IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A315/2015

19296/2010

Date: 21/4/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

.....21/4/2016..... .....
DATE SIGNATURE

In the matter between:

R A	**FIRST APPELLANT**
S A	**SECOND APPELLANT**
J A	**THIRD APPELLANT**
C A	**FOURTH APPELLANT**
versus	
THE MINISTER OF POLICE	**RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The appellants instituted action against the respondent for damages suffered as a result of an incident that occurred on 16 June 2009. On that day at approximately 2:00 am members of the South African Police Service (SAPS) broke into and entered the house where the appellants lived. The appellants believed that they were the victims of crime and that their lives were at peril. The Court *a quo* found in favour of the appellants. However they are not satisfied with certain orders made by the court *a quo* and appeal the following:

a) The amount awarded for general damages. The court *a quo* granted R25 000-00 for each of the appellants;

b) The fact that no award was made in regard to future medical expenses claimed by the appellants;

c) The fact that the court *a quo* granted costs on the Magistrate's Court scale and failed to include costs of counsel;

d) The fact that the court *a quo* granted interest at a rate of 9% and not 15.5%, the applicable rate when summons was issued on 12 April 2010.

THE EVIDENCE

[2] The first and second appellants are husband and wife and the third and fourth appellants are their son and daughter who were respectively 16 and 15 years old at the time of the incident. There is also a baby boy who was 2 and a half years old at the time of the incident but he was not affected by the incident. The family resided at […] … Street, Benoni. On 16 June 2009 at 02:00 am first appellant heard the dogs barking. He went to the bathroom and looked through the window to try and determine what caused it. He saw armed men who pointed laser lights and flash lights at him. It would later transpire that approximately 30 policemen surrounded the property. At the time they were not wearing police uniforms. In the meantime some of the men broke into the house. A rifle was pointed at first appellant and he was told not to look at the person pointing the gun. First appellant testified that he was sure they were being robbed. The men did not identify themselves as policemen. He feared for his family's lives and that his daughter and wife would be raped. The third appellant, who was 16 at the time, was pushed to the floor, a gun was pointed at him and he was stepped on by one of the policemen. He tried to crawl to his sister's (the fourth appellant's) room as she was screaming and he feared that she would be raped, but the men would not allow him to go to her. The second appellant, the mother, also encountered the men and a gun was pointed at her. She wanted to go to her baby's room but was initially refused leave to do so. She was in total shock and she described that she froze. Apparently she was unable to react or even observe properly what was going on around her. It was only after some

20 – 30 minutes when the first appellant told the person pointing a gun at him that they should take their valuables but just spare their lives that the person identified himself as a policeman. Even after this the police failed to inform the appellants why they were there, or to apologise to them, neither did they assist the severely traumatized family. After this the family also witnessed the police assaulting a suspect outside the house. It would later transpire that what motivated the police's actions was that a casino robbery occurred earlier that evening and a suspect directed the police to the address of the appellants as, according to the suspect a certain Eugene Morgan, who was involved in that robbery, lived at the premises. It transpired from the evidence that Mr M, whom the appellants only knew from sight, lived at […] Road. That is the house adjacent to the house of the appellants. The two houses are described as semi-detached houses. Photographs indicate that the houses shared a wall but had two distinct and separate entrances which are clearly marked as […] and […]B.

[3] To add insult to injury, the police again failed to assist the appellants when they tried to lay a charge the next day. The first two appellants went to the Benoni Police Station to do that. Initially the station commander was helpful but when he realised that the complaint was against the police his attitude changed. He was no longer willing to assist the appellants and also told the counsellor who was talking to the second appellant not to assist them any further. After a discussion

between the station commander and the counsellor, the counsellor told the appellants to drop the charges. The appellants persisted however and returned the next day and succeeded in laying charges. The police failed to prosecute because they alleged that the perpetrators could not be identified. This is absurd as the police themselves were the suspects and it would have been very simple to identify the officers who executed the operation at the appellants' house. What is also important is that the respondent did not call any of the police witnesses from the Benoni police station. The Appellants' evidence about what transpired there therefore stands uncontested.

[4] The first three appellants testified but the 4th appellant did not. The evidence was that she was still so traumatized that she was incapable of testifying. The court *a quo* accepted the evidence of the other Appellants and Dr Henk Swanepoel a clinical psychologist that she was unable to testify as she could not face reliving the trauma.

[5] The Respondent did not call any expert to counter Dr Swanepoel's evidence. According to his report, all the appellants suffer from post-traumatic stress disorder (PTSD) as well as related psychological conditions due to the incident. The first appellant suffers from PTSD which is manifesting in dystonia, which is described as a condition where a person lives a life of depression. Such a person can still function but suffers from low mood and low energy. The second appellant suffers from PTSD with heightened levels of anxiety and

dependency due to PTSD. Her sleeping patterns were also affected. Third appellant, who was about 16 years old at the time of the incident, suffers from PTSD anxiety and depression. His school work deteriorated and he suffers from flashbacks. The fourth appellant who was 15 years old at the time of the incident also suffers from PTSD and severe traits of paranoia and severe personality pathology. Her schoolwork also deteriorated and she suffers from suicidal thoughts and according to Dr Swanepoel she developed paranoid personality disorder which is a very serious type of psychopathology. People with this order pose a threat to themselves and others.

[6] The Respondent denied the occurrence of the incident on the pleadings. However at the trial the incident was admitted but it was then contended that the police identified themselves and asked permission to enter. The versions given by the three witnesses called by the State varied from witness to witness. Three of the policemen who were present at the incident came to testify. The court *a quo* rejected their evidence and quite rightly so. The court *a quo* as a result accepted the Appellants' version.

[7] From the evidence it is clear that all the appellants were severely traumatised by the incident.

QUANTUM OF GENERAL DAMAGES

[8] In the light of the aforesaid evidence one needs to consider whether the amount of R25 000-00 awarded per appellant for general damages is appropriate. To determine this one needs to look at the evidence.

[9] The appellants' right to privacy was violated. There was physical assault upon the person of first and third appellants and all the appellants believed that force would be applied against them by the intruders. The predominant and serious injuries are psychological injuries as a result of the shock and trauma suffered by the Appellants. It does appear that the Court *a quo* failed to fully grasp the nature and extent of these injuries as well as the impact which they had and will continue to have on the Appellants.

[10] Dr Swanepoel's evidence stands uncontested that the clinical syndromes, which includes PTSD was caused by the incident. The Appellants' conditions are defined as "*severe and chronic*". It is clear from the evidence and the expert evidence of Dr Swanepoel that there is a causal link between the conduct of the police and the psychological injuries which resulted.

[11] The very nature of general damages makes it difficult to exactly assess an appropriate amount. Ultimately the amount awarded is the amount

which a Court may deem reasonable under the particular circumstances of a specific case.[1]

[12] In **Minister of Police v Steve Dhwathi**[2] the following was said:

"it is well established that an assessment of an appropriate award of general damages (sometimes also referred to as non-pecuniary damages) is a discretionary matter and has its objective to fairly and adequately compensate an injured party (see Protea Accident Fund v Lamb 1971 (1) SA 530 (A) at 534H-535A and Road Accident Fund Marunga ZASCA 9144/2002) [2003] ZASCA 19; 2003 (5) SA 164 (SCA) para 23). An appellate court will interfere with an award for general damages in instances of a striking disparity between what the trial court awarded and what the appellate court considers ought to have been awarded (Protea at 535A; Marunga para 23). It will also interfere where there has been an irregularity or misdirection (Minister of Safety and Security v Scott & another ZASCA (969/2013) [2014] ZASCA 84; 2014 (6) SA 1 (SCA) para 42). A misdirection might sometimes appear from a court's reasoning and in other instances it might be inferred from a grossly excessive award (Minister of Safety and Security v Kruger ZASCA (183/10) [2011] ZASCA 7; 2011 (1) SACR 529 (SCA) para 27).

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[1] Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199; Klopper: The Law of Third Party Compensation, 2nd ed, p 152-158

[2] (200604/14) [2016] ZASCA 6 (2 March 2016)

[13] The learned judge awarded only R25 000-00 to each of the appellants in respect of general damages. The appellants contended that this amount is not fair and reasonable under the circumstances of this case.

[14] Reference to prior awards is a useful aid to assist a Court in determining what a fair and reasonable award would be considering the specific circumstances of a case, but in the final analysis each case must be determined on its own merits. The Court *a quo* relied on three cases in her analysis of what would be a just and reasonable award. I will deal with them in order to determine whether these authorities support the award made by the court *a quo.* To determine this one needs to consider the circumstances of each case.

[15] In **Kritzinger**[3] the plaintiffs were the parents of two children who were killed in a car accident and as a result they suffered from chronic PTDS and major depressive disorder. The Court awarded R150 000-00 and R120 000-00 respectively for general damages. In **Walters**[4] the plaintiff was awarded R185 000-00 general damages arising from the death of her husband who was arrested and detained for drunkenness. The deceased committed suicide while in police custody. It was found that the plaintiff suffered extensive psychological *sequelae* as a result of the death of the deceased. Both these cases dealt with indirect trauma and yet the amounts awarded are

[3] Kritzinger & Kritzinger v The Road Accident Fund 2009 (5K3) QOD 21 (ECD)
[4] Walters v Minister of Safety and Security 2012 (6K3) QOD 11 (KZD)

substantially more than the amount awarded by the Court *a quo.* Dr Swanepoel testified that an incident directly experienced has more serious consequences than one witnessed.

[16] In **Marwana v The Minister of Police**[5] the Court awarded R10 000-00 for the unlawful entry, but it is important to note that a further award was made of R55 000-00 for the unlawful arrest and detention and R90 000-00 for the assault. Thus a total award of R155 000-00. It would seem that the learned judge *a quo* relied heavily on this case as justification for the award of R25 000-00. It would however seem that the Court erroneously took into account only the R10 000-00 awarded for unlawful entry.

[17] I now proceed to refer to some other authorities that could assist in coming to an appropriate award. In the matter of **Vilikazi v Minister of Safety and Security**[6] an amount of R90 000-00 was awarded. In that matter the plaintiff was detained for 5 days but no evidence was led pertaining to the extent of the trauma and there was no evidence of permanent psychological injuries or conditions.

[18] In **Minister of Police v Steve Dlwathi**[7] plaintiff was unlawfully assaulted. The court awarded an amount of R200 000-00 for general damages however the plaintiff suffered physical injuries which resulted in loss of hearing and depression but he did not suffer from post-

[5] 2013 (6126) QOD 154 ECP, 2012 JDR 1444 (ECP)
[6] 2013 A 1001/13
[7] supra

traumatic stress disorder. The evidence pertaining to the psychological injuries seems to have been limited. Therefore the case is distinguishable from the present matter.

[19] The case of **Pillay v Minister of Safety and Security**[8] compares best with the present case. The plaintiff was a 62 year old woman at the time of the incident. The police gained access to the plaintiff's premises by breaking open a security gate and door in the perimeter wall at the main entrance to the house. Doors, door frames, door locks and cupboard door locks were damaged. Some jewellery and cash disappeared. She was severely traumatised and humiliated by the incident and suffered from PTSD and major depression. The Court stated as follows:

"*In assessing the appropriate award to make in relation to the plaintiff's claim for general damages, I take into account the excessive execution of their authorisation by members of the South African Police Service, that the plaintiff was 62 years old at the time, that she was severely traumatized by the events, that her privacy was grossly invaded, and that she felt immensely degraded and humiliated. I also take into account the continuing depression and post-traumatic stress syndrome from which she has been suffering for almost the past six years solely as a result of the incident, the severity of her on-going symptoms, her poor prognosis of recovery, and the fact that she would probably require psychiatric treatment intermittently for the rest of her life. On*

[8] 92004/9388) [2008] ZAGPHC 463

the other hand, I take into account that our courts are not 'extravagant' in awards for general damages [see: Minister of Safety and Security v Seymore 2006(6) SA 320 (SCA), par 20]. There should also be fairness towards a defendant [see: De Jongh v Du Pissanie NO 2005(5) SA 457 (SCA), par 60][9]."

[20] The Court then proceeded to make an award of R150 000-00. (If adjusted for inflation in 2015 this amount equates to R222 775-89).

[21] In my view the learned judge *a quo* clearly misdirected herself when she awarded an amount of R25 000-00 to each of the appellants. The whole family was severely traumatized by the incident and all of them still suffer from PTSD and depression and will continue to do so. The fourth appellant suffers additionally from severe personality pathology. On a perusal of the case law the award made *in casu* is clearly disproportionate and does not constitute a fair and reasonable award.

[22] The question which also arises is if the appellants should be awarded the same amount because they were subjected to the same incident. In my view such an approach is simplistic and runs the risk of disregarding the individual. In determining the quantum of general damages one should consider the person before Court as well as the circumstances of the incident. In doing so I considered the following, which I am of the view is of importance:

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[9] Supra, par 10, p 30

(a) the age of the person,

(b) the gender, which will be particularly important in cases where a person might be more vulnerable as a result of his or her gender,

(c) the psychological make-up of the person. Certain people find it more difficult to deal with trauma than others,

(d) the nature and duration of the violation,

(e) the impact of the trauma on the individual physically and psychologically,

(f) the duration of the physical and/or psychological consequences of the violation.

[23] The aforesaid does not propose to constitute a *numerus clausus*. Each matter will still have to be determined on its own merits but it may serve as a guideline to assist a Court to exercise its discretion judicially. In *casu* all the appellants suffer from anxiety, depression (in different degrees) PTSD and flash backs. I take into account their respective positions in the family, the actual trauma they were subjected to and the consequences of the incident on each of them. In my view the first three appellants should be awarded the same amount without negating their individual suffering. Fourth appellant who was a young girl at the time seems to have suffered more serious consequences as a result of the incident, therefore she should be awarded a larger amount.

[24] In my view considering all circumstances the first three appellants should be awarded an amount of R200 000-00 as general damages. Fourth appellant however should be awarded an amount of R250 000-00.

FUTURE MEDICAL EXPENSES

[25] Dr Swanepoel's uncontested evidence was that all the appellants will require future medical treatment. Although the learned judge *a quo* dealt extensively with his evidence in her judgment she failed to make any mention of the future medical expenses that he referred to nor did she make any reward in this regard. On perusal of the judgment it looks as if this could have been an oversight.

[26] The respondent did not call any expert but merely attacked Dr Swanepoel's evidence pertaining to the costs and attempted to persuade the Court that the appellants could get the necessary medical treatment free of charge from public facilities and that the calculation of future medical expenses by Dr Swanepoel is incorrect. .

[27] Dr Swanepoel's evidence is that the appellants will need psychological therapy as individuals and as a family. I have already dealt with the psychological *sequelae* which were caused by the incident. The following clinical syndromes were specifically identified:

(i) Anxiety;

(ii) Depression

(iii) PTSD.

[28] The fourth appellant was also diagnosed with severe personality pathology including paranoid personality disorder. There is no doubt that future medical expenses will have to be incurred.

[29] Dr Swanepoel's uncontested evidence is that the appellants are likely to need 15 individual sessions and 10 family sessions at a rate of R900-00 per session. In the light of the evidence and especially the severity of fourth Appellant's condition I am of the view that this estimate might even be on the conservative side.

[30] According to Dr Swanepoel, each Appellant will need 15 individual sessions totalling 60 sessions at R900 per session = R54 000-00 (R13 500 each) and 10 family sessions totalling R9000, 00. The expected future medical cost is therefore R63 000-00.

[31] The Appellants testified that they started with therapy but had to suspend it as their medical aid scheme would not pay for it and they could not afford the required treatment. The suggestion that the appellants should attend to a public hospital for assistance is preposterous. In order to do so they will have to pass a means test. Furthermore no evidence was led by the respondent that this will be a viable option available to the appellants. Counsel for the respondent questioned the correctness of the amounts proposed by Dr

Swanepoel. In the absence of evidence to support his argument the opposition to the amount must be rejected.

[32] It follows that a claim for future medical expenses in the amount of R63 000-00 should be awarded.

THE SCALE OF COSTS AWARDED TO THE APPELLANTS

[33] The learned judge *a quo* awarded costs on a magistrate's court scale without counsel requesting it or giving the parties an opportunity to argue costs. It appears as if she decided to apply this scale of costs based merely on the quantum of damages awarded by her. In the light of the award made by this Court the basis for the Court *a quo's* cost order falls away. I however, deem it appropriate to deal with this aspect.

[34] This matter dealt with the violation of important constitutional rights and rights of privacy and personal integrity of the appellants. This case also bears a public interest element as, *inter alia*, it relates to unlawful conduct by the SAPS and the protection of the rights of citizens. An attack on the rights of the individual is an attack on the community and the grinding down of individuals' rights erodes the rights of the community as a whole. Therefore in this type of case the impact is not limited to the individuals but extends to the community of which they form part. This underscores the importance of the matter.

[35] The Courts have granted costs on a High Court scale despite relative low amounts of *quantum* in similar matters. An example of an unlawful search of a premises where notwithstanding the *quantum* awarded the Plaintiff was still awarded her High Court costs is found in **Pillay v Minister of Safety and Security**[10] In **Seria v Minister of Safety and Security and others**[11] the Court dealt with the issue of public interest and awarded High Court costs despite that the damages awarded was only R50 000, 00.

[36] In dealing with a claim based upon an assault by the police Colman J held in ***Dladla v Minister of Police***[12] that:

"*For what the plaintiff is proved to have suffered, the sum of R750 will, in my view, be proper compensation, and that is what I shall award. An award of that magnitude will ordinarily carry costs on the magistrate's court scale only.* ***But I have a discretion to award Supreme Court costs, and I think that it is right to do so in the present case, for two reasons: The first is that the hearing was prolonged by reason of the false evidence which Mthembu and Gcumisa gave, and the second, and more weighty reason is that I wish to mark my strong disapproval of the conduct of the policemen who assaulted the plaintiff.*** *An obiter dictum by*

[10] (2004/9388) [2008] ZAGPHC 463 (2 September 2008)
[11] 2005 (5) SA 130 (CPD) at 151
[12] *1973 (2) SA 714 (W)* at *720F, See also Manamela v Minister of Justice 1960 (2) SA 395 A on 404 E, Rajah v Manning 1959 (1) SA 843 (N) at 836*

SCHREINER, J.A., in Manamela v Minister of Justice, 1960 (2) SA 395 (AD) at p. 404, fortifies me in my view that a special order as to costs against the present defendant is a suitable way of marking that disapproval." [My emphasis]

[37] There can furthermore be no doubt that the case was one of "*more than the ordinary difficulty*" (which is part of the test in law for the scale of costs). It would seem that the incorrect test was applied in deciding the scale of costs and that the learned judge erred in limiting the scale of the cost to the amount awarded[13]. This case ran for 5 days at the end of which the Court requested heads of argument from counsel. To then disallow costs of counsel seems to be wrong.

[38] In this case the duration of the trial was extended dramatically by the respondents initially denying that the incident occurred and afterwards the clearly false evidence of the three policemen which the Respondent had called. If the Respondent had conceded the incident and that the actions were unlawful the matter may have been resolved in one or two days. The Respondent vehemently opposed the matter from the onset and the launching of the action in the High Court was reasonable.

[13] Janse Van Rensburg v Mahu Exhaust Cc And Another 2014 (3) SA 431 (NCK); Keyter v De Wet NO 1967 (1) SA 23 OPA at 28A-B.)

[39] In the light of all the circumstances the learned Judge did not exercise her judicial discretion properly when she awarded costs on a magistrate's court scale. I am also of the view that a punitive cost order is appropriate under the circumstances.

THE INTEREST AWARDED

[40] The learned judge erroneously applied the incorrect interest rate. She applied the interest rate applicable on date of judgment.

[41] In respect of interest the rate applicable when the summons was issued (15,5%) should be applied. Once the summons is issued the interest rate applicable is set and remains unchanged even if the statutory rate is amended[14].

[42] As a result, the correct interest rate being 15.5% should be awarded.

CONCLUSION

[43] In the light of the aforesaid the following order is made:

43.1 The appeal is upheld;

43.2 The order of the Court *a quo* pertaining to general damages, future medical expenses, costs and the applicable interest rate is set aside;

[14] Davehill (Pty) Ltd and Others V Community Development Board 1988 (1) SA 290 (A) at 298 to 299.

43.1 The respondent is ordered to pay general damages in respect of the first, second and third appellants in the amount of R200 000-00 each;

43.2 The respondent is ordered to pay general damages in respect of the fourth appellant in the amount of R250 000-00;

43.3 The defendant is ordered to pay the amount of R63 000-00 to the appellants in respect of future medical expenses; and

43.4 The Defendant is ordered to pay the Plaintiffs' taxed costs of suit on an attorney and client scale (which shall include all reserved costs) on the High Court scale, which costs shall include (but not be limited) to following:

43.4.1 costs of preparing and compiling the plaintiff's bundles and making copies thereof;

43.4.2 the costs of a senior-junior counsel;

43.4.3 the reasonable travelling expenses of the plaintiffs in order to attend to medico-legal evaluations necessary in compiling the medico-legal report;

43.4.4 the costs of the medico-legal reports as well as reservation and preparation fees, if any, of the following experts of whom notice

have been given, namely Dr HJ Swanepoel (Clinical Psychologist).

_____
R G TOLMAY
JUDGE OF THE HIGH COURT

_____
N B TUCHTEN
JUDGE OF THE HIGH COURT

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable
Not of interest to other Judges
CASE NO: A315/2015

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versus	
THE MINISTER OF POLICE	**RESPONDENT**

MINORITY JUDGMENT

MAKGOKA. J

[1] I have read the judgment prepared by my colleague, Tolmay J. I agree that the appeal should succeed. I, however, disagree with the order she proposes in respect of the quantum for general damages and the scale of costs. Below I set.out my reasoning for disagreement on those two aspects.

[2] The factual background is largely common cause and is fully set out in my colleague's judgment. As a result, I do not intend to repeat it here, save the following essential features: The appellants - a couple and their two teenage children - were victims of an unfortunate incident on 16 June 2009, when

heavily armed police officers broke into their residence. They were looking for a suspect in an armed robbery during which a police officer was killed. As it turned out later, the police had been directed to a wrong address. The suspect lived In a property adjacent to that of the appellants. For approximately half an hour the appellants were subjected to a traumatic experience. They were ordered to lay on the floor, and pointed with guns while their house was searched. During that ordeal, the police did not identify themselves as such, or the purpose of their presence at the appellants' property.

[3] As a result of the incident, the instituted action against the respondent, each claiming R750 000 for general damages and R20 000 for future medical expenses. The amount claimed in respect of general damages for each of the appellants was said to be 'a global (sic) figure in respect of the infringement of the plaintiff's fama, dignitas, privacy and honour, deprivation of freedom and infringement of the (appellants') rights to freedom, psychological trauma, medical expenses, future medical expenses, pain and suffering'. Initially, in their notice in terms of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002, each of the appellants claimed an amount of R2 000 000 (TWO MILLION RAND) from the respondent.

[4] The appellants were successful in the trial court before Mali AJ, who awarded the appellants R25 000 each in respect of general damages, and nothing in respect of future medical expenses. The learned ·Judge awarded the appellants costs, but ordered that such costs should be taxed on a magistrate court scale. Interest on the capital amounts was ordered at the rate of 9%. The appellants are aggrieved with the amounts awarded in respect of general damages; the fact that no award was made in respect of future medical expenses; the order of party and party costs on a magistrate court scale, and the rate of interest at 9% per annum. The appellants appeal to this Court with leave of the Deputy Judge President.

[5] I consider briefly, the trial court's judgment. The learned Judge correctly applied the trite principle that although some guidance can be obtained by

having regard to previous awards made in comparable cases, which afford a useful guide, the process of comparison is not a meticulous examination of awards, and should not interfere upon the court's general discretion, as stated in Protea Assurance v Lamb (above} at 535B-536A and Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) paras 17 and 18. The learned Judge was therefore conscious that awards in previous cases can only offer broad and general guidelines In view of the differences that inevitably arise in each case.

[6] In coming to the conclusion she did in respect of general damages, the learned acting Judge considered, mainly, three comparable cases: In Kritzinger v Road Accident Fund,[15] parents of two children who were tragically killed in a motor vehicle accident had to identify the bodies of their children in the mortuary. As a result of the grief associated with the identification of their children's bodies and the incident as a whole, they suffered chronic post-traumatic stress disorder and major depressive disorder, respectively. In Walters v Minister of Safety and Security[16] the plaintiff's husband committed suicide in police custody after requesting him to be detained there because he was drunk. The plaintiff suffered extensive psychological sequelae as a result of the death of her husband. In Draghoender v POF[17] the plaintiff, a mother of a young child, was called to the scene of a motor vehicle collision outside her home where her child had been run down and killed. She suffered emotional shock and trauma and was diagnosed with anxiety disorder (post- traumatic stress), a major depressive disorder with psychosis and a panic disorder with related agoraphobia. In all of the above cases, the plaintiffs were awarded amounts in excess of R100 000.

[7] The learned Judge was satisfied that all the appellants in the present case suffered psychological sequelae. She, however, was 'not persuaded that the severity of suffering by (the appellants) weighs far more than the suffering

[15] Kritzinger and Kritzinger v Road Accident Fund 2009 (5K3) QOD 21 (ECD).
[16] Walters v Minister of Safety and Security 2012 (61K3) QOD 11 (KZD).
[17] Draghoender & 'n Ander v Padongeluksfonds [2006] JOL 18271 (SE).

experienced by the plaintiffs in Draghoender and Kritzinger..,' The learned Judge awarded R25 000 for general damages in respect of each appellant On behalf of the appellants it was contended among others, that this award is totally inadequate in the circumstances, and fails to give sufficient weight to the impact of the incident and how it impacted on the appellants.

[8] It is common cause that the appellants each suffer from a post traumatic disorder as a result of the incident, although the extent varies from one person to the other. In para 5 of my colleague's judgment, the full extent of each appellant's psychological effect is set out, as testified by the clinical psychologist who testified on behalf of the appellants. What remains is to determine whether the trial court's assessment of the quantum adequately compensate the appellants for the trauma they suffered.

[9] It is trite that the award of damages lies as a sole discretion of the trial court. The appeal court's power to interfere with the exercise of that discretion is circumscribed to instances where the award is vitiated by an irregularity, misdirection or where there is a striking disparity between the award and that which the appeal court would have imposed had it been the trial court.[18] As pointed out by the Supreme Court of Appeal (SCA), a misdirection might sometimes appear from a court's reasoning and in other instances it might be inferred from a grossly excessive award.[19]

[10] In the present case, I am unable to fault the reasoning of the trial court that the circumstances giving rise to the trauma should be considered as a factor in awarding general damages, although focus should be more on the impact that those circumstances had on a particular person. However, I am of the view that the misdirection can be inferred from the particularly low award that the trial court made. This Court is therefore at large to interfere with the award, and determine what it considers fair and adequate compensation for the appellants.

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[18] Protea Accident Fund v Lamb 1971 (1) SA 530 (A) at 534H535A.
[19] Minister of Safety and Security v Kruger 2011 (1) SACR (SCA) para 27.

[11] The determination of a fair and adequate compensation is where my colleague and I part ways. She proposes that the first to third respondents be awarded R200 000 each, and that the fourth respondent should be awarded a slightly higher amount of R250 000. Without underplaying the trauma that the appellants suffered, Iam of the view that those amounts are excessive. It should be borne in mind that an appeal court which interferes with an award made by the trial court, exercises a discretion itself, and as such, it has to do so judiciously.

[12] I am quite aware of, and take into account, the recent tendency by our courts to make higher awards than has been the trend in the past. See Road Accident Fund v Marunga,[20] where the rationale therefor was articulated, with reference to Wright v Multilateral Vehicle Accident Fund, in Corbett and Honey, The Quantum of Damages in Bodily and Fatal Injuries Cases vol 4 at E3-31. However, the remarks in Marunga were tempered later in De Jongh v Du Pisanie N.0.[21] where, after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages.[22] The court concluded that the principle remained that the award should be fair to both sides – it must give just compensation to the plaintiff, but 'not pour out largesse from the horn of plenty at the defendant's expense', as pointed out in Pitt v Economic Insurance Company Limited.[23]

[13] The conservative approach propounded In De Jongh is clearly discernible in the judgments of the SCA. where the awards made by the High Court are routinely, and significantly, reduced by on appeal to it. See for example: Marunga (above) (R375 000 to R175 000); Minister of Safety and Security v Seymour (above) (R500 000 to R90 000); Minister of Safety and Security v Tyulu,[24] (R50 000 to R15 000); Minister of Safety and Security v

[20] Road Accident Fund v Marunga 2003 (3) SA 164 (SCA) para 27.
[21] De Jongh v Du Pisanie N.O. 2005 (5) SA 457 (SCA).
[22] Para 60.
[23] Pitt v Economic Insurance Company Limited 1975 (3) SA 284 (N) at 287.
[24] Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA).

Kruger[25] (R300 000 to R20 000) and Minister of Police v Dlwathi.[26] (R675 000 to R200 000).

[14] In Dlwathi, an advocate in private practice was unlawfully assaulted by the police in the presence of friends. He suffered serious and permanent physical injuries. As regards the psychiatric effect of the assault the respective experts on behalf of parties agreed that the plaintiff:

(a) experienced a significant deterioration in his functioning;
(b) has no self-confidence and feels self-conscious about his appearance and the difficulty with his teeth;
(c) has memory and concentration difficulties;
(d) has withdrawn from his hobbies, social and leisure time activities;
(e) is more irritable and has developed depression and anxiety;
(f) suffers from post-traumatic stress.

[15] The High Court had awarded Mr Dlwati a globular amount of R675 000 as general damages for the physical and psychological injuries. The SCA found the amount of R675 000 to be excessive and substituted R200 000 for it.

[16] My colleague relies heavily on the award made in Pillay v Minister of Safety and Secutity.[27] There, as is the case here, there was unlawful and forceful entry into the property of the plaintiff, a 62 year old lady. She suffered post traumatic disorder, and was awarded R150 000. Having read that judgment, it does not appear that the learned Judge there heeded the caution sounded by the SCA in De Jongh. To my mind, and with respect, the award in Pillay is indicative of 'pouring largesse out from the horn of the plenty at the defendant's expense' cautioned against in Pitt v Economic Insurance, referred to with approval in De Jongh. I doubt very much whether that award would have borne the appellate scrutiny of the SCA, in the light of that Court's conservative approach.

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[25] See fn 5 above.
[26] Minister of Police v Dlhwati (20604/14) [2016] ZASCA 6 (2 March 2016).
[27] Pillay v Minister of Safety & Security 92004/9388 [2008] ZAGPHC 463

[17] In the circumstances I am unable to agree with the compensation proposed by my colleague. When one compares, for example, the far-reaching and career-altering sequelae in Dlwati, with those in the present case, it is clear that the appellants should also be conservatively compensated. I find it very difficult to justify an amount of R200 000 (or more) as compensation for the appellants in light of the conservative path that the SCA has consistently followed in such matters, as demonstrated more recently, and lucidly, Dlwati.

[18] My colleague seeks to distinguish Dlwati in suggesting that the psychological effects there were limited. With respect, this is not correct. I have, in para 14 above, set out the full extent of the sequelae, among which, was post-traumatic stress as a result of serious assault. The SCA accepted that Mr Dlwati's emotional well-being had been seriously compromised and his major depressive disorder was in all probability of a permanent nature. At the very least, the prognosis for treatment of that disorder was poor.[28] Mr Dlwati had to, among others, abandon his first career choice as an advocate in private practice to seek employment as a State Advocate. That, in my view, cannot be brushed aside as being of 'limited' consequence.

[19] It must always be borne in mind that the appellants in the present matter were not assaulted, except for limited physical contact on appellants 3 and 4. That should also be a factor in the assessment of the compensation. If my colleague is correct in the compensation she awards to the appellants for only unlawful entry and the psychological trauma, it means that had there been physical assault on the appellants, she would have awarded more. probably in the region of R600 000 to R800 000. That would clearly be out of proportion with previous comparable awards. At the risk of repetition, the SCA in Dlwati awarded a globular amount of R200 000 for severe assault which resulted in, among others, post-traumatic stress and permanent psychological

[28] Para 10 of the judgment in Dlwati.

damage. In the present case there was no assault, and that should be reflected in the compensation the appellants receive.

[20] In all circumstances, taking into account all the relevant factors mentioned in this judgment, and in particular the approach of the SCA in such matters, a sum of R100 000 for each of the appellant would be just and adequate compensation. Unlike my colleague, I do not think that the fourth respondent is entitled to receive a higher award than the rest of the appellants. That was never prayed for in the pleadings, and It was never foreshadowed by the appellant's counsel, who presented very able written submissions, both in the trial court and before us. Consistently, the appellants have sought a similar amount of compensation for general damages. It is not for us to grant something beyond that which the parties seek as relief. As a matter of policy, courts should be slow to do so, unless there are compelling reasons for such an approach. In the event the court does this, the parties should be granted adequate opportunity to address the court on the aspect mero motu raised by the court. That is not the case here.

[21] The trial court did not make any award in respect of future medical expenses, most probably due to an oversight, as correctly pointed out by my colleague. That order should be made in the amount of R63 000 as a total amount for all the appellants. With regard to interest, I agree that the interest should have been ordered at the rate which was applicable as at the time the cause of action arose, which is 15.5% per annum.

[22] Finally, I turn to the issue of costs. I agree that the trial court erred in granting costs on the magistrate court scale. J however disagree that the trial court erred in not awarding costs on a scale as between attorney and client. The award of costs and the scale thereof is a matter within the discretion of the court making the order.[29] The appeal court will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made. Put differently, a

[29] Protea Assurance Co Ltd v Matinise 1978 (1) SA 963 (A) at 976H; Minister of Prisons and another v Jongilanga 1985 (3) SA 117 (A) al 124B.

court of appeal's power to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court, acting reasonably, could have made the order in question.[30] The order of costs on a scale of attorney and client is an extra-ordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. The fact that a litigant came to court with a version which was found to be false and contradictory, does not necessarily mean a punitive costs order should follow. If a trial court does not grant it, in the exercise of its discretion, so be it.

[23] The trial court exercised a discretion in the present matter. There is nothing in the record which suggests that that discretion was capriciously exercised, or that there was a misdirection. My colleague does not identify any of the above in the manner in which the trial court considered the issue of costs. The fact that my colleague would have granted an order of costs on a scale between attorney and client had she sat as a trial court, is not a basis for interfering with a discretion, properly exercised. Accordingly, costs should be ordered on a High Court scale. In my view, it is not necessary to make the elaborate order as proposed by my colleague in respect of the taxation of costs. That is the province of the Taxing Master of this court, in the exercise of his discretion· as to which items should be allowed in the appellants' bill of costs, presented for taxation.

[24] For the above reasons, I would uphold the appeal and substitute the order of the trial court for the following:

1. The defendant is ordered to pay:
    1.1 An amount of R100 000 to each of the plaintiffs in respect of general damages;
    1.2 An amount of R63 000 in respect of future medical expenses for all the plaintiffs;

[30] See Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A) at 670D - E.

1.3 Interest on the capital amounts at the rate of 15,5% per annum from the date of the judgment until final payment;

1.4 Costs of the suit, be taxed on the High Court scale, as between party and party.

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T. M. Makgoka

Judge of the High Court

For the Appellants: Adv RJ Groenewald

For the Respondent: Adv MS Phaswane