IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2012.05.03
DATE

SIGNATURE

CASE NUMBER: 69480/09
DATE: 3 August 2012

CHEAZER BONNY NDLAZI — PLAINTIFF

V

MINISTER OF SAFETY AND SECURITY — DEFENDANT

JUDGMENT

MABUSE J:

1. Three matters were brought to me to be heard simultaneously. These matters were so heard because they arose out of the same set of facts. In all the three matters, the first defendant is the Minister of Safety and Security and the second defendant is a member of the South African Police Services. The first matter that this court heard was matter number 69480/09 in which the plaintiff is Cheazer Bonny Ndlazi. This judgment therefore relates to matter no. 69480/09. I will continue in this judgment to refer to the said Cheazer Bonny Ndlazi as the plaintiff. By the summons dated 10 November 2009 and issued by the Registrar of this court on 11 November 2009, the

plaintiff claims from the defendant payment of the sum of R250 000.00 and certain ancillary relief, for arrest, detention and assault which involved torture.

2. The provenance of the plaintiff's cause of action is an incident that took place on 29 January 2009 when between 09h00 and 09h30 she was taken from her house NO. 3432, Kanyamazane, in the Province of Mpumalanga to a nearby bush where she was held captive against her will, accused of having killed her husband, the late Jimmy Mohlala, in this lifetime the speaker of the Mpumulanga Provincial Legislature, and assaulted in various methods by the police who at the time were acting within their course and scope of employment with the defendant.

3. The whole incident took place in the following manner. On 4 January 2009, she and the plaintiff were at home when her husband was assassinated by unidentified gunmen. In their investigations of the murder, the police, in particular one Mr.Mthombeni, came to her on 5 January 2009 looking for information that would have assisted him to identify the killers. She was asked the identity of the killers and she told the police that she did not know them. The reason she gave to the police was that at the time her husband was shot she was in the upper rooms of their double-storeyed house and could therefore not have seen what happened to the deceased who was assassinated on the ground level of the house.

4. On 28 January 2009 she received a call from the said Mr.Mthombeni who requested her not to go to work the following day as the police wanted to ask her questions about the assassination of her husband. She was also asked to make sure that the other school-going children, with whom she was staying, did not go to school. Seemingly the police wanted to ask the children questions too.

5. The following morning, and as requested by the police, she and the other two plaintiffs did not go to school. At that stage one the children Wandile Promise Mohlala (" Wandile"), the plaintiff in case no. 69479/09, was studying to be a paralegal or legal assistant and depended entirely on the said deceased for financial support.Tshepiso Michelle Mohlala ("Tshepiso"), the other of the school going children and the plaintiff in case no. 69478/2009, was a student at Tshwane University of Technology.

6. On 29 January 2009 in the morning the said Mr. Mthombeni arrived in a number of motor vehicles at the plaintiff's house around 09h00 to 09h30 with a contingent of more or less twelve members of the police services. On their arrival the police found her in the company of the other plaintiffs and other small children. The police instructed her to take the small children to the upper level of the house and she obliged. Having made sure that the small children were safely ensconced in the safety of the upper level of her house, she returned downstairs. Upon her return downstairs she was the police called into the house garage where she was asked questions about the people who killed her husband. In addition, she was shown a photograph in which her son, Tshepiso, was pictured with plentiful of money in the form of notes and was asked if she knew anything about it.

7. Later the police ordered her and Wandile into a Kombi and told them that they were taking them to a police station in Kanyamazane. They drove away from their house but instead the police drove past Kanyamazane Police Station and took them to a bush where they assaulted her as follows. They:

   7.1 covered her wrists each with a piece of cloth and handcuffed her hands behind her back;
   7.2 covered her whole head with a plastic bag and thereby smothered her;
   7.3 put an electric belt around her waistline and repeatedly shocked her with a handheld remote controlled unit;
   7.4 slapped her in the face several times; and,
   7.5 made her to sit on the running board of the Kombi and, whilst she was sitting there, one of the policeman deliberately sat on her lap in order to restrain her from shifting about.

8. The police assaulted her in that manner while they sought from her information about how and by whom her husband was killed. Each time she told them that she did not know, the remote control device would be activated and the electric belt would send electric waves through her body. As a result of the torture that she was going through she admitted that she had killed her husband by hiring men whom she paid R10 000.00 in order to eliminate her husband. She asked the police to take her to the police station.

9. Ultimately the police removed her handcuffs and there after Mr. Mthombeni came with some ice cubes and tried to treat the wounds or injuries she had sustained as a result of the handcuffs. Despite the fact that her wrists had been handcuffed with some cloths, she still sustained some bruises on both of them.

10. When she told Mr. Mthombeni that she would go and lay a charge of assault against the police who tortured her Mr. Mthombeni discouraged her by telling her that if she did that the police would set her house alight and kill her children. She was not discouraged though as, eventually, she laid charges against the police arising from her torture on 29 January 2009. Ever since then she has not heard anything from the police about the matter. The last time she received a report from someone was when she was told that the matter had been referred to the Independent Complaints Directorate.

11. As a consequence of the said assault upon her by the police, she sustained the following injuries:

    11.1 swelling on her neck;
    11.2 bleeding of her calf;
    11.3 bleeding of her feet;
    11.4 lacerations of her back and body necrosis of her epidermis;
    11.5 bruised wrists.

12. Over and above the injuries she sustained she was emotional, had been shocked and traumatised and had been humiliated and denigrated.

13. The injuries that the plaintiff sustained as a consequence of the said assault have been aptly captured in 12 colour photographs that have been handed in as Exhibit "A". For record purposes photographs A1 to A2 show the bruises on her wrists. These bruises were caused by the handcuffs. Photographs A3 to A4 show the blisters, two in photograph A3 and four in photograph A4. Photographs A5, A6 and A8 show bruises on the legs, and in particular photograph A6, shows bruises on the back of her thigh and other bruises on her leg just above her calf. Photograph A7 shows bruises, photographs A9 and A10 show bruises on her right foot. Photographs A11 shows bruises on both her legs just underneath her knees and photograph A12 shows also

bruises on her left leg, one in the front and the other on the back of her leg. These photographs were admitted as evidence.

14. It is for these reasons that the plaintiff claims damages against the defendant. She claims that she was assaulted, deprived of her liberty and humiliated by the members of the South African Police Force who at the time were acting in their course and scope of employment with the defendant.

15. In their subsequent testimony in respect of their own claims, Wandile and Tshepiso confirmed the evidence of the plaintiff in particular that on 29 January 2009 they did not go to school as they have been told that the police wanted to speak to them about the assassination of Jimmy Mohlala; that on the said date the police, among them Mr Mthombeni, arrived at her house in many motor vehicles, that they were taken to the bush and that they came back after 3 o'clock in the afternoon.

16. In respect of all three of them, one Dr. Reinette Du Plessis ("Dr. Du Plessis") tendered medical evidence about the injuries that she had sustained. The said doctor, testifying in a layman's language, told the court that the injuries from which the plaintiff's skin sample had been obtained and the injuries of the plaintiff as depicted in Exhibit "A" were consistent with electrocution. Her report was handed in as Exhibit "D".

17. On the other hand Mr. Mthombeni who gave evidence on behalf of the defendant testified that he could not admit or deny that on 29 January 2009 he was at the plaintiff's house. He denied however that even if he were there he did not do so; with many policemen in many motor vehicles as testified by the plaintiff, her witnesses. He testified that he was with one Motubatse. He denied that he was present when and where the plaintiff was assaulted and disputed that they were assaulted. Furthermore he denied that the plaintiff, together with her son and nephew, was taken to any bush.

18. Mr Brand argued that the plaintiff established that she was abducted and viciously assaulted by the members of the South African Police Services in the presence of an officer, namely Mr. Mthombeni, and that her claim should therefore succeed. He submitted that it was common cause that the plaintiff was assaulted. That she was

assaulted is clear, firstly, from her evidence, secondly from the photographs of her injuries and, thirdly, from the evidence of Dr. du Plessis.

19. I think it is only apposite that I remark about certain aspects of this matter. In a letter of demand dated 15 July 2009 that the plaintiff's attorneys sent to the National Commissioner of the South African Police Services, it was stated in the third paragraph thereof that:

"On or about the 29th of January 2009 Inspector Mthombeni and several other members of the South African Police Service unlawfully arrested, alternatively, kidnapped our client and at/from his home at Kanyamazane, Mphumalanga."

It is quite evident from the said paragraph that the five aspects have been identified. These aspects are firstly, the event that took place, secondly, the date on which the relevant event took place; the identity of the police officer who was present when the event took place; the people who committed that event; and lastly the place where that event took place. For inexplicable reasons, when the summons was drawn, the date of the event was reflected as 22 January 2009. It was pleaded initially that the event that had, according to the aforementioned letter taken place on 29 January 2009, had taken place on 22 January 2009 according to the summons. This anomaly was however corrected before the commencement of the trial. An application to amend the date of 22 January 2009 by replacing it with 29 January 2009 was allowed without any objection in order to set the record straight.

20. Stranger than fiction, when the defendant pleaded to the plaintiff's summons, in particular paragraph 4 thereof, apart from denying each and every allegation specifically, he initially pleaded that:

"4.2.2 The plaintiff was taken in for questioning and to make a statement at the Police Station on 29 January 2009."

Through a successful application to amend, the date 29 January 2009 was subsequently substituted with 5 January 2009. During cross-examination of Mr. Mthombeni, Mr Brand took that issue up with Mr. Mthombeni. He asked him where the date of 29 January 2009 came from initially as the plaintiff had not, in his initial

particulars of claim, referred to it. Quite clearly that put Mr. Mthombeni in a difficult situation as he had not drawn the plea. He was, for that reason, unable to furnish any plausible reasons why, in the initial plea, the defendant had referred to 29 January 2009.

21. During argument, Mr. Mmusi furnished a somewhat feeble and in my view a" Daniel in a Lion's Den" explanation that the defendant had in the said paragraph 4.2.2 of his plea referred initially to the said date of 29 January 2009 because that is the date which had been referred to in the plaintiff's letter of demand. But Mr. Mmusi is a trained counsel. It is accepted that he has, among others, acquainted himself with the Uniform Rules of Court, in particular Rule 22(2), which provides that:

"The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."

22. Accordingly Mr. Mmusi should have known when he drew up the defendant's plea that a defendant pleads to the allegations contained in a combined summons or declaration and not to allegations contained in a letter. His argument, in my view, carries no weight and, if anything, in my view, though the plea was amended without any hassle from the plaintiff, it shows clearly that the defendant knew about the date of 29 January 2009 and that the said date was the core of the plaintiff's case. The plaintiff tried to adjust his case as the matter progressed.

23. The plaintiff and her witnesses all testified that the incidents of which they all complained of in their respective individual claims and in support of one another took place on 29 January 2009. Lest it be forgotten, the plaintiff in this matter is a trained educator. Wandile was studying to be a paralegal or legal assistant and Tshepiso was also studying at Tshwane University of Technology. In my view, all these people are educated and any thought or imagination that they might have forgotten the date on which the event took place would be a remote possibility and devoid of any merit. It is highly unlikely that they could have been bamboozled by the precise date on which the incident took place.

24. One would have to make a finding that they conspired to mislead the court, and there is no iota of evidence to that effect, if one does not accept that they relied on their memories and that their memories are intact. The same cannot be said about Mr. Mthombeni who could not even remember whether or not he was at the plaintiff's house or whether or not he was with the plaintiff and her witnesses on 29 January 2009 but, who to my surprise, was able to remember what happened on 5 January 2009. I find it strange that he was conveniently unable to remember some events but could not remember others while he did not suffer from any loss of memory. His evidence on this aspect is not reliable.

25. There is evidence *aliunde* that the incidents in this matter took place on 29 January 2009. The plaintiff testified that she went to see her attorney the following day and that the attorney started making some arrangements. The following day of the events someone took photographs of her injuries. With modern technology, the date on which such photographs were taken was captured. The date was 30 January 2009. The photographs were handed in without any objection. Argument by Mr. Mmusi that the relevant photographs did not have any faces lacks merit. The plaintiff was able to identify not only the injuries on the photographs as the injuries that she had sustained on 29 January 2009 at the hands of the police but also her body parts. There is no other plausible evidence.

26. The doctor's evidence also assisted to establish not only the age but also the genesis of the injuries that she saw on exhibit "A". She testified that the injuries were not older than 48 hours and that they were consistent with electrocution. In the premises I must accept that the injuries on the plaintiff were fairly recent when the photographs, exhibit "A" that is, were taken and when a biopsy was taken, for the purposes of diagnosis by Dr. Du Plessis, from each of the plaintiffs.

27. It is highly unlikely that the plaintiff and her witnesses could have made a mistake with regard to the identity of Mr. Mthombeni. He knew the plaintiff and the plaintiff and her witnesses all knew him. He also admitted that they knew him and that he used to visit them three to four times a week. Under these circumstances there is no reasonable possibility that they mistook him for someone. Accordingly I find that Mr. Mthombeni was among the policemen who on 29 January 2009 came to the plaintiff's house, interrogated her, drove her in the Kombi from her house to a bush where the

interrogation continued and where she was furthermore assaulted as described by the plaintiff and her witnesses in their evidence.

28. I find nothing wrong with the evidence of the plaintiff and the manner in which she answered questions that were put to her. She was consistent at all times and never contradicted herself. She answered all the questions satisfactorily and where she did not remember she would also tell the court so. I did not find any traces that the evidence that she gave resulted from any conspiracy between her and her witnesses.

29. Neither the plaintiff nor her witnesses testified that Mr. Mthombeni took part in the assault. However there is evidence that Mr. Mthombeni was present when the plaintiff was assaulted; that he witnessed the assault and that he did nothing to prevent those who assaulted her from doing so. He was also present when the plaintiff was removed from her house in a Kombi and taken to the bush. There exists a duty imposed by law on any member of the South African Police Service to protect the community or a members of the community from such activities as abduction and assault. Any failure by a policeman to protect any member of the community from such actions entitles such a member of the community to sue for damages. See **Minister Van Polisie v. Ewels 1975(3) SA 590 A**. I wish to quote copiously from its head notes:

"Our law has developed to the stage wherein an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only incites moral indignation but also that the legal convictions of the community demand that permission ought to be regarded as unlawful and that the damage suffered ought to made good by the person who neglected to do a positive act. In order to determine whether there is unlawfulness the question, in a given case of omission, is thus not where there was the usual negligence of the bonus paterfamilias but whether, regard being had to all the facts, there was a duty in law to act reasonably."

30. The plaintiff claimed general damages. No evidence was tendered in support of her claim. Instead Mr. Brand relied on past awards. He referred me instead to the authority of the **Minister of Safety and Security vs Seymour 2006(6) SA 320 SCA.** With regard to the award of damages, it is now settled law in our country that such

an award is left for the discretion of the court. The principle regarding an award of course was put as follows in **Road Accident Fund vs Marumba 2003(5) SA 164 SCA**:

"It is settled law that the trial Judge has a large discretion to award what he in the circumstances considers to be a fair and adequate compensation to the injured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a "substantial variation" or as it is some times called a "striking disparity" desperatate" between what the trial court awards and what this Court considers ought to have been awarded."

On page 325 Nugent JA pointed out in paragraph [17]:

"That the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."

Having made the aforementioned comments, the Judge proceeded in paragraph 19 of the said authority to refer to certain awards made by other courts.

31. In this matter, the plaintiff was an educator. She had recently lost her husband under mysterious circumstances. Her husband had been assassinated at the place he certainly regarded as his last bastion. She was mourning the death of her dear husband. For no apparent reason whatsoever, the police smelled a rat that she was involved in the killing of her husband. In this country, and elsewhere in the world, it is not unheard of for a woman to kill her husband. It is not so much the suspicion with which the police regarded her as it was the repugnant treatment that was meted out to her that is of great concern. The plaintiff was tricked and told that she would be taken to a police station. In stead she was taken to a bush where she was kept captive and helpless for a protracted period. Her whole ordeal commenced with the arrival of the police at 09h00 or 09h30 and endured until 16h00 of the same day.

32. While in the bush, she was handcuffed from behind and shocked with an electric belt by the police, the very same people who should have protected her. For the duration

of the ordeal, she was deprived of her much cherished liberty by the people from whom she was entitled to seek protection of the law. She was helpless. This happened despite the fact that she did not refuse to answer their questions. Antiquated Gestapo methods by the police to extract information from people in these civilized times cannot be tolerated.

33. As a consequence of the handcuffs, and despite furthermore the fact that an attempt was made by the police, to protect her wrists by wrapping them with pieces of cloth before using handcuffs, she sustained injuries. The injuries on her wrist, in my view, only manifest her struggles to escape from the shocks. She sustained serious injuries also as a result of the shocks. She cried. She was humiliated. These are some of the factors that, in my view, one should take into account in determining an award of damages.

34. She had no access to any other person who could have assisted her even more so at the place where she was being tortured. She suffered degradation. There is no doubt, in my view, that the experience brought with it a certain measure of trauma apart from being distressed.

35. I am mindful of the authorities that Nugent JA referred to in paragraph 19 of the said authority of Minister of Safety and Security vs Seymour. In my view it is not necessary for me to quote them in this judgment save to point out that I am mindful of them and of the reasons furnished by the court in arriving at the award of R90 000.00 in favour of the respondent.

36. Although the plaintiff did not particularise her damages, but opted to claim a globular figure of R250,000.00, Mr Brand indicated, in his submissions in respect of quantum, that in respect of deprivation of liberty, a sum of R100,000.00 to R120,000.00 would not be inappropriate and that in respect of assault and degradation with the resultant injuries any award between R100,000.00 and R150,000.00 would be sufficient compensation.

37. In Seymour's case, the award of R90,000.00 was only for deprivation of liberty for a period of five days. It was not accompanied by any torture or assault. He sustained no injuries. He was never treated after his arrest in the same manner as the current

plaintiff. Accordingly an award of R100,000.00, in my view, would be appropriate compensation. Enough has been said about the nature of the injuries sustained by the plaintiff. In my view, the assault was even worse than the deprivation of liberty. Accordingly I would award a sum of R120,000.00 in respect of the assault and the consequences thereof.

38. I am satisfied that the plaintiff has made out a good case. Accordingly I make the following order against the first defendant. I do so on the basis that at the time the incidents complaint of were committed, the police or members of the police services were acting, and it was also so pleaded by the plaintiff, in their course and scope of employment with the defendant.

1. Judgment is granted in favour of the plaintiff against the first defendant.
2. The first defendant is hereby ordered to pay the plaintiff the sum of R220,000.00 plus interest at 15.5% on the said amount reckoned from the 3rd of August 2012 to date of payment.
3. The first defendant is ordered to pay the plaintiff's costs of the action, which costs shall include:
   3.1 the costs of two counsel; and
   3.2 the qualifying fees of Dr. Reinette Du Plessis.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Plaintiff's Attorneys:	*Frey & Slabber Attorneys*
Plaintiff's Counsel:	*Adv. CFJ Brand* *Adv. I Kruger*
Defendant's Attorneys:	*State Attorney*
Defendant's Counsel:	*Adv. LA Mmusi*
Date Heard:	*30 July 2012 - 1 August 2012*
Date of Judgment:	*3 August 2012*