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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 14227/19

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

In the matter between:

L[...] E[...]

Plaintiff

And

THE MINISTER OF POLICE

First Defendant

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Defendant

JUDGMENT

Mahosi J

Introduction

[1] This action concerns a delictual claim resulting from the plaintiff's alleged unlawful assault by the police officials during his arrest, sexual assault by his co-detainees in the holding cells and unlawful detention. His claim for assault is based on the police officer's alleged breach of their duty to ensure his safety during arrest and whilst in custody. He alleges that the police officials, acting within the course and scope of their employment by the Minister, failed to take reasonable steps to prevent his assault during arrest and sexual assault by his co-detainees whilst in custody. His claim for unlawful detention is based on the police officer's alleged breach of his right to be brought before the court to enable a bail application without unreasonable delay.

The parties

[2] The plaintiff is Mr E[...] L[...] ("L[...]"), a South African male adult. The first defendant is the Minister of Police, who is sued in his capacity as the Minister responsible for the conduct of the members of the South African Police Service ("the SAPS") in executing their constitutional obligations to prevent, combat and investigate crime. The second respondent is the National Director of Public Prosecution, against whom the plaintiff withdrew his case.

Background facts

[3] It is common cause that, around September 2016, the police arrested L[...] at 8343 Extension 6B, Orange Farm, and detained him at Orange Farm Police Station's cells. The exact date and the circumstances surrounding the arrest are in dispute. L[...] alleges that the police assaulted him during the arrest, detained him at Orange Farm Police Station and arranged an ambulance for him to be transported to Sebokeng Hospital for medical attention the following morning.

[4] At the Sebokeng Hospital, L[...] was under police guard for 7 days until his discharge on 30 September 2016. Thereafter, the police detained him at the Orange Farm Police Station. It was during this period that L[...] was allegedly sexually assaulted by two of his co-detainees. On 07 October 2016, L[...] appeared before the Vereeniging Magistrates' Court, where his bail application was adjudicated and granted. However, L[...] could not pay the bail on the same day due to financial constraints. Resultantly, the police

remanded him into custody and detained him at the Leeuwhof Prison until 09 October 2016. On 18 October 2016, the State withdrew the charges against him.

L[...]’s case

[5] L[...] brought two claims, namely, unlawful assault and detention. The claim for assault has two legs. The first entails L[...]’s claim for damages for an unlawful assault he alleged to have endured at the hands of the arresting police officers who kicked, stamped on, manhandled and beaten him with rifle butts during his arrest. This resulted in him suffering a fractured 9th rib, hip and hand injuries for which he claims R80 000.

[6] The second is a claim for damages arising from an alleged sexual assault by two suspects with whom he was detained at the Orange Farm Police Station. In this regard, L[...] avers that the police officers acted wrongfully, unlawfully and/or negligently by detaining him in an overcrowded cell with hardened criminals without surveillance or regular inspection and risking invasion of his constitutional rights. This resulted in injuries to his anal area, humiliation, embarrassment, post-traumatic stress disorder (PTSD), and depression. For this, he claims R400 000.00

[7] Regarding his claim for unlawful detention, L[...] alleged that his detention was protracted by the alleged severe and vicious assault by the police officers during his arrest, making it impossible for him to apply for bail when his co-accused first appeared in Court, and failure to properly confirm his identity and residence. He contended that his detention with hardened criminals without surveillance and in a tiny and unhygienic cell contradicted the Standing Orders of the Police and the Constitution and resulted in deprivation of his liberty, inconvenience, discomfort and sexual assault. He claims damages amounting to R600 000.00.

Minister’s case

[8] The Minister disputes L[...]’s alleged assault by the police during his arrest and sexual assault by co-detainees on the basis that there was no evidence supporting his claim. The Minister asserted that L[...]’s detention was lawful as he was arrested on the basis of a reasonable suspicion that he committed theft and, alternatively, was found in

possession of property reasonably suspected to be stolen. Further that his detention at Sebokeng Hospital was at the instance of the Police to enable him to receive medical treatment after his arrest.

Issues for determination

[9] The issues before the Court are:

- 9.1 Whether the police unlawfully assaulted L[...] at the time of his arrest, and if so, whether the Minister is liable.
- 9.2 Whether L[...]’s co-detainees sexually assaulted him in the cells at Sebokeng Police Station, and if so, whether the Minister is liable;
- 9.3 Whether L[...]’s detention was unlawful.

Relevant evidence

For Mr L[...]

[10] L[...] testified that he is married with four (4) children. At the time of his arrest, he was working as an assistant rigger. On the afternoon of 22 September 2016, he visited his cousin Daddy Mirha Mjandali (“Daddy”) at section 4 Orange Farm township, near Johannesburg. Daddy introduced him to Themba, and they all drove around in Daddy’s vehicle. When they arrived at a different section of the township, Daddy’s car got stuck because of mechanical problems. They sought help and were referred to a certain mechanic, Frank, who could not immediately repair the vehicle as he needed to buy certain parts. As a result, they could not drive back to their respective homes.

[11] As it was late in the evening, Daddy slept at his girlfriend’s home, and Frank found L[...] and Themba overnight accommodation at a house located at 8343 Extension 6B, Orange Farm. At this house, they found other people who went out to buy food and alcohol shortly after their arrival. L[...] was drunk and fell asleep on a couch. He was awoken by the police officers in uniform who kicked and beat him all over his body with a black baton (“a tonfa”) and the butt of a long firearm. He sustained injuries on his right rib, hip, genitals, and fingers and had difficulty breathing.

[12] On the instructions of the police officers, L[...] and his co-accused took their clothes off except their underwear and lay on the ground. The police officers said L[...] and his co-accused were Mozambicans who came to this country to commit crimes. To that, L[...] did not respond. The police officers then hand-cuffed them and continued with the assault as they took them to the police vehicle. They were transported to Orange Farm Police Station and arrived there at around 05h00. L[...] could not stand or breathe properly as his private parts were swollen, his ribs were painful and he was coughing blood. He did not inform the police officers that he was injured and in pain, as they could see that he was severely beaten. His co-suspects informed the police officers that he (L[...]) was not involved in the suspected crime.

[13] The following day, the police officers transported L[...] by ambulance to Sebokeng Hospital, where he was under police guard for seven days. On 30 September 2016, L[...] was discharged from the hospital and detained in the cells at Orange Farm Police Station. He was initially alone and mostly sleeping in the cells, but thereafter, other accused persons started coming in and out.

[14] On one of the days, the police officials locked five suspects in the police cell he was occupying. Three of them were aggressive and asked him which gang he was affiliated with. After informing them that he was not affiliated with any, they asked him to take off his clothes to see whether he had any tattoos. It was at this point that two of the men covered his whole body with a blanket, undressed him, smeared a certain lotion on his anus and took turns in penetrating his anus for about 10 minutes. He did not scream or inform the police officials about the incident, as he was afraid that his assaulters would kill him. After his release, he did not seek medical help from the clinic as he was embarrassed and humiliated to relate the incident to female nurses.

[15] On the conditions of the cells, L[...] testified that the cells had no beds. As a result, he slept on the blankets, which were not enough. Although the food was not filling, the police officials gave him his medication with the meals twice a day. The police official did not visit the cells hourly.

[16] The medical practitioner, Dr. Stan Tenzer ("Dr. Tenzer"), examined L[...] on 20 August 2019, perused his medical records and prepared a report. He was reported to be

suffering from a progressive aphasia, which affected his speech. Resultantly, he could not testify during the trial. L[...]’s counsel successfully moved an unopposed application in terms of Rule 38(2), and this Court admitted his report into evidence.

[17] Dr. Tenzer opined that L[...] suffered severe blunt chest trauma, including a severe fracture of the left 9th rib, contusion on his right hip, and loss of hearing. Further, L[...] could not work, run, or walk long distances. In addition, Dr Tenzer stated that L[...]’s assault exacerbated his previous injuries on both hands, and he suffers from multiple symptoms of PTSD and haemorrhoids. He recorded that L[...] still suffers severe chest pain when coughing, sneezing, moving, lifting or making sudden movements.

[18] The psychiatrist, Dr. Leon Arthur Fine (“Dr. Fine”), testified in support of L[...]’s case and prepared a report in which he opined that L[...]’s sexual assault resulted in him suffering from Post Traumatic Stress Disorder (PTSD), depression, anxiety, haemorrhoids and erectile dysfunction that led to the deterioration of his marital relationship with his wife. During cross-examination, he stated that he did not conduct a formal diagnostic test but elicited information from L[...].

For the Minister

[19] The Minister’s first witness was Sergeant Terreblanche. She testified that on 22 September 2016, at around 04:00 am, she and her co-worker, Bouwer, now deceased, were alerted of a crime involving theft of properties and were directed to the house where the stolen properties were kept. They called Sergeant Shipalana and other police officials, who joined them in attending to the scene at around 05h00, where they knocked at one of the outside rooms. When the door was opened, they found five (5) males and numerous computers. The police officers informed the suspects that they were under arrest for stolen property, instructed them to lie down and enquired about their nationality. Three of them indicated that they were from Mozambique, and the remaining two, including L[...], did not respond.

[20] Sergeant Shipalana testified and confirmed the arrest and its date. He disputed that any of the police officers assaulted L[...]. During cross-examination, Sergeant Shipalane disputed that the police officers had arranged an ambulance for L[...] to be transported to

Sebokeng Hospital. However, when he was reminded that he was off-duty on the day, he conceded that it was likely to have happened. Sergeant Shipalane insisted that no one was injured whilst he was on duty, but when the SAPS70 form was shown to him, he speculated that L[...] could have sustained injuries after he was detained. Sergeant Ndlovu testified that his involvement related to charging L[...] on 24 September 2016 at the hospital, where he observed injuries on his ribs and hip.

Applicable law

[21] The Constitution¹ requires the State and all its organs to respect, protect, promote and fulfil all the rights protected by the Bill of Rights. Those relevant in this case are expressed by sections 7, 9, 10, and 12 of the Constitution as follows:

“7. Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.

...

9. Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

10. Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

...

12. Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right—

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;

¹ Act 5 of 2005, as amended.

- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right—
 - (a) ...
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.”

[22] The test applicable in an action for damages alleged to have been caused by the defendant's negligence has been stated by the Supreme Court of Appeal (“SCA”) in *Groenewald v Groenewald*² as follows:

“In delictual claim of the nature involved in the present case two separate questions arise:

1. Was the defendant at fault?
2. For what consequences caused to the plaintiff in consequence of the defendant's conduct is the defendant liable in damages to the plaintiff?

For the purpose of answering the first question the defendant would be held to be at fault as long as he intended to cause harm to the plaintiff, even if he did not intend that the consequences of such conduct would be to cause the kind of harm actually suffered by the plaintiff or harm of that general nature. He would also be held to be at fault if the reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by such conduct, even if he would not have realised that the consequences of that conduct would be to cause the plaintiff the very harm he eventually suffered or harm of that general nature.”

[23] In *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd*³, Scott JA writing for the majority of the Court said:

“[21] A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. It reads:

‘For the purposes of liability *culpa* arises if –

² 1998 (2) SA 1106, at 1112G-J

³ 2000 (1) SA 827 (SCA), at 838I – 839C

- (a) a *diligent paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

However, in *Mukheiber v Raath and Another* 1993 (3) SA 1065 (SCA) the following was said at 1077E-F:

‘The test for culpa can, in light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A), be stated as follows (see Boberg Law of Delict at 390):

For the purpose of liability culpa arises if –

- (a) a reasonable person in the position of the defendant –
 - (i) would have foreseen harm of the general kind that actually occurred;
 - (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
 - (iii) would have taken steps to guard against it, and
- (b) the defendant failed to take those steps.’”

Submissions

Assault by the police officers

[24] It was submitted, on behalf of L[...], that his version that the police official unlawfully assaulted him must be accepted as it is supported by the unchallenged evidence contained in the docket (the SAPS70), his warning statement, the Sebokeng Hospital records and Dr Tenzer’s report. Further, his disclosure that he was drunk was an indication of his honesty. On the uncertainty of the exact date on which the assault, the arrest and medical treatment took place, it was submitted that it must be accepted that as it occurred in September 2016 it was to be expected that independent recollection of dates fade over time. On the injuries, L[...] relied on the Admission Procedure Checklist of the Sebokeng Hospital (Exhibit "F"), which indicates that he suffered a fracture of the left 9th rib and the Emergency Encounter Form (Exhibit "G"), which mentions the injury to his left femur.

[25] On behalf of the Minister, it was submitted that L[...] was not a credible witness as he kept changing his version. Further that his evidence must be treated with caution as it is

not corroborated. In particular, it was submitted that L[...] insisted that he was arrested on 23 September 2016, but the documentary proof showed that he was arrested on 22 September 2016. Although he testified, during examination-in-chief, that he was assaulted by police officers who were in uniform, he changed this version during cross-examination when he said he could believe that some of them were not in uniform. In addition, he testified that all the suspects were assaulted, but was the only one who claimed to have been injured.

[26] The Minister prayed for the dismissal of L[...]’s case as he was intoxicated during the arrest and could not recall exactly what happened and failed to inform the police officers of the assault upon arrival at the police station. On the injuries, it was submitted that Doctor Tenzer’s opinion does not assist the Court as he stated that he was given an account of the events by L[...] and failed to state the sources that assisted him in compiling the reports.

Sexual assault by co-detainees

[27] It was submitted, on behalf of L [...], that the police officers failed to comply with the Standing Orders regarding the surveillance of the cells and ensuring that L[...] was not detained with dangerous criminals accused of violent crimes. Further that this Court must accept his claim as it was supported by his credible testimony and that of Dr Fine.

[28] It was submitted, on behalf of the Minister, that L[...] failed to prove his claim of sexual assault in the cells and that he suffered penile dysfunction and a swollen anus. It was further submitted that without serving the Minister with the notice in terms of Rule 35(3) of the Uniform Rules to discover the occurrence book for 30 September 2016 until 07 October 2016, he could not establish the exact times the police officers visited the cells. Furthermore, it was submitted that if this Court finds that L[...] was sexually assaulted, it ought to find that it was not as a result of the Minister’s negligence.

Unlawful detention

[29] It was submitted that L[...]’s detention from 23 September 2016 to 07 October 2016 was unlawful in that the warrant of detention was obtained on the false ground that he was

a Mozambican, his stay at Sebokeng Hospital made him not appear at the Magistrate's Court a day after his arrest was necessitated by the police officers' assault and after his discharge from hospital his detention was unnecessarily prolonged.

[30] On behalf of the Minister, it was submitted that to the extent that L[...]s detention prior to his Court appearance was lawful as his arrest was on reasonable suspicion that he committed a Schedule 1 offence of theft. It was further submitted that L[...]s arrest from a period of 23 September 2016 to 30 September 2016 was lawful as the medical certificate showed that he was receiving medical attention at Sebokeng Hospital and his further detention after he was discharged from the hospital was lawful as the Magistrate had ordered that he appear in Court on 07 October 2016.

Assessment of evidence

[31] The Court must determine whether L[...] was assaulted by police officers during his arrest, sexually assaulted by his co-detainees in the police cells and detained unlawfully. Two mutually destructive versions were placed before the Court. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*⁴ the Court had the following to say regarding the method to be employed in resolving factual disputes:

"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's 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, (v) the probability or improbability of particular aspects of his version, (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's reliability will

⁴ 2003 (1) SA 11 (SCA), at 14I-E.

depend, apart from the factors mentioned under (a)(ii), (iv) and (v) 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 a 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."

Assault by police officials

[32] The first enquiry is whether the police official assaulted L[...] at the time of his arrest. The Minister disputed this and challenged L[...]’s credibility on the basis that he failed to recall the exact date and the circumstances surrounding his arrest. Although L[...] testified that his arrest was on 23 September 2016, it is common cause that it occurred on 22 September 2016. This was confirmed by the Minister’s witnesses and the undisputed SAPS70 form, Registration Admission Form, which that indicated L[...]’s admission to the Sebokeng Hospital was on 23 September 2016 at 07h20.

[33] L[...] testified that the police officers who arrested and assaulted him were in uniform and he could not remember how many there were. However, during cross-examination, he stated that he believed that others were not in uniform. The incident happened long ago, and memories are expected to fade over time. Thus, L[...]’s forgetfulness of the specific dates, the number of police officers, and whether all were in uniform is not unreasonable and does not make him less credible.

[34] On the contrary, L[...] came across as an honest and credible witness. His demeanour in the witness box was respectful and appropriate, he answered all questions forthrightly, and his evidence was consistent and unwavering. His disclosure that he had consumed alcohol on the day of the arrest shows honesty, and the Minister’s attempt to

use it to discredit his credibility is unwarranted. I, therefore, agree with the submission that there was nothing in his evidence that seemed doubtful, far-fetched or improbable.

[35] Sergeant Terblanche denied the alleged assault and instructed the suspects to undress. She confirmed the Occurrence Book (Exhibit “N”), in which she states that the suspects had no ‘visible’ injuries. When asked, during cross-examination, whether she checked if L[...] was injured, she became argumentative and stated that she was not a doctor. When asked if she could dispute the injuries, she stated that L[...] did not bring them to the police officers's attention, and as such, she only became aware of his hospitalisation because of this trial.

[36] When Sergeant Terblanche was told that L[...] was detained in the cells in an injured state, she conceded, then later contradicted herself by stating that she knew nothing about it. When it was suggested to her that L[...]’s injuries were noticeable, she stated that she would not know what he did before the arrest. It is clear from the above responses that Sergeant Terblanche avoided answering the simple questions. When she did, she was argumentative and evasive.

[37] Sergeant Shipalane was one of Sergeant Terblanche’s crew members, and he testified that he had not made a written statement about the events. Although he also denied the assault, he and Sergeant Terblanche were not singing from the same hymn sheet. He testified that he entered the room where the suspects were, but Sergeant Terblanche was not sure if he did or remained outside. Sergeant Shipalane said that the suspects were instructed to ‘hold the wall’, but Sergeant Terblanche testified that the suspects were instructed to lay on the floor. This is contradictory.

[38] It is common cause that the police officers transported L[...] to the hospital, where he stayed for a week, hours after his arrest. This is an indication that he was severely injured and in a lot of pain. The correctness of the hospital records handed in as exhibits and not disputed by the Minister during the trial confirm that L[...] was admitted with a fracture of the 9th rib and injury on his left femur. Sergeant Ndlovu confirmed these injuries. To the extent that they were not the kind of injuries one leaves unattended, it is improbable that L[...] was assaulted before his arrest and more probable that the police officers assaulted him during his arrest.

[39] Considering all the evidence, this Court has no basis to reject L[...]’s version, as it is more credible and probable. The police officers knew or ought to have known about L[...]’s assault when he arrived at the police station. The reasonable police officers would have foreseen the possibility of the assault causing harm to L[...] and taken reasonable steps to protect his rights to safety, but they failed to do so. On the evidence, the police officers were negligent.

Sexual assault by co-detainees

[40] In assessing the evidence on the issue relating to the alleged sexual assault, it is apposite to outline the test for negligence as expounded by the Constitutional Court in *Mashongwa v Passenger Rail Agency of South Africa*⁵ as follows:

“[40] The real issue on this aspect of the case is not whether the posting of a single guard, or three guards, could have prevented the attack. It is whether the steps taken by PRASA could reasonably have averted the assault. Crucial to this inquiry is the reasonableness of the steps taken. However, it must be emphasised that owing to the fact that PRASA is an organ of State, the standard is not that of a reasonable person but a reasonable organ of State. Organs of State are in a position that is markedly different from that of an individual. Therefore, it does not follow that what is seen to be reasonable from an individual's point of view must also be reasonable in the context of organs of State. That approach would be overlooking the fundamental differences between the State and an individual. It would also be losing sight of the fact that that the standard of is reasonable person was developed in the context of private persons.

[41] The standard of a reasonable organ of State is sourced from the Constitution. The Constitution is replete with the phrase that the State must take reasonable measures to advance the realisation of rights in the Bill of Rights. In the context of socio-economic rights the availability of resources plays a major part in an enquiry whether reasonable steps have been taken. I can think of no reason in principle or logic why that standard is inappropriate for present purposes. Here, as in the case of socio-economic rights, the choice of steps taken depends mainly on

⁵ 2016 (3) SA 528 (CC)

the available resources. That is why an organ of State must present information to the Court to enable it to assess the reasonableness of the steps taken."

[41] In light of the above authority, it is apparent that the enquiry should be whether police officials, in executing their duties, took reasonable and appropriate measures to prevent the violation of L[...]’s rights to dignity, equality, freedom and security of the person, including the right to be free from violence from both public and private sources.⁶ The relevant SAPS Standing Order 361 (General) titled: *Handling of Persons in the Custody of the Service from their Arrival at the Police Station*, underpins this duty. Clause 1 reads:

“Background

In order to comply with its obligations in terms of the Constitution, the Service is obliged to take certain steps with regard to every person in its custody. The steps that must be followed from the arrival of such person at the police station, are outlined below.”

[42] Clause 13(1)(g) reads:

“Whenever reasonably possible, persons in custody who are alleged to have committed violent crimes, must be detained separately from other persons in custody.”

[43] Clause 13(6)(a)(i) states that, at a station with a 24-hour per day community service centre commander, ordinary persons in custody must be visited at least every hour. Clause 13(6)(c) states that where a 24-hour per day community service centre does not exist, the station commander must, taking into consideration the safe detention of persons in custody, make suitable arrangements for visits to the cells.

[44] The only version of the facts is L[...]’s. He testified in detail how the sexual assault by his violent co-detainees occurred and became emotional that the proceedings had to be adjourned for him to regain his composure. He conceded that he did not report the alleged sexual assault to the police official but explained that fear, humiliation and embarrassment prevented him from speaking out.

⁶ Sections 9, 10 and 12 of the Constitution.

[45] The Minister did not discover the Occurrence Book and Cell Register for the period 30 September 2016 to 7 October 2016, despite being served with the notice in terms of rule 35(3). As a result, it cannot be established whether the police officers detained L[...] with violent criminals or checked on the cells hourly. The Minister further failed to call the cell guard for the period in question to rebut Loqola's allegations. In the absence of contrary evidence, L[...] has established a *prima facie* case that the assailants were detained for violent crimes and that he was detained with them.

[46] In the circumstances, the police officer's failure to keep L[...] separated from persons detained for violent crimes and conduct the surveillance of the cells violated clauses 13(1)(g) and 13(6) of the Standing Orders. A reasonable police officer would have foreseen that if he detained L[...] with violent crime detainees and failed to regularly visit the cells, harm would befall him. Based on the evidence, I am satisfied that the police officers' omission materially contributed to his harm. In other words, had the police officials complied with their duty of care and the Standing Order, L[...] would not have been sexually assaulted. The police officers were, thus, negligent.

Unlawful detention

[47] L[...] contended that the assault, together with the warrant of his detention, which was obtained on the false ground that he was a Mozambican, caused his detention until 07 October 2016. He was arrested on Thursday, 22 September 2016 and contends that he should have been brought to Court for his first appearance on Friday, 23 September 2016. In this regard, he referred the Court to the judgment in *Mashilo v Prinsloo*⁷ where the Supreme Court of Appeal ("SCA") held that "*an arrested person has the right to be brought before the court to enable a bail application as soon as is reasonably possible*".

[48] L[...] was arrested on Thursday, 22 September 2016, and could not be brought to Court the following day for bail application as he was detained at the Sebokeng Hospital, where he was treated as a result of the assault at the hands of the police officials. Had he not been assaulted, he would have been able to attend Court on Friday, 23 September

⁷ 2013 (2) SACR 648 SCA

2016. Similarly, after he was discharged from the hospital on 30 September 2016, he was not brought to Court on the first available court date for bail. He only obtained bail on 07 October 2016. To the extent that L[...]’s detention was common cause, the Minister was burdened with the onus to justify it. However, he adduced no evidence to do so. Therefore, L[...]’s claim that his detention from Friday, 23 September 2016, to Friday, 07 October 2016, was unlawful must succeed.

Quantum

[49] It is apparent from the evidence that L[...]’s assault by the police officers resulted in him suffering a fractured 9th rib and hip injury. In the circumstances, I consider the amount of R80 00 to constitute adequate compensation for L[...].

[50] On the assault by the co-detainees, Dr Fine’s unchallenged evidence was that L[...] is suffering from PTSD and depression, which are attributable to the sexual assault. L[...] suffers from insomnia almost every night, and when he falls asleep, he gets bad dreams. The incident plays itself in his mind daily, especially when he is alone, which makes him suicidal. As a result, he is always in the company of many people and drinks alcohol more than he used to. The sight of police officers scares him such that it raises his heartbeat, makes him sweat and unable to breathe with ease. He developed erectile dysfunction and low self-esteem, which led to the deterioration of his marital relationship with his wife.

[51] Dr Fine found that the regularity and severity of his psychiatric symptoms impair him from performing and enjoying his usual daily activities and life amenities, causing him emotional pain and suffering. L[...] confirmed these findings. In light of the above, it is apparent that the sexual assault had a serious psychological impact on him. In the circumstances, I consider the amount of R250 000.00 to be fair and just.

[52] L[...]’s unlawful detention from 23 September 2016 to 07 October 2016 amounted to 14 days. Considering the conditions that were degrading, humiliating and traumatic, I consider an award of R350 000 fair and just.

Conclusion

[53] The Minister failed to adduce sufficient evidence to rebut the *prima facie* case of negligence put up by L[...] regarding the assault he suffered at the hands of the police officials and as a result of sexual assault by his co-detainees. In the circumstances, L[...]’s assault was occasioned by the negligence of the Minister’s servants. Further, the Minister could not discharge the onus of proving, on a balance of probabilities, that his detention was unlawful. Thus, he is entitled to be fully compensated for the damages he suffered as a result of his unlawful assault and detention. The Minister is liable for the costs of the suit.

[54] Accordingly, the following order is made:

Order

1. The first defendant is liable to pay the plaintiff’s damages as follows:
 - 1.1 The amount of R80 000.00 in respect of the plaintiff’s unlawful assault by the police officers.
 - 1.2 The amount of R250 000.00 in respect of the plaintiff’s unlawful sexual assault by his co-detainees.
 - 1.3 The amount of R350 000.00 in respect of the plaintiff’s unlawful detention from 23 September 2016 to 07 October 2016.
2. The defendant shall pay interest on the aforesaid amounts at the rate of 10.25% per annum *a tempora morae* from the date of summons to the date of final payment.
3. The defendant shall pay the plaintiff’s costs of suit on the party and party scale, including the cost of counsel on scale “B” and the fees of Dr S Tenzer and Dr LA Fine.
4. The defendant shall pay the interest on the taxed costs at the rate applicable at the time when the taxing master makes the allocator for costs from the date of taxation to the date of payment.

D. Mahosi J
Acting Judge of the High Court

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 13 February 2025.

Appearances

For the applicant: Advocate J.M. van Rooyen

Instructed by: Wits Law Clinic

For the respondent: Advocate M. Makgwebe

Instructed by: State Attorney, Johannesburg