessary witnesses. I take the liberty to respectfully suggest to the taxing master that the plaintiffs should be treated in terms of section 37, and, more particularly, section 37(2) of Act 10 of 2013 which I have dealt with.

The costs flowing from the proceedings of 22 and 23 April 2014

[109] There was some debate about which party should be liable for the abovementioned costs because the matter only commenced on 24 April 2014.

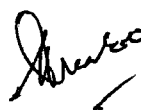
I have considered submissions made by counsel in this regard, and it appears that there was some confusion. It was also a question of no judges being available on one of the days. It seems to me that the correct approach would be not to make any order relating to the costs of the two days.

On behalf of the plaintiffs, interest at 15,5% per annum from fourteen days after the order to date of payment has been contended for. I understand the position to be that the Prescribed Rate of Interest has been reduced to 9% per annum. I have not been addressed on any effect the question of retrospectivity may have. I propose providing for the two rates in the alternative, for the taxing master to make the appropriate order.

The order

[110] I make the following order:

1. Judgment is granted against the defendant for payment to the four plaintiffs as follows:
 - 1.1 R90 000,00 to J Daniels in case no 50047/2012
 - 1.2 R90 000,00 to J Constable in case no 50055/2012
 - 1.3 R90 000,00 to E Faro in case no 50049/2012
 - 1.4 R92 000,00 to A Faro in case no 50050/2012.
2. The defendant is ordered to pay interest on the aforesaid amounts, in each case, at the Prescribed Rate of 15,5% per annum alternatively 9% per annum from fourteen days after the date of this order to date of payment.
3. The defendant is ordered to pay the costs of all the plaintiffs, incurred before and after the consolidation of the trials, to be taxed or agreed upon on the High Court scale.
4. No order is made in respect of the costs of 22 and 23 April 2014.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

50047-2012

HEARD ON: 24 & 25 APRIL 2014
FOR THE PLAINTIFFS: L W DE BEER
INSTRUCTED BY: ERWEE ATTORNEYS INC
FOR THE DEFENDANT: H T CRONJE
INSTRUCTED BY: STATE ATTORNEY