

SOUTH AFRICA / JUDGMENT

Mzingeli and Others v Minister of Police (139/2015) [2019]

ZAECMHC 68 (12 November 2019)

[2019] ZAECMHC 68

COURT

Eastern Cape High Court, Mthatha

BEFORE

Zono

CASE / FILE NUMBER

139/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE LOCAL DIVISION: MTHATHA]

CASE

NO. 139/2015

Heard on:

15 October 2019

Delivered on: 12

November 2019

In

the matter between:

XOLILE

MZINGELI

1st

Plaintiff

LUTHANDO

NDAYI

2nd

Plaintiff

MPUMEZO

XABADIYA

3rd

Plaintiff

and

MINISTER

OF

POLICE

Defendant

JUDGMENT**ZONO AJ**

- [1] The plaintiffs instituted action for damages suffered as a result of unlawful detention against the defendant. The action is defended by the defendant.
- [2] Pre -trial minute demonstrates that the parties agreed that on 15 October 2019 the trial will proceed on both merits and quantum as the special plea relating to non- compliance with Section 3 of Act 40 of 2002 has been withdrawn.
- [3] On 15 October 2019, the date of trial, parties agreed to dispose of the issue of liability and postponed the issue of quantum for possible argument on 16 October 2019. The substance of the court order is as follows:

BY AGREEMENT BETWEEN PARTIES IT IS

“1. Ordered that the:

1.1 Issue of liability and quantum are separated;

1.2 Defendant is found liable for the :

1.2.1 First and Third Plaintiffs’ unlawful detention from 14 September 2010 to 24 July 2014; and

1.2.2 Second Plaintiff’s detention from 13 September 2009 to 24 July 2014.

1.3 Defendant shall pay costs consequent upon the determination of the issues of liability;

2. Recorded that:

2.1 The defendants’ legal representatives shall seek instructions for the settlement of quantum;

2.2 In the event of the issue of quantum not being settled, the parties shall argue this aspect of the case at 14h15 on Wednesday, 16 October 2019 or so soon thereafter as the matter may be called.”

I granted this order.

- [4] On 16 October 2019 the action presented itself in the form of a stated case in terms of which parties agreed on various aspects of the case. Parties’ contentions were defined together with the relief the respective parties sought. In what follows I set out agreed facts giving rise to the claim, dispute, parties’ contentions and relief sought as set out in the stated case.
- [5] Paragraphs 3 to 18 of the stated case form the substance of what sought to be decided and is as follows:

AGREED FACTS GIVING RISE TO THE CLAIM

“3. The plaintiffs were:

3.1 Arrested on 13 September 2009.

3.2 Detained on 13 September 2009.

on charges of housebreaking, theft and murder.

4. The first and third plaintiffs were:

4.1 Found guilty on charges of housebreaking, theft on 17 September 2009.

4.2 Sentenced to 12 (twelve) months imprisonment on 17 September 2009.

5. On 14 September 2010, at the end of their period of imprisonment for 12 (twelve) months, the first and third plaintiffs:

5.1 Were remanded in custody and not released

5.2 Faced charges of murder together with the second plaintiff.

6. The magistrate before whom the plaintiffs allegedly confessed to murder recorded in the confessions that the plaintiffs had (i) informed him that they were confessing because they had been assaulted by the police, (ii) had been tortured by the police, and thus, (iii) had been coerced to confess to the crime of murder. Copies of the confessions in issue and/or parts thereof will be placed before court.

7. On 24 July 2014, the charges of murder were withdrawn against all the plaintiffs.

8. On 02 December 2014, the plaintiff's wrote a statutory letter to the defendant in terms of which the latter was notified that:

8.1 The plaintiffs had been unlawfully arrested in September 2009.

8.2 There had been no reasonable or probable cause for the arrest and detention.

8.3 The plaintiffs had been assaulted and tortured during the arrest found guilty, on 17 September 2009.

8.4 The plaintiffs demand payment of R27 000 000-00 without payment of which they would institute action for the recovery of damages.

8.5 The letter of demand attracted no response.

9. On 24 July 2014, the charges of murder were withdrawn against all the plaintiffs.

10. The special plea of:

10.1 Prescription was disposed of by the Court on 10 December 2018.

10.2 Non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act No. 40 of 2002) is no longer in issue, the plaintiff's having produced proof of compliance to the defendant's satisfaction.

11. The issue of liability was settled on 15 October 2019 when it was ordered that the:

11.1. Issue of liability and quantum are separated.

11.2. Defendant is found liable for the:

11.2.1. first and third plaintiff's unlawful detention from 14 September 2010 to 24 July 2014; and

11.2.2. second plaintiff's detention from 13 September 2009 to 24 July 2014.

11.3. Defendant shall pay costs consequent upon the determination of the issue of liability.

12. In order of 15 October 2019, it was further recorded that:

12.1. The defendant's legal representatives shall seek instructions for the settlement of quantum.

12.2. In the event of the issue of quantum not being settled, the parties shall argue this aspect of the case at 14h15 on Wednesday, 16 October 2019 or so soon thereafter as the matter may be called.

13. The parties have not settled the issue of quantum, each party contending as the respective parties do in paragraph 14, below.

THE DISPUTE

14. The matter is in Court for the determination of the issue of quantum.

THE PARTIES' CONTENTIONS

15. The plaintiff contends that:

15.1. The detention injured their feeling and deprived them of liberty, a right with which each one was born.

15.2. Notwithstanding their knowledge of acceptable means of procuring evidence, the police assaulted the plaintiff in order to procure confessions from them.

15.3. When they were tortured in order to make confessions, they were assaulted whilst hand cuffed, sometimes a plastic was put around their heads to the neck thus depriving them of the natural ability to breath. They were hit by a baton and sometimes their heads drown on a bucket of water so they could choke from breathing in water. All these barbaric acts, led them into confessing to the crime of murder.

15.4. Whilst in detention:

15.4.1 they were on occasion assaulted by the other inmates with the view to force them to join prison gangs.

15.4.2. episodes of sodomy were a usual occurrence.

15.5. For the whole time the plaintiffs remained in unlawful detention, the police:

15.5.1. had an opportunity to disclose to the authorities the callousness of their conduct, which disclosure would have led to the plaintiffs being released from detention, they did not;

15.5.2. did not take any steps to reveal their conduct to the court during the very many appearance that the plaintiffs made before being released, this in their capacity as officers of the law.

15.6. Took away from them a period of more than 4 (four) years of their lives.

15.7. The conditions in detention were inhumane, degrading and unhygienic.

15.8. The plaintiffs are entitled to an award for general damages which will much needed solatium for their injured feelings in the sum between R3 500 000-00 (three million, five hundred thousand rand) and the sum R4 500 000-00 (four million, five hundred thousand rand).

16. The defendant contends that each plaintiff is entitled to an award for general damages in the sum of R1000 000-00 (one million rand).

RELIEF SOUGHT

17. The:

17.1 First plaintiff prays for judgment in the sum of R3 500 000-00 (Three million, five hundred thousand).

17.2. Second plaintiff prays for judgment in the sum of R4 500 000-00 (Four million, five hundred thousand).

17.3 Third plaintiff prays for judgment in the sum of R3 500 000-00 (Three million, five hundred thousand)."

18. The defendant prays for an award to made to each plaintiff in the sum of R1 000 000-00 (one million rand).

[8] The recapitulation of the agreed facts is that the first and third plaintiffs were unlawfully detained from the 14 September 2010 to 24 July 2014 and whereas the second plaintiff was unlawfully detained from 13 September 2009 to 24 July 2014. This agreement accords with the court order dated 15 October 2019. When this court exercises its discretion it will exercise same around the aforementioned periods. The agreed facts are that the plaintiffs informed the magistrates before whom confessions were made that they were confessing because they had been assaulted by the police; that they had been tortured by the police and lastly that they had been coerced to confess to the crime of murder. It is this crime of murder that was withdrawn on 24 July 2014.

[9] The plaintiffs contend that the police assaulted and tortured them in order to procure confessions from them. Not only the police assaulted the plaintiffs, they were also assaulted by other inmates with a view to force them to join prison gangs and were often sodomised. For the entire time the plaintiffs remained in detention they were subjected to inhumane,

degrading and unhygienic conditions. The nature of torture the plaintiffs experienced is described as follows: “they were assaulted whilst handcuffed; sometimes a plastic was put around their heads to the neck thus depriving them of the natural ability to breathe. They were hit by a baton and sometimes their heads down on a bucket of water so they could choke from breathing in water. All those barbaric acts, led them into confessing to the crime of murder.” The defendant does not contend otherwise especially with regard to the picture given by the plaintiffs. The only contention

given by the defendant is with regard to the amount to be awarded which is at variance with what the plaintiffs seek.

- [10] It is not stated by the parties for how long the plaintiffs were subjected to assault, torture and sodomy whilst they were in detention. It is not unreasonable to infer that those conditions or experiences befell plaintiffs for the entire time they had been there in custody or detention. The court may draw inferences from agreed facts.[1] If the magistrate recorded what the plaintiffs told him/her about cruelty they were subjected to and the magistrate did not leave a room that there may be times during their incarceration where they were not subjected to these cruel acts, it is probable that they suffered in the hands of the police for as long as what was sought to be achieved was not achieved by the police. It is reasonable to infer that the cruelty continued until the confessions were procured. It is possible that the police might have been annoyed by the revelation by the plaintiffs to the magistrate and became even more harsher to them.
- [11] This case involves plaintiffs’ rights to human dignity, freedom and security and, a number of rights enshrined in Section 35 of the constitution. Right to privacy is incidental to all those rights. This is a typical case of a gruesome violation of the rights aforementioned.[2]
- [12] In *Minister of Safety and Security v Tyulu* 2009(2) SA 282 (SCA) Para 26 Boiselo AJA had an occasion of saying “in the assessment of damages for unlawful arrest and detention it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feelings. It is therefore critical that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.” It admits of no doubt that there must be an equilibrium and consensus between the injury inflicted and the damages to be awarded.
- [13] In *Minister of Safety and Security v Seymour* 2006(6) SA 320 (SCA) Para 20 Nugent JA held that “money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have

referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.” What the plaintiffs lost can never be restored and cannot be measured in monetary terms.

- [14] In the subject *Van Der Byl* AJ was not quiet. In the matter of *Zealand v Minister of Justice and Constitutional Development and Another* 2009 JOL 23423 (SE) Para13, the following was said “if there is any doubt in one’s mind particularly, the suffering and anguish a person so imprisoned, must endure, one can only cast your mind back in your life over such a period and consider how much has happened to you in those years and how long ago it has seemed. In the words of Holmes JA in *S VV* 1972(3) SA 61(AD) at 614G:.....enlivened by domestic happiness and the free pursuit of their avocationsno such ameliorations attend the slow tread of years when you are locked up.”

The following passage from the Judgment in *S v Martins* 1996(2) ACR 378 (W) at 385I – 386A is also instructive:

“To have freedom restricted, especially if there is confinement to a small area is in itself a severe punishment. A long period of such restriction will to all but the most hardened increasingly border on earthly hell. To have to endure that in the company of unpleasant character.... Personally, though this can be no more than my own view, I think that no life at all can be less harsh than a life without any positive quality at all, but replete with enumerable days each brimming with the new day’s repetition of tragedy, boredom, tensions and reminders that you will at all times be indigestible to the stomach of the community.”

- [15] In *Vuyani Gwebindlala v Minister of Safety and Security*[3] the plaintiff claimed damages for deprivation of liberty, humiliation, degradation and contumelia. The plaintiff is an attorney who was arrested at the offices of his client in Idutywa when he was consulting with his client. He was kept under a watchful eye of the members of the Public Order Police Services (POPS) for four hours. The court, after examining some authorities awarded an amount of R55 000-00.
- [16] In *Akhona Penelope Mahlasela v Minister of Safety and Security and Another* (unreported) Case No. 72/2013 Eastern Cape High Court, Mthatha, delivered on 9 June 2016, the plaintiff sued the defendant for unlawful arrest and detention and assault. The claim for assault was dismissed. The detention of the plaintiff endured for (11) eleven days. This court, after examination of other cases awarded an amount of R200 000-00 for plaintiff’s detention. The degrading nature of the detention appears to have weighed in the Judge mind when considering the amount awarded.

- [17] In the full court of this division in the matter of *Mtola v Minister of Police* (CA23/16) [2017] ZAECHMC 56 (29 June 2017) an amount of R125000-00 was awarded to the plaintiff for arrest and detention for a period of 5 days. Humiliation suffered by the plaintiff, deprivation of liberty for 5 days, unhygienic conditions in the police cells and the fact that the plaintiff was separated from his family and friends for that period were taken into account.
- [18] In the matter of *Tate v Minister of Police and Another* (1452/2015) ZAECHMC 30, 27 June 2018 this court awarded an amount of R75000-00 for plaintiff's detention for a period of three days. In its application of mind to the case the court found that an amount of R25000-00 is appropriate for a day. A respect for human rights was a major consideration by the court.
- [19] In *Mgele v Minister of Police and Others* (1257/2011)[2015] ZAECHMC 70 (6 October 2015) in respect of detention, which endured for four days this court awarded an amount of R150 000-00. Conditions in the cells were described as cold with cement floor, smelly latrines and infested with lice. The plaintiff was bitten by the lice and all of these were taken into account.
- [20] In KwaZulu Natal, the same subject was also considered. In *SS Mkhize v Minister of Justice and Constitutional Development* [2014] ZAKZPHC Case No. 10386/2009 delivered on 14 March 2014 (unreported), the plaintiff was incarcerated for a period of 27 months (two years three months) and the court awarded an amount of R2000 000-00 for general damages. What appear to have weighed heavily in the mind of the court are the awards in other cases. The court relied on those judgments as a useful guide to arrive at a fair and reasonable compensation.
- [21] During hearing of this matter both parties referred me to the case of *SL and Another v Minister of Police* (2143/2016)[2018] ZAKZPHC 33 for different reasons. According to the plaintiff this case can be used to provide a useful guide to the direction this case should take. Defendant's attempts were purely to distinguish this case from the merits of that case. Quite apart from the period that the plaintiffs in this case spent in detention which is less than the period spent by plaintiffs in that case, I see numerous similarities between the two cases. The major difference between the two cases is that the plaintiffs in that case were deprived of their freedom and liberty for a period of 6 years and 11 months. It is noteworthy that the conditions experienced by the plaintiffs in that case are substantially similar to what the plaintiffs herein were subjected to. However, it was submitted on behalf of the plaintiffs that the conditions experienced by the plaintiffs herein were even more egregious when compared to the ones experienced by the plaintiffs in that case.
- [22] In that case, as in here, both plaintiffs were subjected to most humiliating, degrading and dehumanising treatment at the hands of the police. It is common cause herein that the plaintiffs were severely assaulted and tortured during detention. The magistrate before whom confessions were made recorded in the confessions that the plaintiffs informed him that they were coerced to confess by means of assault and torture. It was submitted on behalf of the plaintiffs that the very reason for their arrest was to extract confessions in a

manner that is cruel.

- [23] In that case, both plaintiffs were assaulted throughout their detention period. In this case it does not appear that there was a stage that they were not assaulted. The following instruments were used to assault plaintiffs herein: handcuffs, baton, a plastics glove that were put around their heads to the neck merely to suffocate them, their heads would be drown on a bucket of water so they could choke from breathing in water.
- [24] While in detention, plaintiffs in that case, as in here, became victims of gangsterism. Unlike in that case where plaintiffs were subjected to threats of assault and reprisals by other inmates with a view to force them to join prison gangs, plaintiffs herein were actually assaulted. Unlike in that case, plaintiffs herein suffered constant episodes of sodomy while in detention. Unhygienic conditions in the detention, is what was commonly suffered by plaintiffs herein and plaintiffs in that case. I am alive to the distinction to which my mind was drawn by defendant's counsel about the fact that in that case plaintiffs' bodies were covered in tattoos while they were in detention. Much as it is the distinction that marks this case that plaintiffs herein suffered episodes of sodomy, use of water bucket to drown and choke plaintiffs, plastics were used to suffocate plaintiffs etc. Nevertheless I find that the conditions suffered by the plaintiffs in both cases are substantially the same. The only major distinction between the two cases is that of a period spent by plaintiffs in detention. However, this case like many other cases referred to above will be used as a useful guide for determining the award of damages in this case.
- [25] These facts reminds me of remarks made by Broome JP in the matter of *May v Union Government* 1954 (3) SA 120(N) et 130E "our law has always regarded the deprivation of personal liberty as a serious injury, and where the deprivation carries with it the imputation of criminal conduct of which there was no reasonable suspicion the injury is very serious indeed." The assault committed by the police to the plaintiff, exacerbates the seriousness of injury. A fair and reasonable compensation will be what is commensurate to the injury suffered. The amount must measure up with injury sustained.
- [26] I cannot disregard the circumstances under which the deprivation of liberty occurred, the presence of improper motive or malice on the part of the defendant.[4] It is not in dispute that the plaintiffs were respectively arrested and detained and caused to suffer in the manner they did solely for the police to procure confessions. The police invoked their brute and cruelty solely to victimise plaintiffs and most importantly with the aim to procure confessions on a crime of murder, when they knew perfectly well that plaintiffs have not committed the crime. The intent of the police was so malicious. The manner in which this case has been handled by the defendants shows no remorse for what they did to the plaintiffs. The plaintiffs deserve satisfaction for what they had been put through by the defendant. The above mentioned authors at Page 130-131 had this to say "if all the requirements for liability are met the person whose liberty was wrongfully restrained may claim damages aimed at providing

personal satisfaction.....factors which play a role in the assessment of the amount of damages are the following: the circumstances under which the deprivation of liberty occurred; the presence or absence of malice or an improper motive on the part of the defendant; the duration of the deprivation of liberty; and whether the defendant apologises or provides a reasonable explanation for what happened. In addition, awards in previous comparable judgments.”

- [27] The fact that the charges were withdrawn against the plaintiffs, obviously after the magistrate had recorded how inhumane plaintiffs were treated by the police, makes facts of this case to be more egregious. Had the magistrate not recorded truth about plaintiffs’ detention and the manner in which they were treated by the police, I cannot stop to imagine what could have happened. The plaintiffs could have been convicted of a crime of murder they did not commit. The aim of the police to force the plaintiffs to confess to the crime they did not commit was not only a conviction, but also a heavy sentence which would have costed them life and rob their families valuable members. Each time the plaintiffs were assaulted and tortured (forced to confess) they were reminded of a possibility that they would stay in jail for life and never see their families and friends again. To this end, torture was not only physical but also psychological with possible and attendant sequelae. The second thing that could have happened had the magistrate not disclosed the vile deeds of the police is that, they could have stayed longer in detention and even face possible damages which include death and permanent injuries caused by their co-inmates. I commend them for being brave and not succumbing to the pressures exerted on them.
- [28] The police are placed by the constitution and the legislation on the position of trust. The police has a fiduciary duty to protect the members of the public. Facts of this case demonstrate that police have broken that relationship. I will now turn to examine provisions of Section 205(3) of the Constitution and thereafter the Preamble and Section 13 of the South African Police Service Act 68 of 1995. I reiterate that trust is a substratum upon which the relationship between the police service and citizens is built. Conduct like these inspire citizens to take law into their own hands. A police service that is not committed to its duty of protecting its citizens encourages lawlessness. It becomes worse when they are involved in the abuse of the citizens and in criminal activities like brutal assault and intimidation.
- [29] Section 205(3) of the Constitution provides that “the objects of the police service are to prevent, combat, and investigate crime, maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.” The police in this instance demonstrably failed to keep up to the standard the constitution set for them. Their conduct is an antithesis of what the constitution, which is the supreme law of the land, demands of them. Instead of preventing and combating the crime, they committed it. Instead of investigating the crime of murder allegedly committed, the police committed further crimes which would require them to be investigated. Instead of protecting and securing plaintiffs as inhabitants of the Republic, they exposed them to many dangers of prison cells and even perpetrated crime against them, which clearly demonstrates that they did not uphold the law. To this end, the police violated the constitution.

[30] The South African Police Service Act 68 of 1995 (the Act) was enacted to give effect to the provisions of the constitution. The Act in its preamble provides, inter alia, that: “whereas there is a need to provide a police service throughout the national territory to –

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution.....” I have already dealt with how the conduct of the police failed to ensure safety and security of the plaintiffs when dealing with

Section 205(3) of the Constitution.

[31] With regard to police failure to uphold and safeguard plaintiffs’ fundamental rights guaranteed by Chapter 3 of the Constitution, I wish to deal with three sections in the constitution which were obviously violated by the conduct of the police. Section 12 that deals with freedom and security of persons. Section 10 guarantees a right to dignity and Section 35 guarantees rights of the arrested, detained and accused persons. I wish to further deal with the heightened responsibility of the state, of which the police service is the part, towards the Bill of Rights in Chapter 2 of the Constitution.

[32] Section 7(1) and (2) of the Constitution provide as follows:

“(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

Section 8 (1) of the Constitution further emphasizes that all organs of state, which includes the police service are bound by the Bill of Rights. States duty to respect and protect rights enshrines the constitution permeates every provision of the constitution. The fact that this duty is mentioned everywhere in the constitution underscores the importance of the responsibility.

[33] Section 10 of the Constitution provides that “everyone has inherent dignity and the right to have their dignity respected and protected.” This is a universal right enforceable against any person including the police. It goes without saying that this right was disdainfully violated by the police. Section 12(1) of the Constitution provides that “everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b)
- (c) to be free from all forms of violence from either public or private services;
- (d) not to be tortured in any way ;

- (e) not to be treated or punished in a cruel, inhuman or degrading way.” It is without just cause to detain a person solely to procure confession and when your plan is exposed by the magistrate you abruptly withdraw charges. It is inexcusable for the police to treat plaintiffs in the manner they did and that cannot be tolerated in a civilised society like ours, founded on democratic values of human dignity, equality and freedom.[5] The police, the repository of power to protect, violated the fundamental rights.
- [34] Section 13(3) of the Act enjoins a member of SAPS to perform his or her duties in a manner that is reasonable. It is not at all reasonable to keep in detention people when you know perfectly well that they did nothing. This explains how malicious, brutal and reckless the police were when dealing with plaintiffs, a factor I cannot ignore when determining quantum in this matter. The prosecutor should have been told by the police very early that there is no evidence so that a proper decision is made and not wait for your shenanigans to come to bear in purported confessions.
- [35] In *Botha v Minister of Safety and Security* and *January v Minister of Safety and Security* 2012(1) SACR 305 (ECP) Para 30 this duty was aptly articulated as follows: “Where there are no facts which justify further detention of a person, this should be placed by the investigator before the prosecutor of the case and law casts an obligation on the police official to do so.” In Paragraph 20 it was held that “what is meant by Section 13 of the SAPS Act above is that all police officers must act in accordance with the requirements of the constitution and in doing so must have regard to, particularly, the fundamental rights of every person they are dealing with in the course of their duties.”
- [36] The upshot of this is that the conduct of the police in this case was grossly reckless, malicious and brutal and it should be condemned in strongest terms possible. They should have exercised diligence and tread carefully when dealing with the freedom of persons.
- [37] The stated case and the court order envisage a claim by three plaintiffs against defendant. The parties agreed on a judgment in favour of three plaintiffs, namely, Xolile Mzingeli, Mpumezo Xabadiya and Luthando Ndayi. On 15 October 2019, the parties agreed on an order finding defendant liable for unlawful detention of three plaintiffs. The relief sought by the plaintiffs in the stated case is as follows:

For the first plaintiff:

R3500 000-00

For the second plaintiff: R4500 000-00

For the third plaintiff:

R3500 000-00

The defendant contends that, each plaintiff is entitled to an award of damages in the sum of R1000 000-00 although in the Heads of Argument and during oral argument it was submitted on behalf of the defendant that the second plaintiff is entitled to R1200 000-00. As things stand the parties are poles apart in respect of the amounts to be awarded as damages to plaintiffs.

[38] Mr Pitt submitted that the relief sought in the case is substantially different from the one sought in the particulars of claim. Particulars of claims are an important part of Combined Summons. Combined Summons is a vehicle through which these proceedings were brought. In cases of a disputed issue, so he submitted, it is obligatory to resort to the pleadings.

[39] A court that is called upon to decide a special case under Rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide but did not or that it may wish the parties had included as one of the questions of law they had submitted to it to decide but did not. It would, therefore, be fundamentally unfair to at least one of the parties but, possibly, to both if, in a special case, the court, were to change the question to be decided. It would be both a serious misdirection and a gross irregularity for a court to do so.[6] I can confidently find that I am confined within the four corners of the stated case and I will decide the dispute and the contentions raised therein and decide the merit or de merit of those contentions.

[40] It is in Paragraph 14 of the agreed statement or stated case that the parties specified what the dispute is the court is called upon to decide. There the parties wrote:

“14 The matter is in court for the determination of the issue of quantum.”

In Paragraph 15 thereof the parties set out their contentions. In their contentions they point out to different figures which this court must consider for and in favour plaintiffs. It is in the parties' minds that all three plaintiffs must be compensated but they do not agree on the amounts. I am called upon and I set out to decide this case on the basis of the contended amounts. It is from the contentions of the parties that the question of law sought to be decided emerges.[7]

[41] What cannot be ignored is the reference made in the stated case by the parties to the court order granted by this court on 15 October

2019. I had had sight of the court order and it was granted by consent. The court order found the defendant liable for first and third plaintiffs' unlawful detention from 14 September 2010 to 24 July 2014, and second plaintiff's detention from 13 September 2009 to 24 July 2014. It is therefore plain that the parties call upon this court to consider a fair and reasonable amount each plaintiff is entitled to in respect of those periods set out in the stated case. In the stated case there is no suggestion that I must not consider when deciding quantum of damages, the agreed facts and contentions set out therein, but only prayers in the particulars of claim. I find that oral argument opportunistic as it is not even supported by the written submissions prepared on behalf of the defendant. I regard it as an afterthought.

- [42] In addition to the authorities I quoted above relating to the quantum I considered as well the case of *Siyaxolisa Ntondini v Minister of Police Eastern Cape High Court, Mthatha*, Case No. 2629/2016 delivered on 28 March 2019 (unreported) where the plaintiff instituted proceedings for his unlawful arrest and detention and his detention lasted for six days and an amount of R325000-00 was awarded.
- [43] On the conspectus of the agreed facts, parties' contentions and relief sought in the stated case coupled with the authorities I have considered on the subject, I find as follows: in respect of the first and third plaintiffs an amount of R3000 000-00 for each as fair and reasonable award, and in respect of the second plaintiff an amount of R4000 000-00 as a fair and reasonable amount in the circumstances.
- [45] With regard to costs, the defendant tendered or at least did not oppose costs of suit such to include costs consequent upon employment of two counsels. The defendant did not regard as unnecessary or wrong for plaintiffs to have employed two counsels. A number of authorities were quoted not only by the plaintiffs, by the defendant too. That shows that the matter is complex and needed a lot of attention in terms of legal authorities. The amounts or figures involved in this matter are substantially huge and require a clear articulation. There are no many decided cases where plaintiffs have been incarcerated for such a long period of time. This case did not enjoy much benefit of precedence. In the circumstances I find costs of two counsels appropriate.
- [46] In the result I make the following order:
- (I) The defendant is liable for the unlawful detention of the first plaintiff in the amount of R3000 000-00 (Three Million Rand);
- (II) The defendant is liable for unlawful detention of the second plaintiff in the amount of R4000 000-00 (Four Million Rand);
- (III) The defendant is liable for unlawful detention of the third plaintiff in the amount of R3000 000-00 (Three Million Rand);
- (IV) The defendant shall pay costs of suit, such costs to include costs consequent upon employment of two counsels.

A.S.ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES

For the Plaintiffs:

Adv. AM Bodlani and Adv. N Klaasmani

Instructed by:

T. Noah & Sons

MTHATHA

For the defendant:

Adv. DV Pitt

Instructed by:

The State Attorney

- [1] Plit v Imperial Bank Ltd 2007(1) SA 315 SCA at 318 – 319; Moni v Mutual & Federal Versekeringsmaatskappy 1992(2) SA 600 at 604G – 605A; Rule 33(3) of the Uniform Rules.
- [2] Section 10, 12, 14 and 35 of the constitution.
- [3] (unreported) Case No. 735/2002, Transkie Division (as then it was) now Eastern Cape High Court, Mthatha delivered on 20 August 2004.
- [4] Neethling's Law of personality by Neethling, Potlatch and Visser, 1995 Page 130-131.
- [5] Section 1(a) of the Constitution.
- [6] Mtokonya v Minister of Police 2018 (5) SA 22 (CC) Para 15-16; Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum and Another 2016 (1) SA 621(CC) Page 60-63;
- [7] Mtokonya v Minister of Police (supra) Para 18

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