

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case Number: 12401/2017

|              |                                                                                    |
|--------------|------------------------------------------------------------------------------------|
| (1)          | REPORTABLE:                                                                        |
| (2)          | OF INTEREST TO OTHER JUDGES:                                                       |
| (3)          | REVISED:                                                                           |
| 04 June 2025 |  |
| DATE         | SIGNATURE                                                                          |

In the matter between:

**BONGANI INNOCENT LAWU**

First Plaintiff

**TSHEPO MAKOBI**

Second Plaintiff

And

**MINISTER OF POLICE**

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be the 4<sup>th</sup> of June 2025.

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**JUDGMENT**

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**BOTSI-THULARE AJ**

## *Introduction*

- [1] The first and second plaintiffs instituted claims against the defendant respectively for their unlawful arrest and detention on 28 July 2015. The separate actions were consolidated in accordance with Rule 11 of the Uniform Rules of Court by Tuchten J on 16 October 2018. The consolidated actions then served before the Neukircher J on 2 March 2021.
- [2] Neukircher J, having separated the issues of merits and quantum as agreed by the parties, delivered judgment on the 10 May 2021. Neukircher J found the defendant liable for 100% of the first and second plaintiffs' proven or agreed damages flowing from their unlawful arrest and detention until their appearance in court on 30 July 2015. She then postponed the issue of quantum sine die. This court is therefore seized with the determination of the issue of quantum.

## *Issues*

- [3] At the hearing before me on 4 March 2024, the parties agreed to submit heads of argument on quantum rather than proceed with a protracted two-day trial, to facilitate a just and expeditious resolution of the quantum dispute. This agreement was premised on the common understanding that the plaintiffs are entitled to proven or agreed damages between the dates of detention of 28 to 30 July 2015.
- [4] Both parties have filed their respective expert reports and joint expert reports indicating their findings and recommendations. The expert reports focused on the following issues:
  - a. The quantum for unlawful arrest and detention.
  - b. The quantum for future medical expenses; and
  - c. The quantum for prospective loss of income.
- [5] Below is the summary of the expert reports in so far as the issues outlined above are concerned.

### *Experts reports*

- [6] The plaintiffs' Clinical Psychologist (Ms Faku) opined that the first plaintiff has suffered continued psychological trauma, emotional instability and general loss of dignity within his community because of the unlawful arrest. She argued that the first plaintiff lost opportunities because of the lingering criminal trial. She also indicated in her report that the first plaintiff does not want to participate in social gatherings as they make him uncomfortable, which results in him being agitated, argumentative and impatient.
  
- [7] Ms Faku concluded that the first plaintiff has had significant changes in his psychological functioning which seem to negatively impact on his self-image. Further, he presented with major depressive disorder (mild to moderate) and adjustment disorder with mixed disturbance of emotions and conduct. Accordingly, Ms Faku stated that the first plaintiff will need sessions with psychological therapists.
  
- [8] The defendant's Clinical Psychologist (Mr Khanyi) diagnosed the first plaintiff with Major Depressive Disorder and Post-Traumatic Stress Disorder (PTSD) and a decline in cognitive function. Mr Khanyi and Ms Faku both recommended psychotherapy intervention of no less than 20 sessions.
  
- [9] Regarding the second plaintiff, Mr Khanyi and Ms Faku agree that the second plaintiff's psychological difficulties are primarily attributed to psychological trauma, but they also acknowledge that his cognitive functioning remains intact. They further noted that the second plaintiff's extreme anger and aggressive behaviour may be linked to emotional distress and intrusive thoughts about his social and occupational limitations and the resulting decline in his quality of life following the incident in question
  
- [10] Mr Khanyi and Ms Faku diagnosed the second plaintiff with major depressive disorder (mild to moderate), adjustment disorder, post-traumatic stress disorder, below average cognitive functioning, prevalent of emotional difficulties, anxiety, inadequacy and poor self-concept, passive aggressive, major depressive disorder.

- [11] The Occupational Therapist for the plaintiffs (Ms Tsineng) reported that the first plaintiff suffered loss of energy and his life has changed. She also reported that the first plaintiff had poor motivation, anger outburst and loss of interest in things he used to enjoy. Further, he withdraws himself from everyone, avoids social contact and often talks to himself in anger.
- [12] Ms Tsineng stated that the reported psychological challenges if not successfully treated, may negatively affect the first plaintiff's ability to cope with work on the open labour market. She further stated that the presence of long-term psychological impairment will reduce the skills that the first plaintiff possesses to be employable and this will further reduce his ability to be equal competitor in the open labour market.
- [13] On the other hand, the Occupational Therapist for the defendant (Mr Seloana) reported that the plaintiff's lack of education, lifestyle choices, and substance abuse are the primary factors contributing to his inability to secure employment. However, he notes that the plaintiff is likely to improve if he attends the recommended psychological and occupational therapy rehabilitation.
- [14] Regarding the second plaintiff, Ms Tsineng indicated that the second plaintiff's score of 31 on the Beck's Depression Inventory is associated with severe depression. She accordingly recommends psychotherapy for the second plaintiff
- [15] The Industrial Psychologist for the plaintiffs (Ms Nyahwema) reported that taking into consideration the plaintiffs' pre-morbid employment history, pre-morbid earnings and educational level, they could have continued with their general work employment or should have sought and secured employment outside their organization as part of career growth. She further reported that the plaintiffs were remunerated R2100.00 per month (both Plaintiffs were employed by the same employee) which translates to R25 200.00 per annum.
- [16] Ms Nyahwema stated that during the incident the first plaintiff was 21 years of age and, considering his age and work experience as a general worker, he could have progressed his career and probably reach career ceiling with earnings comparable to the upper quartile of unskilled labour in the non-corporative sector

by the age of 45-50 years reflecting career ceiling. She used the same conclusion for the second plaintiff who was 25 years of age at the time of the incident.

[17] Considering this, Ms Nyahwema stated that the plaintiffs' working abilities have been negatively affected by the incident in question and they now present as compromised employees when compared with their counterparts. She further opines that the Plaintiffs will remain marginally unfair competitors in the open labour market.

[18] The industrial psychologists' joint report confirms that the plaintiff's loss of employment was due to the natural expiry of his contract, not the incident in question. Both experts agree that the plaintiffs remain employable as an unskilled worker and can work until retirement age, further eliminating any grounds for a future loss of income claim.

[19] The Actuary (Ekhaya) stated that they have assessed the loss of earnings and medical expenses for the plaintiffs as at the calculation date and based on the information provided, their methodology assumption and after considering the joint minutes of all the other experts as detailed in their report, the provided this court with estimates which will be considered when dealing with the issues of loss of earning later in this judgment.

#### *The quantum for unlawful arrest and detention*

[20] It is trite that the assessment of the quantum of general damages primarily remains within the discretion of the trial court. In *Pitt v Economic Insurance Company Ltd*<sup>1</sup> the court observed:

“... [T]he Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.”

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<sup>1</sup> 1957 (3) SA 284 (D) at 287E-F.

[21] The determining factors in cases where a court must decide on the quantum of damages for unlawful arrest and detention were aptly set out in *I.H v Minister of Police*.<sup>2</sup> They are, amongst others,

- a. The manner in which the arrest was effected.
- b. The age of the plaintiff.
- c. The conditions of the cell in which the plaintiff was kept, and,
- d. The duration of detention.<sup>3</sup>

[22] According to *Visser & Potgieter* the following can play a role in the assessment of damages:

“In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bona*. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio *iniuriarum* also has a punitive function”.<sup>4</sup>

[23] In *RAF v Marunga*<sup>5</sup> it was held that:

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<sup>2</sup> [2023] ZAGPPHC 1156 (8 September 2023)

<sup>3</sup> *Id* at para 20.

<sup>4</sup> *Visser & Potgieter, Law of Damages*, 3ed p545-548.

<sup>5</sup> 2003 (5) SA 164 at para 23 and 24.

“[I]n cases in which the question of general damages arose, a trial Court had a wide discretion to award what it considered to be fair and adequate compensation to the injured party.

... .

There was no hard and fast rule of general application requiring a trial Court to consider past awards, although the Court might derive some assistance from the general pattern of previous awards.”

[24] Similarly, In *Protea Assurance Co. Limited v Lamb*<sup>6</sup> the court held:

“... [T]he Court may have regard to comparable cases. It should be emphasized, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[25] In light of the above case law, I find it appropriate to consider comparable cases in which the quantum for general damages for unlawful arrest and detention were considered by our courts.

[26] In *Minister of Police and Another v Erasmus*<sup>7</sup> the plaintiff was suspected of having committed the crime of housebreaking with intent to steal and theft. He was arrested and detained in unpleasant conditions for approximately 20 hours and the High Court awarded R50 000.00. The award was reduced to R25 000.00 by the SCA.

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<sup>6</sup> 1971 (1) SA 530 (A) at 535H-536B.

<sup>7</sup> 2022 JDR 0979 (SCA).

- [27] In *Diljan v Minister of Police*<sup>8</sup> (“Diljan”) the appellant was suspected of having committed the offence of malicious damage to property, was arrested on Friday afternoon and detained until Monday, when she was released from custody. Considering all relevant factors, the Supreme Court of Appeal was satisfied that a fair and reasonable amount in the circumstances is R120 000.00 for the 3 days that she was deprived of her liberty. This amounts to R40 000.00 per day held in custody.
- [28] In *Motladile v Minister of Police*<sup>9</sup> the appellant was arrested and detained and remained in custody for five days and four nights. The Supreme Court of Appeal held that, on consideration of the facts and circumstances of the case as well as recent awards made by our courts in comparable cases and the steady decline in the value of money, an award of R200 000.00 was a fair and reasonable compensation for the damages arising from the appellant’s unlawful arrest and detention. It should be noted that the appellant remained in custody for 5 days in that matter, amounting to approximately R40 000.00 per day.
- [29] In this matter, the first plaintiff was at the time of the arrest 21 years and 9 months old and the second plaintiff was 25 years and 3 months old. They were both employed as general workers by the City of Tshwane under the EPWP program. Their highest level of education was grade 10 and each earned a monthly salary of R2 100.00.
- [30] Whilst there are certain similarities between the cases considered above and the present case, each of these decisions differ on the facts and the considerations raised therein from the present. They nevertheless serve as a guide to the general trend in the value of awards made. To the extent that guidance may be derived from these matters I have therefore given careful consideration to them.
- [31] Furthermore, in deciding on the reasonable and fair compensation, I was cognisant that it was stated in *Wright v Multilateral Vehicle Accident Fund*<sup>10</sup> that when having regard to previous awards one must recognize that there is a tendency for awards now to be higher than they were in the past. I believe this to

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<sup>8</sup> 2022 JDR 1759 (SCA)

<sup>9</sup> 2023 (2) SACR 274 (SCA).

<sup>10</sup> [2020] ZASCA 89 (31 July 2020) at para 17.

be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.

- [32] On a consideration of the age of the first and second plaintiffs, the circumstances of their arrest, the nature and duration of their detention, their social standing and the effect of the arrest on them, I am of the view that a fair and appropriate award of damages for the first and second plaintiffs unlawful arrest and detention is an amount of R50 000.00 each (per day). This amounts to a total of R100 000.00 for each plaintiff for the 2 days of detention.

*The quantum for future medical expenses*

- [33] In *AM and Another v MEC for Health, Western Cape*<sup>11</sup> the Supreme Court of Appeal described the functions of an expert witness in the following terms:

“The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.”

- [34] It has been stated that it is the duty of the trial court to ensure that the opinion evidence of the expert is properly motivated. In this regard, the Supreme Court of Appeal in *MEC for Health and Social Development, Gauteng v MM on behalf*

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<sup>11</sup> 2021 (3) SA 337 (SCA).

of OM<sup>12</sup> had the following to say with regard to opinion evidence:

“It is as well to recap the approach to be taken to expert evidence. Such testimony, in a medical matter, amounts to an opinion on how accepted medical principles apply to the facts. It is admissible where the person rendering the opinion is qualified to do so. The opinion must be properly motivated so that the court can arrive at its own view on the issue. Where the opinions of experts differ, the underlying reasoning of the various experts must be weighed by the court so as to choose which, if any, of the opinions to adopt and to what extent. The opinion of an expert does not bind a court. It does no more than assist a court to itself arrive at an informed opinion in an area where it has little or no knowledge due to the specialised field of knowledge bearing on the issues. In this regard, in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*, this Court held:

‘[A]n expert’s opinion represents their reasoned conclusion based on certain facts or data, which are either common cause, or established by their own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of their opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’

With those factors in mind, the expert evidence must be evaluated.” (Footnotes Omitted)

[35] Similarly, in *NSS obo AS v MEC for Health, Eastern Cape Province*<sup>13</sup> the Supreme Court of Appeal stated the following on the same topic:

“It is settled principle that in order to evaluate expert evidence, the Court must be appraised of and analyse the process of reasoning which led to the expert’s conclusion, including the premises from which that reasoning proceeds. The court must be satisfied that the opinion is based on facts and that the expert has reached a defensible conclusion on the matter.”

[36] Both psychologists acknowledge that the first plaintiff reported experiencing difficulties primarily attributed to psychological trauma. They agree that his

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<sup>12</sup> [2021] ZASCA 128 at para 17

<sup>13</sup> 2023 (6) SA 408 (SCA) at para 25.

cognitive functioning remains intact; however, due to a long-standing history of depressive symptoms, he is likely to continue experiencing difficulties with tasks requiring sustained attention and concentration. The persistent psychiatric symptoms, difficulties with attention, and poor self-concept will further impact his behaviour. Both psychologists recommended psychotherapy intervention of no less than 20 sessions.

[37] It is important to note that the first plaintiff has a well-documented history of depression predating his arrest. There is no clear medical or psychological evidence establishing that his Major Depressive Disorder or PTSD was caused by his detention. Further, it has not been determined whether his psychological symptoms arose due to the two days of detention for which the defendant is liable, or whether they were primarily caused or aggravated by the subsequent six-day period of detention for which the defendant is not liable.

[38] In the absence of clear and compelling medical evidence establishing a direct causal link between the defendant's period of liability and the first plaintiff's psychological diagnoses, the defendant cannot be held responsible for any alleged future medical expenses.

[39] It is my considered view that the first plaintiff has failed to discharge the burden of proof necessary to establish a causal link between the two-day detention for which the defendant is liable and the psychological conditions diagnosed. The first plaintiff's claim for future medical expenses should, therefore, fail.

[40] In the joint minute of the psychologists' reports, experts agree that the second plaintiff's psychological difficulties are primarily attributed to psychological trauma, but they also acknowledge that his cognitive functioning remains intact. However, given his long-standing history of depressive symptoms, he is likely to continue experiencing difficulties with sustained attention and concentration due to persistent psychiatric symptoms. Furthermore, attentional challenges, emotional difficulties, and poor self-concept will continue to impact his behaviour and overall functioning.

[41] The experts agree and diagnosed the second plaintiff with major depressive disorder (mild to moderate), adjustment disorder, post-traumatic stress disorder,

below average cognitive functioning, prevalent of emotional difficulties, anxiety, inadequacy and poor self-concept, passive aggressive, major depressive disorder.

- [42] Having said that, it remains uncertain whether the second plaintiff's diagnosis resulted from his detention or from his longstanding history of depressive symptoms or substance abuse, as these factors could have contributed to his psychological condition. It is submitted that the second plaintiff has failed to discharge the burden of proof necessary to establish a causal link between the two-day detention for which the defendant is liable and the psychological conditions.

*The quantum for prospective loss of income*

- [43] Both plaintiffs claim damages for prospective loss of income, with the joint reports of the industrial and occupational psychologists being particularly relevant to this issue. The experts agree that the first plaintiff will benefit from occupational therapy for group therapy, prevocational skills in order to be able to be independent and seek ability for job opportunities using skills training. The experts also recommended 10 to 15 occupational therapy sessions.
- [44] Both experts agree that the first plaintiff will struggle to function optimally in his social environment due to his emotional and psychological compromise following the incident. The experts further agree that the incident in question contributed to the plaintiff's loss of self-confidence, lack of motivation, difficulty in interpersonal relationships, and struggles in professional interactions. These psychological difficulties may reduce his chances of securing employment in an open labour market.
- [45] At the time of his arrest, the first plaintiff was 21 years and 9 months old and was employed as a general worker under the City of Tshwane's Expanded Public Works Programme (EPWP). His highest level of education was Grade 10, and he earned a monthly salary of R2,100.00.
- [46] Both occupational therapists concur that the second plaintiff would benefit from occupational therapy, specifically for group therapy and pre-vocational skills

training. Both experts recommend 10 to 15 occupational therapy sessions. Both experts agree that the second plaintiff's substance abuse is a contributing factor to his employment difficulties.

[47] At the time of his arrest, the second plaintiff was 25 years and 3 months old and was employed as a general worker under the City of Tshwane's Expanded Public Works Programme (EPWP). His highest level of education was Grade 10, and he earned a monthly salary of R2,100.00.

[48] Having said that, it is worth noting that the industrial psychologists' joint report confirms that both the plaintiffs' loss of employment was due to the natural expiry of their contracts, but not the incident in question. Both experts agree that the plaintiffs remain employable as unskilled workers and can work until retirement age, further eliminating any grounds for a future loss of income claim.

[49] The Actuary (Ekhaya) stated that they have assessed the loss of earnings and medical expenses for the plaintiffs as at the calculation date and based on the information provided, their methodology assumption and after considering the joint minutes of all the other experts as detailed in their report, the estimates are as follows:

- a. For the first Plaintiff: Recommended claim against the MOP for loss of earnings: Scenario 1: Nil Contingencies; Cloudious Nyahwema (CN): R1 773 493.00 and Hillary Tomu: Nil and Scenario 2: 5% Past: 10% Future pre-incident and 25% Future post-incident Cloudious Nyahwema (CN): R1 704 090.00 and Hillary Tomu (HT): R 342 424.00.
- b. For the second Plaintiff: Recommended claim against the MOP for loss of earnings: Scenario 1: Nil Contingencies Cloudious Nyahwema (CN): R1 756 527 and Hillary Tomu (HT): R Nil. Scenario 2: 5% Past: 10% Future pre-incident and 25% Future post-incident A Cloudious Nyahwema (CN): R1 683 350.00 and Hillary Tomu (HT): R290 822.00

[50] It is trite that the actuarial calculations must be based on proven facts and realistic assumptions regarding the future. The actuary guides the court in making calculations. The court has a wide judicial discretion and therefore the

final say regarding the calculations. This court has a duty to ensure that the information and opinion evidence upon which the Actuaries relies on in their actuarial calculations is logical and properly motivated.

[51] It should be noted that even in instances where there is no opposing report, as it is the case in this matter, it remains the duty of this court to analyse the report and be satisfied.

[52] In this matter, both experts agree that the plaintiffs remain employable as unskilled workers and can work until retirement age, further eliminating any grounds for a future loss of income claim. In light of the joint findings of the industrial psychologists, it is my considered view that the first and second plaintiffs' claim for prospective loss of income is without merit and should be dismissed.

#### *Reasons for the decision*

[53] Based on the comparative case law and the relevant factors, an award of R50 000.00 per day for each plaintiff, amounting to R100 000.00 per plaintiff, is fair and appropriate.

[54] Regarding the claim for future medical expenses, the plaintiffs have not sufficiently established a direct causal link between their psychological conditions and the two-day detention for which the defendant is liable. The expert reports fail to distinguish between the trauma and/or substance abuse issues experienced by the first and second plaintiffs from their past. Therefore, the claim for future medical expenses should be dismissed.

[55] Concerning the claim for prospective loss of income, the joint reports of the occupational and industrial psychologists confirm that both the first and second plaintiffs' employment with the City of Tshwane ended due to the automatic expiry of their fixed-term contracts and not as a result of the incident in question. The experts further agree that both plaintiffs remain employable as unskilled workers until retirement age. Therefore, the plaintiffs have failed to establish a causal link between the incident and any loss of prospective income, and the claim for prospective loss of income should be dismissed.

## Costs

[56] Costs ordinarily fall within the discretion of the court, which must be exercised judicially, having regard to the relevant factors. It was held in *Affordable Medicines Trust v Minister of Health*<sup>14</sup> that “[t]he award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations.”

[57] The plaintiffs in this matter are partially successful on the issue regarding the quantum for general damages but failed on the two issues regarding future medical expenses and future loss of income. Accordingly, and in the exercise of my discretion, I am of the view that the defendant should therefore be ordered to pay the plaintiffs’ costs incurred in relation to the determination of the quantum for general damages.

## Order

[58] In the result, I make the following order:

1. General damages for unlawful arrest and detention are awarded to the first and second plaintiff in the amount of R100 000.00. each.
2. The First and Second Plaintiffs’ claims for future medical expenses are dismissed.
3. The First and Second Plaintiffs’ claims for future loss of income are dismissed.
4. The defendant is ordered to pay the First and Second Plaintiffs’ costs limited to the issue of determining quantum for general damages on attorney client scale.

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<sup>14</sup> 2006 (3) SA 247 (CC) at para 138.



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**MD BOTSI-THULARE**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

**APPEARANCES**

Counsel for the First and Second Plaintiffs: Adv JSC Nkosi.

Instructed by: MWIM Attorneys.

Counsel for the Defendant: Adv B Ramela.

Instructed by: State Attorney.

Date of hearing: 4 March 2025.

Date Judgment was reserved: 14 March 2025.

Date of delivery of Judgment: 4 June 2025.