Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 11254/2014

In the matter between:

Sakhile Brian Ndebele Plaintiff

And

The Minister of Police Defendant

JUDGMENT DELIVERED: 08 DECEMBER 2022

LE GRANGE J:

[1] The main issue for consideration in this matter is quantum. On 20 March 2019, the merits were decided and the following order, *inter alia*, was made in favour of the Plaintiff:

"1. That on 11 April 2012 and at Cape Town:

(a) the Plaintiff was unlawfully and wrongfully arrested by members of the South African Police Service;

(b) the Plaintiff was unlawfully and wrongfully detained by members of the South African Police Service from 05:00 on 11 April 2012 until 13:00 on 12 April 2012;

(c) constable Bosman wrongfully and unlawfully assaulted the Plaintiff by striking the plaintiff with his fist in the Plaintiff's face;

(d) warrant officer van Eeden wrongfully and unlawfully assaulted the Plaintiff by hitting him with a flashlight three times against his right forearm. "

[2] Subsequent to the merits being decided in his favour, the Plaintiff, amended his claim and the initial amount of R 355 000 claimed was amended to an amount of R 4 615 520.00.

[3] The pleaded claims under the four headings were amended as follows:

i) Estimated past medical expenses: this claim was not amended and remained at the amount of R 5000;

ii) Estimated future hospital, medical and related expenses: the amount of R 50 000 was amended and reduced to R 33 120 in view of the medico-legal report of Melissa Melnick. It was again

amended on 6 June 2022 to an amount of R 96 000, which include costs of one psychotherapy session per week for 12 sessions and thereafter three monthly sessions at a rate of R 1000 per session; psychiatric consolations and monitoring of medication consisting of monthly consolations for a period of 18 months at R1 500 per session and antidepressant and anciolitic medication for a period of 18 months at a costs of R 3000 per month.

iii) Estimated past and future loss of income/earning capacity: the amount of R 100 000 was amended to R 3 977 400 based on the report of Alex Munro dated 26 March 2021;

iv) General damages: the globular figure sum of R200 00 was amended to an amount of R 600 000.

[4] Mr. N J Louw appeared for the Plaintiff and Mr. J Van der Schyff for the Defendant.

[5] In the Plaintiff's case the following witnesses testified: Ms. Melissa Melnick ("Melnick") a clinical psychologist; Ms. Arabella Van der Bijl, ("Van der Bijl") an employee of a firm named Spear, doing business as 'Earnings Specialists'; Dr. Zabow, a clinical psychiatrist and the Plaintiff. Two witnesses testified in the Defendant's case, namely; Ms. Brett Nydahl ("Nydahl") a counselling psychologist and Brigadier Van Wyk, ("Van Wyk") who is the head of promotions and grade progressions at Provincial Human Resource department of the South African Police Services (SAPS).

[6] The factual matrix underpinning the Plaintiff's case can be summarized as follows: The Plaintiff grew up in Umlazi, KwaZulu-Natal where he matriculated in 2003. He obtained a bursary from Services Sector Education Authority (SETA) to study teaching at the University of South Africa (UNISA) although his aim was to study law. He did however not register as a student due to his inability to pay the registration fee of R 2 000. In 2004 he worked at Medal Paints. In order to progress, he joined the South African Defense Force (SANDF) in 2005 until 2009 as an infantry soldier. In late 2006, his infantry was deployed to Sudan as joint peacekeepers with the African Union (AU) and the United Nations (UN). During that time there were two incidents where his unit came under hostile fire from rebel groups. According to the Plaintiff, the two shooting incidents were not directed at him personally and suffered no psychological effects afterwards.

[7] According to the Plaintiff, he decided to join SAPS to be close to his family and to pursue his studies. In 2009 he did his basic training and in March 2011 he was posted as a constable at Cape Town Central police station. He also resided at the police barracks in Cape Town. His partner at the time resided in Groblershoop, Northern Cape and gave birth to his first child in September 2011. In October 2011, the Plaintiff approached UNISA to enroll as a student. Due to affordability issues, he did not proceed with his studies in 2011 or 2012. In October 2011 he apparently only paid an amount of R 150 to be registered at UNISA.

[8] In March 2012, the Plaintiff bought a Volkswagen Polo motor vehicle which was financed via a banking institution. On 11 April 2012, the incident in respect of the

assault and unlawful detention occurred as set out in the court order dated 20 March 2019. On 20 July 2012, flowing from the latter incident, the Plaintiff was dismissed after a disciplinary hearing by SAPS Cape Town. His dismissal was taken on review. The allegations and facts surrounding the incident was investigated by the Independent Police Investigative Directorate, (IPID). On 30 August 2012, his dismissal was found to have been substantially unfair and an award was made reinstating the Plaintiff and it was ordered that he receive back pay from 3 November 2012 until 6 September 2013 (9 Months) equaling an amount of R 85 271, 94. On 2 September 2012, the award was confirmed by SAPS legal services.

[9] It is not in dispute that on 11 April 2012, the Plaintiff was off-duty and with friends and visited a night club in central Cape Town. At about 4.00 am in the morning, Plaintiff accidently poured beer into the glass of an unknown woman (which IPID later established was a Ms. Ntokoleng Nkahle, a local sex worker). An argument ensued between the two of them which continued outside the club.

[10] Nkahle threatened to damage the Plaintiff's car. One of the Plaintiff's friends called the police to escort them out of the area. The police arrived and one of them was constable Bosman. Nkahle apparently jumped on the Plaintiff's vehicle and damaged one of the wiper blades. She also threw a bottle at his vehicle. Due to the commotion, Bosman fired a warning shot in the direction of the Plaintiff as Bosman at the time thought he was under threat from the Plaintiff. The Plaintiff testified that he got scared and got into his vehicle as it was the first time he was fired at. He was about to leave the scene when he was stopped. He got out of the vehicle. Two police officers grabbed

his arms. It was then that Bosman punched him in the face. He was taken to the police van where Warrant Officer van Eeden assaulted him three times with a flashlight on his forearm.

[11] According to the Plaintiff, he was kept in custody with other arrestees and was at one stage threatened by them. After his release from custody, the Plaintiff opened a criminal case against his fellow officers who assaulted him and against Nkahle for malicious damage to property.

[12] On 13 April 2012, the Plaintiff was examined by Dr. Rahim. According to the Plaintiff, he suffered severe pain and swelling on his wrist where the assault took place. Dr. Rahim noted that the Plaintiff was emotional about the incident and his right forearm and wrist was tender. On 26 April 2012, Dr. PSH Bel did an x-ray of the Plaintiff's right forearm. The forearm was normal and suffered no fracture, dislocation and or bony lesions.

[13] The Plaintiff testified that on his return to work a few days after the incident, he felt bad and humiliated as his arrested was known to all his colleagues. According to the Plaintiff, on 16 May 2012 he was called to see a Warrant Officer Truter. At that meeting he was informed about a suspension notice without pay.

[14] It is evident that the suspension severely impacted on the emotional and financial well-being of the Plaintiff. At this point he testified as follows[1]:

[1] Transcripts: 13 September 2021 at page 52 line 10

> *"[A]nd also I was very shocked after receiving that. And more thing [sic] that was shocking me, M'Lord, is that it was suspension without pay. And that just finished me, because I didn't know – from that moment, I thought about where am I going to get more money, where am I going to survive with my finances and everything as my daily life and my family and everything, and the car that I was having and protecting at the time. So it destroyed me, M'Lord. It just – it's something that I can't even explain today. But I was shocked that I was suspended without pay for an incident that I did nothing about*.

[15] Under cross-examination the Plaintiff conceded that during 2013 he worked well, was motivated to the extent that he received a certificate of good work in January 2014.

[16] The Plaintiff, after his re-instatement, decided to continue his studies and registered with the Tshwane University of Technology in February 2014, to read for his Diploma in Policing but did not complete the year.

[17] In June 2014, the Plaintiff issued summons against the Defendant claiming damages arising out of the assault, and unlawful arrest and detention. According to the Plaintiff, he did not continue with his studies due to his failure to concentrate. He also started to experience panic attacks in 2014.

[18] The Plaintiff, due to the panic attacks, was referred by his General Practitioner to consult with a psychologist, Ms. Shahieda Davids ("Davids") which he did on 22 January

2015, to determine the underlying causes of the panic attacks. He however failed to make any follow up appointments in that regard.

[19] In the same year he managed to arrange a transfer to Durban Central Police station and his panic attacks appeared to subside.

[20] According to the Plaintiff, his financial and emotional circumstances improved somewhat, but his symptoms of depression and anxiety persisted and was referred to different doctors who prescribed him certain medication.

[21] In 2018 he was referred to Dr Kahn, a psychiatrist, who admitted him to St Joseph's Hospital for treatment for depression.

[22] In cross-examination, the Plaintiff was confronted with the report by Nydahl, who assessed him on 1 September 2020 and filed a report on 16 October 2020 wherein it was recorded that *'he has not been compliant with the medication prescribed by the psychiatrist to treat his symptoms. Instead he uses alcohol as a coping mechanism, which exacerbates his depression and likely impacts negatively on his performance at work'.* Furthermore, it was recorded that according to his partner '*he was on ant-depressions, but then he stopped taking them. He can't drink when he's taking the medication and wants to drink. He's a black man, you can't tell him anything. He's not really open to getting psychological help".*

[23] In reply, the Plaintiff stated that he started to drink alcohol some time before the medication. He also disputed that he stopped his medication to use alcohol as a coping mechanism. According to the Plaintiff, the reason he stopped using the medication was

the side effects it had on him. He did however not discuss this with the psychiatrist but was rather looking for another doctor who could 'work properly' with him.

[24] The Plaintiff further testified about an incident in June 2020 which caused him further anxiety. Apparently, he was accused of transporting alcohol against lockdown regulations and given an acknowledgement of guilt fine to sign. He denied the charges and refused to sign the document. According to the Plaintiff, he was threatened with suspension and sent to Vryheid on 7 July 2020 to face a disciplinary hearing. The case against him was dismissed due to lack of evidence.

[25] The Plaintiff further testified that but for this incident he could have achieved some qualifications that could have empowered him, advanced his career and better his life outside of SAPS. In cross-examination it was put to the Plaintiff that the real reason he cannot move on with his life is his refusal to take the necessary prescribed medication and not the incident itself. The Plaintiff denied it and blamed the prescribed medication as a problem.

[26] Melnick, a clinical psychologist was briefed to assess, *inter alia*, the psychological impact the incident had on the Plaintiff's life and ability to work as well as the need for any psychological treatment. She consulted on 26 July 2018 and accordingly filed an expert report in that regard. She confirmed, in her evidence that the Plaintiff was using alcohol and that he was convicted in 2015 for drunken driving. According to Melnick, her sources of information was a 2-hour interview and assessment of the Plaintiff, a half an hour telephonic conversation with one of the Plaintiff's colleagues that was stationed

with him in Cape Town, the summons, a police docket and the medical report as compiled by the psychologist, Davids.

[27] A joint minute was compiled by Melnick and Nydahl dated 8 September 2021. The important parts of the joint minute can be summarised as follows: Both agreed that the Plaintiff suffered from ongoing symptoms of major depressive disorder and anxiety since the incident and that his psychological state post 2012 may have limited his attempts in furthering his tertiary education. Both recommended that provision be made for career counselling and or development. Melnick diagnosed the Plaintiff in 2017 with major depressive disorder with anxiety and posttraumatic stress disorder (PSD) and significant symptoms of major depressive disorder. Nydahl differed in her report dated 16 October 2020. She only diagnosed symptoms of major depressive disorder and anxiety, exacerbated by the increase of alcohol consumption and not PSD.

[28] Melnick further opined that the Plaintiff requires a psychotherapy and a psychiatric assessment for medication and in 2017 recommended 9 months of weekly treatment and stated that due to the Plaintiff's ongoing psychological vulnerability more than 9 years since the incident, the prognosis for his full recovery is guarded.

[29] Nydahl agreed that the Plaintiff would require psychotherapy and medication but noted that the Plaintiff was diagnosed with depression in 2014, received treatment for depression at St Joseph's Hospital in 2018 but was non-compliant with the medication prescribed and did not persist with the recommended psychotherapy and opined that his failure to use his medication is a likely contributing factor to his lack of recovery.

She further opined that the prognosis for full recovery is more positive if the Plaintiff complies with the treatment that was recommended.

[30] Melnick in cross-examination accepted she did not check for the root cause of the Plaintiff's alleged psychological condition but merely on how he presented having regard to her sources of information.

[31] Dr Zabow testified that he interviewed the Plaintiff on 15 September 2021 and his wife for collateral information. According to Dr Zabow, having regard to the series of stress-related events, the Plaintiff suffered significant psychological reaction to the incident and its subsequent effects. According to Dr Zabow, the Plaintiff's premorbid pattern as career policeman was disrupted with difficulties to rebuild his path and future plans, including studies and as a prognosis suggested a comprehensive treatment programme of a multimodal nature which should include psychotherapy/counselling and psychiatric consultations as well as appropriate medication to address the symptoms of anxiety, panic, depression and posttraumatic stress disorder.

[32] Dr Zabow suggested the following treatment: individual Psychotherapy of 12 sessions by a Clinical Psychologist at monthly intervals and then 3 monthly for 1 year at R1000 per session; 18 months of Psychiatric consultations and monitoring of medication at R1500 per session and Medication (antidepressant and anxiolytic) R3000 per month for 18 months.

[33] The Plaintiff also relied upon the evidence of Van der Bijl as an earnings specialist. In the Plaintiff's amended particulars of claim and in its filing notice in terms

of Rule 36(9) (a) and (b) the report was recorded as a "medico- legal report of Spear, industrial psychologists".

[34] The Defendant took issue with Van der Bijl's as an expert witness. It is not in dispute that Van der Bijl was requested by the Plaintiff's attorney to assess the Plaintiff's employment and income prospects and potential loss of income resulting from the incident. On 7 June 2019, under the heading '*Spear, specialist. earnings'*, Van der Bijl filed a report as an 'earnings expert'. An addendum report was filed on 12 February 2021.

[35] According to Van der Bijl, as an earnings specialist, her main focus is within the realm of claims regarding injuries that have been sustained in respect of road accidents, medical negligence or injuries on duty how that affects the career of the claimant in the future. She further testified that in order to qualify as an earnings specialist, it's all about experience and not qualification although an earning specialist needs to have a tertiary degree. The experience needed according to her should be within the actuarial realm, calculations, finances, salaries and research.

[36] Van der Bijl, further testified that she worked for two years as an actuarial liability assistant at Munro Forensic Actuaries "Munro", eight years as an earnings specialist and testified once as a witness in open court. According to Van der Bijl, it was initially the actuaries like Munro who would compile these reports but then it became too much for them and decided to hand it over to specialists like her to do the earnings progressions. It was also at Munro where she was taught what is required for an

actuary to do these calculations. She further testified that most industrial psychologist's reports are very vague with little information and do not speak to the right audience. According to Van der Bijl, the lack of proper industrial psychologist's reports gave her and or Munro the idea to write proper reports based on research that will go between a story, a career and the calculations. She also mentioned that the law does not require only industrial psychologists to compile these reports as, according to her, it was initially compiled by actuaries.

[37] In terms of Van der Bijl's education level, she holds an honours degree in Psychology, a post graduate certificate in Education as well as a certificate in Effective People Management.

[38] A joint minute was also filed between van der Bijl and Lisa Hofmeyer where divergent opinions were expressed. Hofmeyer recorded that the Plaintiff would have been eligible for promotion to Sergeant in 2014, regardless of the incident but that none of the SAPS members (which Colonel Gwanya confirmed) who joined in 2009 had been progressed via Grade Progression prior to 2021 and those members were now due for progression to Sergeant, provided they had a clear service record. The Plaintiff would be eligible for Grade progression to Sergeant during 2021 or possibly 2022, as his service record is reflected as uninterrupted (regardless of his dismissal and re-instatement); Hofmeyer, noted the recruitment trends in the SAPS, as commented on by Brigadier van Wyk, Lieutenant-Colonel Wiese and Lieutenant-Colonel Motaung, that there are a significant oversupply of Constables applying for Sergeant positions, as a result, such positions seldom get advertised. Hofmeyer noted that had the Plaintiff

completed his Diploma in Policing by the end of 2016, it would have served as a recommendation when he applied, however, according to collateral sources, due to the lack of vacancies for Sergeant, actual promotions could take typically between 7 to 11 years. Hofmeyer further opined that the Plaintiff will presumably progress to Warrant Officer (B1) by approximately 2029, and to Warrant Officer (B2) by 2036 or 2037.

[39] Van de Bijl expressed a different opinion. She recorded that the Plaintiff needed to financially support his family in the period of his dismissal and ended up in debt. Accordingly, she opined that the Plaintiff has no plans to return to his studies and it is more likely that he will be forced to resign due to the toxic environment in SAPS and would probably find work in an environment which is less detrimental to his mental health and path to recovery. Van de Bijl, postulated that the Plaintiff would at first find work in the informal sector and earn in line with the median/upper level of the Semi-skilled scale (as cited by Robert Koch). The timelines of this move is unclear and according to Van der Bijl, 2023 can be used for calculation purposes. She further postulated that the Plaintiff would experience less stress and strain in a different work setting; he will be able to progress to the level of Security Officer which would be at the lower basic level of earnings on this level by the age of 57 years of age; and, from there his income will increase in line with inflation until he retires at 65 years of age. Van der Bijl also opined that the Plaintiff would suffer substantial loss of income in the future. The latter opinion according to her was based on the following facts; that the Plaintiff had been struggling with Major Depressive disorder and anxiety attacks for many years; he does not have a tertiary qualification and there are no plans of enrolling

to complete his studies due to debt caused by the dismissal period; his working environment was deemed so toxic that even his colleague at the time decided to remove himself from it and there is no clarity as to whether treatment will restore his mental state to the pre-incident level after so many years, while remaining in the same working environment. Van der Bijl also opined that if the Plaintiff obtained a tertiary education by 2016, he was incline to relocate to other stations for progression purposes and would have actively applied to receive a promotion in order to enhance his employability. Furthermore, that in April 2017 the Plaintiff would have received a Grade and Notch increase to earn the salary of a Sergeant on a Notch 7.

[40] In respect of the post-incident scenario Van der Bijl and Hofmeyer agreed on the following:

i) the Plaintiff's unfair dismissal and lack of income for fifteen months was evidently traumatic and felt disillusioned, betrayed and victimised, although he received his back pay.

ii) The Plaintiff did not suffer a past loss of income after his dismissal until he was reinstated, as he received his back pay; his service record was also amended to reflect 'uninterrupted service'.

iii) The unfair dismissal impacted significantly on his emotional functioning, resulting in him developing a major depressive disorder with anxiety, panic attacks which was diagnosed in 2014, despite receiving intermittent treatment.

iv) The resultant symptoms and unresolved feelings of feeling betrayed, alienated and victimised have impacted significantly on the Plaintiff's quality of life from the date of the incident.

v) The Plaintiff's memory and concentration difficulties would have impacted negatively on the Plaintiff's ability to continue with his studies.

[41] During cross-examination, counsel for the Plaintiff conceded that Van der Bijl's evidence on issues that falls within the sphere of industrial psychology will not be relied upon but that her factual evidence as an earnings expert, including the issues that were agreed upon in the joint minute between Hofmeyer and herself, are still relevant and need to be taken into consideration.

[42] Counsel for the Defendant was very critical of the evidence of Van der Bijl and argued that her evidence should be rejected in its entirety as there is no job description of an earnings expert as it only exists as an in-house title adopted by Spear. I will return to Van der Bijl's evidence.

[43] The evidence of Nydahl, in short, was the following: The Plaintiff presented with a wide range of symptoms and behaviours associated with Major Depressive Disorder, such as fatigue, headaches, emotional withdrawal, short term memory loss and problems with concentration and attention including an increase in alcohol consumption over the last few years. He also reported high levels of anger, frustration and disillusionment with regards to his work situation, resulting in social withdrawal,

irritability and lack of interest in activities which he previously enjoyed. The Plaintiff also reported his feeling of being unsupported by his superiors and excessive worrying about financial security.

[44] According to Nydahl, the incident on 11 April 2022 was traumatic and the subsequent arrest and detention of the Plaintiff made him feel helpless and unsupported by a system he had previously trusted. The Plaintiff's dismissal caused him significant financial hardship which impacted on his ability to support his family. The Plaintiff however feels that his reinstatement in 2013 did not adequately address the injustice he suffered as the policemen involved in his incident went unpunished. The Plaintiff further believes he is being targeted as a troublemaker and that management at SAPS Cape Town Central went out of their way to make his life difficult. However, his circumstances have improved at SAPS Durban Central, but apparently ongoing irregularities within the police force is a concern for him which make his job security and future within the SAPS uncertain.

[45] Nydahl holds the view that although the assessments suggest that the Plaintiff continues to suffer from high levels of psychological distress as a result of the incident and subsequent events, she noted he tends to overstate on the self-report measures, which may have been an effort to communicate his level of distress, or alternatively to exaggerate his symptoms which makes the assessment results questionable.

[46] Brigadier van Wyk, who is the head of promotions and grade progressions at the Provincial Human Resource department of the South African Police Services (SAPS),

gave an overview of the Defendant's grade progression policy and the collective agreements it entered into as an employer with employees' unions at the Security Sectorial Bargaining Counsel, (SSSBC)[2] in 2014 and 2020. According to Van Wyk, the incident in 2012 including the Plaintiff's dismissal had no impact on his grade progression in terms of the SSSBC collective agreement of 2020 that repealed the 2014 agreement and he is currently in line for his grade progression as per the normal criteria. Van Wyk also testified that the Plaintiff will be grade progressed at the same time as those members that entered SAPS with him in 2009. Van Wyk further testified that the promotion posts that were and or currently available, were from the rank of Warrant officer and upwards and the Plaintiff would not qualify as a member cannot skip a rank in terms of the SSSBC collective agreement.

[47] The upshot of Van Wyk's evidence is that despite the incident and dismissal, the Plaintiff's career path as a SAPS member had not been prejudiced.

[48] Counsel for the Plaintiff however submitted that the evidence of Hofmeyer and Van der Bijl should be preferred above that of van Wyk as Hofmeyer postulated that on average the Plaintiff suffered a 2.5 years' delay in his career and that he should accordingly be compensated with the necessary contingencies to be applied, alternatively that a fair and just lump sum be determined. It was further submitted that the incident was a direct result of injuries and psychological trauma the Plaintiff suffered and in the circumstances of this case it would be just and equitable not to

[2] The SSSBC was established on 28 July 1999 as a Collective Bargaining Council that deal with all issues affecting SAPS as an employer.

compartmentalise the damages for each injury but to award a globular amount between R 4000 000 and R 600 000. In respect of the future medical treatment is concerned, reliance was placed on the evidence of Dr Zabow and it was contended that the following award be considered namely:

i) costs of one psychotherapy session per week for 12 sessions at a rate of R 1000 per session = R12 000 and thereafter three monthly sessions for one year at a rate of R 1 000 per session = R 3 000

ii) psychiatric consolations and monitoring of medication consisting of monthly consolations for a period of 18 months at R1,500 per session = R 27 000 and

iii) Antidepressant and Anciolitic medication for a period of 18 months at a costs of R 3000 per month = R 54 000.

[49] Counsel for the Defendant argued that except for the purported expert evidence of Van der Bijl and medico-legal report filed by Spear, it does not dispute the qualifications of the remaining experts of the Plaintiff. It was furthermore argued that the Plaintiff was an unreliable and poor witness and the evidence of his expert witnesses' must be viewed in that context when considering the evidence in its totality. To that end, it was contended that the Plaintiff suffered only minor soft tissue bruising as a result of the assault on his person and the amount of R 25 000 would be a fair and reasonable compensation for the assault under the globular heading of damages. Similarly, it was argued that the arrest and detention was for a period of approximately 32 hours and that an amount of R50 000 would be reasonable compensation for the

Plaintiff in view of recent case law. In respect of the Plaintiff's claim for psychological damages it was submitted that it should be dismissed as the Plaintiff was a poor witness and made unsatisfactorily and contradictory reports concerning his psychological health to various experts. In respect of the Plaintiff's claim for future loss of income it was argued that the direct evidence of Van Wyk should be accepted and the claim should be dismissed.

[50] It is now well acknowledged in our law that assessing quantum, is not an exact science but a difficult one which ultimately lies within the discretionary powers of the court, who must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair[3].

[51] In the assessment of damages, the factors that generally play a role are the following: 'circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the Defendant; the harsh conduct of the Defendant; the duration and nature(e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age and health and disability of the Plaintiff; the extent of the publicity given to deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the Defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty;

[3] See Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199.

the effect of inflation; the fact that the Plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that *actio iniuriarum* also has a punitive function'.[4]

[52] In our constitutional state, the award of damages is also to restore the dignity and respect to the injured person and therefore it is important that the compensation to be fair and just. It is also important that in a country with limited resources not to lose sight that the public interest demands that awards be kept within reasonable bounds. It follows that awards made in previous comparable cases may be a useful guide but each case must be decided on its own unique facts[5].

[53] Counsel for both parties have alluded to a number of comparable cases[6] as a guide to determine a just and equitable award in the present instance. I deem it unnecessary to highlight the awards in each of those cases referred to but what is striking is that the compensation awarded for assault in 2020 and depending on the severity thereof, as discussed in Mtsweni[7] at para [34], was ranging between R 102 000 and R209 000 which in today's terms would be between R 111 000 and R 129 772.

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[4] Visser and Potgieter Law of Damages 3 ed at 545-8
[5] See Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) para 17.
[6] Syed v Metaf Ltd 2016 JDR 1001 (ECG); Phasa v Minister of Safety and Security 2016 JDR 2281 (GP); De Lange v Minister of Safety and Security NO 2016 JDR 1178 (GP); Bapela v Minister of Police 2013 JDR 2442 (GSJ); Sofika v Minster of Police (330/2/12 [2018] ZAECMHC 37 (31 July 2018); Mtsweni v Minister of Police (54918/2017) [2020] ZAGPPH 389 (24 August 2020; Gcumisa and Others v Minister of Police (AR621/19) [2020] ZAKZPHC 54 (18 September 2020); Minister of Police and Another v Erasmus (366/2021) [2022] ZASCA 57 (22 April 2022); Scheepers v Minister of Police and Others (36536/2011 [2022] ZAGPPHC 308 (10 May 2022).
[7] Ibid.

[54] In the present instance, it is evident that a single continuous event resulted in the assault, unlawful arrest and ultimately the detention for up to 33 hours of the Plaintiff.

[55] This brings to the Plaintiff's amended claims for damages that was pleaded under four headings, namely:

(i) Estimated past medical expenses in the amount of R 5000.

In view of the totality of the evidence, and considering all the relevant factors, I am satisfied that an award of R 5000 past medical expenses is reasonable and appropriate in these circumstances.

(ii) Estimated future hospital, medical and related expenses in the amount of R96 000:

[56] The Plaintiff's claim was initially the amount of R 50 000 and amended on 6 June 2022 to an amount of R 96 000, in view of the evidence of Dr. Zabow which suggested costs of one psychotherapy session per week for 12 sessions and thereafter three monthly sessions at a rate of R 1000 per session; psychiatric consultations and monitoring of medication consisting of monthly consultations for a period of 18 months at R 1 500 per session and Antidepressant and Anciolitic medication for a period of 18 months at a costs of R 3000 per month.

[57] There can be no doubt that an assault followed by an unlawful arrest and detention is in its very nature traumatic. In the present instance however, the issue is the severity thereof and the consequent psychological harm suffered by the Plaintiff.

There were different views by the parties' expert witnesses as to whether the single event of 12 April 2012 is the main cause for the significant psychological reaction of the Plaintiff and its subsequent effects of depressive order, panic attacks and residual symptoms of PSD. On the Plaintiff's own version, the assault on his person lasted approximately 4- 5 seconds. He was punched once between the eyes. The punch did not cause any visible bruising and the Plaintiff did not lose his conscious. He was further struck three times with a flashlight against his right forearm. Despite his complaint about the severe pain, there were no serious injuries to his wrist and it only needed some ointment and painkillers. It is thus evident on the Plaintiff's own version the incident itself lack a sense of serious violence.

[58] It is further evident that the Plaintiff's subsequent dismissal caused him significant financial hardship which impacted on his ability to support his family and significantly contributed to his emotional and financial well-being.

[59] On the probabilities and evidence as whole, I am therefore not convinced that the Plaintiff established that his psychological reaction and its subsequent effects is solely rooted in the incident of 12 April 2012.

[60] There can be no quibble that the Plaintiff established he would require psychotherapy and medication for his future well-being. I am however obliged to take into account in determining a fair and just award that the Plaintiff was diagnosed in 2014 with depression and received treatment for it at St Joseph's Hospital in 2018. On his own version he was non-compliant with the medication prescribed, did not

persevere with the psychotherapy that was recommended, but rather consumed large amounts of alcohol which was clearly unhelpful to his recovery. The opinion of Nydahl that the Plaintiff's prognosis for recovery is more positive than guarded, if he complies with the prescribed treatment can therefore not be ignored and is accepted. The Plaintiff therefore needs to seriously start playing his part in bringing about his own recovery.

[61] In view of the above-mentioned, the following award is granted:

61.1 one psychotherapy session per week for 9 sessions and thereafter one monthly session for three months each at a rate of R 1000 per session = R 12000;

61.2 psychiatric consolations and monitoring of medication consisting of monthly consolations for a period of 9 months at R1,500 per session = R 13 500;

61.3 Antidepressant and Anciolitic medication for a period of 12 months at a costs of R 3000 per month = R 36 000.

The total compensation awarded is the amount of R 61 500.

(iii) Estimated past and future loss of income/earning capacity- R 3 977 400.

[62] In the amended pleadings, the Plaintiff pleaded that amount of R 3 977 400 is based on the report of Alex Munro dated 26 March 2021. In the trial bundle "C" the

Plaintiff referenced Van der Bijl as the (Industrial Psychologist – Spear). The Plaintiff relied on the evidence in the expert's joint minute between Hofmeyer and Van der Bijl, including the factual evidence of Van der Bijl in support of its claim that he had established a 2.5 years' delay in his career and accordingly be compensated with the necessary contingencies to be applied, alternatively that a fair and just lump sum be determined.

[63] Regrettably, I need to deal in more detail with concerns regarding the evidence of Van der Bijl. The first turns on her expertise, the second on her mandate. From her CV, she recorded her experience under the heading Medico-Legal environment (Spear) as an earnings specialist and lists from 2012 to current that she is an expert witness in court proceedings, evaluating income and earnings progressions of claimants of loss of income and support claims; research of industries and income models; analyzing specialist reports and data; prediction of future career paths and claimants in loss claims; and training junior writers.

[64] Under the heading Medico-Legal environment (Munro Consulting) – Actuarial Report Writer (2011- current) the following is recorded: Reporting for damages claims (Loss of income & Loss of support); research of industries and income models. Under the heading- Industrial Psychology Industry (Integrity international) the following is recorded: Psychometric Assessor (2007 – current); Determine employability attributes and conveying management strategies for career development; assessing dispositional and psychological attributes of employees in the quest for sustained employability and proactive career agency; provide managers with dashboard of possible attributes,

according to which they can devise optimal incentive strategies. It is evident, that Van Bijl is not a qualified industrial psychologist but an employee of a firm which advertises themselves as 'Spear Specialist Earnings' that specializes in compiling career and earnings reports which *inter alia* includes Industrial Psychologists reports to potential clients, like the Plaintiff.

[65] Her brief, according to her report dated 7 June 2019 was to 'assess the claimant's employment and income prospects should the incident not have taken place and now that the incident occurred.' In the second report dated 12 February, 2021, her brief was to update the assessment she reported on 7 June 2019. It was obvious from the pleadings, which was only rectified, as an error, during cross-examination that even Plaintiff's attorneys were under an impression that the evidence of Van der Bijl would suffice as an industrial psychologist, even though she signed it as an earnings specialist. This issue may be seen to be trivial, but people who claim qualifications or titles which they do not possess, need to be treated with some measure of circumspection.

[66] During cross-examination it became clear that the title of an earnings expert is simply an in-house title adopted by Van der Bijl's employer and that the bulk of her work mirrors that of an Industrial Psychologist of which she has no formal training in. The high watermark of her experience is the period she spent as an actuarial liability assistant at Munro who specialises in doing actuarial calculations based on 'industrial psychologists' reports in claims as in the present instance, and later at Spear. Despite Van der Bijl's cynical remark that the law does not require only industrial psychologists to compile these reports, writing reports as an actuarial liability assistant can hardly

qualify one as an expert to assess a claimant's psychological state in order to properly consider his/her job placement. In fact, Van der Bijl opined on issues within the sphere of industrial psychology that simply did not fall within her working experience and counsel for the Plaintiff had to concede that her evidence on those issues should be ignored.

[67] The second concern regarding her evidence is her reports which is of far greater importance. In this connection, it is necessary to deal with the role of an expert witness. In Zeffertt and Paizes, The South African Law of Evidence (Second Edition), at 330 the learned authors, citing an English judgment of National Justice Compania Navierasa v Prudential Assurance Co Limited 1993(2) Lloyd's Reports 68 at 81, set out the requirements and duties of an expert witness as follows:

> *"1. Expert evidence presented to the Court should be, and should be seen, to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise... An expert witness should never assume the role of an advocate;*
>
> *3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;*

4. An expert witness should make it clear when a particular question or issue falls outside his expertise;

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

[68] In Schneider NO v A and Another[8] the court re-emphasised the primary duty of an expert witness and said the following: *'[a]n expert witness, comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of*

[8] 2010 (5) SA 203 at 211J – 212B).

an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific, knowledge which that expert claims to possess.

[69] Van der Bijl may be an excellent employee at Spear but her evidence clearly fell short of what is required in law as an expert witness.

[70] The only other issue is whether Van der Bijl's evidence as a so called 'earnings expert' can be relied upon. According to her, the work of an earnings expert needs to have some tertiary qualification, but what that qualification should be is simply an unknown factor. There is also no registered professional body that earning experts needs to be a member of and or register with. In fact, the term earning expert is largely and in-house name at her employer. It is obvious that Van der Bijl regards the reports by Industrial Psychologist as inadequate for purposes of claims, like in this instance, and that she and or Spear can improve thereon to assist claimants. It is not for this court to prescribe what business and or employment Van der Bijl should do or not but there can be no doubt that her report(s) mirrors that of an industrial psychologist. The fact that she apparently spoke to people, studied cases, looked at policies and seen that other people had been promoted can hardly be regarded as objective opinion of an expert. It is trite that '*an expert is not entitled, anymore more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have*

been admitted by the other party or established by admissible evidence[9]*.* In the present circumstances, despite Van der Bilj's formal education and working experience, she simply failed to provide independent assistance to this court by way of an objective and an unbiased opinion. Instead, she became argumentative, sarcastic and started to overstep the mark by attempting to usurp the function of the court and to express opinions based on certain facts as to the future employability of the Plaintiff and to express views on probabilities which is the function of the court. Her evidence is therefore unreliable and unhelpful and cannot be accepted as an earnings expert.

[71] In view of the above mentioned, Hofmeyer's report is far more plausible and is accepted. The joint minute by Hofmeyer and Van der Bijl, therefore do not fall within the same category as discussed in the matter of Bee v Road Accident Fund[10]. Hofmeyer clearly noted the recruitment trends in the SAPS, as commented on by Brigadier van Wyk, Lieutenant-Colonel Wiese and Lieutenant-Colonel Motaung, regarding the significant oversupply of Constables applying for Sergeant vacancies and or progression. As a result, such vacancies seldom get advertised. Hofmeyer further noted that had the Plaintiff completed his Diploma in Policing by the end of 2016, it would have served as a recommendation when he applied, however, due to the lack of vacancies, actual promotions and progressions could take typically between 7 to 11 years. Hofmeyer further opined that the Plaintiff will presumably progress to Warrant Officer (B1) by

[9] Mathebula v RAF (05967/05) [2006] ZAGPHC.
[10] 2018 (4) SA 366 (SCA) (29 March 2018)

approximately 2029, and to Warrant Officer (B2) by 2036 or 2037. The latter opinion by Hofmeyer was indeed confirmed by Van Wyk.

[72] The evidence of Van Wyk can therefore not be regarded as a retraction of a common cause fact agreed upon by experts that enjoy the same status as facts which are common cause on the pleadings, as discussed in Bee. Van Wyk's evidence stands uncontroverted and there is no justifiable reason to reject it. It follows that the Plaintiff simply failed on a balance of probabilities to show that he suffered a 2.5 year delay in his career progression as a result of the incident. His claim under the said heading of estimated past and future loss of income/earning capacity in the amount of R 3 977 400 therefore falls to be dismissed.

(iv) General damages: the amended claim under this heading is an amount of R 600 000.

[73] Taking into account the factors that generally play a role in the assessment of damages and that an award of damages is to restore the dignity and respect to the injured person, I am therefore of the view that in all the circumstances of this case that a globular award in the amount of R 400 000 would be fair and just compensation for the injuria suffered by the Plaintiff.

Costs:

1. [74] In respect of costs, its follows that costs must follow the event. Counsel for the Plaintiff argued that Ms Van der Bijl like the other expert witnesses of the Plaintiff was a necessary witness and that the costs associated with her evidence

should be allowed. I am not convinced of that argument. In my view it would be unreasonable and unfair to burden the Defendant with the costs associated with her evidence. I am however satisfied that the taxed or agreed qualifying expenses of Ms Melnick and Professor Zabow, including costs of attendance and trial preparation should be allowed, including the Plaintiff's expenses for transportation and accommodation in attending the hearing. In respect of the costs in obtaining the transcripts of the court record, although the parties agreed to share the costs thereof, I am of the view the Plaintiff should not be out of pocket in that regard and the Defendant is ordered to pay the full costs thereof.

[75] In the result the following order is made:

2. Judgement is granted in favour of the Plaintiff as follows:
   i) Compensation in the amount of R 5000 is awarded for past medical expenses.
   ii) Compensation in the amount of R 61 500 is awarded for future hospital, medical and related expenses.
   iii) Compensation in respect of general damages in the amount of R 400 000 is awarded.
3. The Plaintiff's claim for future loss of income is dismissed.
4. The Defendant to pay the costs of suit, including the qualifying expenses of Ms Melnick and Professor Zabow, as taxed or agreed, including costs of attendance and trial preparation, and the Plaintiff's expenses for transportation and accommodation in attending the hearing.

5. The full costs of the transcribed record.
6. Interest will run on the aforementioned amounts at the prescribed rate a tempore morae from the date of judgment to date of payment.

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LE GRANGE, J