



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: 2024 /A200
COURT A QUO CASE NO: 2013/30147

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.


10/03/2025

CORAM MBONGWE J, BAM J AND LABUSCHAGNE J:

In the full court appeal of:

ALFRED LANDWA SKHOSANA

Appellant

and

THE MINISTER OF POLICE

Respondent

FULL COURT JUDGMENT

LABUSCHAGNE J

- [1] The appellant instituted an action as plaintiff against the Minister of Police in the Court a quo for unlawful arrest, unlawful detention and assault.

PLEADINGS

- [2] The appellant pleaded that on or about 22 July 2010 at Siyabuswa he was unlawfully arrested without a warrant, detained and tortured through suffocation by use of a plastic bag, and electrocuted by members of the South African Police Services known to the plaintiff as Colonel Philly Nkosi, Colonel Tswai and other policemen whose names and ranks were not known to the plaintiff. He was detained in the Police cells until 21 September 2010, whereafter he was released on bail. The plaintiff pleaded that the assault took place within sight of members of the public, and that as a result of the assault he sustained severe bodily injuries namely emotional shock, anxiety and trauma and is suffering from post-traumatic stress disorder.
- [3] In respect of the unlawful arrest and detention he claimed an amount of R1 000 000.00 for general damages; in respect of the unlawful assault, R600 000.00 and in respect of future medical expenses, R100 100.00.
- [4] In the plea the respondent admitted the arrest of the plaintiff but contended that the arrest was lawful in that the plaintiff was suspected of committing an offence, namely arson. Arson is a schedule 1 offence. The defendant pleaded that the plaintiff made his first appearance in the Magistrates' Court within 48 hours of his arrest and contends that his detention thereafter was as a result of a court order granted by the court at his first appearance, suggesting that

the defendant/respondent was only liable for the period of detention prior to the plaintiff's court appearance only.

- [5] There is an express denial that the plaintiff was tortured as described in paragraph 2. The defendant denied the bodily injuries pleaded by the plaintiff. A special plea was also raised in respect of non-compliance with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002 which requires written notice to the SAPS within six months from the date of the occurrence giving rise to the claim(s).
- [6] The special plea regarding notice became irrelevant upon the granting of an order by the Magistrates' Court on 19 September 2011 condoning non-compliance with the notice period and permitting the plaintiff to proceed with the legal action.
- [7] On 3 May 2016 an order was granted by Ranchod J in terms of Rule 33(4) for the separation of the issues of merits and quantum. The quantum was postponed sine die and it was recorded that the defendant shall be liable for 100% of the plaintiff's proven or agreed damages in respect of the claims for unlawful arrest, detention and assault.
- [8] The matter proceeded on quantum in the court a quo and only the appellant testified.
- [9] On 1 August 2023 Kumalo J gave judgment in the quantum hearing.

[10] It bears noting that the action instituted by the plaintiff also included a second defendant, Mr Ntuli. However, the action against the second defendant fell away as he had passed away. At the commencement of the trial counsel for the plaintiff informed the court that the action will only proceed against the Minister of Police.

[11] The evidence of Mr Skhosana is summarised in the judgment of the court a quo as follows:

[13] The plaintiff testified that he was arrested on a Thursday when he was in the company of his friend Solly Mahlangu. They were on their way to JS Moroka Municipality offices where they met the mayor, who informed them of the presence of the Police.

[14] They left the premises to go buy themselves food when they were met by three Police motorcades. They told them that his friend Solly Mahlangu was under arrest and the plaintiff enquired why he was being arrested. He was told to shut-up or he will be arrested as well. They were then put in black Mercedes-Benz motor vehicle and told that the Police were looking for JJ.

[15] The Police drove around with them looking for JJ but found another person by the name of Elijah. He also was arrested, and they drove with them to Middelburg, a distance of approximately 120 km.

- [16] On arrival at this place they were put in an office with bloodied walls. Solly was handcuffed and taken away from them. Shortly thereafter they heard him screaming. This lasted for about 30 minutes.
- [17] Later they came back and took the plaintiff to another room. He was asked about the burning of the house of the Municipal Manager. He was assaulted and hit with a shoe several times. He was suffocated with a black plastic carrier bag. This was done repeatedly. Lastly, they used an electric cord to electrocute him.
- [18] Although the plaintiff was detained for approximately 65 days before his release on bail, it appears from the evidence of the plaintiff that the torture or assault was confined to the first and/or second day of the alleged unlawful arrest.
- [19] He was then taken to the Middelburg Police after the torture. He was put in chains and taken to the holding cells.
- [20] They came back around 02:00 and took him to Siyabuswa to look for JJ and several other suspects, Mpho and Paul from Phaahla Village and Kwagga. He was thereafter taken back to Middelburg.
- [21] The plaintiff testified that on Sunday they were taken to Kwagga Police Station and on their arrival, they were met by another policeman who was in the company of Nkosi. Both served on the Serious Crimes Unit. They interrogated him and he was kicked in the forehead, such that he banged the back of his head on the wall and bled.

[22] He was examined by a doctor the following day who compiled a report.

This court was however not referred to or shown the report.

[23] The plaintiff then appeared in court on the Monday and his further detention was ordered with a directive that he be detained at Siyabuswa Police Station. There was a stage when he was transferred to Witbank because of certain grievances they raised but later returned to Siyabuswa after he had raised the issue that the order of the court when he first appeared was that he was to be detained as Siyabuswa.

[24] He stated that the arrest had a bad effect on him. After the ordeal he was diagnosed with high blood pressure and diabetes. He has anger issues against the Police officers and had a wound at the back of his hand which took 12 years to heal. He attributes all the above as the *sequelae of his unlawful arrest.*"

[12] In paragraph [9] of the judgment of the Court a quo the court notes that the issues to be decided were correctly captured in the plaintiff's practice note of 30 November 2021, namely:

12.1 The nature, extent and sequelae of the injuries sustained by the plaintiff because of being assaulted by the members of the South African Police Service; and

12.2 The quantum to be awarded to the plaintiff because of his aforesaid unlawful arrest, detention and assault.

THE COURT A QUO

- [13] In assessing the evidence, the court found that the plaintiff, although being detained for 65 days, his detention from the date of his bail hearing was lawful.
- [14] The court found that the claim for R1 000 000.00 in respect of unlawful arrest and detention was disproportionate as it was based on the "*plaintiff's incorrect assumption that he must be compensated for the entire period of his detention of approximately 65 days.*" The court therefore allowed an amount of R300 000.00 as solatium for his unlawful arrest and detention.
- [15] Regarding the claim of R600 000.00 for the alleged assault, the court found that it is unable to decide about the damages that he is alleged to have suffered because of the assault. This was because, having visited a medical practitioner who noted his injuries and made a report, such report was not produced during the hearing of the matter. The court further noted that the failure to provide this crucial document could not be explained.
- [16] In respect of the issue of medical expenses, the court found that it did not have evidence of the need for future medical expenses as the medical experts, whose reports were uploaded, were not called as witnesses.

- [17] The Court a quo refused leave to appeal. The appellant then brought an application for leave to appeal to the Supreme Court of Appeal who granted leave to the Full Court of this division.

GROUND OF APPEAL

- [18] In the appellant's notice of appeal, the appellant contends that the Court a quo failed to take into account the ambit of agreed facts which were placed on record when the hearing commenced. The appellant contends that the following facts were recorded as common cause between the parties, that:

18.1 The appellant was unlawfully arrested, assaulted, tortured and detained by members of the respondent;

18.2 The respondent was liable for the entire period of unlawful detention of the appellant from 22 July 2010 to 21 September 2010 (approximately 65 days);

18.3 The respondent was liable for future medical expenses.

- [19] The pertinent part of the opening address by Mr Van Eeden, in the Court a quo reads as follows:

"My Lord this matter is a claim for unlawful arrest, detention and assault instituted by the plaintiff against the Minister of Police. In the particulars it was set out that the plaintiff was arrested, detained and assaulted. Reference is

made to the fact that the plaintiff was tortured with plastic bags being put over his head and being electrocuted. A court order was granted in respect of the merits which is on CaseLines under item 12, section 6. It was the Honourable Justice Ranchod on 2 April 2016. In paragraph 3 of the order it is recorded *that the defendant is liable for 100% of the plaintiff's agreed and proven damages in respect of his claims for unlawful arrest, detention and assault.* So we are proceeding today with the quantum portion of the claim. That would be general damages and future medical expenses."

[20] It bears noting that the court order holding the defendant liable on the merits of the matter was unqualified in disposing of the merits. In particular the order does not keep open the issue of causation. It is therefore unnecessary for the plaintiff to establish the liability in respect of his claims. The defendant is held liable for the claims as pleaded. Based on the aforesaid, the appellant is correct that the Court a quo misconstrued the ambit of the issues before him. In particular he erred in curtailing the period of detention when it was common cause that the defendant would be liable for the entire period of his detention as pleaded. The issue of a novus actus interveniens did not arise and the court erred in finding that the detention became lawful when the Magistrate ordered the further detention of the appellant after his appearance in court.

[21] This in itself constitutes a misdirection of fact and resulted in an incorrect application of the law to the matter at hand.

THE APPEAL COURT'S POWER TO INTERFERE ON APPEAL

- [22] The presence of misdirections referred to in paragraph 20, *supra*, is an indication that the discretion of the Court a quo was not judicially exercised. If a discretion was exercised judicially, a court of appeal would not be entitled to interfere - See **Graham v Odendaal** 1972 (2) SA 611 (AD) at 616A.
- [23] In assessing the evidence and the judgment of the court a quo a number of misdirections have been identified. First, the Court a quo unwarrantedly applied a *novus actus* defence despite the order of Ranchod J which included the Defendant's liability for the full duration of the appellant's unlawful arrest and detention.
- [24] Second, the Court a quo erred in not determining the quantum of damages in respect of the undisputed assault on the appellant due to the absence of a J88 form.
- [25] Third, the court a quo erred in not ordering interest on the quantum in terms of section 2A of the Prescribed Rate of Interest Act, 1975.
- [26] The power of the Court of Appeal to interfere is indicated in the face of a misdirection by the court a quo as to the determination of the remaining issues in dispute between the parties. In **Mafisa v Road Accident Fund and Another** (CCT156/22) [2024] ZACC 4; 2024 (6) BCLR 805 (CC); 2024 (4) SA 626 (CC) (25 April 2024), the Constitutional Court stressed the appeal court's power is limited to deciding only the issues raised by the parties on the pleadings. That court said the following:

[48] It is well-established that a compromise, whether embodied in a court order generally, brings an end to the dispute between the parties. Once there is a compromise, there is no longer a *lis* (dispute) between the *parties*."

THE PERIOD OF DETENTION

[27] The consequence of the misdirection of the Court *a quo* was that the court awarded damages to the appellant on an unlawful arrest and detention for 3 to 4 days in an amount of R300 000.00 instead of the period of 65 days.

[28] Comparative awards in case law in such instances indicate that the aforesaid award is inadequate with reference to the full period. And the issue of assault must be taken into account. This is in stark contrast to the contention by counsel for the respondent that, even if the full period of detention were to be taken into account, including the assault, the award of R300 000.00 will still be within the ambit of reasonableness.

[29]

29.1 In **Ndlovu v Minister of Police** (33237/2010; A5054/2013) [2018] ZAGPJHC 595 (11 October 2018) the plaintiff was awarded R473 500.00 (as at 2023 values) for assault, electrocution and 4½ days of detention.

- 29.2 In **Lifa v Minister of Police and Others** (2020/17691) [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ) (17 October 2022) the plaintiff was awarded R600 000.00 (as at 2023 values) for 3 months of detention with no assault.
- 29.3 In **Moloi v Minister of Police** (216/2016) [2023] ZANWHC 94 (22 June 2023) the plaintiff was awarded R550 000.00 for 66 days of unlawful detention following an unlawful arrest.
- 29.4 In **Mahlangu and another v Minister of Police** [2021] ZACC 10; 2021 BCLR 698 (CC) a period of detention of 8 months and ten days, including two months in solitary confinement, resulted in an award of damages of R550 000 plus interest from 2014.
- 29.5 The consideration by the court a quo of the lawfulness of post-appearance detention resulted in a reversal of the onus in respect of unlawfulness. Once an unlawful interference has been proven, giving rise to detention, such unlawfulness attaches to the full period of the detention. It is for the State to prove justification post- appearance- See **Mahlangu** supra at par [32]. In this instance such justification was not possible due to the Ranchod J order.

THE ASSAULT AND TORTURE

- [30] Regarding the court's finding that it could not determine the quantum to be awarded in respect of assault without the Medical Examination Report (the J88 Form), it bears noting that the court heard direct evidence of the assault,

torture and electrocution. The assessment of quantum in such circumstances is not necessarily impossible. The report of the medical examiner would indicate the seriousness of the assault and would confirm the fact of the assault. But it is not the sole source of evidence of the assault. For that, factual evidence of the assault was presented.

[31] The appellant testified that he was beaten many times with a shoe, that he had a sack put over his head approximately five times and that he was electrocuted multiple times during the first few days of his detention. That in itself should have enabled the court to determine an amount to be awarded for assault, even in the absence of the J88 Form.

[32] In **Makhani v Minister of Police** (32261/13) [2021] ZAGPPHC 748 (28 October 2021) the court found:

"The relevance of a J88 Form and proof of the alleged assault (Claim 2)

[34] A J88 form is a legal document described as a Report on a Medico-Legal Examination by a Health Care Practitioner and also constitutes a certificate in terms of sections 212 (4), 212 (8) and 213 (3) of the Criminal Procedure Act 51 of 1977 as amended. The provisions in the Criminal Procedure Act provide that the certificate is objective evidence and is *prima facie proof of what is contained therein* ...

[37] Despite the absence of the J88 or evidence from the doctor who saw the applicant at hospital I am persuaded that there was an assault because *I found that plaintiff and Ronny to have been credible witnesses. ... The*

only problem I have is that in the absence of cogent and comprehensive medical evidence as to the severity of the assault, I cannot find that the assault was a grievous one that resulted in the plaintiff being hospitalized. ... I am satisfied that there was an assault by Tsikelele and that the defendant was liable for damages suffered as a result. ..."

- [33] The assessment of general damages is not a matter of precise calculation. But that is no reason for the court to non-suit the plaintiff. The Court must do as best as it can with the available information to determine the quantum- see **De Lange v Minister of Safety and Security** 2016 JDR 1178 (GP) at par 23-24.

FUTURE MEDICAL EXPENSES

- [34] The appellant contends that the Court a quo erred in finding that there was no evidence regarding the appellant's claim for future medical expenses. The appellant contends that it was recorded as common cause between the parties in this regard and that there was an agreement. It was contended that the respondent reneged on this agreement when the aspect of future medical expenses was raised mero motu by the court in closing argument. The appellant contends that the court erred in making a finding on an aspect contrary to an agreement reached between the parties, as in **Mafisa** referred to above. It is contended that the court erred in then refusing the appellant leave to reopen its case to proof the aspect of future medical expenses after the respondent reneged on the common cause aspect. The issue of future medical expenses was an issue on which an expert would have been called.

The plaintiff elected not to call the witness and ran the risk of the consequences of this decision. While the concession of merits may very well have had the effect that the Minister of Police was liable for future medical expenses, the ambit thereof was still a matter to be proven. Without expert evidence in this regard, the amount of future medical expenses has not been established. Therefore, the Court a quo cannot be faulted on this issue and the quantum of the claim for future medical expenses was therefore not established. Counsel for the appellant correctly conceded the point. He advised the court that he would not persist in the appeal on the issue of future medical expenses.

INTEREST

[35] The appellant further contends that the Court a quo erred in not awarding interest on the amount of damages determined by the court. With reference to the provisions of section 2A of the Prescribed Rate of Interest Act, 55 of 1975 the appellant contends that interest on a delictual claim was due and payable from date of demand. The appellant contended that demand in this instance was the date of service of the particulars of claim.

[36] In **GFE Blything v Minister of Safety and Security and Another** (8281/2013) [2016] ZAGPPHC 770 (31 August 2016) Ledwaba DJP stated the following:

"[18] In terms of the Prescribed Rate of Interest Act it is permissible to recover mora interest on amounts awarded by a court which, but for such award, were unliquidated. Once judgment is granted such interest shall run from

the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is earlier – section 2A(2)(a) of Act 55 of 1975. *The word 'demand' is defined in the Act to mean a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof.*

[19] In the **Kwenda case**, Murphy J accepted that in the particular case, it was reasonably possible for the defendant to assess the quantum once the summons was issued.

[20] In **Eden & Another v Pienaar** referring to the criticism in **Hartley's case** the Full Court of the then WLD, stated that the effect of the inserted section 2A, is that: *'the position in our law is now both liquidated and unliquidated debts bear interest (the latter from the date on which judgment is demanded or claimed by summons) at the rate prescribed by the Minister of Justice in terms of s 1(2).'*

[21] The Supreme Court of Appeal in **Thoroughbred Breeders Association v Price Waterhouse** held that in the absence of a letter of demand, section 2A of Act 55 of 1975, ordained mora interest at 15.5% per annum *from the date of summons.* *The court observed that 'if the award was one for mora interest there is no reason why, having regard to s2A of the Act, interest should only run from the date of judgment and not from the date of summons.'* In paragraph [79] the court concludes: *'since no demand prior to summons was proved, the date for the commencement*

for the calculation would therefore be the date upon which summons was served.’

[22] The Supreme Court of Appeal further held, in **Steyn NO v Ronald Bobroff** that the term mora simply means delay or default. The mora interest provided for in the Act is thus intended to place the creditor, who *has not received due payment ... in the position that he or she would have occupied had the payment been made when it was first requested from the defendant.*

[23] In **Minister of Safety and Security and Others v Janse van der Walt and Another** the Supreme Court of Appeal ordered the first defendant to pay the interest on the amount of damages awarded at the rate of 15,5% per annum from the date of demand to the date of payment. Similarly the Supreme Court of Appeal in **Woji v The Minister of Police** ordered the defendant to pay interest in the sum of R500 000.00 at the rate of 15,5% per annum a tempore more from date of demand to date of payment.

[24] Having regard to the above-mentioned case law and the reasoning therein concluding that interest in illiquid claims for damages may be awarded interest a tempore morae from the date of demand or summons, whichever is earlier, in terms of section 2A(2)(a) of Act 55 of 1975, it is clear in the Takawira case the court in finding that interest on an illiquid claim for damages, can be determined from the date of *judgment.*”

- [37] It follows that the failure to consider and order payment of interest is a misdirection by the court a quo. The absence of a prior demand renders the appropriate date of mora interest to be the date of service of summons.

CONCLUSION

- [38] The Court a quo has misdirected itself in only awarding the appellant an amount of R300 000.00. If one takes into account that the aforesaid award only related to a period of detention for 3 to 4 days and without taking into account the issue of assault and torture, then the basis on which the award may be increased is to take into account the evidence of the assault and the full duration of the unlawful detention, namely 65 days.
- [39] The appellant contended in this court for an award of between R600 000.00 and R700 000.00, whilst the Minister of Police argued **a quo** for an award between R400 000.00 and R500 000.00.
- [40] With reference to the authorities referred to above, and on assessment of the evidence pertaining to the assault and the duration of the period of unlawful detention, an award of an all-inclusive amount of R600 000.00 would be more appropriate.
- [41] In the premises the following order is made:
1. The appeal is upheld with costs on Scale C, including the costs of two counsel.

2. The order of the Court a quo is set aside and substituted with the following:

- "1. The first defendant is ordered to pay the plaintiff damages in the amount of R600 000.00 in respect of the unlawful arrest, detention and assault for the full period of detention as claimed in the particulars of claim.

2. Interest at the prescribed mora rate from date of service of summons on 4 June 2013 to date of final payment.

3. The first defendant is to pay the costs of suit on Scale C, including the costs of two counsel"


LABUSCHAGNE J
JUDGE OF THE HIGH COURT


MBONGWE J
JUDGE OF THE HIGH COURT


BAM J
JUDGE OF THE HIGH COURT

DATE OF HEARING :22 JANUARY 2025

DATE OF JUDGEMENT :10 MARCH 2025

Appearances:

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Appearing with : Adv J Schoeman

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