

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 34739/2026

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

_21 August 2026

In the matter between:

MR JOHANNES PHAKATHI

First Plaintiff

MR THABISO MABOTE

Second Plaintiff

and

MINISTER OF POLICE

First Defendant

**ACTING NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICES**

Second Defendant

Police liability — *Assault and torture of detainees — Action for damages arising from assault by members of the South African Police Service (SAPS) while plaintiffs in custody — Defendants admitting the fact of assault and injuries in pre-trial minutes but*

denying that SAPS members were the perpetrators — Onus of proof remaining on plaintiffs — Failure or omission by police to provide a coherent account justifies an adverse inference that the police were responsible — Defendants held jointly and severally liable.

Damages — *Quantum — General damages — Bodily injuries, physical pain, suffering, contumelia, and severe emotional trauma resulting from unlawful assault and torture by police officers — Plaintiffs subjected to being hooded, suffocated with plastic/rubber material, suspended from a stairwell railing, and struck with rifles — Principles of assessment — Solatium compensatory and not punitive — Striking a balance between fair compensation for egregious constitutional violations and avoiding the undue enrichment of claimants — Award of R600 000.00 to each plaintiff.*

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] The claim for damages in this matter arises from events that occurred in the early hours of 22 April 2016, when the first and second plaintiffs were arrested, detained at KwaThema, and allegedly assaulted by members of the South African Police Service while in police custody.

- [2] The parties agreed that the merits be separated from quantum, in accordance with Rule 33(4) of the Uniform Rules of the High Court. The damages claim was set down for trial commencing on 4 November 2019. The plaintiffs' evidence was led until 7 November 2019, at which point the plaintiffs closed their case, and the defendants applied for absolution from the instances.

- [3] The application for absolution from the instances was dismissed in a judgment of this court dated 14 January 2020, after which the matter became part-heard. The

trial later resumed after a substantial delay, with the defendants leading their evidence from 18 May 2026, culminating in the hearing's completion on 22 May 2026, with judgment reserved.

Background

- [4] It is common cause that the plaintiffs were arrested by police officers acting within the course and scope of their employment. After the arrest, the plaintiffs were detained at Germiston Police Station, where they were charged with negligent handling of firearms. They were then brought before the court on 25 April 2016 and were granted bail. The charges, which were subsequently withdrawn, were formulated under the Firearms Control Act.¹ It is further common cause that the plaintiffs were medically examined on 25 April 2016 and that the contents of the J88 medical reports were admitted as proof of their contents.
- [5] The plaintiffs' case is that, following their arrest, they were transported to a location where they were assaulted and tortured by the police. The defendants deny that any such assault was committed by their members and contend that the plaintiffs were lawfully arrested and dealt with in the ordinary course, without unlawful conduct on their part. Although it is admitted that the plaintiffs sustained injuries and were assaulted, the defendants dispute that such injuries were caused by members of the South African Police Service. In light of these admissions, the dispute between the parties is confined primarily to the identity of the assault's perpetrators and the circumstances under which it occurred.
- [6] Closely related to this is the issue of where and when the events in question took place, particularly what occurred between the plaintiffs' arrest and their detention at Germiston Police Station. Resolving this dispute requires evaluating the mutually destructive versions presented by the parties, including an assessment of the credibility and reliability of the plaintiffs, their supporting witness, and the police witnesses, as well as a consideration of the inherent probabilities. In this regard, the

¹ Act 60 of 2000

Court must determine the significance of the specific allegations placed in dispute in the pre-trial minute, including the denial that the plaintiffs were assaulted at the time of their arrest, that they were transported to Krugersdorp Police Station, or that they were assaulted in the manner alleged in the particulars of claim.

- [7] A further issue concerns the evidential weight of the admitted medical reports, whether the injuries recorded therein support the plaintiffs' version that the assault was inflicted by police officers, and whether the defendants have provided an adequate explanation for the injuries sustained by the plaintiffs whilst in police custody. It is common cause that the plaintiffs bear the onus of establishing their claim on a balance of probabilities, and that, if it is found that the assault was perpetrated by members of the South African Police Service acting within the course and scope of their employment, the defendants would be vicariously liable for such conduct.

Plaintiffs' evidence

- [8] Mr Johannes Phakathi, in his evidence-in-chief, stated that he was 46 years old, self-employed as a taxi owner, and that in April 2016 he had been employed by Simon James Ntshangase at a Pick 'n Pay Store located between KwaThema and Tsakane.
- [9] He stated that in the early hours of 22 April 2016, at approximately 02h30 AM, he was asleep at his home in KwaThema when he heard loud banging on his door and voices identifying themselves as police. Upon opening the door, he was immediately struck on the left shoulder by a police officer wielding a rifle. Approximately six to seven police officers entered his home, some wearing military-type uniforms and others in plain clothes. They were accompanied by Warrant Officer Sergeant Ramakatsa (W/O Ramakatsa), who enquired about a firearm allegedly used in the killing of another person. He denied any knowledge of this.
- [10] After informing the police that he kept his firearm licence in a safe, he was handcuffed with his hands behind his back while naked. His girlfriend, who was also

naked, was instructed to leave the room. He stated that the police opened the safe, removed his firearm licence, placed it with the firearm and his car keys in a plastic bag, and then instructed him to indicate where the second plaintiff, Mr Mabote, resided. He was escorted out of the house by several officers and made to walk approximately 500 metres to where several unmarked vehicles, including BMWs, a Golf, and other private vehicles, were parked. No marked police van was used. He stated that he was pushed into a white car while handcuffed and transported to the residence of the second plaintiff.

[11] He testified that the second plaintiff's residence was in a secure estate, approximately five to ten minutes' drive from his home. Upon arrival, the police stopped some distance away and walked him towards the property, where he identified the house. He further testified that the police jumped over the gate, returned with the second plaintiff, who was already handcuffed, and that both were placed in separate vehicles. He stated that shortly thereafter, outside the boom gate, a police officer told him he would "tell the truth." After this, a black plastic covering was placed over his head, and he was transported at high speed. He remained handcuffed and alone in the back seat and was unable to see where he was being taken.

[12] After approximately 50 minutes, he was taken into a building, still blindfolded, with officers on either side holding him and directing him inside. Upon entering the building, the covering over his head was removed, and he was assaulted. His hands were cuffed behind his back and placed over a railing, and his legs were kicked away, leaving his body suspended on the railing. He stated that he experienced pain in his shoulders and body and that he was further assaulted during this process. He further testified that during this period he was suffocated with a plastic covering and repeatedly assaulted, including being subjected to further physical force and humiliation, and that the assaults were part of attempts to extract information or a confession from him. After that, he was taken to Germiston Police Station, where he remained detained from 22 April until 25 April 2016. During the detention, he was required to sign documents without reading them, and Sergeant Ramakatsa was

present at times. He testified that the second plaintiff was kept separately and that he heard him screaming during this period.

- [13] He was released on 25 April 2016 after the charges against him were withdrawn. He immediately thereafter attended the hospital, where he was examined in relation to his complaint of pain in his body, shoulders, arms, and thighs.
- [14] He further testified that during his detention, he received visits from his wife, who informed him that his personal property was taken, and that his vehicles were not operational. He stated that he felt scared and developed distrust towards the police following the incident.
- [15] Under cross-examination, Mr Phakathi confirmed that he was struck on the shoulder with a rifle as the police were entering his house, but no further assault occurred either inside the house or during the walk to the vehicles. He confirmed that he was transported in unmarked vehicles, not in a police van. He was not blindfolded during the initial stages of transport, but only after leaving the second plaintiff's residence. He indicated that he suffered pain in his shoulder but did not sustain visible head injuries during transport. He acknowledged some differences between his oral evidence and the particulars of the claim, particularly regarding the location and timing of the assaults.
- [16] According to Mr Phakathi's evidence, the second plaintiff, Mr Thabiso Mabote, was arrested at his residence, handcuffed, transported in a separate vehicle, and detained separately from the first plaintiff.
- [17] The second plaintiff, Mr Thabiso Mabote, testified that he lived at Sharon Park Estate and that, during the early hours of 22 April 2016, between 03h00AM and 03h30AM, he was awakened by his wife after she heard noises and movement in their yard, even though the property was secured.
- [18] He retrieved his firearm from a safe in his bedroom upon hearing the noise, but after realising that the people outside were police officers, he returned and placed the gun between the mattress and the base of the bed.

- [19] He stated that approximately eight to nine police officers entered the property, some of whom were wearing military-type clothing. He identified W/O Ramakatsa as the officer who addressed him and asked for his name.
- [20] W/O Ramakatsa enquired about his firearm. He then instructed the other police officers to handcuff him whilst inside the house, but he was not assaulted at that stage.
- [21] After being handcuffed, he was escorted from the house by a group of police officers, who pushed him towards a motor vehicle and placed him in the back seat of a white double cab, where he remained handcuffed with his hands behind his back. As soon as they were outside the estate, the vehicle stopped, and he was told to speak or face consequences. A black hood or covering was then placed over his head. He was then transported for approximately 45 to 50 minutes at high speed, with his face covered and unable to see where he was being taken, which caused him fear.
- [22] He testified that upon arriving at a building, with his head still covered, he was ordered to get out of the vehicle, pushed and directed into the building, and taken to a room where he was questioned by someone whose voice he later recognised as that of W/O Ramakatsa. While in the building, he heard someone screaming and recognised the voice as that of the first plaintiff. He was later taken out of the room and observed the first plaintiff, who appeared injured, crying and pleading for help.
- [23] He testified that he was then assaulted in a stairwell, where he was instructed to climb onto a railing while his hands were cuffed behind his back, and that his legs were kicked away, leaving him suspended with his body hanging from the railing. A plastic or rubber-type material was placed over his head and tightened, restricting his breathing and causing difficulty breathing, and he became distressed. The covering was removed intermittently and replaced, and during the assaults he was struck with a rifle on his stomach and legs, causing pain. The handcuffs were tightened, causing loss of sensation in his hands, and he was struck despite informing the police that he had undergone a hernia operation.

- [24] He stated that he was returned to a room, subjected to further questioning, and that he again heard the first plaintiff screaming from another room. He further testified that, at a later stage, he pretended to faint and indicated that he had asthma. He was then taken outside to a vehicle, where his head was no longer covered, and he observed that the building was long. While in the vehicle, a police officer pointed a firearm at his stomach and threatened to shoot him.
- [25] He further testified that he was returned to a room where he again saw the first plaintiff seated and speaking with police officers, and that he observed the first plaintiff in a distressed state. He stated that he was thereafter taken back to a vehicle, still handcuffed, and driven to Germiston Police Station, arriving there when it was already light outside. He further testified that at the police station he was charged with negligent handling of a firearm and required to sign some documents.
- [26] He testified that he received no immediate medical treatment despite requesting to see a doctor, and that he was taken to hospital only on 25 April 2016, when he was examined. He stated that, before the incident, he had no injuries, and that the pain and injuries he experienced arose after the events described above.
- [27] He further testified that he was not assaulted at his home during the arrest but was assaulted at the location to which he was taken. He also stated that he was not blindfolded while walking from his house to the vehicle, but only thereafter.
- [28] Under cross-examination, he denied defecating on himself. He confirmed that he was pushed while being escorted to the vehicle, but not assaulted at that stage, and that his head was covered only after he had been placed in the vehicle and after they had travelled some distance. He recognised the first plaintiff's voice when he heard him screaming and maintained that the injuries he sustained were inflicted during the incident described. He further confirmed that the J88 report reflected the injuries he sustained, but did not record that he had a hernia, which he had reported.

The respondents' evidence

- [29] The evidence of the police, as presented through their witnesses, W/O Ramakatsa, Sergeant Ledimo, and Captain Januarie, was that the arrest of the plaintiffs on 22 April 2016 arose from information from an informer regarding an alleged murder.
- [30] In his investigation into the alleged murder, W/O Ramakatsa received information from an informer implicating the plaintiffs. He organised a police team, including Ledimo and Januarie, to attend the plaintiffs' respective residences in the early hours of that morning. He testified that upon arrival at the first plaintiff's home, they were directed by a woman to the room where the first plaintiff was sleeping. The first plaintiff opened the door after they knocked, explained their purpose, and asked about a firearm, which the first plaintiff confirmed he had.
- [31] He stated that the firearm was found under a pillow, which he regarded as improper storage under the Firearms Control Act, and on that basis, he arrested the plaintiff. He further testified that the first plaintiff was placed in a motor vehicle driven by Captain Januarie, in which he himself also travelled, and that the first plaintiff then led them to the second plaintiff's residence.
- [32] He testified that at the second plaintiff's residence, entry was obtained with the assistance of estate security, and that the purpose of the police presence was explained to the second plaintiff. Upon enquiry, the second plaintiff indicated that he had a firearm, which was found under the mattress, and that he was accordingly arrested for improper storage of the firearm. He stated that, thereafter, both plaintiffs were transported in police vehicles to the offices of the Flying Squad in Brixton, where they were questioned in relation to the murder under investigation, and that they were not taken to Krugersdorp Police Station at any stage. He further testified that the questioning was conducted separately and that, at no point, were the plaintiffs assaulted, tortured, threatened, blindfolded, or otherwise mistreated by any members of the police.

- [33] Sergeant Ledimo testified that he was present at both arrests and confirmed W/O Ramakatsa's account of attendance at the first and second plaintiffs' homes, the enquiries regarding firearms, and the arrests made on that basis. He stated that he did not assault either of the plaintiffs, did not witness any assault by any other police officer, and that the plaintiffs were transported from the scenes to Brixton and questioned there. He further testified that the plaintiffs were not blindfolded at any stage and were not taken to Krugersdorp Police Station. He stated that he later became aware that a firearm had been recovered from the second plaintiff's residence under the mattress.
- [34] The last witness for the defendants was Captain Januarie, who testified that he was part of the police team, primarily acted as the driver of the vehicle transporting the first plaintiff, and remained in the vehicle during the arrest operations. He stated that he drove the first plaintiff, together with W/O Ramakatsa, from the first plaintiff's residence to the second plaintiff's residence and thereafter drove to Brixton Police Station. He further testified that he did not observe any injuries on the first plaintiff during transport, did not see the first plaintiff being assaulted at any stage, and that no hood or covering was placed over the first plaintiff's head while he was in the vehicle. He disputed the claims that the police transported the plaintiffs to Krugersdorp Police Station at any stage.
- [35] The essence of the defendants' testimony is that the plaintiffs were lawfully arrested and then transported to the Brixton police station, where they were interrogated about the alleged murder.
- [36] In their heads of argument, the defendants argued that the plaintiffs' case should be dismissed as hopeless, consistent with the approach adopted in *Children's Resources Centre and Others v Pioneer Food (Pty) Ltd and Others*². In that case, the SCA described a hopeless case as follows:

² 2013 (2) SA 213 (SCA)

"...Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based. In other words if there is no prima facie case then it is factually hopeless."

- [37] The defendants further challenged the validity of the plaintiffs' particulars of claim on the ground that they are based on hearsay evidence provided by Mr Ntshangase, who at some stage was the employer of both plaintiffs. They contended that the information was hearsay because Mr Ntshangase was not present when the arrests were effected or when the alleged assaults took place. It was further contended that the litigation was financed by Mr Ntshangase, who is not a litigant. Another point was that the plaintiffs' evidence materially differed from the averments contained in the particulars of claim. In this regard, the defendants particularly refer to the plaintiffs' admission during cross-examination that the averment in the particulars of claim that they were transported after the arrest in a police van was incorrect, and that the averment that the head injuries on them were caused by the police van being driven at a high speed was a fabrication. This includes Mr Mabote's denial that he was blindfolded at the time of his arrest.
- [38] Regarding the plaintiffs' reliance on the J88 medical form, the defendants contended that the diagram drawn by Dr Maphosa, who examined them after their release from police custody, did not support the plaintiffs' account of the assault.
- [39] The other challenge to the plaintiffs' case raised by the defendants is that the plaintiffs failed to call Dr Maphosa as their expert witness, and that they did so because they feared calling her would "*go to further sink their case.*" The same point is raised in relation to other witnesses whom the defendants allege the plaintiff failed to call, such as Ms Mgidi.

[40] The other challenge to the first plaintiff's case concerns the averment in the particulars of claim that one of them was assaulted until he defecated. The first plaintiff conceded in cross-examination that this averment was incorrect. This was corroborated by Ms Mgidi's version under cross-examination when she stated that the first plaintiff's clothes did not smell of "poo" when she collected them from the police station.

[41] The other witnesses whom the defendants contended ought to have been called are Mr Ntshangase, Mr Phakathi's girlfriend, his sister, the unnamed Independent Police Investigative Directorate (IPID), and the psychologist.

[42] The principle regarding a failure to call a witness who is available and willing to testify was set out in *Elgin Fireclays Ltd v Webb*³ as follows:

"It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. But the inference is only a proper one if the evidence is available and if it would elucidate the facts."

[43] The principle was reaffirmed in *Galante v Dickinson*,⁴ where the Appellate Division held that if a party is in a position to give material evidence on disputed facts and fails to do so, an adverse inference may properly be drawn. However, an adverse inference is not automatically drawn merely because a witness is not called. In *Oosthuizen v Minister of Police*⁵ the court in dealing with this principle referred to the academic writings in *Principles of Evidence*,⁶ where the learned authors stated the following:

"A party's failure to call available witnesses may in exceptional circumstances lead to an adverse inference being drawn from such failure against the party concerned. The

³ 1947 (4) SA 744 (A) at 749 – 750.

⁴ 1950 (2) SA 460 (A)

⁵ [2023] ZAGPPHC 248 (11 April 2023).

⁶ PJ Schwikkard and Rademeyer (2002) (2nd Edition), at p513:

extent to which such an inference can be drawn will depend on the circumstances of the case. The Court should, inter alia, consider the following: Was the party concerned perhaps under erroneous but bona fide impression that he had proved his case and that there was therefore no need to have called the witness? Is there a possibility that the party concerned believed that the potential witness was biased, hostile or unreliable?"

[44] In *Shishonga v Minister of Justice and Constitutional Development and Another*,⁷ the Court held that:

"... The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify."

Discussion and analysis

[45] As stated above, it is common cause that the plaintiffs were arrested on the day in question, taken to the Brixton Flying Squad for interrogation, detained at the Germiston police station, and then taken to the magistrate's court, where they were charged with contravening the Firearms Control Act.

[46] There are two main issues for consideration in this matter, namely: whether the plaintiffs were assaulted and, if so, by whom. The issue of assault and the contents of the J88 medical reports are admitted in the pre-trial minutes dated 8 October 2019. In this regard, the relevant part of the pre-trial minutes reads as follows:

⁷ 2007 (4) SA 135 (LC) at para 112.

“8.23. That the first and second plaintiffs were assaulted but no admission is made as to whom assaulted the first and second plaintiffs and that the first and second defendants' employees caused the assault.”

[47] Regarding the J88 form, the parties recorded in their pre-trial minutes that the first and second plaintiffs were examined by Dr Maphosa on 25 April 2016 and further agreed that:

“8.17. The defendants admitted the truth of the content of the report by Dr Maphosa dated 25 April 2016 ("the J88 form") and admitted the report as being proof of its content.

8.18. Dr Maphosa concluded in his reports ("the J88 form") that the first and second plaintiff had been assaulted.

8.19 . . .

8.20 . . .

8.21. Dr Maphosa, after examining the second plaintiff, concluded ("the J88 form") that the second plaintiff had been assaulted.

8.22. Dr Maphosa's clinical notes relating to the second plaintiff's injuries are those contained in the diagram forming part of Dr Maphosa's report.

8,23 , , ,

8.24. The defendant admitted the observations made by the following experts to be called by the defendants in their summaries in terms of rule 36(9)(b) that the first and second plaintiffs were assaulted over a number of days and that they sustained injuries without any admission being made that the first and second defendants' employees were the cause of such injuries or that they assaulted the first and second plaintiffs, namely:

8.24.1. The report by Dr Ramokgopa;

8.24.2. The report by Nompumelelo Shezi.

8.24.3. The report by Ms Thozama Jaca.”

[48] It is trite that the terms of an agreement recorded in the pre-trial minutes are legally binding, and the courts are obliged to take them into account when adjudicating a case. The broad principles governing the status of a pre-trial conference were summarised in *South African Breweries (Pty) Ltd v Louw*,⁸ where the court held that:

“...The chief objective of the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, the giving an admission which replaces an earlier denial.”

[49] Thus, the central question, addressed later in this judgment, is whether the injuries sustained by the plaintiffs are attributable to members of the South African Police Service. As indicated above, having admitted the assault, the defendants denied responsibility for it and thereby purported to raise a factual dispute.

[50] Before exploring the factual dispute over who is responsible for the assault, it is appropriate to note that the burden of proving, on the balance of probabilities, both the assault and the responsible party rests with the plaintiffs.

[51] I now turn to address some of the points raised by the defendants in challenging the plaintiffs' case.

The validity of the particulars of claim

[52] The first challenge raised by the defendants concerns the status of the particulars of claim, which, as stated earlier, were developed based on information obtained from a third party, Mr Ntshangase, and thus the contention that the plaintiffs' case is unsustainable. The main complaint of the defendants is that the plaintiffs' case is

⁸ (2018) 39 ILJ 189 (LAC) at para 8.

unsustainable because their particulars of claim are based on hearsay evidence, as Mr Ntshangase did not witness the assault.

[53] It is trite that a claim cannot be defective or be excipiable merely because it is based on information from a third party. In general, the validity of a pleading can be challenged by way of an exception. In the present matter, the defendants elected not to use that mechanism but raised the issue as a general point.

[54] In *Fischer and Another v Ramahlele and Others*,⁹ the Supreme Court held that the purpose of pleadings is to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues. The Constitutional Court in *South African Police Service v Solidarity obo Barnard* confirmed this principle,¹⁰ as follows:

“...the purpose of the pleadings is to define and inform the court of first instance about the issues between the parties and also warn the other parties of the case they are required to meet, so as to give them the opportunity to present factual material and legal argument to meet that case.”

[55] Thus, the particulars of claim, as part of the pleadings, may fail only if the plaintiff cannot produce admissible evidence at trial or if no evidence has been adduced to sustain the claim as set out therein. All that is required of the plaintiff is to plead a cause of action comprising material facts that must be proven at trial. Put another way, the plaintiff need not plead the source of the evidence but simply plead facts.¹¹

[56] In the present matter, the issues for determination are clearly set out in the plaintiffs’ particulars of claim. The cause of action relied upon by the plaintiffs is unambiguous and adequately informs the defendants of the case they must meet. In essence, the defendants were called upon to answer allegations arising from the alleged assault on the two plaintiffs by members of the police. This point is therefore unsustainable,

⁹ 2014 (4) SA 614 (SCA) at para 13.

¹⁰ 2014 (6) SA 123 (CC) at para 204. See also *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) at para 22.

¹¹ *Propshaw (Pty) Ltd v Karoo-Osche, Vryburg (Pty) Ltd* 2018 JDR 1998 (NWM) at para 3 and *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16.

as the nature and scope of the dispute are clearly defined by the pleadings, leaving no uncertainty as to the issues requiring adjudication by this Court.

Failure to call witness by the plaintiffs

[57] The defendants contend that the plaintiffs' case fails because they failed to call certain witnesses to prove it. They particularly emphasised the failure to call the medical practitioner who examined the plaintiffs shortly after their release from custody.

[58] While it is correct that an adverse inference may, in appropriate cases, be drawn from the failure to call a witness, that principle is not applied mechanically. In *Elgin Fireclays Ltd v Webb*,¹² the Appellate Division held that:

"...if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him."

[59] In *Gleneagles Farm Dairy v Schoombee*,¹³ the Appellate Division emphasised that failing to call a witness does not invariably justify an adverse inference. Whether such an inference should be drawn depends on the particular facts, including the witness's significance, the evidence already before the court, and whether the witness would in fact have been expected to support the party's case. In other words, the mere failure to call a witness who is willing and available does not automatically justify drawing an adverse inference. The discretion to draw an adverse inference depends on the circumstances of the case.

[60] In the present case, the correctness of the J88 reports compiled by the medical practitioner is admitted, and the injuries sustained by the plaintiffs are common cause, in light of the admission in the pleadings. The absence of the medical practitioner's evidence affects only the issue of causation, which must be determined in the light of the totality of the evidence before this Court. In *Minister of*

¹² 1947 (4) SA 744 (A) at 749 – 750.

¹³ 1949 (1) SA 830 (A) at 840.

Police v Sabisa & Another,¹⁴ the fact that the doctor was not called to testify or that the full medical reports were not presented was of no moment, given the common cause facts which support the respondent's evidence.

[61] The defendants' reliance on the contradiction between the averment in the particulars of claim and the evidence before this Court, including the failure to call Ms Mgidi, does not materially affect the probabilities or the credibility of the plaintiffs. The defendants' contention in this regard rests on the averment that the first plaintiff defecated on himself due to the assault and on his concession during cross-examination that this is not true. Similarly, during cross-examination, Ms Mgidi's version was that the first plaintiff's clothes did not smell of "poo" when she collected them from the police station. In the circumstances, there was no need to call Ms Mgidi as a witness, particularly as she did not witness the assault whilst the plaintiffs were in custody.

[62] The J88 reports constitute objective evidence of injuries consistent with assault. Although the perpetrators are not identified therein, an important factual foundation in this regard concerns the assault. The objective medical evidence, in my view, is consistent with the plaintiffs' version and remains unexplained by the defendants and accordingly assumes particular significance in the evaluation of probabilities.

Dispute of facts

[63] I now turn to the purported factual dispute over who assaulted the plaintiffs. Resolving such disputes requires applying the well-established approach articulated in *Stellenbosch Farmers' Winery*,¹⁵ namely a composite evaluation of credibility, reliability and probabilities to determine whether the party bearing the onus has discharged it. That approach accords with the principle stated in *National Employers' General Insurance Co Ltd v Jagers*,¹⁶ that findings on credibility cannot be divorced from the probabilities but must be assessed in the light of the totality of the evidence.

¹⁴ 2024 (2) SACR 553 (SCA) at para 20 – 30.

¹⁵ 2003 (1) SA 11 (SCA) at para 5.

¹⁶ 1984 (4) SA 437 (E) at 440 – 441.

The enquiry is thus not concerned with isolated impressions of witnesses, but with a reasoned assessment of the competing versions against the objective facts and inherent probabilities.

- [64] Another important principle in this regard is whether a real and genuine dispute of fact exists. In *Wightman t/a JW Construction v Headfour (Pty) Ltd*,¹⁷ the Supreme Court of Appeal held that a real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has seriously and unambiguously addressed the facts said to be disputed. In general, a bare denial of facts may not satisfy the required standard for a genuine and bona fide dispute of fact. In this respect, the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd*,¹⁸ aptly stated that:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied...”

- [65] It is important to note, however, that where the dispute of facts concerns injuries sustained by a person while under police control, the general evidential enquiry is informed by additional considerations arising from the nature of that control. The authorities make clear that, in these circumstances, the events giving rise to the

¹⁷ 2008 (3) SA 371 (SCA) at paras 11 – 13.

¹⁸ 2008 (3) SA 371 (SCA) (10 March 2008)

injury ordinarily lie peculiarly within the knowledge of the police responsible for the detainee's detention.

- [66] The underlying consideration is that the detainee is deprived of his or her liberty and placed under the police's complete control. In *Mahlangu and Another v Minister of Police*,¹⁹ the Constitutional Court described the arrest of a person as a severe deprivation of liberty and, more importantly, affirmed that persons in police custody are dependent upon the police for the protection of their constitutional rights, including dignity, freedom, and security of person. Thus, once it is established that the injuries occurred while the detainee was under police control, it is incumbent upon the police to provide a satisfactory explanation of how those injuries occurred.
- [67] In *Zealand v Minister of Justice, and Constitutional Development*,²⁰ the Constitutional Court emphasised the obligation on the State towards persons deprived of their liberty. This recognises that detention places a person in a vulnerable position because he or she is deprived of the ability to protect himself or herself, thereby giving rise to a heightened duty on the police to protect a person under their control. It follows, therefore, that the police official's failure to provide a coherent and truthful account of how the injuries were sustained in their custody may weigh significantly against their version.
- [68] However, the above does not reverse the onus resting upon a plaintiff, but it has an important bearing on the evaluation of the evidence. It gives rise to a principle, grounded in both evidential logic and the constitutional responsibilities of the police, that where a person sustains injuries while under police control and the police fail to provide a plausible and coherent explanation for those injuries, that failure constitutes a material factor in the assessment of probabilities and may justify an inference adverse to the police. The strength of that inference will depend on the

¹⁹ 2021 (2) SACR 595 (CC).

²⁰ 2008 (4) SA 458 (CC) at paras 34, 40 & 45 – 50.

circumstances of each case, including the nature of the injuries, the period of control, and the extent to which the relevant facts are within the police's knowledge.²¹

[69] In assessing credibility, the Court must have regard to the pleadings and the admissions contained in the pre-trial minute, which define and confine the issues for determination. In the present matter, the plaintiffs' case has consistently been that they were assaulted while under police control. While their evidence contains inconsistencies in the details of the events, those inconsistencies do not detract from the essential core of their version, nor do they constitute a material departure from the pleaded case or prejudice the defendants. Such discrepancies are of the kind that must be weighed in the context of the overall probabilities.

[70] The admission of assault in the pre-trial minute significantly narrows the enquiry into whether the plaintiffs' cause of action is sustainable. As a result, the inquiry is now more about who, in fact, assaulted the plaintiffs. Put another way, the question is no longer whether the plaintiffs were assaulted, but by whom. The defendants' version must therefore be examined against their own recorded position and the objective evidence. In this regard, inconsistencies in their account, particularly regarding the plaintiffs' movement and handling while in custody, bear on the reliability of their version of the relevant period.

Who assaulted the plaintiffs

[71] Turning to the issue of who assaulted the plaintiffs, it is common cause that during the period in question the plaintiffs were under the control of members of the South African Police Service under the leadership of W/O Ramakatsa. In these circumstances, the factual matrix clearly points to cases in which harm occurred while the plaintiffs were under police control, thereby engaging the police's responsibility to account for how that harm occurred. The absence of such an

²¹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) at para 53 – 60 (in this case it was held, incarceration places prisoners in a position of dependence on the State, which accordingly assumes a heightened duty to safeguard their dignity, health and bodily integrity. The State must take reasonable measures to prevent foreseeable harm to inmates and may be held liable where negligent omissions result in injury.)

account is not neutral; it is a matter to which weight must be given in evaluating the probabilities. The question of whether the assault took place in Krugersdorp, as alleged by the plaintiffs, or in Brixton is of no moment. The fact of the matter is that after arresting them in Kwa-Thema, they took them to some police station, which the plaintiffs assume was in Krugersdorp.

- [72] The inference advanced by the plaintiffs must, however, be approached with appropriate caution. It is not sufficient merely to establish that injuries were sustained while in police custody. The Court must be satisfied, on the balance of probabilities, that the injuries are attributable to the police's conduct. The inference drawn must be the most plausible explanation of the proven facts, not merely one of several equally possible explanations.
- [73] Against this background, the competing versions must be considered. The plaintiffs' version provides an explanation for the injuries that is consistent with the objective medical evidence and the circumstances of their custody. By contrast, the defendants' version is confined to a general denial that any assault occurred and does not engage with the objective evidence. In particular, it fails to provide any coherent explanation of how the injuries recorded in the J88 reports were sustained during the period when the plaintiffs were under police control. It is also important to note that the plaintiffs' material evidence was not seriously challenged during cross-examination, and thus it stands to be accepted as correct.
- [74] In circumstances where the plaintiffs have established that they were under the exclusive control of the police, that they sustained injuries consistent with assault during that period, and that the police have failed to provide any plausible explanation for those injuries. Accordingly, the probabilities favour the plaintiffs' version. The defendants' denial, unsupported by any explanatory account, is inherently improbable. This conclusion is reinforced by the constitutional obligations resting upon the police. As emphasised in *K v Minister of Safety and Security*,²² members of the police are entrusted with the duty to protect persons within their

²² (2005) 26 ILJ 1205 (CC) at para 56.

control and to exercise their powers in a manner consistent with the rights to dignity, freedom, and security of the person. While the present case concerns factual attribution rather than the scope of vicarious liability, those obligations provide an important normative context for evaluating the evidence. A failure by police officials to account for harm occurring under their control is inconsistent with those obligations and weighs heavily in the assessment of probabilities.

- [75] It is also important to note that, when analysing and weighing the version of the defendants' witnesses, as stated earlier, account is taken of the fact that their version was never put to any of the plaintiffs during cross-examination, and, more importantly, that the issue of assault had been conceded in the pre-trial minutes.
- [76] On a proper application of the principles articulated in *Stellenbosch Farmers' Winery*, read together with the guidance, the only reasonable inference from the proven facts is that the injuries sustained by the plaintiffs were inflicted while they were under the control of members of the South African Police Service.
- [77] The foregoing analysis demonstrates that the plaintiffs' evidence was clear, credible, and compelling. Their version was corroborated by the contents of the J88 medico-legal report and further supported by the defendants' admission in the pre-trial minutes that the plaintiffs had been assaulted. As to the identity of the perpetrators, the court is satisfied that, on the totality of the evidence, the assault was perpetrated by members of the South African Police Service. The plaintiffs sustained their injuries whilst in police custody from the time of their arrest in the early hours of 22 April 2016 until 25 April 2016. Significantly, the defendants failed to provide any satisfactory or plausible explanation as to how those injuries were inflicted while the plaintiffs remained under the exclusive control and care of the police. In these circumstances, the only reasonable inference to be drawn is that the police were responsible for the assault and the consequent injuries sustained by the plaintiffs. It follows, therefore, that the defendants are liable for such damages as the plaintiffs are entitled to recover arising from the assault.

Separation of issues

- [78] As indicated earlier, the parties agreed in their pre-trial minutes that quantum should be separated from the merits and considered later. In his concluding submission and the heads of argument, the plaintiffs' counsel sought to persuade this Court to depart from that agreement and to consider quantum at the same time as the merits. It is argued that it is in the interests of justice for the matter to be finally determined without a separate hearing on quantum. In anticipation of this, the plaintiffs sought to amend their particulars of claim to abandon the claim for past and future medical expenses, thereby making it unnecessary to continue separating the two issues.
- [79] Rule 33(4) of the Uniform Rules of Court provides for the separation of issues for trial. Under this Rule, the Court may order the separation of issues of law or fact, which may be decided separately from any other question, including by directing that the question be stayed until others have been disposed of. The order may also be made pursuant to an application by the parties, often included in the pre-trial minute, to separate the issues. In this regard, the Court may, in the exercise of its discretion, refuse, vary or revisit the agreement in the interests of justice or convenience.
- [80] Under Rule 33(4), the enquiry is whether the issue sought to be separated can conveniently be determined apart from the remaining issues in the litigation. In *Braaf v Fedgen Insurance Ltd*,²³ the Court emphasised that convenience is directed primarily at the interests of the Court and only secondarily at the interests of the litigants. In *Tudoric v Tudoric*,²⁴ the concept of convenience was held to encompass not merely the facilitation or easing of the proceedings, but also considerations of appropriateness in the particular circumstances of the case. It follows that the separation of issues is not an end in itself, nor is it to be granted merely on request. Rather, it is an exceptional procedural mechanism to be employed only where it will serve the interests of justice, expedition and finality. Courts must remain vigilant to

²³ 1995 (3) SA 938 (C) at 939H – I.

²⁴ 1997 (2) SA 246 (W) at 251B – C.

avoid the fragmentation of litigation and the attendant risks of piecemeal adjudication, duplicated evidence, increased costs and the possibility of conflicting findings.

[81] In the present matter, the determinative consideration is whether sustaining the separation agreed in the pre-trial will result in the more efficient and appropriate disposal of the matter as a whole. The following factors must be weighed when considering whether to sustain the terms of the pre-trial minutes, which provide for separation of the issues. It is important to note that the plaintiffs' claim is based on allegations of assault and torture, which resulted in the infringement of the plaintiffs' section 10 Constitutional rights and, as a result, caused the damages averred in the particulars of claim. The action was instituted in 2016, and the matter came to trial on 4 November 2019. The trial was initially set down for a four-day hearing on the assumption that it would be concluded within that period.

[82] As stated above at the pre-trial conference, the parties agreed that the issue of liability be dealt with separately from the damages claim in accordance with rule 33(4) of the Uniform Rules of the Court.

[83] At the close of the plaintiffs' case, the defendants raised a point of absolution from the instance, which was dismissed, and the matter was postponed until it resumed some six years later on 18 May 2026. The plaintiffs contend that, as a result, the initial intention to separate quantum from liability had fallen away because the plaintiffs gave evidence in court about the injuries they sustained, the pain and suffering they endured, and their claim for *contumelia*.

[84] Furthermore, the plaintiffs contend that the defendants failed to disclose any documents in response to their claim for damages.

[85] Concerning the general damages heading in the plaintiffs' claim, regard should be had to the defendants' admissions that all the expert reports were accepted as truthful in their content and could be admitted in evidence. It follows that the damages under this heading need not be separated from the merits. Put another

way, once the evidence of the injuries and pain suffered was led and the defendants accepted the plaintiffs' medical reports, the separation of the two issues, insofar as general damages are concerned, fell away. Accordingly, the only purpose of separating the issues would, as stated earlier, be for the plaintiffs to prove their past and future medical costs, which have been abandoned, and thus would be an exercise in futility.

- [86] The defendants opposed the plaintiffs' request to dispense with the separation and contended that they conducted the trial on the understanding that quantum would not be determined alongside the merits.
- [87] Having regard to what has already been said regarding the claim under the heading of general damages, the only issue that remains concerns the purpose of retaining the damages under the headings of past and future medical expenses when no dispute exists under those headings.
- [88] During the proceedings, the plaintiffs moved to amend their particulars of claim to abandon the claim for past and future medical expenses. The essence of the amendment was that the plaintiffs withdrew the claim under the heading of past and future medical expenses. Thus, any attempt by the defendants to lead evidence under these headings would constitute an abuse of process, thereby frustrating the final determination of the trial.
- [89] It is, thus, clear that it is in the interests of justice that this matter be finalised as soon as possible and that the plaintiffs' rights of access to court in terms of section 34 of the Constitution be given effect. Insofar as pain and suffering is concerned, there is no need to lead evidence, as evidence regarding pain and suffering has already been given. There is also no need to lead evidence regarding past and future, as the claim under those headings has been abandoned.
- [90] In their initial particulars of claim, each plaintiff claimed a total of R1 202 500.00. This amount included past and future medical expenses which, as stated above,

were subsequently abandoned. The amount claimed by each plaintiff is now R1 100 000.00.

- [91] The assessment of general damages is a matter of discretion for the trial court to exercise. In exercising its discretion, the court may have regard to previous cases, not as a hard-and-fast rule of general application.
- [92] In *Road Accident Fund v Marunga*²⁵ the Supreme Court of Appeal held that the trial judge has considerable discretion to award what, in the circumstances, is considered fair and adequate compensation for the injuries sustained. The Court further held that awards of general damages are not susceptible to precise calculation and must therefore be determined by the court upon consideration of all the relevant factors.
- [93] In determining an appropriate award of general damages, regard must be had to the nature and extent of the pain, suffering, humiliation, degradation and impairment of dignity endured by the plaintiffs. The evidence in the present matter establishes that both plaintiffs were subjected to a sustained and deliberate course of physical and psychological abuse whilst in police custody. They were blindfolded or hooded for extended periods, thereby inducing fear, anxiety and a sense of helplessness. They were further subjected to assaults involving rifles, fists and kicks, and were restrained in painful and degrading positions whilst handcuffed.
- [94] The first plaintiff endured physical injuries which included pain to his shoulder, back, chest, legs, hands and thumb. His private parts were squeezed, his limbs were bound with ropes, and a pole was inserted between his arms and legs whilst he was tied up. The manner in which he was handcuffed caused swelling and pain to his hands. He was transported with a tightly fitting bag over his head, restricting his breathing and aggravating his distress. The evidence further reveals that the effects

²⁵ 2003 (5) SA 164 (SCA) (26 March 2003) at para 23.

of the assault were not transient, as it took him approximately five months to recover from the injuries sustained.

- [95] The second plaintiff was similarly subjected to serious abuse and degrading treatment. He was transported with a hood over his head for an extended period, suspended in a manner which left his legs hanging, and repeatedly caused to lose his balance whilst restrained. He was struck with a rifle on his stomach and leg, suffered pain in his hand due to excessively tightened handcuffs, and was assaulted notwithstanding that he had informed the police of his previous hernia operation. The pointing of a firearm at his stomach whilst in police custody further heightened the fear, intimidation and emotional trauma to which he was subjected.
- [96] The assaults perpetrated upon the plaintiffs were not isolated acts of violence. They formed part of a prolonged pattern of conduct designed to intimidate, humiliate and degrade them. The conduct of the police officers violated the plaintiffs' bodily integrity, dignity and constitutional rights in a particularly egregious manner. In assessing quantum, the Court must therefore compensate not only for the physical pain and suffering endured by the plaintiffs, but also for the indignity, humiliation, fear and emotional trauma attendant upon their treatment whilst under the control of law enforcement officials. These factors constitute significant aggravating circumstances warranting a substantial award of general damages.
- [97] Whilst the plaintiffs are entitled to be fairly compensated for the pain, suffering, humiliation, shock, emotional trauma and impairment of dignity caused by the police's wrongful conduct, this Court is mindful that an award of general damages is compensatory, not punitive. The assessment of such damages is intended to provide fair and reasonable compensation for the injured party, not to enrich the claimant. In this regard, the Supreme Court of Appeal has repeatedly emphasised that awards of general damages must be fair to both parties.²⁶
- [98] The Court must therefore strike an appropriate balance between, on the one hand, adequately compensating the plaintiffs for the serious violations of their dignity,

²⁶ *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA).

bodily integrity and personal freedom, and, on the other hand, ensuring that the award remains fair, reasonable and proportionate to the harm suffered. To emphasise, the purpose of the award is neither to punish the defendant nor to enrich the plaintiffs, but to afford proper solatium for the injuries and indignities they have sustained.

Conclusion

[99] In my view, the facts and circumstances of this case justify a departure from the parties' agreement to separate the issues. It is in the interests of justice, as well as the convenient and expeditious disposal of the matter, that the issues of liability and quantum be determined simultaneously. As appears from the evidence and the concessions made during the proceedings, the only remaining issue concerns the assessment of general damages, the plaintiffs having abandoned all claims for past and future patrimonial losses. In these circumstances, there is no practical purpose in maintaining the separation of issues, and determining the entire matter at this stage will best serve the interests of the parties and the administration of justice.

[100] It is clear from the above analysis that the plaintiffs' evidence concerning the assault and the injuries sustained was clear and satisfactory and was corroborated by the J88 report. The plaintiffs have accordingly established both the occurrence of the assault and the bodily injuries they consequently suffered.

[101] In the circumstances, I am of the view that both plaintiffs have proved on the balance of probabilities that they were assaulted by the police and thus qualify for general damages.

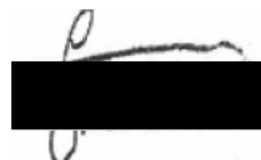
Order

[102] In the result, the following order is made:

1. The agreement recorded in the pre-trial minutes separating the issues of merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court is

varied, and the issue of general damages is determined together with the merits.

2. The plaintiffs' amendment withdrawing their claims for past medical expenses and future medical expenses is granted.
3. The defendants are held jointly and severally liable for the damages suffered by the plaintiffs arising from the assault and infringement of their constitutional rights, the one paying the others to be absolved.
4. The First Plaintiff is awarded general damages in the amount of R600 000.00.
5. The Second Plaintiff is awarded general damages in the amount of R600 000.00.
6. The defendants shall pay the amounts referred to in order 4 and 5 above jointly and severally, the one paying the others to be absolved.
7. Interest on the aforesaid amounts shall run at the prescribed legal rate from the date of judgment to the date of final payment.
8. The defendants shall pay the plaintiffs' costs of suit, including all reserved costs, jointly and severally, the one paying the others to be absolved.



E. M. MOLAHLEHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

For the Plaintiffs: R G Cohen instructed by Glynnis Cohen Attorneys

For the Defendants: S Sethene instructed by State Attorneys, Johannesburg

Date of Hearing: 4 to 7 November 2019 and 18 to 22 May 2026.

Date of Judgment: 21 August 2026