

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG  
REPUBLIC OF SOUTH AFRICA CASE NO. 10196/12

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

16/10/2013  
 DATE

[Signature]  
 SIGNATURE

In the matter between:

ALPHEUS BAPELA  
DIMAKATSO CAROL BAPELA

1<sup>st</sup> Plaintiff  
2<sup>nd</sup> Plaintiff

and

MINISTER OF POLICE

Defendant

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JUDGMENT

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MONAMA J

Introduction

[1] The plaintiffs are suing for damages for unlawful assault, arrest and related reliefs. The first plaintiff is the natural father of the second plaintiff. At the time of the institution of the claim the second plaintiff was a minor. She was appropriately represented by his father. The second plaintiff has since attained majority and the pleadings were amended accordingly.

- [2] The defendant is sued by virtue of the office. He is the employer of the unknown police officers who allegedly committed the delicts that form the subject of this litigation.
- [3] The first plaintiff claims compensation for assault as a result of the gun shot he sustained on his left hand during an unlawful assault on 19 August 2011. The gun shot were inflicted by some rubber bullets. The compensation is for the past medical cost in the amount of **R1935.79**; future medical expenses in the sum of **R237 100.00** and general damages in the sum of **R250 000.00**. The general damages are for pains and suffering, shock, loss of amenities and disablement as a result of a psychological injury which manifested and severe recurrent major depression, generalised anxiety and post-traumatic stress. The first plaintiff has abandoned a claim for loss of future earning capacity.
- [4] The second plaintiff's claim is based on unlawful arrest, compensation for future medical expenses in the sum of **R53 000.00** and general damages in an amount of **R100 000.00**. This latter head of damages include pain and suffering, shock, loss of amenities and disablement. These are sequelae to psychological injury which manifest as recurrent depression, generalised anxiety and post-traumatic stress syndrome.
- [5] The defendant disputes the assault on the first plaintiff. He also denied arrest and detention of the second plaintiff. As regards the claim by the first plaintiff the defendant suggested that shooting was done by either the thugs or by the metro police. However, he was ambivalent in that respect.
- [6] The trial proceeded on both the merits and quantum. The parties admitted the contents of the medico-legal reports of each other's experts. The plaintiff reports were compiled by Dr JMM Da Silva, Ms R Weiner – clinical psychologist and Prof SL Biddulp – orthopaedic surgeon and a hand specialist. Dr SG Wouter- orthopaedic surgeon compiled a report for the defendant. The defendant has not submitted a psychology report and the experts did not hold a joint meeting to discuss their reports nor file a joint minutes.

### **Factual Background**

[7] On 19 August 2011 there was a huge service delivery protest march in Tembisa, Ekurhuleni. The protest march was well attended. The major road which links Tembisa and surrounding areas was blocked with rocks, scrap metal and burning tyres. There was a heavy contingency of police both from the South African Police Services and the Ekurhuleni Metro Police. The following facts are common cause, namely: there was a protest march in Tembisa on 19 August 2011; The march was well attended some approximately seven thousand participants; The first plaintiff was shot twice on the hand with rubber bullets; the first plaintiff was detained in the hospital for a number of days; the second plaintiff was in the company of police for a period of twenty-five minutes and later dropped at her house.

[8] The real issue to be determined include an enquiry as to who shot the first plaintiff, the quantum of compensation, if any, in respect of both the general damages and future medical expenses. Finally whether the second plaintiff was arrested and detained within the meaning of the Criminal Procedure Act ("the Act")<sup>1</sup> and the damages in respect of the alleged shock, pain and suffering can be attributed to the conduct of the police officers or whether they consequence complained of are to remote.

[9] It is axiomatic that the arrest of the second plaintiff must be justified. The onus is on the defendant. This is trite because any arrest is interference with liberty<sup>2</sup> which is now entrenched in the Bill of Rights provisions of the Constitution of the Republic of South Africa.<sup>3</sup>

### **The plaintiffs' version**

[10] The first plaintiff and his wife Mantwa Niveah Bapela testified. The wife is the mother of the second plaintiff. The first plaintiff testified that on 19 August 2011 he was awoken by sounds of gun shots and vuvuzela. He went to his kitchen where he met with his daughter the second plaintiff, The second plaintiff was a student at Ivory

<sup>1</sup> Act 51 of 1977.

<sup>2</sup> *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589 E-F.

<sup>3</sup> Section 12 of Act 108 of 1996.

Park Secondary School. The second plaintiff went into the street to establish whether the taxis were operating. She did not return timeously. During the times 05:30 and 6:00 the first plaintiff became anxious. He went to check the second plaintiff as a concerned parent. He proceeded in the western direction on Exhibit B – the copy of the map of the locality. This was along Slovo Street in Umfuyaneni Section, Tembisa. Some approximately one hundred and fifty meters in that direction he received a call from his wife on his handset. He was informed that the second plaintiff was “taken” by the police. He made a U-turn. In the vicinity of the nearby church he was accosted by members of the Tactical Response Team of the South African Police Services. One of them unlawfully assaulted him twice and shot him with a rubber bullet. He went home and received superficial treatment. The police vehicle arrived with the second plaintiff. He drove to work and was taken by his employer to Linksfield Clinic facility where he received some treatment before being transferred to Edenvale Hospital which is a public facility. He was detained there for a period of ten days. The first plaintiff testified that the incident has changed his character. He is now short-tempered towards his family members and the employer. He denied that he was shot at by criminals. He insisted that he was shot by the members of the South African Police Services. He testified that he was not part of the protest.

- [11] Mrs MN Bapela testified that she was awoken by the gunshot and the noises of the vuvuzela. She remained in bed when her husband woke up. The husband informed her that he was going to look for the second plaintiff. She received a text message on her mobile handset that the second plaintiff was “taken” by the police. She informed the husband through his mobile handset. When her husband was returning he was confronted by the police officers. She saw the confrontation and identified the police officers who confronted her husband through their attire as the Tactical Response Team. When the husband arrived he had been shot in the left hand. She gave him rudimentary treatment. While at the gate of their property the police arrived with the second plaintiff. The witness testified that since this incident the first plaintiff has become short-tempered. He no longer accorded her conjugal rights. She also testified that the second plaintiff has undergone some character change. She is crying a lot and has become seclusive. She denied that her identification of her husband’s assailants is wrong.

[12] The second plaintiff testified about her schooling and her relationship with the first plaintiff on the day in question. She woke up to the noise of the gunshot and vuvuzelas. She went out to establish whether the taxis were operating. From her gate she could see the rocks blockage at Andrew Mapheto Drive in their section. She proceeded in the western direction. At the corner of Slovo and Petrus Africa Streets near a church she observed few taxis at the taxi rank. As she was returning and at the same spot she was accosted by police officers in uniform. She was pushed violently into the back of police vehicle. She was not given an explanation. She eventually ended at Rabasotho Tembisa Police Station. She was asked her age and later driven home. She insisted that she was arrested but did nothing wrong to deserve the arrest.

#### **The defendant's version**

- [13] Captain Boucher, Captain Van de Merwe and Warrant Officer Mahlangu testified for the defendant. Captain Boucher testified that on 18 August 2011 he received instructions to report on duty at 03:00 the next morning because of the protest march. He and his team of 8 reported as requested. They had complete riot equipment's and body protection suits. The team proceeded in the northern direction along the Andrew Maphetho Drive in Tembisa. As they approached the Tembisa Plaza, they were pelted with stones. The road was blocked with stones, burning tyres. The team was forced to discharge rubber bullets. There were negotiations which led to the marchers to congregate at the veld near the stadium. Later that morning he checked for any injured persons at the two local hospitals and found none. He estimated the protesters to be more than five thousand.
- [14] Captain Van der Merwe testified that on 19 August 2011 at approximately 8:45 he reported Tembisa Cluster officer of the South African Police Services. He was informed about the protest. He went with the members of his Tactical Response Team and protected the municipal offices and the police station. The team comprised about ten members. They arrived on the scene at approximately 9:00 long after the alleged shooting and arrest of the plaintiffs had taken place.
- [15] The last witness for the defendant is Warrant Officer Mahlangu. He is the legal officer and stationed at Tembisa Police Station. On 28 March 2013 he met the second plaintiff

at police station where she is doing voluntary clerical work for the defendant. He was looking for a file which relate to the first plaintiff. When he mentioned the name of the first plaintiff to her, the second plaintiff retorted that the person referred to is his father and that she expressed a surprise that the matter is still on.

[16] Five medico-legal reports were submitted. Four on behalf of the plaintiffs and one on behalf of the defendant. The three medico-legal reports deal with the condition of the second plaintiff. The remain reports relates to the condition of the plaintiff.

16.1 Medico-legal reports on first plaintiff. These are compiled by Dr SL Biddulph, Dr Da Silva and Ms Weiner. Dr Biddulph is an orthopaedic surgeon and a hand specialist whilst Ms Weiner is a clinical psychologist. These experts were commissioned by the first plaintiff. In addition thereto there is another medico-legal report on the first plaintiff which was compiled by Dr S Wouter who was commissioned by the defendant.

16.2 Both Doctors Biddulph and Wouter are orthopaedic surgeons. The former is also a hand specialist. Dr Da Silva stated that it is difficult to opine the future prognosis disability of the hand and deferred to the orthopaedic surgeon for comprehensive evaluation. Dr Biddulph diagnosed that the metacarpal fracture is ununited and displaced. He recommended a future treatment of an open reduction and internal fixation of the fourth metacarpal and bone graft. The estimated global cost was R80 000.00. The removal of the internal fixative global costs estimated at R30 000.00. He estimated post-operative physiotherapy and pain control global costs at R50 000.00. Dr Wouter's diagnosis is not materially different. He recommended surgical correction of the mal-union left ring finger metacarpal by corrective osteotomy. He estimates the global cost of R37 000.00 for corrective osteotomy and R4500.00 for post-operative rehabilitation and R3600.00 yearly for pain killers.

16.3 Ms Weiner diagnosed the first plaintiff with the presence of a major depressive order and post-traumatic stress disorder. The latter is characterised by intensive fear, helplessness. The depression is characterised by, *inter alia*,

memory and concentration, frustration at his pain and physical restriction, headaches, feelings of loss, feeling discouraged, irritability, lower frustration tolerance, low impulse control, feelings of sadness and anger, intrusive thoughts about the shooting, feelings of helplessness, self-consciousness, humiliation, anxiety, mistrust, suicide ideation, frustration, loss of confidence, feelings of despondency and impotence, loss of motivation, impatience, reactivity, a sense of being punished, self-blame, feelings of restlessness and agitation, difficulties with decision making, loss of energy, changes in eating and sleeping patterns, fatigue, loss of libido, feelings of despondency and powerlessness. As regard the alleged impotence the expert deferred. The expert recommended psychotherapy treatment consisting of one session per week for one and half years. The recommended costs is some R72 000.00.

- 16.4 As regards the second plaintiff the psychological assessment reveals depressive symptoms, residual symptoms of post-traumatic stress disorder. The therapy sessions and twenty four follow up sessions "as required" are recommended and total costs thereof is the sum of R53 000,00.

### **Evaluation**

- [17] Although the plaintiffs must prove their claims, it is the defendant who must justify the arrest of the second plaintiff, There is no question of who bears the onus to begin. The following questions fall to be determined. First, who shot the first plaintiff. Secondly whether the sequelae of the injuries sustained by the first plaintiff can be attributed to the unlawful conduct of the defendant's employees. Finally, whether the second plaintiff was arrested as contemplated in the Criminal Procedure Act<sup>4</sup> and whether the consequence of such arrest as assessed by experts can be attributed to the defendant's employees. These consequences include a psychological injury – recurrent depression, general anxiety and post-traumatic stress syndrome. These sequelae include pains and suffering, shock, loss of amenities and disablement.

<sup>4</sup> Section 40 of the Act as amended.

- [18] As regards unlawful arrest and detention, the defendant must justify the arrest. The defendant must establish the lawfulness of both the arrest and detention. This is the position under common law and under the Constitution of the Republic of South Africa Act "the Constitution".<sup>5</sup> There is nothing placed before me to justify the arrest and the detention of the second plaintiff. The suggestion that she was not arrested is without merit. She was placed in the back of the police van. She was offered no explanation why. It was only after she revealed her age at the police station that the human treatment followed.
- [19] Notwithstanding that the second plaintiff bears no onus to justify the arrest and detention, she testified first. She was thrown violently into the back of the police van. The police official drove around with her and stopping occasionally. At the police station after giving her age, she was then transferred to the front and driven home. Her version was not contested. She was an honest witness and did not exaggerate. Accordingly, it behoved the defendant to justify. The defendant failed to do so. The second plaintiff was credible and I can rely on her evidence. As regards to the arrest I find that she was unlawfully arrested and detained. In the assessment of the effects of the alleged psychological injury regard must be had to the entire spectrum of facts of the case. These facts include that the second plaintiff did not witness the shooting. She was merely told and she then blamed herself for having went out to check whether the taxis were operating.
- [20] The evidence of the first plaintiff is that he was assaulted and shot at by members of the Tactical Response Team of the police. The assailants used the rubber bullets. Save to deny that the Amaberet or members of the Tactical Response Team were not on the scene at 05:30 – 6:00 the remainder of the allegations remain unchallenged. The defendant's witnesses also denied that during that period the members of the Tactical Response Team wore the ordinary police uniform which is light blue and not the current dark blue as testified to by the witness and the plaintiffs.
- [21] The defendant's suggestion that the first plaintiff was a victim of gangster masquerading of the police is, in my view, opportunistic. What would be the benefit

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<sup>5</sup> *Minister of law and order v Hurley and Another* 1986 (3) SA 568 (A) at 589 D-F and *Zealand v Minister of Justice and Constitutional Development* 2008(4) SA 458 (CC) at 468 B-C.



for the gangster to shoot the first plaintiff? The first plaintiff and his witness were adamant that he was shot at by the Amaberet. The evidence of the commander demonstrated that his unit members were not on the scene at the relevant time. However, there is evidence that there were other divisions of the police present on the scene. It was also conceded that these units carried gun capable to discharge the rubber bullets.

### **The arrest of the second plaintiff**

- [22] The clinical psychologist evaluated the second plaintiff on 24 August 2012. Her conclusion is that the second plaintiff has depressive symptoms, residual symptoms of post-traumatic stress disorder and irrational feeling of guilt. She recommended psychotherapy. The second plaintiff attributed these sequelae to her father is shooting and injury. She blame herself. She did not witness the shooting. She only heard about the injury later. The question is whether the defendant is liable in such a situation or whether those factors are to remote to constitute necessary nexus..
- [23] It is true that the first plaintiff did not report the incident to the police. He relied on the advice of the social worker who advised him to see his attorney for assistance. On 3 November 2011 a demand was served on the defendant. The demand was comprehensive and the defendant has an opportunity to investigate the facts. He cannot now cry foul. In my view nothing turns on this aspect.
- [24] Still on the question on investigation there is evidence that after a march the standing practice of the police is to visit local hospitals to establish injuries. However, in this case the visit was limited. It was limited to the public hospital of Tembisa and private facility of Arwyp Clinic in Kempton Park. The public hospital of Edenvale Hospital was excluded. Again, nothing turns on this aspect.
- [25] The uncontested evidence shows that the only people who had and could have fired the rubber bullets are police. Indeed, Captain Bouwer testified that his unit fired rubber bullets. The police have failed to show that their conduct was justified. I accordingly find that the police unlawfully shot the first plaintiff with rubber bullets. The first plaintiff has proved his case.

[26] As stated somewhere in this judgment the purpose of the award differs. As regard the general damage the purpose is to offer the injured some solitiam whereas as regards special damages the purpose is to compensate the injured for the actual expenses incurred or expenses to be incurred in future. In this regard the experts are expected to assist the court in arriving at the reasonable amounts. The experts are expected to be objective, irrespective of party who commissioned their service. It is regrettable to observe that the experts appear to act for the party who requested their services rather than being objective.

[27] In assessing the quantum in respect of the arrest regards must be had to the duration of arrest and detention as well as previous award in similar situation. I will also have regard to the facts that previous reward only serve as a guide. The court is required to make an award *ex aequo et bono*. The primary purpose of damages in this case is:

*“-not to enrich...but to offer...her the much needed solatium for her injured feelings”<sup>6</sup>*

The arrest and detention endured for relatively short time. No excessive force was used to effect arrest. In **Ngema v Minister of Police**<sup>7</sup> the plaintiff was awarded an amount of R40 000.00 for wrongful arrest and detention which lasted less than three hours. In casu, I am of the opinion that an amount of R50 000.00 will be a fair award.

[28] It is trite that a person should not be held liable for all harm caused by his unlawful and negligent act. There are limits on the extent of *aquilian* liability and not to cast the net of liability too wide. Therefore, in order to succeed, the second defendant has to prove legal causation as held in **International shipping Co. (Pty) Ltd v Bentley**.<sup>8</sup> I am of the view that the ultimate psychology injury suffered by the second plaintiff is to remote. This claim must fail. To hold otherwise will be extending the net too wide. The injuries were not foreseeable.

<sup>6</sup> Minister of Safety and Security v Tyulu 2009 (5) SA (SCA at 93D and Minister of Safety and Security v Seymour 2006 (6) SA 320 SCA

<sup>7</sup> Case No 5081/2012 South Gauteng High Court (unreported).

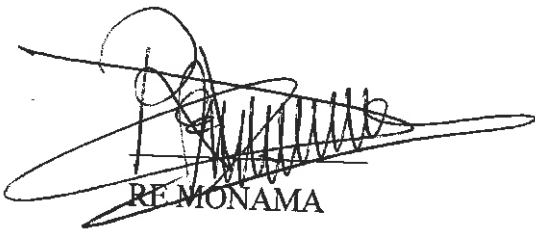
<sup>8</sup> 1990 (1) SA 680(A).

- [29] Dr Wouter for the defendant examined the first plaintiff on 4 February 2013. He diagnosed him with significantly reduced function of the non-dominant hand. This conclusion is corroborated by Prof Biddulph for the first plaintiff. The later expert recommended open reduction and internal fixation of the fourth metacarpal and bone graft. These two experts differ as regards the cost for future medical treatment. The differences are huge. The expert are approximately R129 000.00 apart. Unfortunately they did not hold a conference where their discrepancy could have been addressed. Perhaps, it is again necessary to reiterate that the experts witness must be objective, uninfluenced and give independent opinion and lastly assist the court regardless who sought their opinion. I am in full agreement with the submission of the plaintiff's counsel in this regard. He submitted that the award must be average. In my view the costs of R99 000.00 for future orthopaedic treatment will constitute a fair amount for the treatment of the left hand. The amount of R99 000.00 is on average between the costs recommended by the experts. As regards the psychological treatment, the expert estimated an amount of R72 000.00. The plaintiff's counsel argued that I should award that amount because there is nothing placed before me to the contrary. The submission is attractive but regard been had to the disparity referred to above about the costs by the two experts orthopaedic surgeon it may be dangerous to do so without much thought. In my view the amount should be averaged. The award of R36 000.00 will be fair.
- [30] As regards an award for pain and suffering the following factors must be taken into account. The length of the pain during the assault, during recuperation and possible future treatment. It must be borne in mind the purpose of compensation. It is a compensation and not an enrichment scheme.
- [31] I am persuaded by the argument and submission by the counsel for the plaintiff's that in order to reach a fair award the amounts suggested by the experts should be averaged. I also find the suggestion attractive because the experts failed to hold a conference to discuss their reports. Regard being had to the time spent in hospital and time likely to be spend in future the pain must have been and will be substantiated.
- [32] *In casu* the experts give different estimate amounts for future medical expenses. This is surprising because they are both in the same discipline. The first plaintiff's experts

collectively estimate the cost of future medical treatments at an amount of R237100,00. This amount is for both the orthopaedic and psychological treatments. On the other hand the defendant's experts who assessed the first plaintiff estimate the total cost at approximately R41 000.00 and annual amount of R3600.00 for painkillers. The discrepancies fuel the general perception that experts are "hired guns"<sup>9</sup>.

[33] In the circumstance I make the following order:

1. The defendant is ordered to pay the first plaintiff an amount of R1935.79 for past medical expenses.
2. The defendant is ordered to pay the first plaintiff an amount of R135 000.00 in respect of future medical expenses.
3. The defendant is ordered to pay the first plaintiff an amount of R150 000.00 for general damages.
4. The defendant is ordered to pay the second plaintiff an amount of R50 000.00 for unlawful arrest and detention.
5. The second plaintiff's claim in respect of general damages is dismissed with costs.
6. The defendant is ordered to pay the plaintiffs' costs (excluding the costs relating to the second plaintiff's claim for general damages) but including the costs of the three experts who drew up the plaintiffs' medico-legal reports.



RE MONAMA

JUDGE OF THE SOUTH GAUTENG HIGH COURT

<sup>9</sup> Schneider NO and Others v AA and Another 2010 (5) SA 203 (WCC) and Ntsele v MEC for Health Gauteng Provincial Government Case No. 2009/52394 v Gauteng High Court (Unreported).

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