IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: 2143/16

In the matter between:

S L	First Plaintiff
M H	Second Plaintiff

and

MINISTER OF POLICE	First Defendant
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Defendant
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Defendant
DIRECTOR OF PUBLIC PROSECUTIONS KWAZULU-NATAL	Fourth Defendant

Coram : Seegobin J

ORDER

In the result, I make the following orders:

1 The defendants are ordered to pay to each plaintiff the sum of R3 653 560.00.

2 The defendants are ordered to pay interest on the above amount at the prescribed rate from a date fourteen (14) days after date of judgment to date of payment.

3 The first and second plaintiffs are ordered, jointly and severally, to pay the defendants' trial costs for 27, 28 and 29 May 2018 and 5 June 2018, such costs to include the costs of two counsel.

4. The defendants are ordered, jointly and severally, to pay the first and second plaintiffs costs of the action from date of issue of summons up to and including 25 May 2018, such costs are to be paid on a party and party scale and are to include the costs of senior counsel as well as the plaintiffs' actuary (report only) but will exclude all costs associated with the experts, Mr Clive Willows and Professor Joey Buitendach.

JUDGMENT

Seegobin J

[1] These are claims for damages brought by Mr S L (first plaintiff) and Mr M H (second plaintiff) against the Minister of Police (first defendant), the Minister of Justice and Correctional Services (second defendant), the National Director of Public Prosecutions (third defendant) and the Director of Public Prosecutions, KwaZulu-Natal (fourth defendant). The plaintiffs' claims are founded on the *actio iniuriarum* and arise out of their wrongful, malicious and unlawful arrest and deprivation of their freedom and liberty which spanned a period of 6 years and 11 months.

[2] The total damages claimed by the first plaintiff amounts to R11 062 074.00 while in the case of the second plaintiff the amount claimed is R9 921 048.00. The individual heads of damages claimed in respect of each plaintiff are as follows:

2.1 The first plaintiff's claim is for past and future loss of earnings (R2 039 574.00); wrongful, malicious and unlawful arrest and deprivation of freedom and liberty (R7 000 000.00); impairment to dignity and reputation (R1 000 000.00); general damages for pain, suffering, discomfort, loss of amenities of life and psychological trauma (R1 000 000.00) and future medical expenses (R22 500.00).

2.2 The second plaintiff's damages are for past and future loss of earnings (R898 548.00); malicious and unlawful arrest and detention and deprivation of freedom and liberty (R7 000 000.00); impairment to dignity and reputation (R1 000 000.00); general damages for pain, suffering, discomfort, loss of amenities of life and psychological trauma (R1 000 000.00) and future medical expenses (R22 500.00).

Liability

[3] The defendants conceded liability on 17 May 2018. In terms of that concession they agreed that they were jointly and severally liable to compensate each plaintiff for one hundred percent of his proved or agreed damages. The trial on quantum proceeded before me on 29 May 2018. The plaintiffs were represented by Mr Moodley SC and the defendants by Ms Hemraj SC assisted by Mr Bedderson.

[4] Both plaintiffs testified in their respective cases. Two expert witnesses were called on their behalf: the first was Mr Clive Willows, a clinical

psychologist, and the second was Professor Joey Buitendach, an industrial psychologist. While the defendants closed their case without calling any witnesses, the answers elicited on their behalf under cross-examination, particularly of the plaintiffs' experts, have a substantial impact on some of the plaintiffs' claims. I will revert to this aspect later in the judgment.

General principles governing the assessment of damages

[5] In general a court has a wide discretion in determining fair and reasonable compensation to an injured person. The purpose of the award is to provide much needed *solatium* for a persons injured feelings rather than to enrich him or her. Boiselo AJA in *Minister of Safety and Security v Tyulu*[1] put the position as follows:

> 'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed *solatium* for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolf and Others v Minister of Safety and another* 2009 (2) SACR 271 (SCA) (2009 (5) SA 94; [2009] ZASCA 39) paras 26-29).'

[1] 2009 (2) SA 282 (SCA) para 26.

[6] It goes without saying that an unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual. As far as back as in 1954 Broome JP in *May v Union Government*[2] observed that: 'Our law has always regarded the deprivation of personal liberty as a serious injury'.

[7] In this regard Nugent JA in *Seymour, supra,*[3] said the following:

> 'I do not think that the courts in earlier cases placed less value on personal liberty than ought to be placed on it today. Indeed, what was said in *May* shows the contrary. Nor do I think there is any basis for concluding that awards that were made at that time reflect a more tolerant judicial view of incursions upon personal liberty. It was precisely because personal liberty has always been judicially valued that the incursions that were made upon it by the Legislature and the Executive at that time were so odious. The real import of the Constitution has not been to enhance the inherent value of liberty, which has been constant, albeit that it was systematically undermined, but rather to ensure that those incursions upon it will not recur. To the extent that the learned Judge placed a jurisprudential premium on personal liberty that was absent before now, in my view, it was misdirected.'

[8] While I consider that the Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom,[4] in my view, courts should be careful not to over-emphasise the right in order to punish a guilty party unduly. A delicate balance must be struck between the rights of an aggrieved party on the one hand and the guilty party on the other in order to arrive at an assessment which is fair and reasonable in the circumstances.

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[2] 1954 (3) SA 120 (N) at 130F.
[3] At para 14.
[4] Langa CJ in Zealand v Minister for Justice and Constitutional Development and another 2008 (2) SACR 1 (CC) para 24.

[9] Insofar as past awards are concerned, our courts have consistently held that the assessment of damages with reference to past cases are fraught with difficulty and should be avoided. The following comments by Nugent JA in *Seymour*, *supra*, are apposite in this regard (references omitted):

> '[16] As pointed out by Botha AJA in *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms*, it is generally undesirable to adhere slavishly to a consumer price index in adjusting earlier awards. But, provided that that stricture is borne in mind, it is useful as a general guide to the devaluation of money. In the cases that follow I have added, in brackets, the value of the relevant award adjusted according to the indices in Koch.'
>
> [17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that. As pointed out by Potgieter JA in *Protea Assurance*, after citing earlier decisions of this Court:
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> > "The above quoted passages from decisions of this Court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their *sequelae* may have been either more serious or less than those in the case under consideration."'

[10] There are, in my view, two other factors that should guide a court in arriving at an award that is fair and reasonable: the first is that the monetary award to be made represents nothing more than a *solatium* for the pain and loss suffered; the second is that a consideration of the awards made in previous cases shows that our courts are not extravagant in compensating for such loss. The point was made succinctly by Nugent JA in *Seymour*, *supra*, as follows:

> '[20] Money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.'

[11] It is also not helpful to calculate a daily tariff or what has been termed a 'flat-rate' in arriving at an award. In *Mkwati v Minister of Police*,[5] Mbenenge JP put the position as follows (footnotes omitted):

> 'It is also incumbent on me to give heed to the principle recently enunciated by the Supreme Court of Appeal that the amount of the award is not susceptible of precise calculation; it is arrived at in the exercise of a broad discretion. In *Philip v Minister of Police and Another* it was observed, in relation whether the court should calculate the award on a daily tariff or a single all-inclusive award, that the nature of the compensation and the inherent variables applicable in each case would be minimised by trying to place an average daily tariff on such a determination. The court went on to state that "[t]he fact that each case must be considered on its own merits militates against a so-called average flat rate per day" and that "a single all-inclusive award would appropriately address and express all the factors to be considered."'

[5] [2018] ZAECMHC 2 para 18. See also *Alves v Lom Business Solutions (Pty) Ltd and another* 2012 (1) SA 399 (GSJ) in which Willis J (as he then was) said the following '[36] ……The question arises as to whether there should be a '*per diem rate*' in cases such as this would be inappropriate. It would be too formulaic to do justice in different cases. As I pointed out in *Mvu v Minister of Safety and Security*, views as to what may be an appropriate award in a particular set of circumstances may differ quite markedly from person to person' (footnotes omitted).

[12] I should point out that in argument Mr Moodley agreed, correctly in my view, that the proper approach would be to fix a globular amount in respect of non-patrimonial damages rather than attempt to fix flat rate as has been done in certain cases.

[13] The final point that I make on the assessment of damages, based on the experience in this division, is that it is fast becoming a notorious fact that claims for personal injuries are being pitched at such exorbitant levels thus making it extremely difficult for courts to make a proper determination. This relates not only to claims of the kind under consideration herein but also to claims against the Road Accident Fund as well those arising out of medical negligence in public hospitals. The notion seems to be that since the State is held liable the claims should be as high as possible. In my view, much of the blame for this must be laid at the doors of the claimants' legal representatives and the experts employed. The difficulty posed in such matters is that it creates unrealistic expectations in the minds of the claimants concerned. The further difficulty with such an approach, in my view, is that it loses sight of the fact that such damages are not there to enrich but to serve as some form of *solatium* to an injured person for the pain and loss suffered. The following words of Holmes J in the matter of *Pitt v Economic Insurance Co. Ltd*[6] ring true today as they did in 1957.

> 'I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff but not pour out largesse from the horn of plenty at the defendant's expense.'

The Evidence

[14] What follows is a summary of the evidence adduced by the plaintiffs at the trial. I start with the evidence of the first plaintiff.

[6] 1957 (3) SA 284 (N) at 287E-F.

First Plaintiff

[15] Mr L is presently 36 years old. He was born on […] 1981. His standard of education is Grade 9. Both his parents are deceased. His father died when he was 18 years old. His mother died in November 2006. He has two brothers and one sister. Prior to his arrest he had a relationship with a woman from whom one child was born, a boy born on […] 2005. After leaving school he found employment at a Shell Garage in Verulam from 1999 to 2003. He earned a salary of R90.00 per day. In 2003 he ran a tuck shop in Verulam and earned an average monthly profit of R4 000.00.

[16] He testified to the manner in which he was arrested by members of the South African Police Service during the evening of the 12th June 2006 and the events which followed. During the evening in question he was asleep at his brother's house when police officers entered. It is common cause that they did so without a warrant of arrest. He was assaulted by being slapped. His hands were handcuffed behind his back and he was struck with the butt of a firearm.

[17] In a half-naked state he was taken out of his house and flung him into the back of a police vehicle. He was driven to a sugarcane field at Buffelsdale where he was accused of having robbed and raped a person. There he was once again assaulted. He testified that he experienced a near death experience when a plastic glove was placed over his head causing him to suffocate until he almost lost consciousness. A gun was placed in his mouth with a threat that he would be shot. He was thereafter pulled to the ground with a rope attached to the handcuffs behind him and whilst he was lying on the ground a dog was set upon him which bit him a number of times in the region of his groin. He bled profusely from the dog bites.

[18] According to Mr L he had to endure the harrowing experience of being driven in the back of the police vehicle throughout the better part of the night in a manner which caused him extreme discomfort, pain and suffering while he was bleeding from the dog bites. He was eventually taken to a container at the Tongaat Police Station where his torture and assault continued. After this he was again taken to the sugarcane field at Buffelsdale and thereafter to a place known as Cotton Lands. Eventually he was taken back to the Tongaat Police Station and after being booked into a cell he was taken to the Osindisweni Hospital where he was treated. He testified that because of the policemen's intimation to the doctor on duty that he was a robber and a rapist, the doctor proceeded to stitch his wounds without administering any anaesthetic to him. He confirmed that scars continue to remain up to the present time from the dog bites which he had sustained at the time.

[19] The assaults and torture continued throughout the period that he was in custody at the police cells at the Tongaat Police Station. He was intermittently taken out from his cell and brutally assaulted. Whilst these assaults were in progress the policemen involved were consuming alcohol. He eventually succumbed to the pressure and assaults which were perpetrated upon him thereby admitting to offences which he did not commit. According to Mr L he felt as if he was going to die when these assaults were being perpetrated upon him. When he eventually appeared in the Tongaat Magistrates Court, he informed the Magistrate that he was being assaulted on a daily basis and requested that he be remanded to a place other than the Tongaat Police Station. Following upon this request, he was remanded in custody to the Westville Prison.

[20] He described his incarceration at the Westville Prison as being horrific. He was initially placed in an overcrowded cell and was made to sleep on a filthy

mattress on the floor. The cell had two open toilets and one shower. His cell was infested with lice and cockroaches. He became a victim of the gangsterism which prevailed in the cell. He testified that the gangsters harassed and assaulted him from time to time. He was threatened to join the so-called '28 gang' in prison. He was given three options: the first was that he could sleep with 'the general' of the 28 gang for three days; the second was that he should receive 28 slaps and the third was that he could stab another person in prison. Mr L did not take up any of these options. Informed the prison warders of the threats made against him and following upon this, he was eventually transferred to another cell which he described as having better conditions.

[21] Whilst he was in prison he was not allowed to attend his mother's funeral and this caused him great anguish and pain. He described a routine day at the Westville Prison as being the following: They would be woken up at 03h00 every day. About 8 to 10 of the inmates would then proceed to the shower where they would be allowed to take a shower for about a minute under cold water. If they spent longer than a minute in the shower, they would be assaulted. After their shower they would stay awake until about 07h00 when they would then proceed to the kitchen area in order to obtain their breakfast. Breakfast comprised of a spoon of porridge and two slices of bread and tea. They would then proceed back to their cells where they consumed their breakfast. At 10h00 they would be taken out for exercise and thereafter returned to the cell at about 11h00. They would remain there until about 13h00 where after they would proceed to obtain their lunch from the kitchen from whatever extra food they received for lunch they would retain some for supper. Thereafter they would be locked in the cell until the next morning when the routine would start all over again.

[22] Mr L testified that at his request he was transferred to another cell where the conditions, as I pointed out, were much better from a gangsterism point of view but nonetheless were still bad. He testified about the assaults which took place during the times when they went to the kitchen in order to fetch their food. These assaults were in the form of initiation for a person to join a gang. He himself became a victim of such an initiation when he was stabbed on the right side of his neck by another inmate with whom he had no quarrel. He received treatment at the King Edward Hospital for this wound. The doctor who treated him informed him that had the wound been slightly deeper, he would have died. He was very fearful for his life thereafter.

[23] He testified that throughout his incarceration he was not afforded any reading material nor was he allowed to have any contact visits. His sister who visited him from time to time brought his child to such visits where they would communicate by a telephone through a window screen. After his release from custody he attempted to re-establish a relationship with his child but found it very difficult to do so.

[24] As far as his employment post-incarceration is concerned, he testified that he was employed by Metier Concrete Mix from about 2014 until about 2017. According to Mr L, he was dismissed from this employment mainly because he refused to do work privately for the manager of that enterprise at the latter's house without any pay. He further testified that when his employers became aware that he had served time in custody for robbery and rape they began making disparaging remarks about this from time-to-time. After he was dismissed from Metier he resumed gardening work for a Mr Himesh who was his sister's employer.

[25] According to Mr L he believed that he was treated differently by his community after his release from prison. The community did not believe that he had been an awaiting trial prisoner. They were under the impression that he had been sentenced and had served time. They accordingly regarded him as a criminal who had committed rape and robbery.

[26] He further testified that he suffers from severe headaches which he believed are due to the constant and uncontrollable thoughts that have been running through his head as a result of his imprisonment. He also still suffers severe pain from the dog bites especially in cold weather.

[27] Under cross-examination by Ms Hemraj, Mr L admitted that he had been arrested on two occasions prior to this. On the first occasion he was arrested on suspicion of being in unlawful possession of a firearm and he was detained in custody for two days and thereafter released on bail. The case against him was eventually withdrawn. He agreed that his detention on the first occasion, although for a short period, was traumatic.

[28] On the second occasion which was on the 10th April 2006, he admitted that he was arrested and charged for being in possession of a radio which was suspected to be stolen. He, however, maintained that this was his own radio. He was incarcerated for approximately one month at the Westville Prison. The case against him was eventually withdrawn. He once again confirmed that his stay in the Medium A section of Westville Prison whilst awaiting trial, was a frightening experience because even then there were threats of assault and violence. Then too he was placed in a crowded cell with no privacy. It was pointed out to him that in the report compiled by Mr Willows, it was mentioned that he had been acquitted on the 11th May 2006. He, however, stated that this was a mistake.

[29] He was closely questioned about the operation of his tuck shop business prior to his detention herein. He stated that he rented two rooms from premises belonging to a Ms Hlengiwe. He described the nature of his business and the nature of the grocery items that he sold. He maintained that his daily takings ranged from between R300.00 to R350.00 per day. He was questioned on the profit margins derived from the sale of such items and he reiterated that on average he made a monthly profit of R4 000.00. On further questioning he stated that his nett profit with his average monthly takings were in the region of R4 000.00.

[30] As far as his employment at the Shell Garage in Verulam is concerned, he maintained that he received R90.00 daily from 1999 to 2003. He worked 7 days a week and according to him, he performed his duties diligently.

[31] With regard to his employment with Metier, he maintained that the manager consistently raised the matter of his imprisonment at Westville Prison with him and the fact that he was a member of a gang. This was despite the fact that Mr L informed him that he had been acquitted of all charges. It seemed that the manager did not believe him. He was eventually dismissed from Metier during August 2017. While in his evidence-in-chief he maintained that the reason for his dismissal was that he refused to perform any work privately for his manger and without pay, he now admitted that he was dismissed because did not go to work which resulted in disciplinary proceedings being initiated against him. He admitted that he was dismissed as a result of these disciplinary proceedings. He maintained, however, that had he not been dismissed, he would have continued working at Metier.

[32] After he left Metier he took up employment with Mr Himesh where he earned R80.00 per day. He left Mr Himesh in 2013 as he was accused of instigating other employees by singing and making a noise.

[33] Mr L testified that he currently works on a part-time basis two times a week for Mr Himesh doing gardening. He is paid between R80.00 to R150.00 per day. He further testified that he is currently in a stable relationship with another woman from whom he has a child. He has a good relationship with members of his family. He neither smokes nor drinks alcohol. Under re-examination he reiterated that his daily takings were R300.00 to R350.00 per day.

Second Plaintiff

[34] Mr H's evidence can be summarised as follows: He left school after Grade 8. He was initially employed, after obtaining his driving licence in 2002, as a taxi conductor for a Mr Sifiso Hlela. He earned R500.00 per week.

[35] During the evening of the 12th June 2006, members of the South African Police Service arrived at his house. They kicked open the door and arrested him. He was handcuffed behind his back and placed in a police vehicle. He was driven to a sugarcane field at Buffelsdale where he was made to climb onto the back of a bakkie with his hands still handcuffed behind his back. A police officer by the name of Soobramoney stood on his thighs. Another police officer, Mr Govender, approached Mr H and placed a plastic glove over his head and face causing him to suffocate. Soobramoney then proceeded to kick him on his chest. He was tubed in this fashion on about three occasions. He heard other persons crying and screaming out and assumed that they too were being brutalised.

[36] Mr H testified that he was thereafter taken back to the Tongaat Police Station where he was again assaulted by the investigating officer, Mr Reddy. He was consistently assaulted during his period of incarceration at the Tongaat Police Station. When he eventually appeared at the Tongaat Magistrates Court, he requested that he be detained elsewhere and following upon this request, he was remanded in custody to the Westville Prison.

[37] He further testified that whilst at the Tongaat Police Station he would be assaulted on a daily basis by being kicked, booted and tubed as well. During these assaults he felt as though he was going die. When he was remanded to Westville Prison he was placed in Section 2, cell 9 with other awaiting trial prisoners. His description of the conditions of the cell accorded substantially with that provided by Mr L, the first plaintiff. Likewise the routine described by Mr H is exactly the same as that described by Mr L.

[38] Mr H testified that he was assaulted by his inmates. He was not allowed to attend his maternal grandmother's funeral and this made him feel very bad. He was pressurised to join a gang by 'the general' in charge of the 28 gang and he was given two options: He could either have sex with the general or he could stab someone else. He felt bad about these options and was unable to sleep. Despite informing the prison warders of these options and requesting to be transferred to another cell, his request was denied. Eventually, after witnessing the general sleeping with someone else, he chose to stab another inmate rather than sleep with the general. He felt very bad about this because it was not his intention to stab anyone but did so because of the pressure that was placed upon him.

[39] As far as the stabbing is concerned, he testified that the general had given him a flat iron which was removed from the upper part of a shoe. He was

instructed to stab a non-gang member and hold that person so that he could be identified as the one who had done the stabbing. On a certain day he then chose a victim and stabbed this person on top of his head. He testified that he felt very sad about this because the victim screamed and cried out loudly. Thereafter, the warders approached and severely assaulted Mr H. He was assaulted with batons and was taken to hospital where he was kept for about two weeks. His legs were swollen and he had to use a wheelchair. He was thereafter transferred to a cell where he was kept in isolation for 30 days. He described the conditions of the isolation as being very bad indeed. When he was discharged from the isolation cell he was transferred to another cell in Section B2.

[40] He testified that in this cell the general caused his chest to be tattooed intimating that before he could be properly accepted as a member of the gang, he would have to be tattooed. Thereafter the rest of his body was tattooed by others on the instruction of the general. Mr H testified that he belongs to the Christian faith known as the Shembe which strictly forbids tattooing of the body. He testified that if he did not allow the tattooing to take place, he would have been stabbed by one of the members of the gang.

[41] Throughout his incarceration at the Westville Prison, he did not have contact visits but spoke to his visitors through the glass. Prior to his incarceration he had a relationship with a woman called Madudu from whom he had a child in 2000. He also had a relationship with one Nombulelo with whom he has a child. He testified that his relationship with Nombulelo ended during his incarceration. He further stated that his first born child never visited him whilst he was in prison.

[42] He testified that after his release his community did not receive him well. Members of the community seemed to be afraid of him and were under the

impression that he was a person who had committed a crime for which he had been detained for a lengthy period of time. He had a few friends before his incarceration and they too abandoned him after he was released. He was unable to wear any short-sleeve shirts or shorts because of his tattoos.

[43] He explained that he was unable to keep any jobs. Whenever he revealed that he had served time in prison, his potential employers would advise him that they would call him but did not do so. He testified that apart from driving taxis, he was employed by a Mr Kevin Maduray for whom he drove a water tank and earned R200.00 per day. During this time they were involved in constructing roads at Eshowe. However, when the contract ended so did his employment. He earned approximately R600.00 a week. Thereafter he was employed as a taxi driver until he was arrested for malicious damage to property. After his release from prison he worked for Dawnco Plant and Civils earning R4 500.00 per month. His employer also paid for a room for him. When this contract came to an end his employment also terminated. He thereafter went back to Mr Sifiso Hlela and was employed as a taxi driver. He worked for Mr Sifiso Hlela for a while and thereafter became employed by Alkatrans where he drove a truck and earned R5 000.00 per month. When his contact with Alkatrans came to an end, he found employment with a concern known as Action Transport where he drove trucks and earned R1 250.00 per week. He thereafter returned to Mr Sifiso Hlela and worked as a taxi driver. He left this employment around March 2018 as he felt threatened when a group of males arrived at the taxi rank and enquired about his whereabouts. Mr H further testified that prior to his incarceration he enjoyed playing soccer, cricket and volleyball. He has no previous criminal convictions.

[44] During cross-examination by Ms Hemraj, he stated that he was instructed to stab a non-gang member and that he was to execute the deed whilst they were

outside the cell on their way to the kitchen. He made a random selection of his victim and chose someone who was smaller in build than him. He grabbed this person by the collar of his shirt with his left hand and stabbed him with his right hand on his head. After he had stabbed him he continued holding him. The warders then arrived and began assaulting him. He was thereafter taken to hospital and after his stay in hospital he was placed in solitary confinement.

[45] Ms Hemraj referred to a letter of demand written by his attorneys wherein it is recorded that in 2010 one of the prisoners threw an object which appeared to be a knife at him and that he had sustained a broken leg for which he had been placed in isolation for thirty days. It was suggested to him that the version contained in the letter was different from the version to which he had testified. He maintained that his attorney was probably mistaken about the event. He further stated that he did not sustain a broken leg but that his legs were swollen.

[46] It was further put to him that in the report of Mr Clive Willows, it is again mentioned that he had broken a leg. He again stated that this was not true. He agreed that becoming a member of a gang implies that he enjoyed protection from other inmates. He also agreed that no pressure had been put on him to commit any acts of violence. He agreed that all he was requested to do was to recruit other members to the gang. He stated he was forced to do this because he himself had joined the gang in a forceful manner. He agreed that apart from the tattooing of his chest, the other tattoos on his body were done over a period of time.

[47] Mr H admitted that prior to his arrest, he was detained at the Ndwedwe Police Station from 27 March 2006 to 3 May 2006. Prior to that detention he was charged for rape in 2004 and detained at the Verulam Police Station for approximately three days where after he was released on bail. He stated that

after the complainant had testified in that case, the charge against him was withdrawn.

[48] He admitted that his previous arrests and detention were also traumatic experiences and that the cells in which he was detained were dirty, crowded and lacked any privacy. He was not informed that together with the malicious injury to property, he was also being charged with attempted murder. He agreed that his incarceration for the latter two charges was traumatic and throughout these incarcerations he did not earn any income nor was he able support his family. He testified that currently he is in a stable relationship with another woman. He also enjoys a stable relationship with members of his family, who give him support. According to him he performed his work in a diligent manner at all times.

Mr Clive Willows

[49] As mentioned already, Mr Clive Willows is a clinical psychologist. He was responsible for compiling a psychological report in respect of the two plaintiffs. He compiled a single report for both Plaintiffs. His report is dated the 2nd May 2018 and is contained in Exhibit D.

[50] Whilst it does not appear from the report itself, Mr Willows testified that he consulted with each plaintiff for a period of two hours. In conducting his assessment and compiling his report, he was furnished with a copy of the plaintiff's particulars of claim but not the letter of demand. He confirmed that he did not rely on any collateral information nor did he perform any of the recognised tests in order to make a diagnosis of Post-Traumatic Stress Disorder (PTSD) in respect of both plaintiffs. His view was that there was no sufficiently recognised test in order to do this. On the basis of the information provided by

the plaintiff's themselves Mr Willows concluded that both of them suffered from PTSD.

[51] He testified that the plaintiffs' experiences were characterised by a profound sense of helplessness and an inability to determine what the outcome of the treatment would be. Both of them were rendered helpless by the fact that they were handcuffed and significantly outnumbered by the armed men. Both have vivid recollections of believing that they would be killed and that their isolated and helpless situations provided no opportunity for escape. Their exposure to having gloves covering their faces led to near death experiences where they relied on hostile aggressors for their rescue.

[52] According to Mr Willows his summary of the plaintiffs' narratives accorded substantially with what the Plaintiffs themselves told the Court in their evidence and what is contained in the plaintiffs' particulars of claim. He stated that the plaintiffs' captors were unable to appeal either to their reason or their humanity which removed any realistic hope that they could be saved or freed from their plight. The plaintiffs informed him that the living conditions were harsh and lacking in any assurance of personal safety.

[53] He stated that over a prolonged period of approximately seven years, not only were the plaintiffs subjected to hardship, but mentally and psychologically, they were traumatised by their experiences of helplessness and not being heard and therefore believing that there may be no end to this experience. They were powerless to bring about their own freedom and safety. According to Mr Willows, the narratives of the plaintiffs contained a recurring theme of their helplessness and powerlessness. This is a core feature in the cause of a recognised psychiatric diagnosis known as PTSD. Associated features are a sense of shock and horror and a belief that one's health and life is in danger.

Prolonged exposure to such stressful circumstances can lead to a loss of hope and the further diagnosis of depression, as a major mood disorder. Extreme and protracted exposure to such stress can culminate in significant changes in belief systems and personality.

[54] He testified that the treatment received by plaintiffs would meet the criteria of any recognised definition of torture and as such would be considered as a fundamental violation of human rights. Such rights are designed to ensure that individuals are able to have confirmation of their sense of self-worth and value which are in themselves central components of personal integrity. He concluded that the symptoms described by both plaintiffs are typically those associated with PTSD and depression.

[55] In respect of each plaintiff he stated that the second plaintiff, in his own words, said that 'I went off my head'; he further stated that the experience has changed his life; he lost any concern about consequences and can be reckless; and he has less compassion for others. With regard to the first plaintiff, he speaks of the difficulty to re-integrate into society where he is treated with suspicion and is shunned; he speaks of his deep anger and wish for revenge (which has subsequently desecrated); he has recurring headaches; and in respect of both of them, Mr Willows stated that both have intrusive memories and dreams of their ordeal.

[56] He stated that the plaintiffs were of similar age when they were incarcerated and during this period they would be likely to have invested energy in the development of their careers, consolidate relationships and in their case, they were actively involved in the development of relationships as fathers. In these areas they have been extensively handicapped and disadvantaged. They are aware that their peers have progressed whilst they have to 'start again'.

[57] Mr Willows concluded by stating that both plaintiffs have suffered considerable psychological trauma from the time of their arrest until their release and subsequently as they attempt to re-integrate into society and family units. The consequences they describe are logically congruent with the experiences they describe and are congruent with psychological literature pertaining to experiences of torture and trauma. There is no evidence of exaggerating claims.

[58] According to Mr Willows, apart from psychological trauma and harm, both have experienced physical discomfort, pain and suffering. Their long period of incarceration removed them at a critical time from their personal and career advancement and has handicapped their development and financial security. He stated that if made public their experiences would create in their society at large, a sense of vulnerability that the state powers are such that individuals have no protection from possible torture and extensive incarceration, regardless of innocence or evidence in their own defence. It would be difficult for those not involved in the criminal justice system to understand how it may take up to 7 years to gather the evidence in order to secure a conviction.

[59] He stated that the consequences have been both immediate and long-term. He found it difficult to conclude with certainty that they would not be permanent. In his opinion, both plaintiffs require psychological help to re-integrate into society and to address the self-harming habits that have become evident in their personalities and behaviour. In this regard he recommended weekly sessions for 6 months (25 sessions for each). The current medical aid rate is R900.00 per one hour session.

[60] Under cross-examination by Mr Bedderson, Mr Willows confirmed that in carrying out his assessment of the plaintiffs he relied on their reports to him based on their subjective accounts which were explored by him with them. With respect to their prior incarcerations, he stated that such incarcerations would have an effect on them but it would be difficult to integrate the effects of their previous incarcerations with their latter incarceration. Whilst he agreed that there were isometric tests that were available, he averred that the American scenario was not suitable to be applied to South African citizens especially those with a low educational level. He stated that the plaintiffs used mild words to depict the emotions from which they suffer. He averred that his opinions may be accepted because the plaintiff's account of events forms a logical link to the psychological conclusions which he has made.

[61] When asked by the court what he would have done if he had more time in order to carry out his assessment, Mr Willows stated that he would have sourced collateral information by interviewing family members and the people who knew the plaintiffs prior to their arrest and he would have questioned the plaintiffs more deeply. He was further asked by the court following upon the previous question and the evidence led by the plaintiffs in the trial, whether he was confident in the contents of his report and with enough time, he would have made observations thus leading to a different conclusion. He paused a long time before responding to these questions and then explained that the questions were loaded and enquired whether he was being asked to undermine his own report.

Professor Joey Buitendach

[56] The next witness called by the plaintiffs was Professor Joey Buitendach, an industrial psychologist. Mr Moodley took the witness through two reports which she had allegedly compiled on behalf of the plaintiffs. She was led extensively in her evidence-in-chief on the contents of both reports. However,

under cross-examination by Mr Bedderson, it turned out that Professor Buitendach had not interviewed either of the plaintiffs and relied on the information obtained from the plaintiffs by an intern employed by her who was a qualified Industrial Psychologist. She was specifically asked by Mr Bedderson if she had informed the plaintiffs' legal representatives that she was not personally involved in the assessments but that these were done by her intern. She replied in the affirmative. When asked by the Court on whether she could vouch for the correctness of the evidence contained in the report, she stated that she could not. In light of this, Mr Moodley did not re-examine Professor Buitendach. In argument, Mr Moodley pointed out that he considered her to be a dishonest witness and that very unfortunately for the plaintiffs, her evidence with respect to their employment and their loss of earnings or earning capacity could not be properly corroborated with credible evidence from an expert source.

Facts that are common cause or not disputed

[57] The following facts which emerge from the evidence and the particulars of claim are either common cause or not disputed.

57.1 Following upon his arrest during the evening of 12 June 2006, Mr L was charged with the following offences: on count 1 he was charged with housebreaking with intent to rob and robbery allegedly committed on 5 May 2006; on count 4 he was charged with the rape of a 38 year old woman, such offence being allegedly committed on 5 May 2006; on count 7 he was charged for unlawful possession of a firearm, to wit a shotgun, allegedly committed on 13 June 2006, and on count 8 he was charged for unlawful possession of ammunition, to wit: 3 live shotgun rounds, allegedly committed on 13 June 2006.

57.2 The case made out by Mr L is that despite him informing the police in his particulars of claim that he could not possibly have committed the offences in counts 1 and 4 as at the relevant time he was in custody from 13 April 2006 to 11 May 2006 for an offence of being in possession of or receiving stolen property, none of the defendants servants took any steps to verify his alibi.

57.3 The case made out by Mr L on counts 7 and 8 is that he had not committed any of these offences and that the police had falsely and maliciously preferred these charges against him.

57.4 As far as Mr H is concerned, following his arrest on 12 June 2006, he was charged on count 1 with housebreaking with intent to rob and robbery which allegedly took place on 5 May 2006 and on count 2 he faced a charge of housebreaking with intent to rob and robbery which allegedly took place on 2 April 2006.

57.5 The case made out by Mr H is that despite him having informed the police and the servants of the other defendants that he could not possibly have committed the offence in count 2 because at the relevant time he was in custody at the Ndwedwe Police Station, alternatively at Westville Prison, on a charge of malicious injury to property and further, that he could not have committed the offence in count 1 because on his release from custody on 3 May 2006, he proceeded to his mother's home where he remained for a number of days, none of the servants of any of the defendants took any steps to confirm his alibi.

57.6 Both plaintiffs averred that they were unable to obtain bail due to the opposition thereto by the investigating officer as well as the prosecutors involved.

57.7 There is no dispute that of the 6 years and 11 months spent in custody, 5 years thereof were taken up by the trial that ensued. Both plaintiffs were legally represented throughout. At the culmination of the trial both plaintiffs were found not guilty and acquitted of all charges on 6 May 2013. The present action was instituted on 1 March 2016. It was preceded by a letter of demand dated 23 July 2013.

Findings

[58] In favour of both plaintiffs and based on the evidence I take the following into account:

58.1 From the time of their arrest during the evening of 12 June 2006, both plaintiffs were subjected to the most humiliating, degrading and dehumanising treatment at the hands of the police. This took the form of severe assaults: first at their respective places of residence and thereafter in the sugarcane fields at Buffelsdale. It was here that the barrel of a gun was placed in Mr L's mouth with a threat that he would be shot. It was also here that a rope was attached to his handcuffs and a police dog set on him. Even though he received treatment at the Osindisweni Hospital for his dog bite injuries, this treatment was carried out without any anaesthetic.

58.2 The assaults on both plaintiffs continued throughout their detention in the police cells at the police stations concerned. While their request to be transferred to the Westville Prison was acceded to, the conditions to which they were subjected at Westville were nothing short of appalling:

the cells were over-crowded with 40 to 60 inmates being housed in a single cell; the cells were filthy, unhygienic and infested with lice and cockroaches; only 20 beds were to be found in these cells with the rest of the inmates having to sleep on the floor on thin mattresses and use filthy blankets; they were each subjected to the added indignity of using the open toilet and shower found in the cell in view of everyone else.

58.3 Both plaintiffs became victims of gangsterism and the constant threat of assaults and reprisals. This was no doubt to be expected given the prevalence of gansterism in our prisons. While Mr L was brave enough not to succumb to any of the options given to him by the 'general' of one of these gangs and was moved to another cell with better conditions, Mr H was not that fortunate. His request for a transfer was denied by the prison warders. He then elected to stab an inmate so as to ensure his acceptance by the gang. This stabbing of course resulted in him being severely assaulted by the warders and being placed in solitary confinement for a period of 30 days. Mr H will forever carry the reminders of his membership to the gang in the form of tattoos that grace his body. Mr L, on the other hand not only bears the scars of the dog bite wounds on his leg, but he also carries a scar arising out of a stab wound which was inflicted by one of the inmates on the right side of his neck.

58.4 Both plaintiffs suffered the pain and distress of not having any contact visits with their loved ones. Both of them also suffered the pain and anguish of not being allowed to bury loved ones who passed on while they were in custody – Mr L in particular, was severely affected by the fact that he was unable to attend his mother's funeral. Both plaintiffs lost the opportunity to establish meaningful relationships with their children who were quite young when the plaintiffs were detained. Both plaintiffs

suffered a loss of amenities of life, more so in the case of Mr H who testified that he enjoyed playing soccer, cricket and volleyball prior to his incarceration. Mr H also testified that he now finds it difficult to wear short-sleeve shirts and shorts due to his tattoos. Both plaintiffs also testified that they find it difficult to re-integrate themselves into their communities as they feel that community members are afraid of them and view them as criminals due to the lengthy period they spent in detention.

58.5 Both plaintiffs were about 25 years old when they were detained on charges in this matter. They were approximately 32 years old by the time they were released. Six years and eleven months is indeed a long time to be deprived of one's liberty and personal freedom. It is also a long time to be deprived of an opportunity to establish a career, to strengthen personal relationships and in general to create a sense of self-worth and well-being. The impact that a long period in prison has on one's life was commented upon by Van der Byl AJ in *Zealand v Minister of Justice and Constitutional Development and another*[7] in the following way:

> 'If there is any doubt in one's mind as to the effect some 5½ years' imprisonment, particularly, the suffering and anguish a person so imprisoned, must endure, one can only cast your mind back in your own life over such a period and consider how much has happened to you in those years and how long ago it has seemed. In the words of Holmes JA in *S v V* 1972 (3) SA 611 (AD) at 614 G:
>
> > ". . . enlivened by domestic happiness and the free pursuit of their avocations . . . (n)o such ameliorations attend the slow tread of years when you are locked up."
>
> The following passage from the judgment in *S v Martin* 1996 (2) SACR 378 (W) at 385i – 386a is also instructive:
>
> > "To have freedom restricted, especially if there is confinement to a small area, is in itself a severe punishment. A long period of such

[7] [2009] JOL 23423 (SE) para 13.

> restriction will to all but the most hardened increasingly border on earthly hell. To have to endure that in the company of unpleasant character . . . Personally, though this can be no more than my own view, I think that no life at all can be less harsh than a life without any positive quality at all, but replete with enumerable days each brimming with the new day's repetition of tragedy, boredom, tensions and reminders that you will at all times be indigestible to the stomach of the community.'"

[59] Against the plaintiffs and based on some of the responses given by them and their experts under cross-examination, I make the following findings:

59.1 It is clear that this was not the first time that the plaintiffs were arrested and detained by the authorities on various criminal charges. As I pointed out already, Mr L had been arrested and detained on two prior occasions on different charges. So too was Mr H. In all probability I consider that the conditions in the police cells on those occasions were hardly any different from those experienced on this occasion. The point I make is that theirs is certainly not a case where two people were suddenly plucked out of society and forced to experience these horrific treatments and conditions.

59.2 A further fact which became apparent in the evidence is that their criminal trial took at least five years to be finalised. In all this time both plaintiffs were legally represented. While they complained that they were not released on bail, it is not clear on the evidence precisely what steps were taken, either by them or their legal representatives, to pursue further bail applications and/or appeals arising from the refusal thereof. Nor is there any evidence to suggest that the sole delay in finalising their respective trials lay with the authorities concerned.

59.3 As far as the plaintiffs difficulties in re-integrating themselves in society is concerned, whilst I accept that such difficulties may have existed when they were initially released from prison, I do not accept that these difficulties are ongoing and will continue to persist. There is very little in the evidence itself of both plaintiffs to suggest that they are finding it extremely difficult to re-adjust and re-establish themselves in society. On the contrary the evidence shows that both of them were able, within a short time of being released, to find reasonable employment and to maintain such employment for fairly long periods. Mr L's employment with Metior Concrete for instance went on for about three (3) years and ended more because of his absenteeism rather than for any other reason. In Mr H's case his employment generally came to an end when contracts terminated rather than through any fault on his part.

59.4 Observing the plaintiffs testifying and quite contrary to the findings made by Mr Willows, I did not get the impression that these were young men filled with bitterness and hate flowing from the way in which they were treated by the authorities. From their demeanour in the witness box and the confident manner in which they testified, it seemed to me that the plaintiffs are keen to just get on with their lives: both of them are currently in stable relationships with other women; Mr L has in the meantime also fathered another child; both of them enjoy good relationships with members of their families, who continue to provide them with care and support.

59.5 In light of these factors I find it extremely difficult to accept Mr Willows' diagnosis of severe post-traumatic stress disorder being suffered by both plaintiffs. As I pointed out already this diagnosis by Mr Willows was made after a short consultation with the plaintiffs and without

subjecting them to any of the recognised psychological/psychometric tests generally used to make such a diagnosis. I consider that the nature of the evidence relating to PTSD as presented by Mr Willows in this matter is quite different from that presented by the plaintiffs in *Minister of Safety and Security v Augustine and others*[8] in which the evidence of Dr Swanepoel was led. Dr Swanepoel, a clinical psychologist, testified about the psychological *sequelae* suffered by the plaintiffs in that matter. What was relevant about his evidence was that he had conducted a series of tests on the plaintiffs and also interviewed them extensively before concluding that they suffered from PTSD. This was quite different from what Mr Willows did in the present instance. I am accordingly driven to conclude that no reliance can be placed on the evidence of Mr Willows and his diagnosis of PTSD in respect of both plaintiffs is highly unreliable. In my view, the failure on the part of Mr Willows to consult extensively, to carry out any of the recognised tests and to have regard to collateral sources has seriously prejudiced the plaintiffs in their claim under this head. However, despite my rejection of Mr Willows' evidence on the issue of PTSD, I nonetheless lose no sight of the fact that the plaintiffs have been in detention for a lengthy period of time thus making it difficult to re-adjust completely to a normal life in society. I accordingly consider that a few sessions of psychotherapy may assist to alleviate the painful memories and discomfort of the past and to allow them to look to the future with a renewed sense of purpose and positivity.

59.6 As far as the claims for past and future loss of earnings or earning capacity are concerned the following factors are relevant:

59.6.1 Neither of them produced a shred of reliable evidence to prove the nature of work they performed and how much they

[8] 2017(2) SACR 332 (SCA) paras 20, 21 and 22. See also: *Syed v Metaf Limited t/a Metro Cash and Carry* [2016] ZAECGHC 38 .

earned pre-incarceration. While Mr L testified that he ran a tuck shop after working at a garage at Verulam, he produced no tangible evidence whatsoever to substantiate this. He could, for instance, have called some corroboratory evidence in the form of members of his family or the landlady of the premises from whom he rented to substantiate his claims. His failure to understand the difference between gross income and profit seems to suggest that his evidence was contrived. This notwithstanding, the defendants have reasonably conceded that Mr L should be compensated for past loss of earnings for the period of his incarceration. The approach by the defendants which, in my view is fair and which I accept, is that Mr L should be regarded as falling into a category of unskilled labour which mediun according to Robert J Koch in his *2018 Quantum Year Book* translates to a salary of R2 150-00 per month.

59.6.2 As far as Mr H is concerned, he claimed that pre-incarceration he drove a taxi for Mr Hlela and earned R500-00 per week. Once again, no evidence was produced to substantiate his claim. One would have expected him to at least call Mr Hlela to confirm this since he worked for him again as recently as in March 2018. Despite this paucity of evidence from Mr H, the defendants once again conceded that the same approach be adopted as with Mr L. In respect of both plaintiffs, however, they contended that a contingency factor of at least 25% be applied due to the lack of evidence relating to their respective work histories.

59.6.3 Turning to their claims for future loss of earnings, neither plaintiff has shown that he is unemployable. On the contrary, the evidence shows that both of them were in stable employment for

long periods of time post-incarceration and only lost employment for the reasons outlined already. Both of them seem to be good workers and performed their work diligently. They both seem to suggest that they tend to lose their employment because of some stigma attached to them arising out of their incarceration. This can hardly be the case: whatever unsavoury comments were directed at Mr L for instance, this did not deter him from continuing his employment with Metier for almost three (3) years until he was eventually dismissed due to absenteeism; in Mr H's case he worked for transport companies for long periods but lost his employment whenever contracts came to an end and not because of any fault or misconduct on his part. The reason for him abandoning his last employment with Mr Hlela is rather strange – he claims he did so out of fear that certain people came looking for a certain 'Patrick' at the rank and he feared that they were looking for him and yet on his own evidence he was never known as Patrick at the rank but rather as 'Bhoho'. No reasons were advanced by Mr H as to why he considered his life to be in any danger. It seems to me that this evidence was contrived to bolster his claim under this head.

59.6.4 Just to conclude on the aspect of loss of earnings, as conceded by Mr Moodley, no reliance whatsoever can be placed on the evidence of Professor Joey Buitendach and/or the projections made by her regarding the possible employment prospects of both plaintiffs.

Damages for non-patrimonial loss

[60] I now turn to consider the most difficult aspect of this case and that is to determine what amount would represent fair and reasonable compensation for

the plaintiffs arising out of their extraordinarily long period of incarceration. As I alluded to in paragraph 12 *supra*, I intend fixing a globular amount in respect of these damages rather than attempting to determine an amount under each specific head or to determine a flat-rate per day.

[61] In contending for an award of R7 million for each plaintiff, Mr Moodley submitted that such an amount was justified given the peculiar circumstances of the case, in particular the duration of the incarceration. Both in written argument and oral submissions Mr Moodley referred to a number of past cases dealing with awards for unlawful detention. For purposes of this judgment I do not intend referring to each and every case relied on by the plaintiffs. As I pointed out already, no two cases are alike and past cases merely serve as a guide and nothing more. The current day value of such awards will be denoted in bold:

61.1 In *S S Mkhize v Minister of Justice and Constitutional Development*,[9] an unreported judgment by my brother Bezuindenhout AJ (as he then was), the plaintiff was incarcerated for a period of 27 months from November 2001 to February 2004. In awarding the plaintiff the sum of R2 million for general damages, Bezuidenhout J said the following at paragraph 18:

> 'The facts of each case must be considered in determining the damages to be awarded. It is however helpful to consider awards in other cases in determining the damages. In *Thandani v The Minister of Law and Order* 1991 (1) SA 702 (ECD) an organiser of a general workers union was detained for 88 days and an amount of R22 000.00 was awarded which translates to approximately R80 000.00 at present. [**R124 468.00**]
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> In *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (ECD) a 26 year old male with limited education was detained for 144 days. An amount of R

[9] [2014] ZAK Z PHC Case No. 10386/2009 (unreported) Kwa-Zulu Natal Division, Pietermaritzburg, date 14 March 2014.

> 40 000.00 was awarded which translates to R132 000.00 [**R181,247.00**] at present.
>
> In *Manase v Minister of Safety and Security* 2003 (1) SA 567 (CKHC) a 65 year old grandfather was detained for 49 days. R90 000.00 [**R204,162.00**] was awarded which translates to R137 0000.00 at present.
>
> In *Minister of Justice v Hoffmeyer* 1993 (3) SA 121 (AD) he was detained for 5 months. R50 000.00 was awarded which translates to R165 000.00 [**R226,558.00**] today."

The current value of the award is **R2 500 000.00**.

61.2 In the unreported judgment of *Van Alphen v The Minister of Safety and Security*,[10] the plaintiff sued the defendant for unlawful arrest and detention and malicious prosecution. The plaintiff had been arrested on 19 April 2006 on a charge of allegedly conspiring or attempting to aid and abet another to escape from lawful custody. The plaintiff was taken to court on the same day and kept in the holding cells. He was later released on R2 000.00 bail. The court (per Lopes J) awarded the plaintiff damages in the sum of R200 000.00 made up as follows: R75 000.00 for wrongful arrest, R75 000.00 for malicious prosecution and R50 000.00 for *iniuria*. This judgment was delivered on 31 May 2011. Present day value is **R295,000.00**.

61.3 In the unreported case of *Borain and another v Minister of Safety and Security*,[11] the two plaintiffs were arrested and detained at the holding cells of the Hillcrest Police Station from 10h00 until their release from custody at approximately 22h00 on 5 September 2008. The plaintiffs alleged that during their arrest and detention, they suffered

[10] [2011] ZAKZDHC 25; [2011] JOL 27312 (KZD) (unreported) Case No. 8245/07 dated 31 May 2011
[11] [2011] ZAKZDHC 53 (unreported) Case No. 16735/08, Kwa-Zulu Natal Division, Durban, dated 28 November 2001.

emotional distress, embarrassment and public humiliation and were unable to attend to their work-related responsibilities. The Court per Murugasen J (as she then was) stated as follows:

> "[57] Relevant facts in this matter are the age of the plaintiffs, the circumstances, nature and duration of their arrest, the conditions under which they were detained, their frustrated attempts to be released on bail, their professional standing and the conduct of the police towards them.
>
> [58] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) on appeal the Supreme Court held that R90 000 [present day: R177,225] [**R186,141.00**] was an appropriate award in respect of a 63 year old man who had been unlawfully arrested and detained for 5 days albeit 24 hours was in custody and the remaining period under police guard in hospital.
>
> [59] In *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) the court held on appeal held that an award of R100 000 [present day : **R161,629**] for general damages was appropriate when the appellants were unlawfully arrested and detained for 3 days and 4 nights and subjected to humiliation and under extremely unhygienic conditions.
>
> [60] In *Minister of Safety and Security v Kruger* 2011 (1) SACR 529 SCA the court held "that the police have a duty to carry out policing in the ordinary way. They have no business setting out an arrest into a showpiece". The suspect was shown in a television broadcast being handcuffed and led to a police vehicle. The respondent was awarded R50 000 [present day: **R73,767.00**] for unlawful arrest and detention and R20 000 [**R 29,507.00**] for *iniuria.*
>
> [61] In *Minister of Safety and Security v Tyulu* 2009 (2) SACR 282 SCA the court found that although the detention was for a short period, there were aggravating factors: the arrestee was a magistrate arrested by people with whom he normally worked; he was manhandled and dragged into a police vehicle; he was taken to the scene of a motor collision and made out to be a criminal; he was arrested for an improper motive. As a man of considerable

> standing in the community he must therefore have been severely embarrassed, humiliation and shock and concomitant anguish and stress. He was awarded R15 000 [**R24,224.00**].
>
> [62] Having evaluated the relevant facts in the light of the comparable cases and the Classified Listing of Inflation Adjusted Awards as set out in the *Quantum Handbook* 2011, I am of the view that a fair and appropriate award of general damages for the unlawful arrest and detention of the plaintiffs in an amount of R40 000 each."

Present day value **R59,000.00**.

61.4 In *Khumalo v The Minister of Safety and Security*,[12] the plaintiff was charged inter alia, with obstruction of justice and detained overnight at the Berea Police Station he was released on the following morning on bail. The court (per Gorven J) awarded the plaintiff the sum of R50 000.00 (**R59,556.00**) for his unlawful detention.

61.5 In *Mkwati v The Minister of Police*,[13] the plaintiff was arrested on 29 April 2013 and detained. He was released on 30 May 2013 after he had been charged with robbery with aggravating circumstances. Plaintiff claimed damages for his unlawful arrest and detention. He was in Standard 8 at the time. The following was stated in paragraphs 5 to 7 of the judgment (references omitted):

> '[5] In pursuit of the claim, the plaintiff testified that on 29 April 2013 whilst walking back from a school meeting he was arrested and put in the back of a canopied police van with his arms handcuffed from the back. The van was driven in a rough manner, causing the plaintiff to lose balance and, from time to time, to be thrown around and sometimes hit himself against the van's body panel. When he wanted to know why he had been arrested, the police said that

[12] [2015] ZAKZDHC 48 (unreported0 Case No. 458/2010, KwaZulu Natal Division, Durban, dated 4 June 2015
[13] [2018] ZAECMHC 2 (unreported) Case No. 2902/2013, Eastern Cape High Court, Mthatha, dated 23 January 2018

they were looking for his brother, who was eventually apprehended and also put into the back of the van.

[6] The handcuffs were only removed from the plaintiff upon arrival at Ngqeleni Police Station. He was detained in a filthy cell and subjected to torture by cell inmates he found already there. The blanket he was supplied with was dusty. At times the blanket would be snatched from him, and he would end up leaning against the wall for the duration of the night for warmth. The mattresses they were supplied with were also filthy. The cell toilet which was within view and proximate was blocked, causing an unbearable stench. Because of the stench that pervaded the cell, he lost appetite and hardly ate. It occurred that an inmate would relieve himself whilst meals were being partaken of. The cell was not sufficiently ventilated, despite the fact that the inmates would smoke dagga and tobacco. At no point were the cells ever cleaned. When being supplied with food (morvite porridge in a plastic container), the police official concerned would simply open the cell door and throw the food on the floor without even entering the cell. At the time of his arrest and detention the plaintiff had been doing standard 8. He could not attend school for the duration of the detention.

[7] It emerged during cross-examination that the plaintiff was incarcerated at Ngqeleni Police Station for five days, whereafter he was transferred to Wellington Correctional Centre, Mthatha to await his trial, upon his first appearance in court. No testimony was given of the conditions that prevailed at Wellington Correctional Centre, hence the Plaintiff was released after spending another eighteen days.'

The following was stated by the court (per Mbenenge JP) at paragraphs 17 to 20 of the judgment (footnotes omitted):

'[17] Courts have been warned to be wary of the primary purpose in the assessment of damages for unlawful arrest and detention which is not to enrich the aggrieved party but to offer him or her some much needed *solatium* for his or her injured feelings, but at the same time to be astute in ensuring that the awards they make reflect the importance of the right to personal liberty and

the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.

[18] It is also incumbent on me to give heed to the principle recently enunciated by the Supreme Court of Appeal that the amount of the award is not susceptible to a precise calculation; it is arrived at in the exercise of a broad discretion. In *Phillip v Minister of Police and Another* it was observed, in relation whether the court should calculate the award on a daily tariff or a single all-inclusive award, that the nature of the compensation and the inherent variables applicable in each case would be minimised by trying to place an average daily tariff on such determination. The court went on to state that "[t]he fact that each case must be considered on its own merits militates against a so-called average flat rate per day" and that a "single all-inclusive award would appropriately address and express all the factors to be considered."

[19] The circumstances surrounding the Plaintiff's arrest, especially *en route* to the police station were quite an ordeal. The detention at Ngqeleni Police Station, under squalid circumstances, was inhumane and degrading in the extreme. The subsequent detention at the Wellington Correctional Centre does not seem to have been beset by the woes that prevailed at Ngqeleni, as indeed the plaintiff said nothing anent thereto in his testimony. However, even during that lengthy period, the plaintiff was deprived of his liberty and separated from friends and family.

[20] Having regard to all the above as also previous awards, including those made to *Mtola v Minister of Police and Nel v Minister of Police*, a fair and reasonable award in the circumstances of this case is R 560 000.00.'

Judgment was delivered in January 2018.

61.6 In *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (CkH) the plaintiff, a sixty-five year old businessman, had been arrested for murder and detained for a total of forty-nine days. All

charges against the plaintiff were later withdrawn in the High Court. At paragraphs 27 to 29 the Court said the following:

> '[27] The Court takes a serious view of the malicious arrest and detention of the plaintiff. He was at the time 65 years old, married, a grandfather and a successful businessman, residing permanently in Keiskammahoek. Not only had he never been in any trouble with the law before, but he must have also have been respected in the small village where he lived and conducted his business. The serenity of his life was obviously shattered by the arrest and, as he testified, the detention proved to be a traumatic experience. He was detained for a lengthy period – 49 days – during which time he had to share a cell with criminals. Due to his arrest and detention he lost the esteem not only of the people in Keiskammahoek, but also of his business associates.
>
> [28] Mr Bloem has referred to certain cases which, with respect, are not apposite to the question of damages in this case. The Court has traced the undermentioned three cases which could be of some assistance to it. *Thandi v Minister of Law and Order* 1991 (1) SA 702 (E): the plaintiff, a 37-year-old organiser of the General Workers Union, was wrongfully arrested by the South African Police on 17 August 1983 and handed to the Ciskeian Police, who detained him until 14 October 1983 (59 days). He was awarded general damages of R22 000 [**R124,468.00**]. *Mthimkhulu and Another v Minister of Law and order* 1993 (3) SA 432 (E): The two plaintiffs were arrested unlawfully by the police, charged before a magistrate and detained until their acquittal, 144 days later. They were each awarded R40 000 [**R181,246.00**] for the deprivation of their personal liberty, and R4 000 [**R18,124.60**] for malicious prosecution. *Tobani v Minister of Correctional Services NO* [2000] 2 B All SA 318 (SE): The plaintiff was detained in the St Albans Prison, Port Elizabeth, under an order of court which expired on 8 July 1998. When his name was called so that he could be taken to court that day, he did not respond. He was therefore unlawfully detained in the prison until his release on 17 February 1999, ie for a period of seven months. The Court took into account that the plaintiff did not respond to his name being called, and also did not complain to the prison authorities that he was being wrongfully detained.

> He was awarded R50 000 [**R138,524.00**] general damages for unlawful detention.
>
> [29] The Court is of the opinion that the malicious arrest and detention were the main wrongful acts committed against the plaintiff. The malicious prosecution was a natural corollary to the previous acts. After careful consideration of all the facts, and especially the hardship, humiliation and indignity suffered by the plaintiff, and after considering the abovementioned cases, the Court is of the opinion that an award of general damages in the sum of R100 000 will be fair and just in this case. R90 000 of this amount will be allocated to the claim for malicious prosecution, And R10 000 to the claim for malicious prosecution. In addition an award of R21 906 will be made for special damages arising from the malicious prosecution, being the admitted legal expenses paid by the plaintiff in respect of his criminal case.'

The present day value of R90,000.00 is **R216,000.00**.

61.7 In *Syed v Metaf Limited t/a Metro Cash and Carry and another*,[14] the plaintiff, a thirty-eight year old man was wrongfully and unlawfully arrested by members of the SAPS on 2 December 2005 and kept in police custody. He was released on bail on 6 December 2005. The plaintiff also sued for malicious prosecution. In assessing the plaintiff's damages the Court stated that whilst no two cases are alike, guidance in the assessment of an appropriate award for general damages can be obtained by comparison of factors in different cases and referred to the various volumes of Corbett and Honey (*The Quantum of Damages in Bodily and Fatal Injury Cases* (Juta)) and referred to the following cases (footnotes omitted):

> "[79] In HOCO v MTEKWANA the plaintiff and his minor child were arrested in Port Elizabeth and detained for seven days before being transported to Cape Town. No shower or bathing facilities had been made available to the

[14] [2016] ZAECGHC 38 (unreported) Case No. 4095/2009, Eastern Cape High Court, Grahamstown, dated 31 May 2016

plaintiff. The award of R80 000.00 for general damages in 2010 has a present value of R110 000.00 [**R123,986.00**].

[80] In BHENGU v MINISTER OF SAFTEY AND SECURITY the plaintiff was a forty-seven year old owner of a taxi business who was detained for seven days in a cell with hardened criminals who had a wish to extract revenge on him. The award of R130 000.00 made for general damages in 2010 has a present value of R178 000.00 [**R201,447.00**].

[81] In FUBESI v MINISTER OF SAFETY AND SECURITY the plaintiff was an eighteen year old who was detained for, in effect, four days in a crowded cell where he was very scared. The award of R80 000.00 made for general damages in 2010 has a present value of R110 000.00 [*present day:* **R123,986.00**].

[82] In VEN DER MERWE v MINISTER OF SAFETY AND SECURITY the plaintiff, who was a builder and the owner of a coffee shop in Grahamstown, was arrested and detained on a Friday. He was incarcerated in appalling conditions and was assaulted. He was released on the following Monday, only to be shunned by members of his church community. A pre-existing condition of depression was aggravated by his detention and he was unable to manage his business properly thereafter, leading to its closure. The award of R120 000.000 made for general damages in 2011 has a present value of R157 000.00 [present day: **R177,042.00**].

[83] In KOTSWANA v MINISTER OF SAFETY AND SECURITY the plaintiff, who was thirty-four year old married man, was detained for eighty-four hours in conditions which were unpleasant and unhygienic. Although he was afraid of those with whom he had been detained he was not let out of the cell. The award of R110 000.00 made for general damages in 2012 has a present value of R 136 000.00 [present day: **R153,723.00**].

[84] In MHLABENI v MINISTER OF SAFETY AND SECURITY the plaintiff who was a twenty-nine year old male, was assaulted and detained in a

smelly cell with an open toilet along with twelve other persons. After five court appearances the charges laid against him were withdrawn. The award of R70 000.00 (R60 000.00 for the arrest and detention and R10 000.00 for the malicious prosecution) made for general damages in 2012 has a present value of R74 000.00 [present day: **R97,824.00**].

[85] In my view, having regard to the comparable awards to which reference has been made, on the facts of this matter excluding the development of the post-traumatic stress disorder, an appropriate award for damages would have been R150 000.00 [present day: **R232,473.00**]. However, having found that the plaintiff has established the required causative links between the defendant's wrongful conduct and the plaintiff's post-traumatic stress disorder, it is necessary that the award for general damages be increased to compensate the plaintiff accordingly.

[86] In THE ROAD ACCIDENT FUND v RUTH F.S. DRAGHOENDER the plaintiff, a forty-seven year old woman, suffered emotional shock, trauma and post-traumatic stress disorder which rendered her permanently unable to earn an income after witnessing the death of her son. The award of R80 000.00 made for general damages in 2007, which was confirmed on appeal, has a present value of R147 000.00 [present day: **R154,470.00**].

[87] In KRITZINGER AND KRITZINGER v RAF the plaintiff witnessed the death of his two daughters as a result of which he suffered from a post-traumatic stress disorder and chronic stress disorder with flashbacks and nightmares. He became emotionally withdrawn and avoided social functions and churches. He also suffered from headaches on a daily basis from a sleep disorder. The award of R150 000.00 made for general damages in 2009 has a present value of R215 000.00 [present day: **R242,443.00**].

[88] In LETT AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND ANOTHER a child and mother witnessed the shooting of his sister and her daughter. The child suffered a major depressive disorder, dysthymic disorder and chronic post-traumatic stress disorder requiring

counselling and anti-depressant medication. The award of R100 000.00 made for the general damages in 2011 has a present value of R130 000.00 [**R147,535.00**]. The mother suffered a major depressive disorder, dysthymic disorder, a major depressive episode, panic disorder with agoraphobia, chronic post-traumatic stress disorder and a generalised anxiety disorder requiring psychological and psychiatric treatment. The award of R120 000.00 made for general damages in 2011 has a present value of R157 000.00 [present day: **R177,091.00**].

[89] In MAART v MINISTER OF POLICE it was established that as a result of witnessing the shooting of her son the plaintiff suffered chronic and severe post-traumatic stress disorder, a major depressive disorder and psychosis with a poor prognosis, all of which made her unemployable. The award of R200 000.00 made for general damages in 2013 has a present value of R234 000.00 [present day: **R264,329.00**].

[90] In comparing the awards made in the matters to which I have referred to a notional award for general damages in respect of the psychological and emotional sequelae in the present matter, I have identified factors which are common to all. I have also taken into account factors that differ, predominantly the finding made in this matter that the plaintiff's post-traumatic stress disorder is treatable with a conservatively positive prognosis for recovery. In my view, taking all the relevant factors into consideration, an appropriate award for general damages in respect of the plaintiff's psychological and emotional sequelae flowing from the unlawful arrest and detention and malicious prosecution would be R150 000.00 [**R242,443.00**].

[91] It is desirable that a single award for general damages be made to ensure consistency between the plaintiff's particulars of claim and the resultant order. A combination of the two main elements of the plaintiff's claim for general damages results in an award of R300 000.00.'

Present day value **R336,000.00**.

61.8 In *Vuyisa Mgele v The Minister of Police and Others*[15] the plaintiff claimed damages for wrongful arrest, wrongful detention, torture, humiliation, degradation and *contumelia* and pain and suffering. The defendant failed to plead after a notice of bar had been served. The plaintiff then set the matter down for default judgment. According to the particulars of claim, the police arrested and assaulted him at his home on 18 November 2010. They were not in possession of a warrant of arrest. In particular, the police attempted to suffocate him with a refuse bag. Thereafter he was detained for four days. He sustained various injuries all over his body. The court after referring to a number of other cases awarded the following damages: R100 000.00 for unlawful arrest and R150 000.00 for unlawful detention and R150 000.00 for *contumelia*, pain and suffering. The total damages of R400 000.00 equates to **R476 545.00** today.

[62] Turning to the matter at hand, a case which is very similar to that of the present plaintiffs in terms of the length of detention is the matter of *Zealand v Minister of Justice and Constitutional Development and another*, *supra*, in which the plaintiffs who had several previous convictions, were eventually sentenced on 28 September 1998 to an effective sentence of 18 years imprisonment on a charge of murder. The convictions and sentence were set aside on appeal on 23 August 1999. However, due to a failure on the part of the registrar of the Grahamstown High Court to issue a liberation warrant following upon the success of his appeal, the plaintiff remained in custody as a sentenced prisoner and was only released on 9 December 2004. When the error on the part of the registrar was discovered he was already in unlawful detention for an effective period of four (4) years and 10 months. The general damages claimed on his behalf was the sum of R10 000 000.00. The award made by the trial court

[15] [2015] ZAECMHC 70 – (unreported) Case No. 1257/2011, Eastern Cape High Court, Mthatha, dated 6 October 2015

(Van der Byl AJ) in 2008 was the sum of R2 000 000.00, the current value being **R3 233 000-00**.

[63] The general damages of R10 000 000.00 claimed in *Zealand* constituted damages for unlawful detention, loss of freedom and amenities of life, pain, suffering, humiliation and *contumelia*. The prison conditions to which Mr Zealand was subjected to as a sentenced prisoner were alluded to by the learned Judge as follows:[16]

> 'Whilst in prison, particularly, during the period of his unlawful detention, he joined one of the prison gangs, namely the "26" gang. The circumstances under which and reasons for joining the gang are not quite clear from his evidence. At first he said he had done that to protect himself, but later in his examination-in-chief indicated that he had done that out of his own choice. In order to become a member he had, as a prerequisite for membership, to assault a co-prisoner in the dining hall. On that occasion he struck his co-prisoner with a tin mug on the head. Later, apparently on the instructions from gang members with senior ranks, he stabbed a co-prisoner with a sharpened ear of a tin mug in order to be promoted to a higher rank in the gang, in his case to sergeant.
>
> Whilst in prison he acquired a number of tattoos all over his body, but he was unable to say whether he acquired the tattoos before or after he was transferred from Medium A to Maximum Security. He, however, indicated that he acquired the tattoos before he joined the gang and acquired them, or some of them, out of his own choice sometimes to kill time.
>
> Furthermore he testified on the difference in privileges and treatment of awaiting trial prisoners as opposed to privileges and treatment of sentenced prisoners.'

[64] It is noteworthy that the conditions experienced by Mr Zealand are in some ways very similar to what the plaintiffs herein were subjected to.

[16] See the High Court judgment at para 15 at page 22.

However, I need not dwell on these conditions as they have been adequately dealt with earlier on.

[65] In light of the factual situation prevailing herein, the nature of the evidence adduced by both plaintiffs, the regard to awards in previous cases, the unprecedented duration of the detention and the huge injustice done to both plaintiffs and without in any way trying to punish the defendants for the wrongs committed by their servants herein, I consider that a fair and reasonable amount for non-patrimonial damages should be the sum of R3.5 million for each plaintiff.

[66] With regard to the plaintiffs' claims in respect of special damages, I intend awarding each of them the sum of R10 800.00 for psychotherapy/psychological counselling. This is based on 12 sessions at the rate of R900-00 per session, using the figures provided by Mr Willows.

[67] As for their claims for loss of earnings are concerned, for reasons already set out above, I intend awarding them damages for past loss of earnings only. These damages are based on unskilled earnings of R2 150-00 per month over a period of six years and 11 months. This amounts to R178 450.00. While the defendants have suggested a contingency deduction of 25% I believe that a deduction of 20% will suffice. The nett result is therefore the sum of R142 760.00 for each plaintiff.

Summary of award

[68] First plaintiff:

Damages for non-patrimonial loss	R3 500 000.00
Special damages for:	
(a) Psychological counselling	R 10 800.00

(b) Past loss of earnings	R 142 760.00
Total damages	R3 653 560.00

Second plaintiff:	
Damage for non-patrimonial loss	R1 500 000.00
Special damages for:	
(a) Psychological counselling	R 10 800.00
(b) Past loss of earnings	R 142 760.00
Total damages	R3 653 560.00

Open tender and costs

[69] It is common cause that by notice dated 17 May 2018 the defendants formally admitted liability herein. At the same time they made an unconditional offer to pay each plaintiff the sum of R3 833 429.00 (three million eight hundred and thirty three thousand four hundred and twenty nine rand) in full and final settlement of the plaintiffs' claims. The defendants further tendered to pay the High Court costs of both plaintiffs to date of the tender on a party and party scale. This offer was effectively rejected by the plaintiffs by the commencement of the trial on 28 May 2018. It is apparent that the damages awarded fall by me short of the amount tendered by the defendants on 17 May 2018. The resultant consequence for the plaintiffs is that they are now liable for the defendants' costs of the trial which ran from 22-30 May 2018 and finalised on 5 June 2018 when the matter was fully argued. Regrettably for the plaintiffs this is the risk they ran when they decided to reject the defendants' offer.

Order

[70] In the result, I make the following orders:

70.1 The defendants are ordered to pay to each plaintiff the sum of R3 653 560.00.

70.2 The defendants are ordered to pay interest on the above amount at the prescribed rate from a date fourteen (14) days after date of judgment to date of payment.

70.3 The first and second plaintiffs are ordered, jointly and severally, to pay the defendants' trial costs for 27, 28 and 29 May 2018 and 5 June 2018, such costs to include the costs of two counsel.

70.4 The defendants are ordered, jointly and severally, to pay the first and second plaintiffs costs of the action from date of issue of summons up to and including 25 May 2018, such costs are to be paid on a party and party scale and are to include the costs of senior counsel as well as the plaintiffs' actuary (report only) but will exclude all costs associated with the experts, Mr Clive Willows and Professor Joey Buitendach.

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SEEGOBIN J

APPEARANCES

Date of Hearing	: 27, 28 and 29 May 2018 and 05 June 2018
Date of Judgment	: 15 August 2018
Counsel for Plaintiff	: Adv. Y Moodley SC
Instructed by	: Silvia Da Silva & Associates
Counsel for Defendant	: Adv. Hemraj SC (assisted by Adv. Bedderson)
Instructed by	: State Attorney Kwa-Zulu Natal