

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3) REVISED
15/05/2015 DATE
 SIGNATURE

15/5/15
CASE NO: 70139/2012

LEAAN WHANITO PETERS

PLAINTIFF

And

THE MINISTER OF SAFETY AND SECURITY	FIRST DEFENDANT
THE COMMISSIONER OF THE SAPS N.O.	SECOND DEFENDANT
SERGEANT NAVING SINGH	THIRD DEFENDANT
WARRANT OFFICER VAN ZYL	FOURTH DEFENDANT

JUDGMENT

THOBANE AJ,

[1] The plaintiff issued summons against the defendant in which he alleges firstly, that on the 31st August 2011, after being arrested by the Metro Police, he was unlawfully incarcerated by the defendant, in that there was no legitimate basis for such incarceration. He further alleges that he was so incarcerated from the 31st August 2012 to the 2nd September 2011. Secondly, the plaintiff alleges that he was assaulted by the third defendant, at various stages, as a result of which assault he sustained serious injuries which included a broken jaw. That upon being released from custody he had to undergo corrective medical procedure that included insertion of a plate and screws to his jaw.

[2] On the papers, the defendants on their part, admit the arrest carried out by Metro Police but deny that the plaintiff was unlawfully incarcerated. The defendants admit however that the plaintiff was moved to Silverton Police Station and that on the 2nd September 2011 he appeared in the Pretoria Magistrates Court on a charge of theft of a motor vehicle. The assault is also denied.

[3] At the commencement of proceedings the plaintiff moved an application for condonation. Plaintiff asked the court to condone its failure, should the court find that there was such failure, to give the notice of intention to sue, as contemplated in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. Leave was granted to the plaintiff to proceed and no order as to costs was made.

[4] The defendants took a point that a party i.e. Metro Police, who in their view should be before court, has not been joined by the plaintiff. The defendant in essence raised the question of non-joinder.

[5] The substantial test for non-joinder is stated and has come to be accepted as follows:

"Whether the party that is alleged to be a necessary party for purposes of the joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in these proceedings."

See **BOWING NO v VREDEDORP PROPERTIES CC & ANOTHER 2007 (5) SA 391 (SCA) pg 398 para F-H** which quoted with approval the principle in **AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR 1949 (4) SA 637 (A) at 657.**

[6] The action instituted by the plaintiff is based on two causes of action as stated in paragraph 1 above being unlawful incarceration as well as assault. The allegation by the plaintiff is that the first defendant up to the fourth defendant were the perpetrators.

[7] The contention by the defendants' legal representative was, and on this the mis-joinder was premised, that Metro Police, as the persons that carried out the arrest, was not a party to these proceedings. I hasten to add that the court is not called upon to

pronounce as to the legality or otherwise of the arrest. The arrest that took place on the 31st August 2011 is admitted, however, the detention at Moot Police Station is denied whereas the transfer or move to Silverton Police Station on the 1st September 2011 is admitted.

[8] It could not be pointed out to me, nor could I discern, how on the above facts, the order that is sought i.e. a finding that;

(a) The plaintiff was unlawfully incarcerated and/or,

(b) Was assaulted by the defendants,

will likely prejudice the legal interests of a party that has not been joined. That party being Metro Police.

[9] The question of indemnity as advanced by the defendants legal representative is in my view far fetched for two main reasons. Firstly, the decision to incarcerate is the defendants and the defendants alone. Secondly, there is no averment that the arrest which is not the cause of action but which has been admitted by the defendants, was carried out in a manner that calls for this court's intervention and/or pronouncement. Simply put, the defendants cannot seek indemnity from Metro Police, for the alleged unlawful detention carried out by the defendant alone or indemnity from the alleged assault which the defendants deny occurred.

[10] In the absence of prejudice potential or real, on the party not joined, i.e. Metro Police, the point raised, that of mis-joinder, failed with costs.

[11] Owing to the time constraints and the availability of the expert witness it was ruled that the evidence of the plaintiff's expert, Dr. Pierre Brits be heard first. The defendant did not object to this approach and the plaintiff was directed to be outside court for the duration of the testimony of Dr. Brits.

[12] Dr. Brits testified that he was a psychologist who consulted with the plaintiff and thereafter prepared a report which was admitted into evidence as exhibit "A" and ran from pages 1 through to 85. After stating his qualifications he indicated that he was initially in the employ of the Department of Correctional Services but that he later joined the Department of State Security where his responsibilities included, *inter alia*, helping employees who had been exposed to trauma. He asserted that he was an expert in the field. He explained what Post Traumatic Stress Disorder was as well as its origins. He sketched briefly details of the initial consultation with the plaintiff. He recorded the fact that he was at first cagey but later became more open and was able to open up and tell his story.

[13] He testified that in his view the plaintiff suffered from depression and that he was able to formulate that view having gathered "raw facts" from the plaintiff himself. He pointed to the facial injuries that the plaintiff sustained and how these would affect him in his daily life. In his view the plaintiff would need to be empowered with coaching skills by way of psychiatrist treatment. He testified that the plaintiff would benefit from future psychological treatment as he exhibited signs of losing interest in life. He stated as an example the incident in 2013 when the plaintiff

had a bike accident as a result of which both his legs were broken necessitating him to be wheelchair bound. Whereas previously he was a fearless young man who had insatiable appetite in motor bikes, following the incident he was hesitant and indecisive. In his view further consultation with experts in the future would assist him regain his confidence and trust.

[14] He testified that the plaintiff was well known in his township as a talented motor cyclist who carried the nickname "Van Damme", and that his father was known to be a specialist mechanic who was able to tweak motor bikes and make them more powerful. The plan was for the plaintiff to attend a course of sorts near Delmas for his biking skills to be honed and for him to be trained. Since the accident his confidence has been affected and he lacks self confidence to appear in public and to participate in biking events. In his view the plaintiff's future prospects as a biker have been seriously compromised.

[15] The beating he received from Sgt. Singh, the third respondent, in front of the members of the public which included the complainant in the motor vehicle theft case, as well as the suffocation to the point where he wetted himself twice, was both humiliating and violated his human rights. As a result he experienced conflicting emotions and, given that his mother is a police woman, seeing her in police uniform extracted from him mixed emotions, and so does the sound of police sirens and the sight of police vehicles. His self esteem has been lowered and his self worth taken

away. This will likely negatively impact on his long term functioning with the opposite sex, so he testified.

[16] Prior the incident the plaintiff was a fearless young man who probably, given his talents, would have gone on to compete internationally. He now lacks spontaneity, was presumed guilty till he proved himself otherwise, was made to interact with hardened criminals, lost trust in the police, suffered trauma and contemplated suicide. At the time he had been busy with matric but as a result of the incident he failed two subjects his explanation being that he could not concentrate because of the trauma and the effect of the medication to treat same.

[17] In future, it would be necessary for the plaintiff to receive therapy from a psychologist and to be coached by a professional to equip him with coping skills, all of which require money. Such a process would entail the training of his immediate family so as to empower them to support him in that endeavor. The anxiety from which he suffers can be characterized as extreme. It must be accepted, so he testified, that anxiety will remain a part of his life. His quality of life has been diminished. He has no dreams, lacks self confidence and contemplates moving to a new place. Given that he will not be able to cycle again, suffered emotional shock and given the trauma that he had to endure, the plaintiff will benefit from an award that will equip him to cope with all the challenges brought about by the events that were visited upon him. His evidence in chief ended on that point.

[18] Before cross examination could take place the the parties indicated that the defendant was not going to proceed therewith and that the defendants have made the following concessions, which were duly noted;

1. The merits are conceded in full;
2. The defendants are liable for costs incurred on the merits on a scale as between attorney and client.

[19] The Plaintiff, Leaan Whanito Peters testified that on the 31st August 2011 he was driving his father's vehicle a red Honda Ballade on the way to MacDonald. He was stopped by Metro Police who included one Rudi who is well known at Eersterus. He was then handcuffed. He asked what crime he had committed but was not at that stage answered. He was taken to Dykor Street in Silverton. On arrival he was told that the person he had been with earlier stole a motor vehicle. The person referred to was one Clinton Smith whom he had given a lift at a traffic light and had driven with for about 5km. During the interrogation and while in handcuffs, he was being assaulted in full view of members of the public.

[20] He had been handed over to the SAPS flying squad by the Metro Police. The members of the flying squad were the third and the fourth defendant. He was driven and made to sit at the backseat of the motor vehicle which was driven by the fourth defendant. The third defendant sat with the plaintiff at the back seat and continued to assault him. He lost count of how many times he was assaulted but he was being hit

with clenched fists and open hands. During this time he experienced excruciating pain.

[21] At some point a firearm was drawn by the third defendant and pressed hard against his private parts as he sat in the car. At which point he wet himself. An experience which was both horrifying, humiliating and deeply embarrassing. As he had been crying and reeling in pain, he was told *"to stop crying like a bitch"*. The vehicle he was driven in was taken to an isolated railway track near Silverton where he was made to alight the vehicle and thrown on the ground. The third defendant removed a plastic bag from the boot of the car which he placed over his head, tightened it around the neck and suffocated him with till he suffered a black out. It is also during this suffocation that he again wet himself. He indicated that he was in terrible pain and was crying throughout, repeatedly begging the police to stop. He could feel that his tooth was loose and that there was something not right with his jaw. The plaintiff was being assaulted throughout.

[22] The vehicle was driven to K9 where the third defendant is based and his girlfriend was collected. Throughout all this he was in handcuffs. He was driven to Silverton Police Station and on arrival it was found that the cells were full. It is also at Silverton where he saw his father. He avoided eye contact with his father but could see that he was a broken man and was in tears. On realizing that the cells were full they drove him to Moot Police Station. On the way there they went via Kilnerton where they dropped off the third defendant's girlfriend. They also stopped at a shop

where they bought cigarettes. At Moot Police Station his mother asked to see him and noticed that he had a swollen face on the left hand side, a loose tooth and bruises in the neck area. All the injuries had been caused by the assault, including the loose tooth, he suffered at the hands of the third defendant. He testified that seeing his mother at Moot Police Station was heart breaking. She was also in tears and appeared devastated. She asked if the plaintiff could be taken to hospital in light of the injuries to which request they agreed. As the plaintiff was on a medical scheme she wanted to take him to a private hospital, however this was refused. The plaintiff was taken to Tshwane Hospital where he was examined by a medical practitioner. He was in handcuffs which were taken off momentarily when he was examined but were thereafter put back on him. He told the attending Doctor that his jaw was broken but was told that if it was broken he would not have been in a position to talk. This explanation he accepted. He was prescribed pain medication which was given to the third defendant.

[23] He was thereafter taken to Moot Police Station where he was read his rights and certain forms were completed. He was then booked into the cells. His last meal had been around lunch time and since then he had not eaten anything. The first night he was alone in a cell and slept on a mattress. He felt humiliated and thought he was like a nobody. More like a dog in a cage. It was cold, he was in pain throughout the night and could hardly sleep. The following morning he was placed in a populated cell with four other detainees and spent the entire day there. There was an open toilet with no privacy at all. They were given food however owing to the pain he was

experiencing in his jaw, he couldn't eat as he couldn't chew. At about 12:00 he was transferred to Silverton Police Station where he spent the night. The sleeping conditions were just as bad. He didn't know who to trust and could not sleep fearing something might happen while he slept. The smell was equally unpleasant. The following morning he and others about thirty to forty in total, were transported by truck court. but did not appear in court. He was told while in the cells that charges had been withdrawn and that he could go home.

[24] He was met on being released by his father who offered him food, he asked his father to take him to a dentist as he was in pain and his tooth was loose as he thought it could be pulled out. He was transported to the dentist who after taking x-rays and examining him informed him that his jaw was fractured and that there needed to be a medical procedure performed immediately. He was then referred to another specialist and an operation was performed where a plate was inserted into his jaw and screws were also inserted. Following this procedure, for months he could not take any solids surviving on only liquids. To this day, so he testified, he still experienced pain on cold days and he avoids certain solid foods that are hard to chew. These problems did not exist before the assault incident.

[25] He was a keen motor cyclist who was well known in his township. He participated in drag racing and attended cycling shows. He had considered making cycling a profession. After the incident he became cagey and was fearful of being pulled over by the police whom he believed were supposed to protect the citizenry

but who in his case did the opposite. As a result he didn't want to drive anymore. He is no longer an outgoing person and since he was held in high esteem by the kids in his community he felt that he had lost the self worth although he consulted Dr Brits who assisted him immensely, he no longer views the police in the same light. As a result of the arrest he could hardly concentrate and he consequently failed two subjects. He had to repeat them in order to pass matric and lost a year as a result. People no longer view him in the same light. He was injured, has been scarred emotionally, suffered shock and he now believes he should be adequately compensated therefore.

[26] During cross examination he confirmed that the drag races that he participated in was structured and various clubs organized them. Although he did not belong to any club he participated as an independent competitor. He confirmed that he was once incarcerated on an assault charge but that in that matter charges were withdrawn.

[27] Dawn Antoinette Bowers testified that she is the plaintiff's mother. She confirmed that when she saw the plaintiff at Silverton Police Station he was down, appeared to be in pain, was in tears and did not want to keep eye contact. She tried to be strong and not to cry in front of him. She tried speaking to the fourth defendant but was told nothing. Next she saw the plaintiff at Moot Police Station after she specifically asked to see him. She observed that his face was swollen and he had blue eyes. She offered him food which the plaintiff could not eat. She asked what had

happened to him and the response he received was that adrenaline was high. She insisted that he be taken to hospital to which they agreed. However, they refused that he should use her medical scheme and also refused that she should accompany him to hospital.

[28] After charges were withdrawn the plaintiff was collected from court and he said that he should be taken to the dentist as his tooth was loose. He was informed by the dentist that the tooth could not be removed as his jaw was broken. He was operated on to correct the broken jaw.

[29] She confirmed that the plaintiff was a kind hearted child who loved motorbikes prior the incidences that gave rise to this action. He was held in high regard by members of the public at Eersterus and was considered to be a role model. He was very competitive in the races he participated in to the extent that he almost always was first. This led to an approach by sponsors who wanted to sponsor him however her attitude was that he should finish matric before such sponsorship could be considered. Following the events of the 31st August 2011 to the 2nd September 2011 the plaintiff is no longer the same person, so she testified. He was now more reserved and has a diminished self esteem. He is no longer out going, preferring instead to stay at home and not socialize. While he enjoyed participating in charity events before the incidents, that is no longer the case. He wants to move out of Eersterus to a place where he is not known as he struggles to face the people in his township. His attitude

towards the police has changed. Such attitude extends to her since she is in the employ of the SAPS.

[30] In argument it was submitted on behalf of the plaintiff that the fact that the defendant conceded merits and tendered costs on a scale as between attorney and client, was indicative of the fact that there was acknowledgement of wrongdoing. It was argued further, that the testimony of the expert was well reasoned and laid the basis for future consultations and debriefing therapy. An application was brought to amend the figure in respect of the 60 consultations from R1400-00 per consultation to R1600-00 per consultation, thus bringing the total to R96 000-00 as well as the figure in respect of continued future debriefing from R200 000-00 to R220 000-00. The proposed amendment was not objected to and was allowed.

[31] With regards to general damages it was submitted on behalf of the plaintiff, in detail, that the various heads of damage be compensated accordingly. It was argued that varying amounts be allocated for emotional trauma, shock, *contumelia*, pain and suffering as well as loss of amenities of life. I was referred to the judgment of ***Rowan v Minister of Safety and Security NO 2011 (3) ALL 443 (GSJ)***, with regard to the unlawful detention.

[32] On behalf of the defendants it was conceded that a case for the 60 consultation as well as the debriefing therapy has been made out and that there was no qualms with an award for these heads of damage. The objection was noted with a claim for

therapy to be offered to the immediate family. It was further submitted that the various heads of damage should be looked at in a globular manner and not be compartmentalized. With regard to the unlawful detention it was argued that having regard to the fact that merits have been conceded, an award of R40 000-00 per day of unlawful detention would adequately compensate the plaintiff. In this regard I was referred to the judgements of *Minister of Safety v Scott [2014] ZASCA 84*, *Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP)*.

[33] It was further submitted that an award for the injury to the jaw of the plaintiff should be compensated accordingly and in this regard I was pointed to the judgment of *Phillemon Kgoroshi Matladi v Road Accident Fund*, that involved injuries to the jaw. It was submitted in conclusion that an award of R616 000-00 comprising the special damages as testified to by Dr Brits in the sum of R316 000-00 plus R300 000-00 being a globular amount for general damages would be a fair and reasonable award.

[34] The determination of an appropriate amount to award for damages is by and large a matter of discretion. The determination requires the evaluation of the personal circumstances of the plaintiff, the circumstances surrounding his detention as well as the assault. A further consideration is to seek guidance from comparable awards made previously. Keeping in mind that the comparison is not a meticulous examination but rather a guide. The discretion remains in tact and is in no way diminished by that exercise. See *Ngcobo v Minister of Police 1978 (4) SA 930 (D)*, *Protea Assurance*

Co Ltd v Lamb 1971 (1) SA 530 (A), Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP).

[35] Bearing in mind the purpose of awarding general damages as articulated in *Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)* being the primary purpose is "*not to enrich [the claimant] but to offer him or her some much-needed solarium for his or her injured feelings*". In the context of this matter he has to be compensated for unlawful detention, the fact that his freedom was taken away from him as well as its duration, the fact that he was assaulted severely and that as a direct result of the assault he will require future professional intervention.

[36] The plaintiff was at the time 19 years of age and was attending school. Up until the incident, there is no indication that he could not realise his full potential as a person. There were no impediments to him reaching his dreams. He enjoyed sports and was a keen motor biker. He regularly participated in biking events sometimes competitively and he got diplomas, so he put it, prize money as well as other awards. It is clear that he saw a future for himself in professional biking. This is supported by the fact that his talents were spotted by sponsors who wanted to be involved in his biking. This is indicative of the fact that but for the incident he would have gone further to achieve a lot in biking. The community in which he lived, that of Eersterus, looked up to him, young as he was, as a role model. He came from a stable family structure and it is not disputed that he gave his time to charitable causes. He was therefore a well rounded young man, rooted in his community.

[37] An act of kindness, that of giving a lift to someone he knew, precipitated a chain of events that has left the plaintiff a shadow of his former self. He is now a broken young man turned into an introvert, lacking in trust, belief and self confidence, afflicted by pain and with a future that lies in ruins. Following his arrest by Metro Police, he was handed over to the third and fourth defendants. He was assaulted in full view of members of his community while in handcuffs. While being transported and with his hands handcuffed behind him, he was continuously assaulted. He did not testify about the point at which he felt his jaw break or his tooth coming loose. The first time he referred specifically to the tooth and the painful jaw was when he was lying on the ground after being suffocated. This, in my view, points to the fact that the assault was not relenting. There was no opportunity for him gather his thoughts and to feel so as to be able to point to the moment at which his jaw was broken. A firearm was pointed at and pressed hard against his private parts obviously in a threatening manner. One can not begin to imagine the fear that engulfed him to a point where he wet himself. The humiliation and loss of dignity that he suffered thus far was just reprehensible. That he was taken to an isolated place where effectively he was tortured by suffocation to a point where he passed out and again wet himself is criminal conduct of the worst kind.

[38] The code of ethics of the SAPS rests on the following five pillars,

1. *Integrity,*
2. *Respect for Dignity,*

3. *Obedience of the Law,*
4. *Service Excellence and*
5. *Public Approval.*

The fourth and fifth defendants violated each and every one of the five pillars. The actions of particularly the third defendant were clearly intentional. It could not have been lost to him that he ought to conduct himself with utmost integrity. That he was dealing with a fellow human being, a youngster, deserving of his trust, honesty and respect. Instead of respecting the plaintiff's dignity, he violated it. He did not obey the law but he simply set out on a course to deliberately violate it. He became a perpetrator of violence on someone that was vulnerable. His actions were deplorable and would not find approval with members of the public. The strongest disapproval and condemnation of the conduct of the third defendant is well deserved. See *Van Rensburg v City of Johannesburg 2009 (1) SACR 34 (W)*.

[39] The Constitution accords everyone the right to freedom and security of the person, which includes the right –

(a) not be deprived of freedom arbitrarily or without just cause.

Section 35 of the Constitution provides detailed rights to arrested, detained and accused persons, including the right to be released if the interests of justice permit and upon reasonable conditions, and to humane conditions of detention. That the human rights of the plaintiff were violated was conceded. Although the concession is commendable it is however damning and a serious indictment on the state of policing.

[40] The plaintiff was on the 31st August 2011 at about 15h00 after being arrested by Metro Police, placed in custody of the defendants before. From that time he was driven around in a police vehicle. At some point the police vehicle stopped at a shop so the defendants could buy cigarettes. A passenger was also given a lift and later dropped off at her place while the plaintiff was in the vehicle. These are serious violations. He was released on the 2nd February 2011 at about 11h00. He was therefore in detention for a full day and 20 hours. He slept in police cells twice, admittedly he could not sleep. Given that he was in pain for the duration of his incarceration and that the conditions he was exposed to were very foreign to him as a result he found it difficult to cope. Therefore it must have been a very difficult period of two days for him.

[41] I have looked at case law and have compared the awards granted to what I propose here under. I have where necessary adjusted what was awarded then, as a guide, in line with inflation. I have taken into account the fact that the defendants conceded the merits of this matter and that no witnesses were called on behalf of the defendants. Also, there was no mounting of a substantial challenge to the evidence of the expert witnesses. I am of the view that an award for therapy of immediate family should not be allowed. A fair and reasonable amount for future medical expenses should exclude family therapy. For purposes of this judgment general damages will be considered in a globular manner.

[42] The parties are *ad idem* that costs should follow the event on a scale as between attorney and client.

[43] I therefore make the following order;

43.1. The defendants are directed to pay the plaintiff the sum of R816

000-00 (Eight Hundred and Sixteen Thousand Rand),

43.2. Interest on the above amount at the prevailing rate from the 9th May

2012 to the date of final payment,

43.3. Costs of the action on the scale as between attorney and client.

A handwritten signature in black ink, consisting of several overlapping loops and a central mark, positioned above a horizontal line.

ACTING JUDGE OF THE HIGH COURT

Date Heard: 12th and 13th May 2015

Date of Judgment: 15th May 2015

Counsel for Plaintiff: Adv. Coetzee

Counsel for Defendant: Adv. Mfazi