



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

CASE NO.: 58933/10

In the matter between:

JOSEPH JULIA MOKOENA

Plaintiff

And

THE MINISTER OF POLICE

Defendant

CIVIL MATTER

KGOELE J

DATE OF HEARING : 16 MARCH 2015

DATE OF JUDGMENT : 11 JUNE 2015

FOR THE PLAINTIFF : Adv. F H H Kehrhahn

FOR THE DEFENDANT : Adv. Magano

JUDGMENT

KGOELE J:

A. INTRODUCTION

- [1] The plaintiff instituted a claim for damages against the Minister of Police in his capacity as the employer of members of the South African Police Services (**SAPS**) for his alleged unlawful deprivation of his liberty and assault. The plaintiff alleges that over a period of three days in January 2010, he was unlawfully deprived of his liberty and assaulted by members of SAPS at Elandskraal. His claim for damages is for the total amount of R285 300-00 which is made up as follows:-

Claim A = R60 000-00(Assault and deprivation of liberty on 4/1/10)

Claim B = R300 -00(Cell-phone confiscated by the police on 4/1/10)

Claim C = R25 000-00 (Unlawful deprivation of liberty) on 5/1/10)

Claim D = R50 000-00(Assault and deprivation of liberty on 5/1/10)

Claim E = R150000-00(Assault and deprivation of liberty on 7/1/10)

- [2] These allegations were denied by the defendants, who pleaded a bare denial to the plaintiff's allegations. The duty to begin and the onus of proof therefore rested on the plaintiff.

B. SUMMARY OF THE EVIDENCE

PLAINTIFF'S CASE

CLAIM A AND B

- [3] Plaintiff testified that at the time of this incident he was in the employ of Mr Joseph Nyanku (**Nyaku**), the third witness who testified on his behalf. They were also staying in the same house which belonged to Nyanku. At that particular time members of the SAPS were looking for a suspect called Kgotlelelo, who was accused of killing one of their members. The plaintiff knows Kgotlelelo through the younger brother of his employer, namely, Sello Nyanku. Sello Nyanku had earlier called him and informed him that the SAPS are looking for Kgotlelelo and if he sees him he must report to the police.
- [4] On Sunday the 4th of January 2010, Kgotlelelo came to their house and asked for food and money. It was around past six in the afternoon. Plaintiff told him that he did not have food or money and Kgotlelelo left. He went to the police station at Elandskraal to report his encounter with the suspect. He was with Sello Nyanku.
- [5] Later during the same day, at around eight or past eight in the evening, whilst watching TV at Nyanku's place, he heard a noise of the kitchen door being kicked open. He was with Nyanku and his wife Silver, at that time. Members of the SAPS entered the house. They were dressed in private clothing, but had brown bullet proofed vest on, handcuffs, 9mm guns and rifles. They pointed them with firearms and further ordered them to lie down and whilst on the floor, were kicked

with booted feet. He was kicked on his head and stomach. They ended up handcuffing him, searching his pockets and taking a Cell-phone from him. They then asked them of the whereabouts of Kgotlelelo. They were taken out of the house. They continued asking them questions about the whereabouts of Kgotlelelo at the same time hitting them with open hands. He identified Mr Morokweng, Mr Ngudi and Mr Phoku amongst the police officers who were there at the scene.

- [6] Outside there were many other police officers who were wearing uniforms. They were with Ms Lebogang Mokobi (**Lebo**), the second witness who testified on behalf of the plaintiff, who was known to the plaintiff. The SAPS members, according to him, also pulled his private parts at that time and it was painful as he screamed. There were no vehicles in front of Nyanku's house. The vehicles used by the SAPS members were seen by the plaintiff at Mr Ngobe's house, and it was parked next to his shop. He could not say how many vehicles there were but were many. As a result of plaintiff and Nyanku being continuously assaulted, he suggested that they should go to the house of a relative of Kgotlelelo to look for him there. That is the house of Mr Ngobe. They (the plaintiff, Nyanku and Lebo) walked to the house of Mr Ngobe, whilst surrounded by the SAPS members. The plaintiff and Nyanku were still handcuffed at that stage. When they arrived at Ngobe's house which is about 1km from Nyanku's house they went right up to the gate. The SAPS members used a cutter to cut the chain around the gate open. Other police officers jumped over the fence. The SAPS members went to the front door and knocked. Some of the police officers searched a flat on the premises occupied by Indian tenants. Mr Ngobe was not assaulted or treated harshly by the SAPS

members, they only enquired from him if he knows the whereabouts of Kgotlelelo. He replied in the negative. Mr Ngobe owns a private school and they went to this private school in order to search for Kgotlelelo there.

- [7] Upon arrival at the school, they found a security guard. The police officers then cut open the lock of the gate to gain access to the school. The school was searched and Kgotlelelo was not found. When they were returning back, Lebo was then taken back to her house in one of the police vehicles. The police only released them at around 01h00. He then asked to be given back his cell phone but it could not be found and Inspector Morokweng, promised to buy him a new one and further that he will bring it the next day.
- [8] He indicated that at no stage did he agree with the members of SAPS to accompany and assist them in the search for Kgotlelelo. They took him by force and he was handcuffed at all the times with his hands at the back and was feeling pains. According to him his phone is worth R300-00. To date, he has not received a new phone that he was promised.

CLAIM C

- [9] The following day on the 5th of January 2010 in the morning around six, two police officers who were unknown to him by names but were part of the group that came the previous night arrived at Nyanku's house again. This time they requested him alone to get into the vehicle they came with. Upon enquiring why, he was not given a

reason. The said vehicle was not a marked one. They were wearing private clothes. They were armed and he was handcuffed the same way as the previous night. They then took him away and drove with him to Nyanku's mother's house in Elandkraal still searching for Kgotlelelo. When they could not find Kgotlelelo they went to various places and villages still in pursuit of him. The villages included Mvusini village and Moralela village. He was only taken back home at around 13h00. During this encounter he was not assaulted at all. He only felt pains on the hands where he was handcuffed. He experienced the need to go to the toilet but did not ask for that because he was scarred of them.

CLAIM D

[10] On the same day (as Claim C), the SAPS members came back to Nyanku's house at five in the afternoon, where they found the plaintiff with Nyanku and his wife again. Although they were many in number, not all of the officers were wearing SAPS uniforms and some of them were wearing private clothing. They were dressed in bullet proof vests and had firearms and handcuffs. The SAPS members arrived there with Sello Nyanku, who is the younger brother of Nyanku.

[11] He was taken away together with Nyanku, handcuffed then and placed in separate vehicles. He was hit with an open hand and even pinched. At that time he was seated in between two SAPS officers. They went to a place called Tsantsabela and parked next to a dam. They took Nyanku who was still handcuffed and went with him near the dam. A plastic bag was placed over his head and was only removed after he

had messed himself. He was left standing in the car but could see what was happening. One of them hit Nyanku with fists on the stomach telling him to speak the truth.

- [12] They were put back into separate cars and went to Moiding. The plaintiff was still handcuffed although he indicated that he was not assaulted this time. After their encounter at Moiding, they were taken back to Elandskraal with the brother of Kgotlolelo. The plaintiff was specifically taken to the Elandskraal SAPS members. On arrival, they waited for Joseph Nyanku and one Jackie. The vehicle he was in was parked outside the SAPS members Elandskraal premises and was still inside the vehicle whilst waiting. He was hungry and too scared to ask to go to the toilet. He was not given an opportunity to visit a bathroom facility by the SAPS members. When the police and Nyanku arrived at the Elandskraal Police Station one Tjommie also arrived. The SAPS members asked Tjommie if he saw Kgotlolelo. Nyanku then told the SAPS members that he needed to take medication and that is when the SAPS members released them. The handcuffs were removed. It was at 21h00 when they were freed to go home.

CLAIM E

- [13] On 7 January 2010 at 20h00 the plaintiff was with Nyanku and his wife, Silver at their house. The police arrived and entered through the security door. At that stage they were busy enjoying a meal. The police said that they (plaintiff and his company) are enjoying themselves whilst they (SAPS) are looking for someone. The plaintiff knew that these people were police because he recognised them from his previous encounters with them and they were wearing bullet proof

vests and had firearms. Some were wearing SAPS uniforms. The SAPS members ate their food and started to assault him. Some then took Nyanku away. The plaintiff was taken to the kitchen by four other police officers and Nyanku to the garage. He was beaten and slapped in his face on both cheeks and his ear started to bleed. The plaintiff heard Nyanku screaming in the garage. The police stopped assaulting him and took Nyanku away. He remained behind. He also testified that after that day the police continued to come but on all those occasions they were asking them about Kgotlelelo but in an orderly manner and not assaulting them at all.

Mokgadi Lebogang Deborah Mokobi

- [14] She testified that she also knew Kgotlelelo who was wanted by the police as he usually visits Nyanku. She knew about the fact that Kgotlelelo was wanted because earlier during the week Mr Thobejane who explained to her that he was from Motetema police station called her and wanted to know the whereabouts of Kgotlelelo. On Sunday evening, the 3rd of January 2010 the police and his brother knocked on her window requesting her to open. It was around eight o'clock in the evening. After opening, the police who were clad in civilian clothing, bullets proof vests and had firearms, torches and handcuffs entered her house and searched it, at the same time enquiring where Kgotlelelo was. They were approximately twenty in number. After that she was forced to walk with these police officers to Nyanku's place as she told them that Kgotlelelo normally visit there. They made her to stand outside at Nyanku's place when they went around the house and came through the front door with the plaintiff and Nyanku who

were according to her, assaulted and further instructed to lie down. They were handcuffed when they were so assaulted. They were even kicked and they screamed. She was also hit with an open hand and told to speak the truth. The police officer that assaulted her is Mr Ngudi. Joseph Nyanku then suggested that they go to his uncle, Mr Ngobe. The procession proceeded to Mr Ngobe's place. The SAPS members surrounded them as they were walking to Mr Ngobe's place. She saw the vehicles used by the SAPS members for the first time next to Mr Ngobe's house. Mr Ngobe's gate was cut open. His house searched. He then suggested they should check at his private school. At that time there were also police officers with uniform. She did not accompany the police to the school as she was taken back to her house in a vehicle.

Joseph Rasimati Nyanku

- [15] He confirmed that the plaintiff was working and staying with him as he had a contract erecting toilets in the village Elandskraal. His evidence corroborated that of the plaintiff in as far as the events that relates to the incident that took place on Sunday when the police arrived at this place during the night at past eight (Claim A and B). He also knew Mr Ngudi, Inspector Phoku and Superintendent Morokweng amongst the members of SAPS. His evidence of about what happened inside and outside his house is also the same as that of the plaintiff including up until they went to Mr Ngobe and Mr Ngobe's private school. He also indicated that he was pulled with his private parts amongst the assault he received. He also corroborated Lebo on the fact that she did not accompany them to Mr Ngobe's school. He did not mention the fact that plaintiff was searched and a phone taken from him, but that he

witnessed when they were about to be released that plaintiff was requesting for his Cell-phone from the police. They asked amongst themselves about its whereabouts. When they could not find it, they promised plaintiff that they will give him the phone the following day. They were then released at around 1h00.

[16] In respect of Claim C, he testified that during the early hours of the morning, although he could not recall the time, two police officers came to his house and asked for the plaintiff. They left with the plaintiff after he was handcuffed. He did not know where the SAPS took the plaintiff to. He knew they were police officers as they were part of the group that came to his house the previous day. The SAPS officers were not wearing police uniform, but they were armed. He cannot recall at what time they returned, safe to say it was during the day. On his return, the plaintiff explained that he was taken to Morarela and Mbuzinini villages.

[17] In as far as Claim D is concerned, he also corroborated the plaintiff in as far as how the police arrived in the afternoon of the same day of Claim C how they were taken in separate vehicles to the dam and how he was assaulted until he messed himself.

[18] In as far as Claim E he testified as follows:- On the 7th of January 2010, the witness was busy eating at his house in Elandskraal. He could not recall the time as it was too long ago. The police arrived at his house and said that he (the witness) is sitting comfortably whilst they (the police) don't sleep and they are looking for a person. The police had a male person with them on handcuffs whom he did not

know. Some of the police officers then took their food and ate it. Some of the police officers took the plaintiff and left with him, whilst others took him to the garage. The police officers said that he will hand over the “boy” today, referring to Kgotlelelo. At the outset, the police asked for Kgotlelelo’s ID document. He took it out and gave the ID document to them. He had the ID document according to him, because Kgotlelelo was looking for work and for this reason he held onto the ID document. He was taken back to the garage, where the police told him that he will tell the truth and that he will give Kgotlelelo to them. One officer came with a plastic bag and placed it over his head and he was assaulted until he messed himself again. The witness did not know where the plaintiff was in proximity to the garage, but he did hear the plaintiff screaming. The SAPS members broke open the garage ceiling searching for a gun. They did not find any weapons.

- [19] The officers that went to his house were indeed SAPS members and the witness recognised them from his previous encounters with them. He named them to be Mr Morokong, Mr Phoku and Mr Thobejane. The police said that there is another place where Kgotlelelo can be, referring to the place where his cattle normally graze, at Emmerspan. He was then taken to Emmerspan by the SAPS members without the plaintiff and was brought back during the night. When he arrived back, the plaintiff told him that he could not sleep and his ear was bleeding. When asked if he made the statement in regard to this matter, he said that he cannot read English and thus cannot confirm whether the statement was his.

DEFENDANT'S CASE

Pegs Thobejane

[20] He was a Constable in the South African Police Service and stationed at Motetema Police Station. He testified that during January 2010 they were investigating a murder case of a police officer who was stationed at Rakgoadi Satellite Police Station, which falls within the Motetema police station. A suspect known to the police, one Kgotlelelo, was wanted in connection with the murder which had taken place on Friday, 01 January 2010. He was tasked to investigate the murder case with Mr Morokong and Mr Phoku. According to him the police had at that time already issued pamphlets bearing the photo of Kgotlelelo and the contact details of the police officers who were investigating the case. Furthermore, the pamphlets promised a reward of R50 000, 00 to anyone who could provide information that would lead to Kgotlelelo's arrest.

[21] On Monday, 4th January 2010, they went to Elandskraal at around 10h00 after they had received information from members of the community that Kgotlelelo had been seen there. As they were not familiar with the place, they first went to the Elandskraal Police Station to familiarise themselves with the place. Whilst waiting outside their car at the police station, they were approached by an unknown black male. He identified the said person as Nyaku who testified on behalf of the plaintiff in Court. The person asked them if they were from Motetema Police Station and informed them that he had seen Kgotlelelo at his house the previous day. They then gave the man their

contact numbers and requested that he call them should he see Kgotlelelo again.

- [22] A few moments later they received a call that Kgotlelelo had been seen at Groblersdal taxi rank selling a laptop. They proceeded to the taxi rank at around 13h00 and subsequently traced the person to whom Kgotlelelo had sold the laptop. He informed them that Kgotlelelo had boarded a taxi to Johannesburg. Later the same day they left for Johannesburg and only came back from Johannesburg when Kgotlelelo was arrested on or around the 06th February 2010. He said that after Monday, 04th January 2010, they did not go back to Elandskraal at all since they left for Johannesburg. He denied having assaulted the plaintiff or having seen him at all the occasions he mentioned. He denied being part of the team that deprived the plaintiff of his liberty on all the occasions mentioned.

Moleke Phoku

- [23] He was a warrant officer by rank and stationed at Motetema Police Station. He was also the Investigating officer in the case docket of a police officer who was murdered on the 01st January 2010 at Rakgoadi satellite police station which fell under Motetema Police Station. He was working with Thobejane and Morokong as a team to investigate the Murder Case. He testified that whilst looking for Kgotlelelo who was the suspect in the murder case, they learned that he had killed another victim in Marble Hall on Sunday. They followed the lead to Mablehall. They received information that the suspect was Kgotlelelo

whom they were already looking for in another case docket. They went back home after attending to the scene.

[24] On Monday, 4th January 2010, they went to Elandskraal at around 10h00 as they had received information that Kgotlelelo had been seen there. They arrived at the Elandskraal Police Station as they were not familiar with the place. Whilst sitting outside their car, they were approached by an unknown black male (whom he identified as Nyaku in court). He asked them if they were from Motetema Police Station and informed them that he had seen Kgotlelelo at his house the previous day. They gave the man their contact numbers and requested that he call them should he see Kgotlelelo again. Later during the day they received a call that Kgotlelelo had been seen at Groblersdal taxi rank selling a laptop and they proceeded there. They eventually traced the person to whom Kgotlelelo had sold the laptop to. He (the person traced) informed them that Kgotlelelo had boarded a taxi to Johannesburg. They then left for Johannesburg the very same day. They only came back from Johannesburg when Kgotlelelo was arrested on or around the 06th February 2010. He said that after Monday, 04th January 2010, they never went back to Elandskraal as they had left for Johannesburg to arrest Kgotlelelo there. He too denied assaulting and depriving plaintiff of his liberty as testified by him.

Ms Sylvia Moshidi

[25] She is a professional nurse stationed at Elandskraal clinic. She testified that she was on duty when the plaintiff visited the clinic on 12 January 2010 and further that she had in fact been the one with whom

the plaintiff consulted with and subsequently referred him to Matlala Hospital. The plaintiff had complained to her that he was assaulted by the police and was complaining about his ear. She added that the information in the clinic records would have been provided by the plaintiff and no one else. She noticed pass coming out of the plaintiff's ear mixed with little blood.

- [26] She indicated during cross-examination that Matlala hospital is approximately 10kms from the clinic. She cannot say if the injuries of the plaintiff were serious by merely looking at him. Because he was assaulted, he referred him to be examined by a doctor as it is standard procedure so that they could check whether there were no internal injuries that could have been missed by the nurses/them.

C. THE LAW

- [27] It is trite that in civil proceedings the “onus bearing party” (in this case the plaintiff) must, in order to succeed, proof his case on a balance of probabilities.

- [28] The Court in the case of **National Employers General Insurance Limited v Jagers 1984 (4) SA 437 (E) at 440 D-G** held that

“it seems to me with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and

accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false".

[29] In the case of **Stellenboch Farmers' Winery Group Ltd and Another v Martell Et CIE and Others 2003 (1) SA 11 (SCA)**, the following is stated at **paragraph 14I-15G** as a technique that is generally employed by the Courts when determining disputes in which stories are mutually destructive:

"[5].... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions; (vi) the calibre and cogency of his

performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (vi) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as the final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

D. ANALYSIS

- [30] There were some inconsistencies in the evidence of the plaintiff and his witnesses. Firstly, there was a time contradiction. To claim C, he testified that the SAPS abducted him at 06h00, whilst the particulars of claim and his statement state this time as 08h00. As to claim A, there was a discrepancy as his oral testimony was to the effect that when he was pulled with his testicles he was outside, whereas in his statement it was written that it was inside the house. There was also a date contradiction. Under cross examination he maintained that the first incident took place on a Sunday, and when questioned about why it is stated in his statement that it was a Monday, 4th June, he disputed that it was the 4th. He also testified that he went to the clinic on 8th January, whilst a nurse testified that he went to the clinic on the 12th.

[31] The correct way of evaluating the evidence in situations where there are contradictions between the witness' statement to the police on the one hand and the evidence of such a witness in court on the other hand, is set out by the Supreme Court of Appeal in **Mafaladiso 2003 (1) SACR 583 (SCA)** (summary contained in the headnote) as follows:-

“The judicial approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree) identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court.

(i) Firstly, it must be carefully determined

- What the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and
- What is the precise nature thereof

In this regard the adjudicator of fact must keep in mind

- that a previous statement is not taken down by means of cross-examination
- that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and
- that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail

(ii) Secondly, it must be kept in mind that

- not every error by a witness and not every contradiction or deviation affects the credibility of a witness

- non-material deviations are not necessarily relevant
- (iii) Thirdly, the contradictory versions must be considered and evaluated on a holistic basis.
- The circumstances under which the versions were made
 - The proven reasons for the contradictions
 - The actual effect of the contradictions with regard to the reliability and credibility of the witness
 - The question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations
 - And the connection between the contradictions and the rest of the witness' evidence
- Amongst other factors, [are] to be taken into consideration and weighed up.
- (iv) Lastly, there is the final task of the trial judge, namely
- To weigh up the previous statement against the *viva voce* evidence
 - To consider all the evidence and
 - To decide whether it is reliable or not and
 - To decide whether the truth has been told, despite any shortcomings.”

The dictum was referred to and applied by the court in **S v Govender 2006 (1) SACR 322(E) 325f-326d** and **S v Ismail 2006 (1) SACR 593 (C) 599 a-d**.

[32] In my view, all these contradictions are not material. Besides the fact that the incident happened some time ago, 5 years to be precise, it was shown during his evidence in chief that he has a low level of education and English is not his first language. During cross-examination he insisted that although he put his signature on the

statement taken by his attorney of record, it was never read to him as he said he was hurrying for other clients. The fact that his education is low was firstly demonstrated by the fact that during cross-examination he indicated that he made three statements. It only emerged later that he was referring to one statement which had several incidents which happened on three separate dates. Secondly, when he was asked about what he said about Mr Nyanku's profile [which word was written in his statement], he indicated that he did not even understand what the word "Profile" means. All of these contradictions can be attributed to defective recollection because of a lapse of considerable amount of time since the incident occurred and as it will become apparent later, not because he is lying. See: **Mafaladiso** matter quoted above.

- [33] Furthermore, Lebo who appeared to have a better level of education than plaintiff and Nyanku, although she too was not sure about the date, whether it was the 3rd or 4th, insisted that the incident when she accompanied the police to Nyanku's place was on a Sunday. Nyanku, whose level of education is lower than the two, was also not sure whether it was a Monday or Sunday. A sight should not be lost of the fact that the plaintiff's testimony is that before the first incident at Nyanku's house during that evening, he went to the police station earlier to report that the suspect Kgotlelelo was with him during the day, and according to him that day was a Sunday. On the same breath, the evidence of the defendants also is to the effect that they received information that Kgotlelelo was at Nyanku's place on a Sunday. This in my view strengthens the version that the first incident took place on Sunday as Lebo and plaintiff insists. In addition to all of the above, the clinic record reveals that the plaintiff alleged that he was assaulted by the police on Sunday. This information would have

been given by the plaintiff when the events were still fresh in his mind. This also proves a previous consistent statement of the plaintiff. I am thus satisfied that the first incident took place on a Sunday.

[34] His demeanour in Court was candid and impressive even during cross-examination. On more than one occasion, he admitted that during a particular stage in his evidence, he was not assaulted, which fact speaks volumes to his honesty. As far as the clinic date contradiction is concerned, he did not hesitate to make a concession that he might have made a mistake. It therefore becomes clear that the contradictions as far as dates and days are concerned, are attributed to mere lapse of a significant amount of time and lack of education which in my view, is understandable. Of significance is the fact that plaintiff and his witnesses corroborated each other on the material aspects of how the incident unfolded. Plaintiff and Nyanku deserve a special mention on this aspect. If one takes away the dates, their evidence as far as the ordeal which occurred in a number of days and at various locations is concerned is the same.

[35] The contradiction of whether when the entourage went to search Ngobe's private school Lebo was there or not according to plaintiff, is also immaterial because it relates to a collateral issue and more importantly, Nyaku and Lebo's evidence corroborated each other on this aspect that she was not there, she was already taken home by the police.

[36] The contradiction about whether plaintiff and Nyaku were made to lie down inside the house or outside also fell away because plaintiff and Nyaku corroborated each other on this aspect that it was inside the

house. The same applies to the one relating to the issue whether they were pulled with private parts inside or outside the house. Nyaku corroborated plaintiff's *viva voce* evidence that it was outside.

[37] Lebo similarly came across as an honest witness. There were very few inconsistencies in her evidence which as I had indicated above and in my view are not material and cannot taint her credibility. She is an independent witness as she did not institute a claim against the SAPS. She did not witness the entire episode of the plaintiff's claim. If she was dishonest, there was no reason why she should have only lied about a small portion of the plaintiff's claim as opposed to corroborating him in his entire evidence. She corroborated almost the entire version of the plaintiff and Nyaku as to how the police arrived on that Sunday evening, how they entered into Nyanku's house, how they were assaulted outside the house and how they went to Mr Ngobe's house being cuffed which are the fundamental issues in Claim A of the plaintiff.

[38] Mr Nyaku, despite the fact that he was not certain with dates, his evidence from Claim A until Claim E corroborated that of the plaintiff in material respects as already indicated above. He is therefore regarded as a credible witness too.

[39] The evidence of the defendant's witnesses, the two police officers, Thobeyagae and Phoku, was straight forward and consisted of a bare denial of the incidents. The only criticisms that were levelled against their testimony were to the effect that when questioned as to their proximity in terms of where they were in relation to the vehicle whilst at Elandskraal SAPS, Thobejane testified that they were outside whereas

Phoku said they were inside the vehicle. In as far as the quality of their recollection of the events on those two days they testified about is concerned, they were not impressive and failed dismally on this aspect. When prompted for details as to who gave them information about the suspect being seen at Nyaku's place on Sunday, both of them could not remember apparently because they did not take the name of that person. They hide behind the fact that it was an informer. It is highly improbable that the name of the informer could not be taken down by them. What they can claim in a matter like this is revealing the said name, which can be accepted, but not the fact that they did not know and/or take the informer's name at all. They further could not say who the driver of their vehicle was on those two days, and furthermore, at what time they left for Groblersdal taxi rank, and when they ultimately also left for Gauteng and lastly, where they stayed over when they were at Gauteng. When compared to the quality of recollection of events of the plaintiff and his witnesses are concerned, which event took place over a long period of time, 3 days, and was full of several events and incidents, they fair dismally poor. This unfortunately taints the reliability of their evidence.

[40] When weighing up the probabilities in this matter, this is where the defendant's version crumbled. The following can be cited:-

- The two police officers, refused to make even simple concession that the investigation was of national importance as one of their own was killed and that there were pressure on them to apprehend the suspect. It is highly improbable that this investigation was just treated like a normal investigation as they claim. I am saying this because the investigation thereof started

immediately according to their version. Within those two days, if their version that the victim was killed on Friday is to be believed, the police had already issued pamphlets containing a picture of the suspect and furthermore, a reward of R50 000-00 was already offered. Furthermore, the case was given to three police officers to investigate from their own version.

- They testified that they were wearing brown bullet proof vests and civilian clothing when they were at Elandskraal SAPS, armed with pistols and had handcuffs in their possession. This strengthens the version of the plaintiff and his witnesses that they were seen by them at Elandskraal armed and clothed like that, and further, a probability that they also proceeded to Nyanku's place. I find it highly improbable that the plaintiff and his witness can concur this piece of evidence including the number of cars that were there.
- Surprisingly and conveniently, when they were approached by a person who gave them information about the suspect when they were at the police station of Elandskraal they did not once again take the name and particulars of this important person who came voluntarily at the police station to give them valuable information they needed and which initially caused them to come to Elandskraal.
- Is it further a coincidence that according to the plaintiff he went with Sello Nyanku (the brother of the plaintiff) to the police station and at the same time the defendants now recognise the

man they did not take his particulars as Nyanku (the third witness of the plaintiff) here in court?. It is quite obvious they resorted to this unknown male that they did not take his particulars as Mr Nyanku, the plaintiff's witness, as they realised that he knows them including the police officer Morokweng very well from long time ago as he testified in his evidence in chief. I need to pause here in order to mention on this aspect that during the plaintiff and Nyanku's evidence and cross-examination of their testimony, no mention was made to the fact that the unknown man that came to them at the police station was Nyanku. This evidence only emerged during the defence case. It therefore stands untested.

- According to them they received information that the suspect was at Nyanku's place on Sunday. In my view, it is highly improbable that they decided not to follow this information and went to Johannesburg first instead to look for the suspect. The probabilities weighs heavily towards the fact that they indeed went to look for this suspect at Nyanku's place, and tried to force information out of the plaintiff and Nyanku as to the suspect's whereabouts, as they were still of the opinion that he was still around Elandskraal.
- The probability that the plaintiff and his witnesses could have concocted their evidence in order to falsely implicate the defendants is clearly far-fetched if one takes into consideration the manner in which they corroborated each other as to the material aspects of how the plaintiff was deprived of his liberty

and assaulted by the members of SAPS. As indicated above, this is not a case of a single episode of events, but several of them, hence the number of claims laid by the plaintiff. In addition, there's an abundance of other neutral evidence which support their version. The clinic record and evidence by the nurse is to the effect that the plaintiff claimed to have been assaulted by the police. This proves his previous consistent version ever since. Plaintiff had no pre-existing ear pathology. He received medical attention for that at the clinic first as testified by the nurse who was called by the defendants. Although they did not testify, the ENT, Dr Chris Smit and the Audiologist, Mariet du Plooy, compiled reports which were admitted into record as evidence which also confirms the injury of the plaintiff's ear.

- According to the defendants, they do not know plaintiff and Lebo at all, and they were seeing the two for the first time in Court. The two witnesses positively identified them and their version is that they were at Elandskraal on Sunday. The defendants say that they only went to Elandskraal on Monday. If we agree with the defendant's version, how was it possible that they were positively identified by them when (1) the two police officers have not met them at all? (2) the two police officers are not even stationed at Elandskraal Police Station?.
- The thought as to whether is it a coincidence that the two witnesses claim that they saw them on Sunday at Elandskraal village when the defendants happened to have gone there on a Monday cannot escape one's mind.

[41] In the light of the assessment that I made above, I am of the view that the probabilities weighs heavily in favour of the plaintiff and he had on a preponderance of probabilities satisfied this Court that his evidence together with that of his witnesses despite the shortcoming mentioned above, is true and therefore reliable. The version advanced by the defendants therefore falls to be rejected. Plaintiff succeeds in all his claims. The deprivation of the plaintiff's liberty and the resultant assault on his person cannot in my view in the circumstances of this matter be justified.

E. QUANTUM

[42] The plaintiff testified that he had internal pains because he was kicked on his head, body and feet. He suffers from ear discharge and he finds it difficult to hear. His sleep has been affected. He has nightmares of the police beating him ever since the incident took place. When he sees the police, it raises his consciousness. He is scared of the police. He suffers from anxiety. He used to do piece jobs which he stopped due to the ear problem. He also complained of headaches. He went to the clinic on 12th January 2010. They gave him medication and referred him to Matlala hospital, which he could not attend due to financial constraints. He did not have transport money. He later went to Pretoria for treatment and to a private doctor in Groblersdal.

[43] The plaintiff was deprived of his liberty in Claim A from around 20h00 until 1h00 in the morning (approximately 5 hours). In Claim C he was taken from 06h00 in the morning until 13h00 (6 hours). In Claim D it was from 17h00 in the afternoon until 21h00 (4 hours). The entire

period of his deprivation of liberty is therefore approximately 15 hours. Claim E was comprised of assaults only.

[44] Claim B is of a cellular phone worth R300-00. In addition to being deprived of his liberty, he was handcuffed on all occasions which resulted in him suffering pains on his hands. The plaintiff had done nothing wrong and was taken away by force. He was handcuffed and made to go to various places in those handcuffs as if he was a dangerous criminal, when there was no charge levelled against him. It goes without saying that this conduct impaired and degraded his human dignity.

[45] The plaintiff's Elandskraal clinical note was admitted into evidence. According to this medical note, which is a referral form, the plaintiff was: *"assaulted by the police on Sunday last week. Bleeding observed on Wednesday. Pain affecting the head... Watery discharge observed on Thursday."* The Plaintiff was referred to the Matlala hospital. Although plaintiff testified that he often suffers from headaches as a result of the assault, this was not supported by any medical evidence.

[46] The medico legal report by Dr Chris J.B Smit (Ear, Nose and Throat Surgeon) was admitted as evidence. According to this report, plaintiff consulted the expert on 3 February 2010 for the first time, and again thereafter. The expert noted that *"plaintiff was assaulted and specifically, he was hit against the left ear. Plaintiff had no history of previous middle ear infections or any ear pathology before the assault. The left ear bled for some time after the assault, but has stopped. On examination, the left eardrum was red, due to blood vessels engorgement, and there was slight deafness on the left side"*. The expert concluded that the eardrum could have been

perforated, as the ear bled. The eardrum showed some signs of injury because the ear was red and the plaintiff had mild conductive deafness (1.2%).

[47] The medico legal report by Mariet du Plooy (Audiologist) was admitted into evidence also. This expert confirmed loss of hearing in the left ear and that the left ear presents with mild to moderate conductive deafness.

[48] Although there was no psychological report on the effect of the injuries sustained by the plaintiff, deprivation of personal liberty has consistently been regarded by our Courts as a serious injury. What more can we say if it is accompanied by a series of assaults which depicted an intention of causing grievous bodily harm to a person.

[49] Counsel for both the plaintiff and the defendant referred this Court to some decisions for a comparative analysis in order to determine the award of damages, which I had taken into consideration in the analysis of this matter. The compendium of all of the decisions they referred to and numerous others not cited shows that there can be no rule of thumb. It depends entirely on the circumstances of each and every case.

[50] In the case of **Wagner v Minister of Defence (46923/10) [2012] ZAGPPHC 59 (19 April 2012)** Makgoka J remarked in **paragraph 14** as follows:-

“whether the arrest was malicious or not, is an important consideration in the assessment of damages. In *Masisi v Minister of Safety and Security*

2011 (2) SACR 262 (GNP) this court held that where the arrest was malicious, the plaintiff would be entitled to a higher amount of damages than would be awarded, absent malice. The court awarded R65 000 to the plaintiff who had been detained for over 4 hours. See also *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (W), where a 74 years old retired accountant was detained for approximately seven hours by the members of the Johannesburg Metro Police Division (JMPD) for unpaid traffic fines. He was awarded R75 000 after the Court found the conduct of the metro police officers unreasonable and reprehensible in refusing to explain to the plaintiff the reason for his arrest, and in not affording him an opportunity to explain, and not verifying the facts before detaining him.”

[51] In the same case quoted above the Court awarded the following amounts in respect of the two claims respectively:-

CLAIM 1 : R40 000-00

CLAIM 2 : R20 000-00

In the first claim the Court took into consideration the personal circumstances of the plaintiff which were the only evidence put before Court as no other evidence of the amount of damages were led. The plaintiff was 47 years old, married, with three children. He was a mechanical engineering who was employed by Denel. The Court also took into consideration that there were no malice on the part of the officers and the duration of detention in this incident was from 12h00 until 19h35 (7 hours 30 minutes). In the second claim, there was no indication of the duration of the detention but the plaintiff was in addition grabbed around his neck, pushed against a corner, and throttled. He was released without being charged later in the afternoon of the same day.

[53] In the case of **Minister of Safety & Security v Scott and Another 2014 (3) ALL SA 306 (SCA)**, the plaintiff had been wrongly arrested and detained for a period of nine (9) hours. The Court *a quo* awarded the plaintiff damages in the amount of R75 000-00 for the unlawful arrest and detention. The Supreme Court of Appeal reduced the award in respect of the respondent's (plaintiff) damages to unlawful arrest and detention to R30 000-00. The 2014 value of this amount, according to **Koch, Quantum Yearbook, Classified list of inflation Adjusted Awards**, is R34 000-00

[54] In the case of **Mvu v Minister of Safety and Security and Another 2009 (6) SA 82 (GSJ)**, the plaintiff was awarded damages of R30 000-00 for a wrongful detention. The plaintiff was incarcerated from 10pm until the next morning. The Court awarded damages in the amount of R30 000-00. The present value according to **Koch's Quantum Yearbook** is R42 000-00.

[55] In this matter the only personal circumstances of the plaintiff put before the Court was that he was born in 1985 and attended school until standard 9. As indicated above he was deprived of his liberty for 15 hours all in all and further assaulted several times. The specialist indicated that he suffered hearing loss of 1.2% in his left ear. Unlike in the **Wagner** case quoted above, the malice on the part of the officers in this case was grossly extreme and was uncalled for. As already indicated above they were only looking for information and they know very well that their conduct in eliciting information the manner in which they did was not only unlawful but morally reprehensible. It is quite clear that they took advantage of the vulnerable position the plaintiff was in because they repeated doing almost the same on a number of

days. The **Wagner** case is further distinguishable from ours because there was also no indication that the plaintiff in that matter was handcuffed. In this matter he was and the assault on the plaintiff was repeated and was severe.

[56] Having taken all of the above into consideration, I am of the view that the following amounts are fair and reasonable compensation of the plaintiff in the circumstances of this matter:-

All the unlawful deprivation of liberty taken together	= R120 000.00
All the assaults taken together	= R 20 000.00
Cell-phone	= <u>R 300.00</u>
TOTAL	= <u>R140 300.00</u>

[57] The following order is therefore made:-

57.1 The defendant is ordered to pay **R140 300-00** to the plaintiff's Attorneys, **MPHELA & ASSOCIATES**, which amount shall be paid into their trust account, the details being as follows:-

ACCOUNT HOLDER :	MPHELA & ASSOCIATES
BANK :	STANDARD BANK
BRACH CODE :	05.....
ACCOUNT NUMBER :	23

57.2 The defendant is ordered to pay the plaintiff's taxed or agreed costs on a party to party scale, which costs shall include but not limited to the following:-

- 57.2.1 Costs of counsel;
- 57.2.2 Costs for the trial bundles;
- 57.2.3 The reasonable travelling and accommodation expenses of the plaintiff to attend the medico legal appointments of the parties;
- 57.2.4 The reasonable taxable fees on the experts Dr Smit and Du Plooy, including the preparation, reservation and day fees, if any.

A M KGOELE
JUDGE OF THE HIGH COURT

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