

SOUTH AFRICA / JUDGMENT

Kutumela v Minister of Safety and Security (36053/05) [2008] ZAGPHC 430 (12 December 2008)

[2008] ZAGPHC 430

COURT

High Courts - Gauteng

BEFORE

K Makhafole

CASE / FILE NUMBER

36053/05

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IN

THE

HIGH COURT OF SOUTH AFRICA

(TRANSVAAL

PROVINCIAL DIVISION)

PRETORIA

DATE:

12/12/2008

CASE

NR: 36053/05

In

the matter between:

MADIMETJA

PHINEAS KUTUMELA APPLICANT

versus

MINISTER

OF SAFETY AND SECURITY RESPONDENT

JUDGMENT

MAKHAFOLA, AJ:

INTRODUCTION:

- [1] Madimetja Phineas Kutumela, the plaintiff herein, has instituted an action against the Minister of Safety and Security consisting of three claims namely: arrest and detention, malicious proceedings and assault.
- [2] Claim 1 relates to his arrest by SAPS on or about 21 October 2004 at Kopfontein, the border post between Botswana and South Africa. Claim 2 relates to 25 October 2004 when members of SAPS set the law in motion by charging the plaintiff with kidnapping and murder of one female constable Francis Rasuge without reasonable and probable cause for doing so. Claim 3 relates to assault that allegedly occurred between 21 October 2004 and 29 October 2004 by Captain Pitsoane, Inspector Mano and other members of SAPS unknown to him at Klerksdorp, Hammanskraal, Wallmansthal and Soweto by being given electric shocks in order that he should suffocate, by covering his head with a wet bag.
- [3] Separation in terms of Rule 33 (4) of the merits and quantum was ordered by the court after counsel were consulted and had agreed that the question of liability should be dealt with first. Before the plaintiff began to lead evidence claim 1 was withdrawn.

CASE FOR THE PLAINTIFF:**SOLOMON KAGISO PEDINYANA MOGOPODI MOLEFE:**

- [4] He is a medical doctor who holds BSC, MB and CHB degrees. He practises as a general practitioner. He began his private practice in 2002. He had examined the plaintiff who had visited his consulting rooms on 7 March 2005. Thereafter he prepared a medical report which is part of Exhibit "D". He read the report into the record.
- [5] According to the report the plaintiff on examination looked scared, in pain and was anxious. The chest had multiple bruises which were very tender on palpation. He could feel the fracture of the left infra axillary rib with his hand. It was severely bruised and was painful.
- [6] He could not detect any abnormality on the ears, nose and throat of the plaintiff. His eye was bleeding over the covering of the eye. The photos appearing in the photo-album Exhibit "B" were taken on 8 March 2005. The right eye depicted on page 5 of Exhibit "B" corresponds with his findings. The said right eye had subconjunctival haemorrhage. In pages 8 and 9 of Exhibit "B" the photos there depict injuries on the ankle and right hand elbow of the plaintiff. He further testified that the main complaint of the plaintiff was "general body pains post alleged assault yesterday." His diagnosis is: multiple soft tissue injury and rib fracture.

- [7] From the chest x-ray there is a small right apical pneumothorax which means that there are air-trappings between the covering of the lung and the lung itself subsequently pushing the lung away from the rib cage. This condition is caused when there is communication from external air due to puncture of the rib cage indicative of the rib cage damage. The fractures are of the 7th rib posteriorly and the 4th and 5th ribs.
- [8] There is a slight cardio-megally with a left ventricular configuration which entails a swelling or enlargement of the heart towards the side of the left ventricle. In his experience, these injuries were caused by trauma. For instance, a bruise can be caused by blunt trauma, a scratch can be caused to the body where it was, for example, forcefully dragged against a hard surface. A fracture can be caused by a blunt object hitting the chest. Subconjunctival can be caused by haemorrhage with a blow to the eye or warfarin because patients on this drug develop spontaneous haemorrhage.
- [9] The first photo on page 6 of Exhibit "B" depicts injuries that something was placed on the foot especially the left foot that poked the foot. It is possible that an electric wire could have been poked into the foot. It is not easy to say the injuries he had observed from the plaintiff resulted from electric shock or burn. One needs to take specimens for the laboratory people to decide. In respect of the plaintiff, no specimens were taken and sent to the laboratory. Covering with a wet bag would result in suffocation. The plaintiff alleged to him that the injuries he had sustained were caused by police assaults on him. The apical pneumothorax is due to assault. He did not record any suffocation of the plaintiff because if a person suffocates he dies.
- [10] The injuries on the hands of the plaintiff depicted on pages 1 to 3 of Exhibit "B" could have been caused by objects like a robe and also handcuffs. He had given the plaintiff Betapain tablets for anxiety.

MADIMETJA PHINEAS KUTUMELA:

- [11] He was born in Mokopane in December 1953 and he is currently 54 years old. He became a traditional healer in 1981 after inheriting this trade from his grandfather. He married Dolly Lisbet Kutumela in 2005 and they have five children. He resides in Sekampaneng in Hammanskraal since 1983. His traditional healing practice is well known by the people.
- [12] He knows William Nkuna who is one of his patients he had helped. He was arrested on 21 October 2004 at the border post between Botswana and South Africa. At the time he was in the company of Nicklas Shiburi. He had returned from Botswana where he was treating his patients.
- [13] When he passed at the border gate members of SAPS asked if he was Kutumela and he answered in the positive. He was put into a certain office and it was explained to him that the police from Temba had asked them to stop him so that they could come and talk to him and that was at about 3 o'clock pm.

- [14] The Temba Police arrived at about 9 o'clock pm. One Inspector Mano spoke to him in the office where he was saying he had a warrant card and he was sent by a Temba Magistrate to look for him and arrest him. When he asked why he was arrested he was told not to tell him nonsense.
- [15] When they left the border post he was placed in his own motor vehicle where he sat between two police officers. A third police officer sat in the front seat with Nicklas Shiburi who was driving. His motor vehicle drove in front of the police vehicle when the cars left for Zeerust Police Station. En route he was asked by one of the policemen if he knew William Nkuna. He answered that he knew him. One of them warned the police officer who was asking him not to ask him questions as that would be done where they were going to.
- [16] At Zeerust Police Station Nicklas Shiburi was asked to park the car. He (the plaintiff) was told to take out his washing materials and leave everything in the car. From there they left for Klerksdorp and arrived at the Vaal-Maseru Bus Service offices upstairs. He remembers that there were about 10 police officers. He knows two police officers namely Inspector Mano and Captain Pitsoane.
- [17] Captain Pitsoane asked him if he knew William Nkuna. He answered yes. He told him that they have arrested William Nkuna and he has told them he had killed Francis Rasuge together with him (the plaintiff) by hitting her thrice at the back of her head. After she was killed he cut her private parts and gave them to him. He denied any knowledge about that.
- [18] Thereafter, they told him that since he was denying knowledge they would show him who they are. They tied his hands with belts like safety belts to the chairs, and took off his shoes. They loosened his trousers pulling it slightly downwards and his private parts were exposed.
- [19] A certain machine like a battery charger which has electric wires and a rubber-like object was placed on his head and tied to his neck. Whilst so covered on his head he could not breathe properly. His breath came back to him and he could only breathe slightly. The persons who placed this object over his head are Inspector Mano and Captain Pitsoane and others who were present. One of the police officers referred to this object as "natsak". Whilst so covered, he felt that they were placing objects on his shoulders, the outside wrists, feet and private parts and these were cellotaped on those parts of his body.
- [20] That machine was placed on the table and it choked him whilst burning him inside. The pain was just too much to bear. They removed the objects from his head and asked him where they had taken the girl to. At all times he did not know to which girl they were referring to until they told him that her name is Francis Rasuge. He could not tell them anything about her because he did not know her, but they repeated their torture on him. He remembers that he was tortured about four times.

- [21] When he realised that they were going to kill him, he then told them a lie and he assured them that the body parts given to him by William Nkuna were at his home. They left the following morning at dawn on a Friday arriving at his home at about 07H00 before his wife reported for duty at 08H00.
- [22] They went at the back of his house where his “muthis” are kept in a house. He called his wife who opened the door. He showed them a bottle containing half of the ground remains of a vulture and said that those were Rasuge’s private parts which they wanted. They took a photo of the bottle and removed the bottle.
- [23] Inspector Mano was playing the leading part. He asked him where will they find the body of Rasuge. He said: “you are going to show us the body, jy gaan kak”. Then they left his house with him.
- [24] He told the police another lie by saying they killed her and threw her body into the Jukskei River because he wanted to rest as they tortured him “time after time”. At the Jukskei River he pointed at a spot as a place they had thrown the body, but he knew that he was telling them a lie. “I told them a lie because they did not want to hear the truth that I did not know anything,” he said. They spent almost the whole day at Jukskei River near Alexander moving up and down the river. Nothing was found.
- [25] They tortured him again inside a Condor motor vehicle whilst he was lying on his stomach. He was tortured only once at Jukskei River. As he was feeling the pains one of them asked if he could make a statement before a Magistrate. That was at night. He made a statement to the Magistrate in Temba where he denied any knowledge of the allegations about him and told the Magistrate about the torture he was subjected to by the police. Thereafter, he was detained at Moot Police Station in Pretoria.
- [26] He told the police a lie when they insisted that he should show them Rasuge’s body, by directing them on N1 Potchefstroom Road to a drainage. He had to tell them a lie because they had promised to kill him. He was taken twice to this place where they were assisted by municipality workers to open the drains. It took almost the whole night to search the drains and nothing was found.
- [27] He later went to court for the first time, and he was alone. The second time he appeared in court he was with William Nkuna. And in the open court he again told the Magistrate that he was injured. When the case was remanded the court ordered that they (William Nkuna and himself) be detained at Pretoria Central Police Station.
- [28] After nothing was found at the Potchefstroom Road he directed the police to Apies River where he pointed under the trees as the place where they had buried her. Nothing was found and they tortured him as they did at Jukskei River. He felt pains, heat and needles in his body. His sexual organs were not functioning anymore. He testified further that he was tortured everyday and the police insisted that he took the body parts of Rasuge and manufactured medicine. They said that he is the cause that William Nkuna should not

disclose where the body is. The police had told him that he was involved in the kidnapping of Rasuge whilst William Nkuna was involved in the killing and giving him her private parts for “muthi”.

- [29] The charges against him were withdrawn on 3 March 2005. The community was chanting outside the Temba Court whilst other people were wearing T-shirts with the photo of Rasuge. He was transported in a “Hippo” to Sunnyside Police Station for his safety as they told him he would be released from there. He then told the police that if the chanting community wants to kill him then he would proceed from Sunnyside Police Station to his uncle’s home in Atteridgeville.
- [30] At Sunnyside Police Station the police gave him R20 for transport to Atteridgeville. When he left the Police Station there were police outside the building and at the gate. He had crossed over a street in front of the Police Station and he proceeded southwards. From behind there approached a car and it stopped across the road blocking traffic and sounding a siren with a “woo-woo” sound. He felt people grabbing him from behind and pulled what he was wearing onto his head. People passing by exclaimed and asked what they were doing to him. They placed him in the car without his will and the car moved to where he did not know.
- [31] Whilst in the car the occupants swore at him saying: “Mosono wa Mmago “jou ma se poes” we have found you today, we are not the police but cousins of Rasuge and we are going to kill you today.” They drove for about half an hour and turned into a gravel road moving slowly. He was dead frightened and had given up hope.
- [32] The car stopped whilst he was still covered on his head. Whilst he had thought that he had been taken by thugs, he was surprised when they put the same rubber cover on his head as police had used on him which prevents breathing.
- [33] They sat on him with the rubber covering his head and he was so frightened that he defecated. He was lying on his back for about 3 minutes. At this time he had scratches on the sides of his ankles on both legs. He could hardly breathe and he was feeling pain. As they realised that he would suffocate they removed the rubber cover and covered him with a jersey. They told him that if he does not disclose the whereabouts of Rasuge’s body he would end there. They were going to kill him.
- [34] He had given up hope and told them to kill him because he knew nothing about the said body. He devised a plan because he was feeling pain. If these people were going to kill him he would rather go and die next to his home.
- [35] He invited them to Bosplaas bush where he digs his medicines as the place where she was dumped. They then removed the rubber cover replacing it with a jersey. They cocked their firearms and fired from his back. He heard sounds of shots over his head. They said to him that they were not Northwest Police who spoiled him. Unless he took out Rasuge’s body they were going to kill him. They told him that they were Gauteng Police.

- [36] It was raining. They brought him to a place like a dam. He was handcuffed with his hands at the back and his head was covered. They pushed him into the water. He could not pull himself out of the water. When they took him out, his stomach was full of water. One of the police officers trampled on his stomach until the water was released.
- [37] There in the bush they made fire. They kept on hitting him with the back of a spade on his chest and his back whilst searching for the body. They spoke amongst themselves some suggesting that he be thrown into the fire and others refusing. The body could not be found.
- [38] From there they drove to a police station next to the former Police College in Hammanskraal. It was around 3 o'clock in the morning and they wanted to rest. They drove into the backyard of the police station where they parked their cars and had a rest. He remained in one of the cars still handcuffed.
- [39] At dawn they returned to the bush with him to carry on the search. He knew there was nothing to be found because he was telling them a lie. The search went on for the whole day. The cars were about 15. His assailants were speaking amongst themselves and they even called Inspector Mano on his cellphone. They told him (Inspector Mano) that he (the plaintiff) had explained to them as he did to him.
- [40] They asked him if he knew Martin Aphane who used to bring food and money to them, (William Nkuna and himself) at Odi Prison. He denied knowing him. They drove with him to Temba City Shopping complex where they collected Martin Aphane and took them to Bosplaas bush. They asked Aphane if he knew him, he said no. Then they placed a rubber over his head. He (Mr Aphane) was in from of him. They sat on him and he defecated. They told him Martin knows nothing, he (the plaintiff) must know, and take out Rasuge.
- [41] As he was standing he was pushed forward, he fell and was injured on his face and on the right eye. They kicked him with booted feet in the presence of females. They removed his pants placed the blunt part of a knife on his penis, saying they were going to cut it demanding the body of Rasuge until a Captain stopped them. Whilst speaking amongst themselves they addressed one another according to their ranks.
- [42] Some of them left to buy food whilst the others remained with him at the bush. He was also throttled and could not eat anything for the whole day. At about 3 pm they wanted to leave for their respective homes and they let him board a blue BMW whose number plates he did not see. He was taken to a Police Station in Gauteng. They booked him at a police station and asked him to supply them with a new name which he supplied as Isaac Lebelo. He spent a night in a cell alone.
- [43] During the torture he was kicked on the left hand side of his ribs. When it is cloudy he feels pain and he cannot work because of the injuries. He is unable to dig 'muthis'. From the police cells in Gauteng they drove to a Police Station in Pretorius Street. He saw this police station well because they had left him in the vehicle when they entered the police station.

- [44] From the Police Station in Pretorius Street, Pretoria they drove along the Mabopane highway and stopped at a spot that looked like a dumping site. They asked him not to look at them because they wanted to kill him for refusing to take out the body of Rasuge. He was asked to remove all his clothes. He did and became naked. He heard them preparing their firearms. They fired shots from his sides and over him thrice. He was then told to wear his clothes.
- [45] From there they proceeded until Suurman in Hammanskraal where they stopped at a dam and told him that William Nkuna had told the Inspector and his group that Rasuge was thrown into the dam by Nkuna and himself. He told them to get in and look for her. They did not.
- [46] They proceeded to Hammanskraal Supermarket and asked him if he knew Ivy Kaapu who is his cousin's daughter who lives in PP Rust. She had been his helper. From there they proceeded to the home of Ivy. On arrival there he was left in the car with two male persons whilst some of them entered the house. After about an hour they returned and reported to him that like him Ivy knows nothing. They returned to Hammanskraal shopping complex and arrived at night.
- [47] They asked where his driver lived. He told them, and they drove to the house of Nicklas Shiburi next to where he (the plaintiff) resides. On arrival there he does not know what happened. From there they asked to be taken to his other driver who drives his car when Nicklas is not present. He took them to the house of Richard Malobola. He did not enter the house of Mr Malobola. He remained in a lying position in the car. They remained in the house of Richard Malobola for about an hour. He heard Richard screaming. They then left for Hammanskraal shopping complex where they remained in the cars until early the following morning.
- [48] They then took him to his home dropping him at the gate. They told him not to look back. His wife was sweeping at that time. They told her that they had brought him back alive without killing him.

RICHARD MALOBOLA:

- [49] He resides in Tambo View, Temba location, in Hammanskraal. He is a driver of the plaintiff. On 6 March 005 at about 1:30 AM people knocked at his house. When he asked who they were, they said they were police. He opened for them and they entered his house.
- [50] They asked him if he knew William Nkuna, Rasuge and Kutumela. He told them that he knew only Kutumela. They asked him about an incident whereby Kutumela, a certain lady and himself had gone to Soshanguve to perform certain duties. He told them that after those duties had been performed by Kutumela he was dropped at his house.

- [51] They were talking to him in Tswana and Zulu. They told him that he is supposed to know those persons because Kutumela knows them. They hit him with sjamboks and open hands. They pulled something over his head that looked like a rubber. One of them brought an axe and hit his toes with its blunt part. The beating lasted for about 2 hours ending towards dawn. He was feeling pains and he was screaming. There were many of them beating him and he could not even count them.
- [52] He sustained injuries. He received medical treatment at a hospital. He was dizzy when they beat him and cannot recognise them now because during the beating he could not see well. He opened a case of assault on 7 March 2005 at Temba Police Station. It was registered as an assault with intent to do grievous bodily harm and a case number was also allocated: CAS191/03/2005.
- [53] He has never appeared before court. The police had visited and informed him that they would call him in due course, but this has not happened. Under cross examination he testified that they told him that they were going to Kutumela and would bring him to him.

CASE FOR THE DEFENDANT:

- [54] Tsietsi Mano is a captain in SAPS and he is presently an acting commander of the Organised Crime Unit and he is stationed in Potchefstroom. To date he has been in SAPS for 26 years and has been a detective since 1986.
- [55] His name is the second on the list on Exhibit "F". All those appearing on the list are members of the task team and the task team leader is reflected as Captain Pitsoane. They were to investigate the case stated on exhibit "F". He was promoted to the rank of Captain on 1 August 2005 whilst Captain Pitsoane was promoted to the rank of Superintendent in 2005 and to Senior Superintendent in
2007. Captain Pitsoane was based in Phokeng in the Northwest Province.
- [56] The task team was investigating two cases namely Temba CAS1013/08/2004 relating to the alleged kidnapping of a female police member by the name Nyadi Francis Rasuge. The second case was that of conspiracy 89/09/2004 opened by Gadifele William Nkuna against Francis Rasuge. The kidnapping case was opened by her parents.
- [57] After the arrest of William Nkuna and the subsequent interviews with him, they received information from him that after killing Ms Rasuge he handed the body to Kutumela a traditional healer who had used the parts of the body for 'muthi' purposes. Mr Kutumela was the last person who handled the body, he (Nkuna) did not know where it was disposed of.
- [58] On tracing Kutumela they found that he had gone to Botswana. They acquired a warrant of arrest and blacklisted him at the posts of entry into Botswana. They faxed the warrant of arrest to Kopfontein Police Office so that the police there could arrest him, until they pick him up.

- [59] He, together with some members of his team left Temba for Kopfontein. On arrival he identified himself to Kutumela and produced the warrant of his arrest and explained to him the purpose of his arrest. They requested to search his motor vehicle. They did not find anything that had relevance to the case. Kutumela was cooperative. He did not give them problems. He told Kutumela that he was going to book his car at Zeerust Police Station for further investigations.
- [60] He travelled with Kutumela in his car whilst other members of his team travelled in Kutumela's car with Kutumela's driver to Zeerust Police Station where Kutumela's car was booked in. Thereafter, they departed with Kutumela and his driver to Klerksdorp. Most of the members of his team had to change clothes because most of them stayed there. They would then return to Pretoria to continue the investigations.
- [61] At about 10 o'clock in the morning he and superintendent Pitsoane went into an office at the Vaal-Maseru bus depot and began to interview Kutumela about his involvement in the case of Francis Rasuge. Kutumela admitted he had received the body of Francis Rasuge from William Nkuna and had cut off the tongue, 2 breasts as well as the private parts intending to use them for "muthi". He together with William Nkuna had thrown the body into the Jukskei River next to Alexander. He was willing to go and point out where the body was thrown in the river. He had dried the body parts, ground them, mixing them with the herbs and placed them in bottles which he was prepared to show them.
- [62] They left Klerksdorp about 03H15 and 03H30 for Temba. Kutumela directed them to his house where his wife opened a shack which is his surgery. Kutumela pointed out a specific bottle to superintendent Pitsoane claiming the contents to be a mixture of herbs and the body parts of Francis Rasuge. The bottle was seized and sealed to be dispatched for forensic investigations. They left for Temba Police Station to await Police divers from Hartbeespoortdam Police Station to accompany them to Jukskei River for a search.
- [63] After the arrival of the police divers they all left after 10H00 for Jukskei River where Kutumela pointed at a spot where the water in the river was very very shallow, just above the ankles. The police went down the river assisted by police dogs but found nothing. Kutumela further told them that William Nkuna could have come back to take away the body without his knowledge. He was also prepared to make a confession about what he told them.
- [64] After arrangements were made Kutumela was taken to Temba to make a confession. The same night of making that confession it was handed to him (he captain Mano). The following Monday, 25 October 2004, Kutumela appeared at Temba Magistrate Court co-opted as an accused with William Nkuna. This was his first appearance. He was thereafter remanded in custody where he would from time to time be taken out for further investigations. The alleged confession formed part of the docket.

- [65] At a certain time the Plaintiff's attorney intervened that he should not be booked in and out of the police cells for further investigations without him being informed. His attorney requested further that the Plaintiff be removed and be detained in Pretoria Central Prison. After the Plaintiff had been detained at Pretoria Central Prison they did not take him out for further investigations.
- [66] He was in court on 3 March 2005 when the charges against him were withdrawn. They requested the assistance of the Crime Combating Unit to supply riot vehicles to protect the Plaintiff and William Nkuna when being removed from the Court premises. The people in the court gallery were displeased about the withdrawal of the charges. Nkuna was to be transported to Sunnyside Police Station to be detained for another matter. Both men were transported in a "Nyala". The Plaintiff was afraid to remain in Temba because the community had indicated they would attack them.
- [67] After the Plaintiff was taken to Sunnyside Police Station he did not see him leaving the said Police Station. He does not know what happened to him later on because no one has spoken to him about the Plaintiff.

SELLO NICK PITSOANE:

- [68] He is now a Senior Superintendent in SAPS and he is stationed at Phokeng Organised Crime Unit. He has been in the Police Services for 23 years now. He was appointed by the Provincial Commissioner as the leader of the task team investigating the kidnapping of Constable Francis Rasuge. At the time the task team was appointed, he was a Captain.
- [69] He was not present when the Plaintiff was arrested at Kopfontein border gate. He joined the task team in Zeerust. He supervised and coordinated the investigations. He took the team to Klerksdorp where the majority of its members resided. The task team operated from Temba Police Station.
- [70] He and Captain Mano had a discussion with Kutumela who told them that he had removed body parts from the body of Constable Rasuge. The discussion was held in the offices of the Organised Crime Unit.
- [71] From Klerksdorp the task team left for the home of the Plaintiff to fetch the body parts in question. On arrival, they were led to Kutumela's surgery where he took out a bottle and told them that the contents were Constable Rasuge's private parts and breasts. They conducted a search at this house.
- [72] Thereafter, he arranged police divers and sniffer dogs to go and search the Jukskei River where Kutumela had alleged the body had been thrown into. The water was so shallow and one could see that the body was not there.

- [73] They left Jukskei River for Pretoria. Captain Mano told him that Kutumela was prepared to make a statement before a Magistrate. Captain Mano made arrangements that a statement be taken. He did not accompany Kutumela to the Magistrate in Temba. He denied torturing the Plaintiff with any electric devices including a “wet sack”. Kutumela was formally charged on 24 October
2004. He did not continue with any investigations relating to Kutumela after the charges had been withdrawn against him on 3 March 2005.
- [74] He is aware that on 28 October 2004 Kutumela was booked out by one Superintendent Labuschagne who is a psychologist, and that they had a meeting. The meeting did not yield positive results. By this he understands that the psychologist could not establish that Kutumela was involved as they believed Mr Kutumela was involved.

FANIKI PHANUEL MOLEFE:

- [75] He is an Inspector in SAPS stationed at Temba Police Station. He has been in the police services for the past 21 years. He was a member of the task team investigating the case against William Nkuna. He was the initial investigating officer before the task team was appointed.
- [76] He used to visit Mrs Kutumela at Bernetts Furnitures in Hammanskraal. At first he was alone, and later with other members of the task team. She used to be very cooperative when asked about the whereabouts of Kutumela. Exhibit “G” is a statement he made which was used on 19 October 2004 to apply for a warrant of arrest. After they had arrested William Nkuna for the kidnapping of Constable Rasuge he told them that the Plaintiff was also involved.
- [77] He approached Advocate Mahoka about the information he had received from Nkuna. Before 18 October 2004 he had also met Mrs Kutumela who informed him that Kutumela was supposed to have been back for the past two weeks from Botswana but had not as yet arrived.
- [78] He sees Exhibit “H” which is a statement of Mrs Doly Kutumela taken by Tsietsi Mano on 24 September 2004. He sees that in this statement Mrs Kutumela does not know when her husband was coming back. He was not aware of this statement which was taken before he had met Mrs Kutumela. But he was aware that the said statement was in the docket.
- [79] He is also aware of the statement Mr Kutumela made before a Magistrate in Temba. He was not present when the statement was made. He knows that Inspector Motlhabane who is a detective at Temba Police Station was not part of the task team but had travelled with Kutumela to make a statement at Temba Court.

THE LAW:

- [80] ONUS: In *PILLAY V KRISHNA AND ANOTHER* 1946 (AD) at 952 the court stated that: “Import and guides in determining upon which party the onus of proof in any action rests are furnished by the general principles that normally the onus rests upon the party who asserts the affirmative in substance and upon the party who would be unsuccessful if no evidence were led.”
- [81] In *NATIONAL EMPLOYERS MUTUAL GENERAL INSURANCE ASSOCIATION V GANY* 1931 AD 187 at 199 the test was stated as follows: “Where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false.”
- [82] In *DUNCAN V MINISTER OF LAW AND ORDER* 1984 (3) SA 460 (TPD) at 465 H-I the court states the following: “A lawful arrest in terms of that subsection can be made upon a reasonable suspicion. The word “suspicion” connotes an absence of certainty and of adequate proof, as does the word “verdenking” in the Afrikaans text. As it was aptly put by Lord DEVLIN in the *PRIVY COUNCIL IN SHAABAN BIN HUSSEIN AND OTHERS V CHONG FOOK KAM AND ANOTHER* [1969] 3 ALL ER 1626 at 1630: “Suspicion in its ordinary meaning is state of conjecture or surmise where proof is lacking;” “I suspect but I cannot prove.” Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.”
- [83] The CONSTITUTION ACT 108 of 1996 SECTION 35 (1) provides: “Everyone who is arrested for allegedly committing an offence has the right -
- (a) to remain silent;
 - (b) to be informed promptly
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person.”
- [84] SECTION 35 (2) of ACT 108 of 1996 provides: “Everyone who is detained, including every sentenced prisoner, has the right –
- (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- (f) to communicate with, and be visited by, that person's –
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.

[85] The CONSTITUTION ACT 108 of 1996 SECTION 12 states that:

“(1) Everyone has the right to freedom and security of the person, which includes the right –

- (a)
- (b)
- (c) to be free from all forms of violence from either the public or private sources;
- (d) not to be tortured in any way;
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

[86] The CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, (“CAT”) (241LM 535) defines “torture” in PART 1, ARTICLE 1 as follows: “For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions.”

[87] “CAT” ARTICLE 4 states the following:

“1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to commit an act by any person which constitutes complicity or participation in torture.

- 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

- [88] The EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (213 UNTS 221; EUROPEAN TS 5) states in SECTION 1, ARTICLE 3 thereof the following: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
- [89] SECTION 43 (1) (C) of CRIMINAL PROCEDURE ACT 51 of 1977 provides: “Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.”
- [90] The definition of kidnapping: “Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child.”

Vide: CRIMINAL LAW. By CR SNYMAN 4th EDITION P462.

- [91] In PRINSLOO AND ANOTHER V NEWMAN [1975 (1)] SA 481 (AD) at 504 C-G the court had the following to say: “The applicant for a warrant is required to consider the available information in order to determine whether it discloses that the person concerned is guilty of ‘an act or omission punishable by law.’ It must, however, be borne in mind that the applicant is authorised to make the application if the information discloses ‘reasonable grounds of suspicion’ that the person concerned is guilty of ‘an act or omission punishable by Law’. It is not required that the suspicion should eventually prove to have been well-founded. It is, in my opinion, sufficient if the available information is such that it could reasonably give rise to the suspicion entertained by the applicant. The applicant is required to entertain a suspicion that an offence has been

committed; he is not required to consider whether the information demonstrates with certainty that an offence has been committed by the person mentioned in the warrant. In order to determine the question, the applicant must consider the facts and the law. To that end, he may avail himself of competent legal advice. Ultimately, however, the responsibility of deciding whether the application is to be made is that of the applicant himself. If, in all the circumstances, it appears that the suspicion of the applicant was honestly entertained by him, and is one which the available information could reasonably give rise to, the application falls within the terms of sec. 28. The question is: was the suspicion reasonably entertained, and not, was it rightly entertained by the applicant? The question arises whether or not the magistrate, who considers and decides upon the application for a warrant, exercises a discretion of a judicial nature.”

- [92] SECTION 203 of ACT 51 of 1977 reads as follows: “No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.”

[93] SECTION 35 (3) (j) of ACT 108 of 1996 reads as follows: Every accused person has a right to a fair trial, which includes the right - “not to be compelled to give self-incriminating evidence.”

[94] In RV BLOM 1939 AD 188 at 202-203 the court discusses “two cardinal rules of logic” which should not be ignored when reasoning by inference:

“(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

FACT

ANALYSIS:

[95] Captain Mano testified under cross examination that he had co-opted and charged the Plaintiff as an accused because he had been implicated by William Nkuna but this information from Nkuna was not under oath. He conceded that it was fair to charge a person when you have evidence under oath. Asked why there was an exception made when charging the Plaintiff he answered that he did not understand. Asked to show the court evidence which formed the basis to arrest the Plaintiff he could not show it.

[96] He decided to charge the Plaintiff after consulting with a Public Prosecutor whose name he could not tell to the court. He testified that the decision to charge the Plaintiff was a collective decision of the police and the prosecution.

[97] Further, under cross examination he conceded that the Plaintiff’s initial reaction to being asked about Rasuge’s body was a denial of any knowledge. They did not accept his denial because William Nkuna had told them the Plaintiff was involved.

[98] During the interview they countered the Plaintiff’s denials with information from Nkuna. After about 1 or 2 hours the Plaintiff ultimately told them he was involved. They use verbal tactics when they interview a person.

[99] They continued with the interview countering the denial by the Plaintiff until they were satisfied they have got the truth from him. They expected from the Plaintiff to say he was involved. He further conceded that the plaintiff could not be positively linked to the crimes with which William Nkuna was found guilty of. All the sources of information saying that the plaintiff was involved with Nkuna were not given under oath.

[100] They interviewed the plaintiff about the statement he made to the Magistrate and what he told them. They could not leave him in peace because they had problems with him for telling them different stories.

- [101] Inspector Molefe conceded that on the facts in his affidavit which are not correct, he would not have obtained the warrant of arrest. He relies in paragraph 4 of his affidavit on 2 grounds: that William Nkuna had visited the plaintiff at his residential home. This fact is not supported by Mrs Doly Kutumela from whom he alleges he received the information. The second ground is that Mrs Kutumela had told him at the time that Kutumela should have been at home for the past two weeks. He has conceded that this conflicts with the contents of Exhibit "I" because therein Mrs. Doly Kutumela states that she does not know when her husband would return from Botswana.
- [102] Relying entirely on the above two grounds to obtain a warrant of arrest was itself a misrepresentation of the facts to the Magistrate to obtain a warrant. The documents from which Inspector Molefe quoted the facts were misrepresented because of the following reasons: (i) William Nkuna did not find the plaintiff at his home. He did not visit the plaintiff but had visited the plaintiff's residence and left that homestead without meeting the plaintiff.
- (ii) There is no document as quoted by Inspector Molefe where Mrs. Doly Kutumela alleges that she knows when her husband would be back or should have been back for the past two weeks.
- [103] Superintendent Pitsoane was adamant that the plaintiff had admitted knowing the whereabouts of the body of constable Rasuge. He was the leader of the task team, supervisor and coordinator of the investigations. He testified under cross-examination that he had been present the whole time during the investigations. According to him the plaintiff never denied that he was ever involved in the disappearance of Constable Rasuge. He testified further that the plaintiff told them during the interview in Klerksdorp that he knew about the case because Mr Nkuna is the one who killed the lady and he received her bodyparts. Confronted with the version of Captain Mano that Kutumela had initially denied any knowledge of the disappearance of Francis Rasuge, he reneged from his previous version to say that must have been said when he was absent from the interview room.
- [104] This is indeed a lame reason being mindful of the fact that in his evidence-in-chief he never testified that he had left the interview room and Captain Mano never testified to that effect also.
- [105] After all, when Superintendent Pitsoane testified in chief about the findings of the Psychologist Labuschagne not yielding positive results, he expressed the sentiment that the police believed Mr. Kutumela was involved.
- [106] There can be no doubt that Superintendent Pitsoane and his task team pursued investigations against the plaintiff despite his denials in Klerksdorp, his denial statement to the Magistrate Temba, psychologist's negative report, and pointings-out negative results.

[107] It is not difficult to understand why the members of the task team could not divest themselves from their belief that the plaintiff was involved in the crimes. They believed the sayso of both William Nkuna and the several faceless informers which was not given under oath at any given moment implicating the plaintiff. I must say offhand that their belief was groundless and it was not based on any objectively ascertainable information and/or evidence which a reasonable person would normally be expected to rely on.

EVALUATION:

[108] It is abundantly clear from the uncontradicted and uncontroverted evidence of the plaintiff that the police at Klerksdorp namely the then Captain Pitsoane and Inspector Mano respectively had unleashed torture with their notorious “natsak” on the plaintiff and that as a result he had to alter his version of truth to lies for them to stop the torture which was resumed at Jukskei River when the body of Rasuge could not be retrieved therefrom.

[109] As the trial proceeded to take its turns and twists the evidence by the police was hard-played by that of the plaintiff for the following reasons:

- (a) The plaintiff’s evidence has remained consistent throughout the trial and has stood the test of cross-examination.
- (b) The evidence of Captain Mano and Superintendent Pitsonale (as they are now winged) is contradictory and remains a bare denial of the tortures, and this factor was rightly conceded by the defendant’s counsel.
- (c) The evidence of Captain Mano and Superintendent Pitsoane could only deny what the plaintiff had testified to implicating them directly with full details of how the tortures at different locations were precisely executed.
- (d) Both police officers have experiences of more than 20 years in the police services. Captain Mano has been in the police service for 26 years and Superintendent Pitsoane for 23 years. But both of them did not warn the plaintiff in terms of the Constitution after he was arrested and detained prior to questioning him about the serious charges of kidnapping and murder. Constitution Act 108 of 1986 (supra).
- (e) The said police officers did not warn the then detainee (now plaintiff) of his rights before going to do pointings-out at his Sekampaneng home and later at Jukskei River, and at MI Potchefstroom.

Vide: Drainage

- (f) If they did warn him they would have testified so. In any event they are accustomed to testify in court. Captain Mano admitted under cross-examination that he is accustomed to testifying in court. Yet in stark contrast to the provisions of the Constitution he fails to warn the arrestee of his constitutional rights.

- (9) Captain Mano was only able to deny torturing and choking the plaintiff whereas the plaintiff was able to detail all the events leading to the tortures and precisely how the torture and choking occurred. He could not remember precisely what other places he had visited with the plaintiff after further investigations had directed them. The plaintiff gives finer details about what happened to him each time he was booked out of custody for further investigations.
- [110] The conduct of the police, especially Captain Mano is startling. He continues to have the plaintiff interviewed even after they had received expert opinion from a police psychologist that the plaintiff knows nothing. They further take him for pointings-out.
- [111] He testified that Inspector Molefe was asked by him to take the plaintiff to Temba Magistrate in stark contrast of what appears in the said statement Exhibit "API" that he was taken there by Sello Nick Pitsoane of Phokeng Serious & Violent Crime Unit inscribed by Magistrate EST. MHLONGO. His testimony materially contradicts that of Inspector Molefe who testified that the plaintiff was taken to Magistrate by Inspector Motlhabane who is attached to the Detective Section at Temba Police Station, who was not part of the task team.
- [112] In the face of such a material contradiction Inspector Motlhabane was not called to clear the contradiction. The police could not explain why the learned Magistrate would write that the plaintiff was brought to his office by Pitsoane if he had been brought there by Inspector Motlhabane. Moreover, the defendant had agreed with the plaintiff that the learned Magistrate should not be called because the contents of the statement are not in dispute.
- [113] The only inference from such a material contradiction in contrast to an objective inscription in the statement by the magistrate is that the police were deliberately misleading the court. If, indeed, there were a genuine error on their part, they would have asked the defendant to call Inspector Motlhabane to clarify and dispel the contradiction.
- [114] The conduct of the police is strange. They interview the plaintiff about the whereabouts of Constable Rasuge and he denies any knowledge. They continue to counter his denials with information from Nkuna and informers with no information under oath. The first interview lasts for one to two hours. Captain Mano testified that they were looking for the truth.
- [115] How did the police know what was the truth between what was told by Nkuna and their informers and the plaintiff? This they did not tell the court. They request expert opinion from a police superintendent who is a psychologist. He informs them that the plaintiff does not know anything about the crimes. Added to the above, they were in possession of a statement made to a Magistrate where the plaintiff denied any knowledge of the whereabouts of Constable Rasuge.
- [116] Despite all these, the police continue to interview the plaintiff until, as they say, they got the truth. In an about-turn the plaintiff becomes cooperative and tells them where the body was dumped and where the parts cut from the body were placed. Captain Mano and Superintendent Pitsoane fail to tell the court why the plaintiff who initially told them he did

not know the whereabouts of the body has suddenly admitted to knowing the whereabouts of the body. They fail to tell the court what caused him to change his mid so drastically to incriminate himself with such serious crimes before them but fails to incriminate himself before the Magistrate. The plaintiff tells the court in detail why he had to incriminate himself before the police because he was tortured and choked with a “natsak” and electric devices.

- [117] The evidence tendered by the police officers on behalf of the defendant is devoid of all truth. On the other hand the version of the plaintiff outweighs that of the defendant in credibility and probability. The evidence of Inspector Molefe relates to the application for a warrant of arrest and the person who had escorted the plaintiff to Temba Magistrate for a statement. His evidence has no self-contradictions but contradicts that of the Captain Mano on the aspect of who had taken the plaintiff to the Magistrate in Temba to make a statement.
- [118] I need to remark about the reliability of the evidence of Inspector Molefe as against that of Captain Mano and Superintendent Pitsoane. His evidence was in no way exculpatory about his involvement in the task team. He was not implicated by the plaintiff in any wrong-doing, torture or shock. His testimony did not protect any member of the task team nor did it protect him. He made concessions without being pressurised by the cross-examiner where concessions were due. I have no reason to question his testimony that he had told the truth.
- [119] I now turn to deal with the alleged kidnapping of the plaintiff next to Sunnyside Police Station. The defendant could not controvert the plaintiff's evidence on this aspect and the subsequent conduct of those who had kidnapped him. The best the defendant could do was for counsel to submit that the perpetrators cannot be identified and tender submissions of bare denials.
- [120] The court relies on the evidence of the plaintiff and that of Mr Malobola to infer from it whether the perpetrators were police or not. The alleged kidnappers did the following:
- (a) they confronted the plaintiff and investigated the disappearance of Constable Francis Rasuge;
 - (b) they used violence, torture and shock on the plaintiff in seeking to know about the whereabouts of Constable Francis Rasuge;
 - (c) they told the plaintiff that they were Gauteng Police;
 - (d) they locked up the plaintiff in a police cell in a police station in Gauteng, asking him to assume a false name and surname. The plaintiff obliged and the alleged kidnappers registered him at the police station as Isaac Lebelo;
 - (e) they returned from a night search in the Bosplaas bush in the early hours of the morning to rest in the Hammanskraal Police Station without being denied entry by the police into the station's premises;

(f) the same team had visited Mr Malobola at his home and had introduced themselves to him as policemen;

(g) the same team has beaten and tortured Mr Malobola in a similar manner as it did to the plaintiff.

[121] It is clear that this team could not have been thugs impersonating the police. They had access to the occurrence book in a Gauteng Police Station where they had registered Isaac Lebelo as the plaintiff and that entry was discovered to the plaintiff. Whilst in the Bosplaas bush they contacted Captain Mano by cellphone (but Captain Mano denied this). They also called themselves by their ranks in the bush and were obedient to a person by the title of a captain.

[122] The only logical inference to be drawn from the above is that the alleged kidnappers were police officers. What has happened to the plaintiff is regrettable in that the police who are in duty bound to protect the plaintiff had instead inflicted pain and suffering in a humiliating fashion. The photo album depicting handcuff injuries and other injuries to the face, body and hands of the plaintiff are a despicable spectacle of cruelty offending against our constitutional values SECTION 37 (5) (c), ARTICLES 3 and 5 of the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. Any conduct contravening the conventions is a crime in terms of ARTICLE 4 of "CAT".

APPLICATION OF THE LAW:

[123] It is abundantly evident that when Inspector Molefe applied for a warrant for the arrest of the plaintiff the information he relied on was not taken on oath to found a reasonable suspicion that a person sought to be arrested had committed the alleged offences.

Vide: Section 43 (1) (c) of Act 51 of 1977 (supra).

[124] Both Captain Mano and Superintendent Pitsoane relied on the alleged self-incriminating information of the plaintiff about the

disappearance of Constable Francis Rasuge when he had not been warned that what he said before them may later be used against him in a court of law. Without having complied with Section 35 (3)(j) of the Constitution the information obtained from the plaintiff is not admissible in this trial. The inferences to be

drawn from the conduct of the Gauteng police are consistent with the rules of logic enunciated in RV Blom (supra).

[125] The prohibition of torture and cruelty is embodied in the Constitution, the Convention Against Torture and the European Convention on Human Rights. Whilst I accept the plaintiff's version and that of Mr Malobola, I reject as false the evidence of both Captain Mano and Superintendent Pitsoane relating to torture for the reasons already enunciated above and for not following the dictates of the constitution and the other two conventions.

The application of the principles in all authorities I have cited above are relevant in the consideration of the totality of evidence before court.

[126] The police officers who had investigated the cases against the plaintiff and had dealings with him did not conduct themselves in terms of the law, in particular the supreme law of this country. Whilst so acting within the course and scope of their employment with the defendant they flouted the law. They are accountable for their actions and the defendant is vicariously liable in the circumstances.

[127] In the ultimate analysis the defendant's case dazzled dismally from claim 2 to claim 3, and finally bowed out to the plaintiff's

case leaving the court with no alternative but to find in favour of the plaintiff on both claims with costs.

COSTS:

[128] As a general rule the successful party should be awarded costs. But it is trite that the trial court as the court of the first instance has a judicial discretion to award costs.

Vide: FRIPP V GIBBON & CO 1913 AD 354 at 357.

[129] In casu, claim 3 relating to assault is complex in that the alleged police involved are unknown to the plaintiff regard being had to the

circumstances relating to the alleged kidnapping, the assailants calling themselves the cousins of Constable Rasuge, and the assailants not introducing themselves by names to the plaintiff. The plaintiff did not have the opportunity to observe his assailants sufficiently.

[130] The court had to rely on the evidence of the plaintiff alone together with other circumstances like: (a) the assailants using a police station cell to detain the plaintiff in Johannesburg and registering him in a police station register as Isaac Lebelo. That register had been discovered by the defendant to the plaintiff.

[131] The evidence of the plaintiff spanning over two days covered both claims simultaneously. The evidence on claim 3 had to lay a proper basis for inferences because the kidnappers were not directly identified. This claim was complex. The plaintiff's employment of two counsel was justified in this case. On the facts herein the court is competent to order that both counsel for the plaintiff be paid such costs as argued for.

ORDER:

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

(a) Claim 2: malicious proceedings; and

(b) Claim 3: assault

succeed with costs including the costs of 2 counsel.

K MAKHAFOLA

ACTING JUDGE OF THE HIGH COURT

Advocate for Applicant: Adv. N van Nieuwenhuizen & Adv. DE Meyer

Instructed by: Noko Phago & Associates

Advocate for Respondent: Adv. M Phago

Instructed by: State Attorney: S Botes

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