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Damages for Injuries Arising from the Infringement of the Rights of Persons in Police or Prison Custody: South Africa in Comparative Perspective (Part 2)

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Abstract

The common law, constitutional and statutory backgrounds forming the basis for the prisoner's claim to protection by the Bill of Rights and other statutory protections; having laid down the preliminary issues and the general principles governing the award of damages for injuries arising from infringements of the rights of persons in police or prison custody received attention in part (1). Then, this part commences with the study of rampant police assault cases of which the preponderance of the materials comes from South Africa, followed by a case study of the police assault cases from Botswana, Lesotho, Namibia and Eswatini.

Keywords: rights of persons; police or prison custody; residual liberty; protection of rights; arrested person; detained person; sentenced and convicted person; quantum of damages.

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4 ASSAULT BY POLICE OFFICERS

Although assault, on its own, is a stand-alone cause of action in delict,[1] quite often, claims for assault committed by police officers tend to be made along with wrongful arrest and detention. This is encountered in a large number of cases involving these two causes of action. Sometimes, plaintiffs tend to claim for assault under a separate head seeking general damages.[2] That was the case in the following instances:

- *Minister of Police v Dlwathi*[3] – where the claim was for facial injuries, loss of hearing and depression arising from unlawful assault by police officers, but the police conceded the merits and the issue for determination turned on quantum. The SCA regarded as excessive the general damages award of R675 000 for pain, suffering, disfigurement and loss of amenities of life and reduced it to R200 000.
- *Fisa v Minister of Police*[4] – where the police entered the plaintiff's hair salon and searched it without a warrant; arrested, detained, and tortured him – this was done by the police without reasonable or probable cause and without legal authority. Smith J awarded the plaintiff the sum of R300 000 in general damages; R142 851.85 for loss of income; and R87 357 for future medical expenses.
- *Peterson v Minister of Safety and Security*[5] – where the plaintiff made a claim for unlawful arrest, detention and assault having been pepper-sprayed, dragged from his

1 For more assault cases: see e.g. *Riekert v Branch* 2012 6G3 QOD 1 (ECP); *Joseph v Minister of Police* 6G3 QOD 5 (ECM); *King NO v Minister of Safety and Security* 6G3 QOD 11 (ECM); *Light v Minister of Safety and Security* 2019 ZAECBHC 21 (29 October 2019).

2 A typical example of an assault as a stand-alone claim is *King NO v Minister of Safety and Security* 2012 6G3 QOD 11 (ECM) paras 5–7, and 10 where the plaintiff was assaulted by a court orderly and member of the SAPS, using a stick or baton, at court in full view of members of the public and the media. Several photos depicting the bloodied, injured person with an almost naked upper body were published in local newspapers. She sustained abrasions on the right elbow and right thigh; bruises on the right breast; left chest; both sides of her back; as well as right hand; bruises, open wounds, and tenderness on the right arm; haematoma on the left back and left eye and lacerations on the scalp, left eye and lower leg. She was admitted to a casualty unit where her lacerations were sutured, and she was discharged with analgesics and antibiotics. She suffered from related headaches 18 months after the incident. The court regarded the conduct of the police official as particularly reprehensible and repulsive. It also found that her humiliation was exacerbated by the fact that photos depicting the embarrassing situation were splashed in the newspapers and on a website. The plaintiff sought R150 000 damages relying on *Peterson v Minister of Safety and Security* QOD, 2011 6K6 1 ECG; while the defendant argued that R90 000 would be fair and reasonable in the circumstances relying on *Bennett v Minister of Police* 1980 3 SA 24 (CPD), and *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 (VSC). The court did not find particularly helpful these two last cases decided before the coming of the Bill of Rights under entirely different political and socio-economic circumstances. Smith J held that: "It is settled law that our courts now generally tend to award higher damages in the light of the facts that rights relating to, inter alia, privacy, bodily integrity and dignity are now entrenched (and protected) by the Bill of Rights. Violations of these rights are generally regarded by our courts in a much more serious light than was the case previously. I am entitled to have regard to this tendency when comparing the damages awarded in older cases – *De Jongh v Du Pisasnie NO* 2004 2 All SA 565 (SCA) paras 64-65. The *Peterson* decision is in my view therefore a more relevant and helpful precedent." She was awarded R140 000 in respect of general damages for the assault.

3 2016 ZASCA 6 (2 March 2016).

4 2016 ZAECELLC 1 (26 April 2016).

5 QOD, 2011 6K6 1 ECG.

home in shorts and locked up in a police cell for eight hours. At the police station he was assaulted again by a police officer who punched him in the face, kicked him on the jaw and hit him several times with a baton on the back. The plaintiff suffered pain for a number of days. The plaintiff was awarded R60 000 for arrest and detention and R120 000 for the assaults.[6]

- *Poswa v Minister of Safety and Security*[7] – where the plaintiff who was assaulted by police officers developed depression and post-traumatic stress. Although he was detained for five to six hours, and the assault in *Fisa* was more serious, the judge held that what mattered was the brazen and cruel manner in which the assaults were perpetrated by the police and their subsequent irregular attempts to hide their unlawful acts. The plaintiff was awarded R170 000 in general damages.
- *Martins v Minister of Police*[8] –although Chetty J found that the extent of the violence perpetrated on the plaintiff may properly be regarded as common assault, it nonetheless constitutes an infringement of the plaintiff's right to bodily integrity, and requires censure. The court found no lawful excuse for the officer's officialdom stance by not only assaulting the plaintiff but by also arresting and detaining him in order to assuage his "wounded vanity." The court considered an award of R25 000 for the assault and R40 000 for unlawful arrest and detention as a fair award.
- *Mokwoena v Minister of Police*,[9] where the plaintiff was deprived of his liberty for a total period of 15 hours; he had done nothing wrong and yet was taken away by force. He was handcuffed and made to go various places with the handcuffs as if he were a dangerous criminal, when there was no charge levelled against him. This conduct, no doubt, impaired and degraded his human dignity. He had internal pains because he was kicked on his head, body and feet. He suffered from ear discharge and had difficulty hearing. He suffered from anxiety and had nightmares of the police beating. Kgoele J awarded the sum of R120 000 for the unlawful deprivation of liberty and R20 000 for the assaults.
- *Marwana v Minister of Police*[10] – where a 46-year-old domestic worker was arrested and detained for about 30 hours. During the period of detention, the police did not only manhandle her, they also assaulted her by striking her with a wooden plank. She sustained excessive bruises on her back, upper arms and knees, and abrasions to both wrist joints. She was strangled with a plastic bag over her mouth and nose until she soiled herself. During this period, she was taken to her home for further investigation. They entered and searched her home without her permission or any legal authority. In her action, she claimed damages for unlawful arrest and detention; wrongful and unlawful assault; and unlawful entry. Tshiki J held that the assaults were a serious violation of the plaintiff's rights to dignity and that she had done nothing to deserve such humiliation, shock and trauma and that the pains she suffered "could not be

6 In *Daniels v Minister of Police* 2015 ZAGPPHC 317 (26 February 2015) paras 88–89 and 98–100, Prinsloo J found some similarities between the injuries sustained by the plaintiffs in this case and those of the plaintiff in *Peterson*. In both cases, the victims were kicked and punched repeatedly. Injuries were sustained in both cases: in *Peterson,* it was bruises to the head and jaw whereas in *Daniels,* it was a swollen hand, broken lip, swollen eye, dislocated ankle and other bruises. The injuries were not permanent in either case. In both cases, the homes of the victims were broken open by the police and they were assaulted except that Peterson was also assaulted while he was in the police cells. The difference in the two cases as spotted by the court was the absence of evidence in the *Peterson* case, psychological *sequelae* such as constant fear or reliving the incident. There was also the use of pepper-spray in *Peterson* but the plaintiff in that case did not have the added misery of having his Rastafarian hair forcibly cut off. Prinsloo J further stated: "In both cases there are signs of humiliation: Peterson was asked to wipe his own blood and, for example, Evert Faro (one of the four plaintiffs in *Daniels*) was asked to lie with his head between the legs of his brother Adam. In the case of the plaintiffs before me, there appears to be more evidence of ongoing swearing and foul language used including the humiliation of references to the private parts of the mother of some of the plaintiffs. It should be borne in mind that the *contumelia*, also resorting under the *actio iniuriarum*, as explained, includes the infringement of the plaintiff's right to privacy, dignity and reputation. All this, in my view, should be taken into account for purposes of assessing a realistic damages award." In considering the quantum to be awarded, the judge observed that the four plaintiffs "went through the same horrendous experience. They were all injured, humiliated and, to an extent, psychologically traumatised." Hence, the realistic award to make was R90 000 each with an addition of R2 000 for loss of earnings made to plaintiff Adam Faro.

7 2011 ZAECPEHC 41 (29 September 2011).

8 2013 ZAECPEHC 27 (4 June 2013) para 10.

9 2015 ZAGPPHC 401 (11 June 2015) paras 42–44 and 56.

10 2012 ZAECPEHC 56 (28 August 2012).

justified by any stretch of imagination."[11] The judge further observed: "Before I dealt with this case, I could not, even for a moment, comprehend as a reality in our advanced state of constitutional democracy, that there are policemen who are still engaged in such clandestine conduct of assaulting detained persons. This type of behaviour should be viewed in a serious light and those involved should be removed from the ranks of the police service."[12] While the judge considered an award of R55 000 to be reasonable in the circumstances of unlawful arrest and detention in this case; the judge further awarded R90 000 for the assault and R10 000 for unlawful entry.[13]

Quite apart from the foregoing cases, the majority of which are from the Eastern Cape Provincial Division of the High Court, there are some recent cases that need to be mentioned in the present context. Essentially, there are three decisions of the Mthatha Division of the Eastern Cape High Court that dealt with police assault and brutality that represent the three scenarios discussed below. In addition, there are two other cases from that same provincial division that further illustrate instances of assault by police officers and the issue of quantum of damages awarded to the victims of the assault. These two cases are also discussed below.

4 1 Where the Assault Claim was not Proved[14]

The plaintiff in *Sibulali v Minister of Police*[15] was unable to prove assault by failing to present to the court any concrete evidence of the alleged assault. The guiding principle discernible from this case is that where a plaintiff alleges that assault was committed against her by police officers, which was in the form of torture, such as suffocation by plastic, hitting her with sticks on her back, she must show some evidence to prove such allegation. Even if the injuries sustained were not visible or very serious, the plaintiff must show that some assault took place and/or that injuries were indeed sustained. In this case, the plaintiff did not tender any evidence of medical treatment for her allegations and Mgxaji AJ found her evidence to be "factually incredible" and her recollections of the assault was unreliable, hence her claim failed.[16] The claim of the plaintiff in *Light v Minister of Safety and Security*[17] that the second defendant, a police officer wrongfully and intentionally assaulted him repeatedly with a stick and that by so doing, he failed to uphold the duty he owed the plaintiff of protecting him from acts such as that of the second defendant. Makaula J was not convinced that, in the circumstances of this case, the plaintiff had successfully shown that he was assaulted by the second defendant at the police station and that even if he were pushed as was admitted, given the manner the plaintiff had rushed into the station, there would still be no assault.

11 *Marwana* para 21.
12 *Ibid* para 21.
13 *Ibid* paras 20–22.
14 *Cf* in *Mapiye v Minister of Home Affairs* 2018 ZWHHC 146 (21 March 2018) where the claimant failed to prove the damages claimed. The Harare High Court awarded the plaintiff US$1000 for *contumelia*; US$1000 for unlawful arrest; and US$1000 for unlawful detention after finding that the arresting officers had no reasonable suspicion that the plaintiff was a suspect in the case for which they effected the arrest, and that rendered the arrest and detention unlawful as the plaintiff was unreasonably denied his liberty coupled with the police failure to exercise their statutory discretion properly. Although the court appeared to have accepted that the plaintiff was unlawfully assaulted by the police officers, and that the plaintiff suffered pain and suffering and some degree of shock emanating from the assault of which the defendants were liable in damages, however, no damages was awarded for the police assault, because the plaintiff had been unable to show that he suffered any disfigurement because he did not lead evidence on the actual injuries he might have sustained; that the extent of his injuries was not known; and that it is difficult to quantify the damages sustained in the absence of the medical report indicating the extent of such injuries.
15 2016 ZAECMHC 31 (21 June 2016) paras 29 and 35–36.
16 Although the plaintiff was successful in his claims for wrongful arrest and unlawful detention and was accordingly awarded the sum of R140 000 in damages on both counts, his claim for assault failed – *Nel v Minister of Police* 2016 ZAECELLC 4 (26 July 2016) paras 17–18. Mbenenge J held that the plaintiff's claim to have been assaulted by members of the police service when he was arrested in a heavily intoxicated state and point of half-consciousness which must have greatly impaired not only his perceptions but also rendering his account of how he received the injuries less credible than if it were otherwise. In these circumstances, the version of the police witnesses regarding how the plaintiff got injured would be more credible. It was thus more probable that the plaintiff was assaulted by members of the community prior to his arrest and not by the police hence "the plaintiff must be non-suited on the assault claim."
17 2019 ZAECBHC 21 (29 October 2019).

4 2 Where the Assault Claim was Proved but Quantum of Damages yet to be Determined

In *Mdutyana v Minister of Police,*[18] the police officers, feeling aggrieved by the plaintiff's "reckless driving" felt that they needed to teach him a lesson. The defendants observed the plaintiff's motor vehicle and concluded or realised it was being driven recklessly. Feeling that the driver of the vehicle nearly collided with their own thereby endangering their lives or bodily integrity, the police officers turned around and chased the vehicle. The plaintiff's vehicle stopped either to give way to the police motor vehicle or they were forced to. The policemen approached the vehicle and one of them opened the driver's door, pulled him out of the vehicle and struck him with fists, asking why he was driving recklessly. The others shouted: "kill this dog". The officers then proceeded to assault the plaintiff. Beshe J held that there was no lawful excuse or justification for the police officers to assault the plaintiff, hence the assault was held to be wrongful and unlawful.[19] The defendant was held liable to the plaintiff for such damages that the plaintiff would be able to prove arising from the assault on him.[20]

A similar finding of liability was made in *Sebogodi v Minister of Police,*[21] where, apart from claiming for wrongful arrest, the plaintiff also claimed damages for assault perpetrated upon him by police officers in the process of the arrest. The defendants argued that following a call for their attention, they arrested the plaintiff for committing acts of domestic violence in their presence in accordance with section 40(1)*(a)* of the CPA; that they were acting in terms of section 2 of the Domestic Violence Act 1998; and that he had resisted arrest, hence they had relied on section 49 of the CPA with regard to the use of reasonable force to effect a lawful arrest.[22] Kgoele J fully agreed with the submissions of the plaintiff to the effect that although the arrest and the use of force are two concepts, they are so interwoven in the circumstances of this matter that it will justify the proposition that where the balance of probability proves that the arrest was unlawful, the use of force will automatically also be unlawful on the ground that the use of force to arrest was non-existent. In other words, the defendant's use of force to arrest would automatically tantamount to an assault on the person of the plaintiff if the defendant failed to prove its lawfulness bearing in mind that physical interference with a person's bodily integrity constitutes assault in any event.[23] In spite of the contradictions in the evidence, it was clear from the J88 form that the plaintiff sustained bruises in the lower left scapula; bilateral neck; left eye and right eye; and general bodily pains. Further evidence of the assault was that the plaintiff alleged that the second defendant slapped the plaintiff with open hands and attacked him with clenched fists, all the blows were directed at the plaintiff's face; whilst the plaintiff was lying on the ground all three police officers kicked him with booted feet; and he was then forcefully dragged to and thrown into the SAPS vehicle. Corroborating the plaintiff's evidence to an extent was the defendant's admission that the plaintiff was forcefully dragged into the police van; was on the ground at a certain stage; and was pushed.[24] The court therefore concluded that the defendant failed to establish the essential element of their defence as to the lawfulness of the arrest, detention and the assault. Accordingly, the defendant was held liable for 100% of the agreed or proven damages to the plaintiff arising from the unlawful arrest, detention and the assault which occurred on 26 April 2015.[25]

18 2016 ZAECMHC 25 (26 May 2016) paras 21–22.
19 *Mdutyana* para 21.
20 *Ibid* para 22.
21 2017 ZANWHC 68 (27 October 2017).
22 *Sebogodi* para 21.
23 *Sebogodi* para 23.
24 *Sebogodi* paras 26–27.
25 *Sebogodi* paras 30–31.

4 3 Where Assault was Proved and Quantum Determined

In contrast to those cases discussed already where liability was not proved (*Sibulali v Minister of Police*[26]) or where liability was proved but quantum was postponed *sine die* (*Mdutyana v Minister of Police*[27]) there is the third case from the same Mthatha Division of the Eastern Cape High Court which was decided on the same day as *Mdutyana* by the same judge, where liability was not only proved for the assault but also damages were assessed in the same judgment. In the third case, however, liability was proved and an award was made instantly for the assaults to the plaintiff in *Malashe v Minister of Police*.[28] Incidentally, all three cases were decided within a space of one month – between 26 May and 21 June 2016. It was established in *Malashe* that the plaintiff sustained bruises and abrasions on both his chest and back as well as on his wrists. In effect, a large part of this 62-year-old man's chest was covered by bruises and abrasions. The police officers had literally broken into the room where the plaintiff was sleeping and questioned him about the whereabouts of a .38 firearm. When he denied knowledge of the firearm, he was struck with an object/stick on his forehead. Although one of the men was in police uniform, the assailants produced no search warrant.[29] The plaintiff's evidence was that he was struck with a stick, a big cable, fists and open hands. With his hands tied behind his back, he was made to lie on top of hinges protruding from the engine of the kombi that transported him to Dutywa station. For most of the time, he was naked on a cold winter night when the police drove around with him in the locality. The assault therefore was a sustained one and there was no doubt that the plaintiff must have endured a lot of pain and suffering as a consequence. The incident must have been shocking and traumatic for him coupled with his feeling of humiliation and embarrassment in the full view of his son, wife, daughter, female police officers and people who had gathered outside the plaintiff's premises. In the process, the plaintiff's "right to dignity, respect, privacy and to bodily integrity was treated with disregard or were disregarded."[30] Having considered these circumstances, Beshe J awarded the plaintiff the sum of R120 000 general damages for pain and suffering; and R50 000 for shock, humiliation and *contumelia* for assault committed by the police officers.[31]

26 2016 ZAECMHC 31 (21 June 2016) discussed in para 4.1 above. .
27 2016 ZAECMHC 25 (26 May 2016).
28 2016 ZAECMHC 24 (26 May 2016).
29 *Malashe* para 4.
30 *Ibid* para 29.
31 *Ibid* para 31. In *Minister of Police v Daniels* 2016 ZAWCHC 65 (1 June 2016) paras 2, 22–24, the Full Court of the Western Cape High Court having come to the conclusion that the defendant did not satisfy the court that the plaintiff had committed an offence or that even if he did, that he, the officer properly exercised his discretion to arrest him whereas the plaintiff had discharged the burden of proving that he was assaulted by the police officer in question which necessitated his undergoing medical treatment, losing past and future income and experienced pain and suffering. Since the arrest was unlawful, any physical force used in effecting it was also unlawful. The court further added that even if the arrest was justified, it was perfectly clear that excessive force amounting to assault was employed. Although the court would have been inclined to have awarded the plaintiff "some worth more in respect of assault" which was serious even though it did not result in permanent injury, than the R25 000 awarded by the Magistrate, and "some worth less in respect of the arrest and detention" (which was no more than an hour) to the R25 000 awarded by the Magistrate, the court would not interfere in that award in the absence of any material misdirection.

4 4 The Quantum Awarded in *Damana v Minister of Police*

Damana v Minister of Police[32] is another case from the Eastern Cape Division[33] – decided a few months earlier than *Mdutyana* and *Malashe* – that dealt with police assault and brutality where the police was held liable and the issue before Majiki J turned on determination of general damages and loss of income, the issue of future medical expenses having been agreed upon by the parties in the sum of R32 000. After the incident, the plaintiff was hospitalised for 18 days. In hospital, he was placed in cervical skeletal traction for 13 days. He wore a neck brace for five days after the C5/6 procedure carried out on him after general anaesthesia. Since the brace was removed, the plaintiff seldom suffered pain and took analgesic medication. There is a 35% chance that within the next 15 years he would have to have an extension of fusion to the C6/C7 level. His work on contract basis was affected and so was his social life. In order to assess the general damages for pain and suffering the court had to look at the nature and extent of the injuries and duration of the pain suffered by the plaintiff, among other issues. The orthopaedic and medical points of view were explained to the court by one Dr Van Daalen that he had fully recovered while the occupational therapist testified that he was strong and does not have pain. His difficulties were purely psychological. The court referred to two earlier cases. First, *Ramolobeng v Lowveld Bus Services (Pty) Ltd, Gauteng North Province*[34] – where a 34-year-old man, employed as a packer at a vegetable market suffered injuries to cervical and lumber spine and had a head injury with concussion. He had spinal surgery and had an artificial disk inserted at levels L3/L4 and was hospitalised for six months. He suffered erectile dysfunction, moderate depression, and low self-esteem and struggled with domestic chores. He could not sit for long, sleep on one side, nor play soccer, and was rendered unemployable in the open labour market. He was awarded R550 000 for general damages. The distinguishing feature between the *Ramolobeng* case and *Damana* is that the plaintiff in the former suffered total loss of amenities of life. Second, in *Nhantumbo v RAF, South Gauteng*,[35] a 49-year-old self-employed panel beater and spray painter suffered soft tissue injury of the cervical and lumber spine. The plaintiff suffered severe pain for approximately two to three weeks subsequent to the collision. He would suffer pain throughout his life. He was awarded R200 000 for general damages. In contrast to these two cases, the plaintiff in *Damana* did not suffer so much of prolonged pain and, certainly, not a total loss of amenities of life.[36]

In respect of loss of earnings, the determination centred on what the plaintiff would have earned had the assault not occurred. At the time the incident took place, the plaintiff had a pending case of possession of dagga; he had a history of incarceration but had been out of prison 13 years before the present incident; his earnings were irregular, that is, on contract basis and when there were no contracts, he could earn as low as R700 per month. The judge reasoned:

> If I am to accept that the plaintiff would have worked until he was 65 years of age. He would have worked for 21 years from the date of the incident. It is only in 15 years that there is a chance of 35% fusion. The plaintiff did not present a guaranteed structure of employment, his employment depended on availability of would be employers. The plaintiff was also prone to committing offences that could land him in jail again.[37]

32 2016 ZAECPEHC 12 (26 January 2016) (*Damana*).

33 See also *Sofika v Minister of Police* 2018 ZAECMHC 37 (31 July 2018) discussed in the next paragraph. Perhaps one should pause here and point out that for a reason yet to be discovered in specific in-depth research on the issue, one could not avoid observing that an enormous amount of the cases encountered by this author in every aspect of the law of arrest, detention and malicious prosecution, appears to originate from the Eastern Cape Division of the High Court including the Constitutional Court judgment in *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC). In other words, one could hazard a guess that out of the total number of cases decided in the South African jurisdiction, more than half of all the cases emanate from the Eastern Cape. Another supposition is that even within the Eastern Cape, the greater proportion of the cases have been decided by the Grahamstown Division followed closely by Mthatha, then Port Elizabeth, East London and Bisho Divisions, in that order. What is clearly required is for research to be conducted in the pursuit of an LLD or LLM Degree or purely for publication purposes so as to ascertain the actual percentage of the cases on the two fronts postulated, and perhaps, the reasons for the high rate of police-arrest cases in the Eastern Cape especially Grahamstown and Mthatha Divisions.

34 Case No. 29836/2009 (3 February 2015).

35 Case No. 11385/2011 (16 August 2013).

36 *Damana* para 28.

37 *Ibid* paras 30–32.

Of course, when he re-offends and is found guilty, he would be sent to jail and would be unemployed. All these are factors that must count in determining the quantum for loss of earnings in this particular case. The judge considered the sums of R132 900 and R374 300 calculated by the forensic actuaries for past and future loss of earning and in which 40% contingency deduction in view of the circumstances of the case is applied, the award for past and future loss of earnings was R304 320 plus the general damages of R275 000.[38]

4 5 *Sofika v Minister of Police*

The plaintiff in *Sofika v Minister of Police*[39] was arrested by members of the SAPS and detained. In his claim for damages for wrongful arrest, detention and assault, he alleged that he was assaulted by members of the SAPS by slapping him with open hands in the face and on his back; by hitting him with fists in the head and all over the body; and by kicking him in the head and all over the body with booted feet until he fell down. He was kicked continuously while on the ground and was suffocated with black plastic bag which was put on his head to cover his face; he was further assaulted when his head was covered with the plastic. As a result, the plaintiff allegedly sustained injuries on his left thigh, wrist and head. He therefore claimed damages for humiliation, degradation, *contumelia*, pain and suffering.[40] The issues that Toni AJ had to decide were: (a) whether the plaintiff was assaulted by members of the SAPS; and if so; (b) the quantum of damages to which the plaintiff was entitled.[41]

After weighing the evidence in the face of two mutually destructive versions, the trial court found that the defendant had actually not adduced evidence in rebuttal of the plaintiff's evidence which remained undisputed, hence his testimony that he was assaulted was clear. Toni AJ was not persuaded by the fact that the injuries the plaintiff sustained might have been minor since:

> Assault is an unconstitutional and degrading invasion of the bodily integrity of an individual and deserves a strongest possible form of censor by any court of law. It is a form of corporal punishment that needs to be discouraged by the courts as it flies in the face of the Constitution. Whilst police are by law allowed to use minimum force to effect arrest and subdue a suspect in circumstances, for example, of resisting arrest, such force was not justified in this case. No evidence was led at all as to why the plaintiff was arrested, in the first place. Clearly the assault on the plaintiff is *prima facie* unlawful.[42]

In assessing what should be a fair and reasonable compensation, the trial judge had to bear in mind the injuries sustained by the plaintiff, including the nature, permanence, severity and impact on the plaintiff's life,[43] in addition to the reference to prior awards which serves as a guide since each case is determined on its own merits[44] as laid down by Nugent JA in *Minister of Safety and Security v Seymour*.[45] It also referred to the SCA judgment in *Minister of Police v Dlwathi*[46] where it was reaffirmed that an assessment of an appropriate award of general damages is a discretionary matter and has as its objective to fairly and adequately compensate the injured party;[47] that the appellate court will not interfere with the award of the court *a quo* unless there was a misdirection or an irregularity[48] which might appear from the court's reasoning and, in other instances, might be inferred from a grossly excessive award.[49] Then, reference was made of a passage from the speech of the Judge President of the South Gauteng High Court in *Mogakane v Minister of Police* where Legodi JP had been quoted as saying in reaffirmation of the long-held view that: "There is no fitted formula for the determination of the quantum of damages obtainable through the *actio iniuriarum*. Such a determination is in the discretion of the Judge, who must determine the quantum by taking into account all

38 *Ibid* paras 33–34.
39 2018 ZAECMHC 37 (31 July 2018) (*Sofika*).
40 *Sofika* paras 3–5.
41 *Ibid* para 14.
42 *Ibid* para 32.
43 *Mimi Margret Philander v Minister of Safety and Security* Case No. 473/2011 (NWHC).
44 *Sofika* para 35.
45 2006 6 SA 320 (SCA) para 17.
46 2016 ZASCA 6 (2 March 2016).
47 *Protea Accident Fund v Lamb* 1971 1 SA 530 (A) at 534H-535A; *RAF v Marunga* 2003 5 SA 164 (SCA) para 23.
48 *Minister of Safety and Security v Scott* 2014 6 SA 1 (SCA) para 42.
49 *Minister of Safety and Security v Kruger* 2011 1 SACR 529 (SCA) para 27.

relevant factors and circumstances according to what is just and fair."[50]

In order to enable the court to exercise its discretion in arriving at a reasonable amount in the circumstances of the case, the court referred to the following previous awards, some of which have already been discussed earlier in this paragraph:

- *Fisa v Minister of Police*[51] where the injuries were of a serious nature resulting in post-traumatic stress and had long-lasting effect, R300 000 was awarded;
- *Peterson v Minister of Safety and Security*[52] where the sum of R120 000 was awarded for the assault committed against the plaintiff;
- *Poswa v Minister of Safety and Security*[53] where the sum of R170 000 was awarded to the plaintiff who developed post-traumatic stress after being assaulted by police officers;
- In *King NO v Minister of Safety and Security*[54] the plaintiff was awarded R140 000 for the injuries suffered in police beatings with a stick and a baton;
- In *Nkosi v Minister of Safety and Security,*[55] the court awarded the plaintiff the sum of R100 000 in general damages as a result of an assault that led to a cut lip and tenderness to his testicles; and
- In *Bantu v Minister of Police*[56] the plaintiff was awarded R80 000 for an assault, during which, he was *inter alia*, held by his testicles.[57]

Although distinguishable from the case in hand, there was the unreported judgment of Nicholls J in *Sibanda v Minister of Police*[58] where the plaintiff was charged and detained for 17 days, 16 of which were spent in hospital. He was shot in both legs and there was evidence that there were injuries of a permanent nature that would have a lasting effect on the plaintiff. After taking into account the amounts awarded against the police for unlawful detention[59] and amounts awarded under the Road Traffic Accident Fund,[60] and previous awards as a guide,[61] the plaintiff was awarded a global sum of R500 000 made up of R50 000 for unlawful arrest; R100 000 for future medical expenses; and R350 000 for general damages. Having taken into consideration all the evidence placed before the court; and having regard to the special circumstances of the case; and bearing in mind the fact that the primary purpose of damages was not to enrich the plaintiff but to offer him or her the much needed *solatium* for his or her injured feeling,[62] Toni AJ awarded the plaintiff in *Sofika* the amount of R23 000 as a fair and reasonable compensation for the assault by the police officers.[63]

4 6 Where Liability was Conceded and Quantum Determined

The case of *Mogakane v Minister of Police*[64] is a clear illustration of one of the rare instances where the State conceded liability leaving the court to iron out the issue of quantum. In this case, the plaintiff claimed damages for wrongful arrest, detention and assault by police officers in the course of their employment. Legodi JP observed that the plaintiff was not only claiming damages for unlawful arrest and detention, but also for assault meted out against him by the

50 Although this case was cited in the *Sofika* judgment as "Case No. 50811/2011 (24 May 2012)", however, this author accessed the same judgment of Legodi JP in *Mogakane v Minister of Police* under (3044/2016) 2017 ZAGPPHC 817 (20 December 2017) and the statement attributed to the Judge President can be found in paragraph 6 of that judgment.
51 2016 ZAECELLC 1 (26 April 2016).
52 QOD, 2011 6K6 1 ECG.
53 2011 ZAECPEHC 41 (29 September 2011).
54 2012 6G3 QOD 11 (ECM).
55 2012 JOL 29147 (GSJ).
56 2015 JOL 33018 (GJ).
57 *Sofika* paras 39–44.
58 2012 ZAGPJHC 200 (23 October 2012) paras 55–56.
59 *Maphalala v Minister of Law and Order* Case No. 29537/93 (10 February 1995) (WLD); *Manase v Minister of Safety and Security* 2003 1 SA 567 (Ck); *Seria v Minister of Safety and Security* 2005 5 SA 130 (C); *Oliver v Minister of Safety and Security* 2008 2 SACR 387 (W).
60 *Aeschliman v RAF* Burchell JM, Gauntlett J, Honey DP, *The Quantum of Damages in Bodily and Fatal Cases* 1993 vol 6 E7-1; *Tys v Guardian National Insurance Co. Ltd*, Corbett MM, Gauntlett J, Honey DP, *The Quantum of Damages in Bodily and Fatal Cases* 1993 vol 4 E3 17-30; *Fourtin v RAF* Corbett MM, Gauntlett J, Honey DP, *The Quantum of Damages in Bodily and Fatal Cases* 1993 vol 5 E5 1-8.
61 *Minister of Safety and Security v Seymour* 2006 6 SA 320 (SCA).
62 *Sofika* paras 45–47.
63 *Ibid* para 47.
64 2017 ZAGPPHC 817 (20 December 2017).

police for which the judge further observed:

> It must be a great concern that in these days of constitutional imperative where all human rights are entrenched, the police still find it necessary to seek to elicit by force and physical abuse information from persons suspected of having committed offences. It is this kind of conduct which reminds one of the past atrocities with no consequences perpetrated by the police and security forces against activities on ordinary members of the society before democratic South Africa. But even most importantly, it must be of great concern that it is this tendency of relying on suspects to provide the police with information which blocks any attempt on the part of the police to transform and become experts in their own right derived from their own expertise and knowledge in the detection of crimes and those accused of commission of crimes without relying on information forcefully provided by the suspects. Change of mind set and probably training need to be steered in the direction that lays emphasis on competence and excellence in the investigation of crimes.[65]

Legodi JP reiterated literally all that has been said about the law of arrest and detention;[66] how drastic an infringement they are to the rights to liberty and human dignity;[67] and how much personal liberty is prized in a constitutional democracy that its interference cannot be tolerated.[68] The Judge President addressed the purpose of award of damages for unlawful arrest and detention being to vindicate the rights infringed by giving the aggrieved compensation for the injuries caused; and that in the absence of any fitted formula to deal with the assessment of such an award, the matter is within the court's discretion to determine what amount is fair and just in the circumstances.[69] Most importantly, such an award must reflect the fact that the right(s) breached is protected by the Constitution.[70] The Judge President did not understand the SCA in setting the template in *Minister of Safety and Security v Seymour*[71] to be suggesting that heavier amounts of damages should not be awarded in deserving cases, "neither do I see it as encouraging infringement of such rights." The court then proffered the idea that "the solution lies in awarding damages jointly and severally against those who had abused their authority in the course of their employment and in some deserving cases order such individuals to pay costs out of pocket for extravagant conduct. Only in that way, will the public purse be preserved for truly deserving matters."[72]

5 TWO BOTSWANA CASES

There are two Botswana cases that need to be mentioned here. One dealt with assault generally while the other concerned assault committed by the police against a person in their custody. In the first illustration (*Nkhori v Sebi*[73]) the plaintiff, who had shared a girlfriend with the defendant, was felled by the defendant, punched and kicked as he rushed to catch a bus to get to work. The plaintiff suffered swelling on the left side of his face and his left jaw was broken. His jaw remained wired for a period of six weeks after the assault. In addition, his head had hit the manhole cover next to where he fell. Phumaphi J held that the approach to general damages had been to award a global figure rather than break up into subheads. In the circumstances, the plaintiff was awarded a global sum of P100 000 as appropriate to meet the justice of the case.

Unlike in the foregoing case where the assault was committed by a private non-governmental agency against another private citizen, the case of *Rapekenene v Attorney General*[74] involved assault by the police consequent upon the arrest and detention of the plaintiff. The plaintiff's claim for unlawful arrest and detention was unsuccessful because the police officer who held him for two days had a reasonable suspicion, based on the information available to him, that the plaintiff was a robber.[75] On the other hand, as much as Walia J found that the arrest of the plaintiff without a warrant was not in breach of section 28 of the Criminal Procedure and

65 *Mogakane* paras 12–13.
66 *Ibid* paras 4-5.
67 *Theobald v Minister of Safety and Security* 2011 1 SACR 379 (GSJ) para 175.
68 *Zealand v Minister of Justice and Constitutional Development* 2008 2 SACR 1 (CC) para 12.
69 *Mogakane* para 6.
70 *Ibid* para 7. See also *Thandani v Minister of Law and Order*1991 1 SA 702 (E) 707A-B.
71 2006 6 SA 320 (SCA) 326G.
72 *Mogakane* para 10.
73 2013 1 BLR 285 (HC).
74 2013 1 BLR 507 (HC) 513D-H.
75 *Rapekenene* at 512F-G.

Evidence Act Cap 08:02 (CPEA) since it was carried out on reasonable suspicion of the plaintiff having participated in an alleged robbery which might have been justified, the assault was without doubt unlawful.[76] Again, as much as the assault was proved on a balance of probabilities, the injuries suffered by the plaintiff were so minor as to be almost insignificant. The damages awarded by the court was therefore more of a disapproval of the high-handedness of the police officers than for the actual injury. This is because courts should not be seen to be condoning any acts of violence on the part of law enforcement agencies, on citizens suspected of criminal conduct.[77] Walia J further held that the courts in Botswana have generally been conservative in awarding damages in cases of assault. In arriving at an award of P5 000 for some pain associated with bruising in the circumstances of the case, the court referred to the following previous cases:

- *Mosaninda v Attorney General*[78] where P5 000 was awarded for bruises suffered from handcuffs and leg-irons;
- *Malope v Tshegofasto*[79] where P3 000 general damages was awarded; and
- *Nkunga v Attorney General*[80] where P7 500 was awarded for bruises and abrasions, a wound, grazes, swelling and scratching extending from neck to the thighs. [81]

6 ASSAULT BY LESOTHO POLICE AND MILITARY OFFICERS

A common thread that runs through these cases is the brutality of the police and members of the defence force on individual citizens in the pretext of enforcing the law and sometimes for no reason at all. What is amazing is the admission of liability by the authorities in most of these cases; they often concede liability while quantum remains the only issue for the court to determine. What is equally astonishing is that the assaults committed in the cases under discussion did not arise from attempts to arrest for suspicion of having committed a crime or for having been found committing an offence in the presence of a police officer. These assault cases do not even turn out to belong to the category of using excessive or disproportionate force to effect an arrest. They are all cases of wanton and unwarranted assaults with no apparent reason or just cause.[82]

76 *Ibid* 513D.
77 *Ibid* 513F.
78 1994 BLR 411 (HC).
79 2002 BLR 266 (HC).
80 2010 1 BLR 342 (HC).
81 *Rapekenene* 513F–H.
82 Reference could also be made to the High Court judgment in *Raposholi v Commissioner of Police* 2007 LSHC 67 (30 May 2007) where the plaintiff, an accounts clerk of a government hospital, was arrested, detained and assaulted when she went to the police to report the snatching of the government money in her care by two gun-trotting men. While the court dismissed her claims for unlawful arrest and detention, it nevertheless entered judgment in her favour for the assault. In awarding her M8 000, Mofolo J stated that although the assault was trifling, a court must not take kindly to police assaulting detainees in their custody and the fact that they did so in the course of interrogation made no difference since it was not within their discretion to act other than as servants of the Crown. Similarly, although the plaintiff in *Makhasane v Commissioner of Police* 2011 LSHC 20 (3 January 2011) proved her case on a balance of probability, the damages she sustained were not of a serious nature in that the malicious arrest lasted for only two hours and the assault was minor hence the court awarded M2 000 under each head. For *contumelia*, the award was M3 000. The sum of M1 000 was awarded for loss of the plaintiff's business goodwill because evidence was not led to prove daily takings before and after the incident. *Cf* in *Lechesa Ranthimo v Commissioner of Police* 2014 LSHC 2 (27 February 2014) where in determining the quantum to be awarded the plaintiff arising from the unlawful detention of his taxi, the daily takings from the plaintiff's record book was taken into account in calculating the average takings for a period in making the award.

6 1 *Molise v Officer Commanding Thaba Tseka Police Post*

In *Molise v Officer Commanding Thaba Tseka Police Post,*[83] the trial judge emphasised that an assault in whatever form is a delict that affects a person's bodily integrity as much as it is a breach of the fundamental right to the protection against torture or inhuman or degrading punishment by anybody upon a human being as provided for in section 9(1) of the 1993 Constitution of Lesotho. Although the plaintiff did not disclose to the court his standing in society or his reputation, it was however held that the plaintiff's right to be treated "humanly and with dignity are protected under the Constitution" as a human being. The plaintiff's evidence that he was subjected to torture, inhuman and degrading punishment for one hour by police officers whose duty it was to uphold the rule of law and to protect him was not contradicted. It was, however, more disturbing to find that the cattle in question was ultimately not found in his possession and it was for that reason that the police released him from custody. Meanwhile, "unjustified brutal torture and assault" by supposed law enforcement officers, which the judge found to be "shocking and deplorable" and "clearly criminal offences" had taken place. In effect, the cattle in question had been found but not in the plaintiff's possession even though the police had already subjected the plaintiff to "intensive, prolonged brutal assault and torture on a suspicion that it was the plaintiff who had stolen same." In these circumstances, the court considered the plaintiff's bodily injuries and disfigurement, assault, pain and suffering and awarded him damages as follows: (a) assault – M50 000; (b) pain and suffering – M3 000; and (c) disfigurement – M12 000. These were coupled with interest at 18.5% per annum and costs of the suit.

6 2 The *Morobi* case

The alleged "offence" of the plaintiff in *Morobi v Commissioner of Police*[84] was that he was being disrespectful to government officials simply because when the police officers asked him to stop, he did not come out of the car but merely lowered his window. In the process of a barrage of questions, the officers spotted an incorrect entry of the expiry date of his learner's licence which the plaintiff was not even aware of. Instead of arresting him if they had reasonable ground to suspect that he had committed an offence, they preferred to inflict physical assault on him. They used pepper spray in his eyes and ears and assaulted him with police batons. They demanded money which the plaintiff did not have. They left him waiting at the scene of the incident as they instructed but they did not come back. A medical report from the hospital confirmed assault on the plaintiff's ribs with a blunt instrument; a severe degree of force was used causing injury to life, with a "moderate, degree of immediate disability – moderate degree of long term disability – partial." The plaintiff used to work at a place where he carried bags of seeds; he could no longer do so after the assaults which took place in public. As a pastor, his congregation started to look at him differently after the attacks. This brought humiliation and lowering of his dignity. The defendants admitted liability but contested the issue of quantum.[85]

Considering the damages to be awarded in the circumstances for pain and suffering, *contumelia* and medical expenses, Hlajoane J, in the exercise of the court's discretion, took into account the following factors:[86] the nature and seriousness of the assault; the fear created in the plaintiff; the extent of the humiliation; the motive of the attacker; the status of the plaintiff; whether an apology was tendered by the defendant; previous awards in comparable cases while giving allowance for inflation and treating each case with its peculiar circumstances.[87] In view of the fact that the plaintiff did not resist arrest, yet, the police resorted to treating him in such an inhuman fashion and ended up not arresting him,[88] the court awarded the plaintiff M70 000 for pain and suffering; M30 000 for *contumelia;* M300 for past and future medical expenses and cost of the suit.[89]

83 2013 LSHC 74 paras 10, 13–18.
84 2012 LSHC 1 (9 February 2012) (*Morobi*).
85 *Morobi* para 27.
86 See generally, Visser and Potgieter, *Law of Damages* (3ed) 549 where the authors had enumerated the factors to be taken into account in calculating the quantum of damages in assault, including rape cases.
87 *Morobi* paras 20–21; *Mohlaba v CLRDF* LAC 1995-1999 184 at 191G-J; *Protea Assurance Co Ltd v Lamb* 1971 1 SA 530 at 535-536.
88 *Morobi* para 26.
89 *Ibid* para 29.

6 3 *Mokaka v COP*

Like in *Morobi*, a bizarre and unprovoked assault situation involving no arrest or detention similarly took place in the subsequent case of *Mokaka v Commissioner of Police*.[90] The plaintiff, a construction worker, and his friends were returning from a circumcision school when they were ordered to stop by two shouting policemen on horseback. His companions ran away while the plaintiff stood. The policemen ordered him to drop his stick and raise his hands which he did. One of the police officers then took the stick and assaulted the plaintiff and left thereafter with the stick. Medical evidence showed that the plaintiff sustained a "deformed left forearm, reduced range of movement at the elbow joint as well as pain and tenderness over the deformed part of the arm." As a result of the injuries, the plaintiff would "not be able to do normal work at his place of employment because of the reduced range of movement." The assault was inflicted in full public view and some villagers had gathered nearby apparently to watch the incident. The court had no difficulty in accepting the evidence of the plaintiff, also being corroborated by eye-witness testimony, as more probable than the poor account of events by the defendant which Monapathi ACJ described as "not only riddled of improbabilities and absurdities but also preposterous and laughable. Suffice to say that no reasonable court may accept it."[91]

The Acting Chief Justice approached the assessment of damages from the premise that there is no fixed formula for assessing non-patrimonial loss.[92] Referring to the well-known South African case of *Pitt v Economic Insurance Co Ltd*,[93] the Acting Chief Justice held that it is recognised that the court has the power to estimate the amount *ex aequo et bono* and consequently enjoys the discretion with fairness as the dominant norm.[94] The court also accepted the proposition based on the judgment of Innes CJ in *Hulley v Cox*[95] to the effect that fairness to both sides must not only give compensation to the plaintiff but must avoid pouring largesse at the horn of plenty at the defendant's expense.[96] And, that as much as previous awards as updated to current value through the consumer price index can never be decisive, yet, they are instructive.[97] The court considered the pain and suffering which the plaintiff was made to endure as a result of the attack and brutal assault by police with no just cause. He suffered public ridicule and emotional hurt and has been disabled by the deformed and disfigured arm. The plaintiff was a young man "who still has many years to live and make ends meet for himself and his family and children. He still has to enjoy life and its amenities. All these are but dreams never to come true as he is now physically incapacitated as a result of the unlawful attack on his person by the police."[98]

In addition to the foregoing, the Acting Chief Justice took into account in assessing the damages that may be awarded to the plaintiff that sums claimed were "a token of compensation" since no monetary value could ever adequately compensate the plaintiff for the pain and suffering he had endured; the permanent disfigurement he had been subjected to; the loss of amenities of life including ability to work for himself; as well as his feelings that were gravely

90 2014 LSHC 47 (11 February 2014) (*Mokaka*).
91 *Mokaka* para 18.
92 The same judge had said in *Khosi v Second Lieutenant Babeli* CIV/T/507/90 that: "[i]t is difficult to measure *contumelia*; pain and suffering in terms of money. It is not the purpose of the law to punish but to seek to compensate plaintiff as much as possible with the aid of whatever evidence and information at the court's disposal based on broad general considerations."
93 1957 3 SA 284 (D) 287E-F per Holmes J.
94 *Mokaka* para 20.
95 1923 AD 234 at 246.
96 See Visser and Potgieter, *Law of Damages* (3ed) 500.
97 *Mokaka* para 21.
98 *Ibid* paras 22–24.

hurt.[99] Three previous awards which the court considered were recent cases, namely:

- *Ramoholi v Commissioner of Police*[100] where Chaka-Makhoaoane J awarded the sum of M250 000 in 2011 to the plaintiff who had sustained injuries far less than those of the plaintiff in *Mokaka*;
- *Letsela Morobi v Commissioner of Police*[101] where Hlajoane J in 2012 awarded the sum of M100 000 to the plaintiff whose injuries were described as superficial when compared to that of the present plaintiff; and
- In *Commander LDF v Tlhoriso Letsie*,[102] the Court of Appeal awarded damages in the sum of M150 000 to the plaintiff whose bones were not broken.

So, in the present circumstances, where the plaintiff sustained grievous bodily injuries; had been left disfigured and deformed by the police as a consequence of which he no longer performed his duties as a construction worker; he was enduring continuing pain as a result of brutal attacks on his person by the police which was totally uncalled for and unwarranted, the judge was prepared to award the plaintiff the sums he had claimed as they were fair and reasonable and ought to be awarded as prayed.[103] In effect, the sums claimed and awarded were as follows: (a) M100 000 for pain and suffering; (b) M80 000 for disfigurement; (c) M50 000 for loss of amenities of life; and (d) M20 000 for *contumelia* being a total of M250 000.[104]

6 4 The *Lebajoa* cases

The judgments in *Lephatsoe Lebajoa v Commissioner of Police*[105] and *Malatsi Lebajoa v Commissioner of Police*[106] offer further illustrations of the penchant of the law enforcement and other security agents for inflicting physical and bodily injuries on the citizens of Lesotho in purported maintenance of law and order. Both plaintiffs were simultaneously subjected to similar assaults by the same police officers. They were beaten, kicked and forced to roll down the hill, which caused them some pain even if the resultant injury was not readily discernible to the naked eye in the form of cuts and bruises save for the ones on Lephatsoe's calf. In considering the appropriate amount to award the plaintiff in *Lephatsoe Lebajoa,* Majara J rejected the submission that the police officers in question "were trying to poke fun at the plaintiff" because the police were expected to behave in a professional manner and not abuse their powers by gratuitously ill-treating and assaulting civilians without reasonable or probable cause whereas they were there, *inter alia*, to see to it that everyone was protected and that no one received the kind of treatment which the plaintiff received at their hands. The learned judge held that the above factors[107] together with the fact that the assault was both unnecessary and unprovoked were serious enough to warrant compensation as the resultant humiliation was considerable. The court had regard for the fact that it should express its disapproval of the seriousness, brutality and humiliating effect of such treatment. It also took into account the absence of any possible reasonable explanation from the defendants concerning the assault. After considering comparable cases,[108] the court awarded the plaintiff the following: (a) M15 000 for pain, shock and suffering; (b) M25 000 for *contumelia;* (c) 18.25% interest from date of judgment; and (d) cost of suit.[109]

Adopting the foregoing reasoning of Majara J, and having regard to the quantum of damages awarded by the trial judge in that case, Peete J held in *Malatsi Lebajoa* that the plaintiff had not called for medical evidence to substantiate the gravity of his injury to justify

99 *Ibid* para 25.
100 CIV/T/445 (29 August 2011).
101 2012 LSHC 1 (9 February 2012) (*Morobi*).
102 *Letsie v Commander, RLDF* LAC 2009-2010 549.
103 2014 LSHC 47 (11 February 2014) (*Mokaka*) paras 27–28.
104 *Mokaka ibid* para 1.
105 2007 LSHC 156 (31 May 2007).
106 2010 LSHC 99.
107 The court drew analogy from the Zimbabwean case of *Minister of Defence v Jackson* 1991 4 SA 23 at 27, where it was held that the quantum of compensation must bear relation to the extent of the loss suffered and be directly proportionate to the extent of the loss, including the intensity of the injury to feelings which also objectively include age, gender, social status, culture and lifestyle. In addition, the damages to be awarded should have some purpose such as: counter-balancing the plaintiff's unhappiness; providing psychological satisfaction for the injustice done to him as well as enabling him to overcome the effects of his injustice.
108 See also *Marine and Trade Insurance Co Ltd v Katz* 1979 4 SA 961 (A) 983.
109 *Morobi* para 29.

his claim for M90 000 damages for pain, shock and suffering as well as *contumelia*. However, as the two cases arose from the same set of facts, the awards in both cases should not differ substantially unless there were special circumstances or that a degree of injury in one case is more grievous than in the other. The only distinguishing feature between this case and the previous is that Lephatsoe Lebajoa was a public figure and a well-known musician who probably suffered a graver *contumelia* during the assault than Malatsi Lebajoa. Peete J awarded the sum of M15 000 for pain, shock and suffering; M15 000 for *contumelia*; 18.25% interest from the date of judgment and cost of suit.[110]

7 ASSAULT AND SHOOTING BY MEMBERS OF SWAZI DEFENCE FORCE

In addition to those assault cases from the Eswatini jurisdiction which are discussed in the context of claims for damages for injuries arising from police shootings in South Africa, Lesotho, Namibia and Eswatini, such as *Santos v Attorney General* where the sums of E220 000 and E230 000 were awarded respectively for special as well as general damages,[111] the claims for injuries sustained in the shootings in both *Magagula v Reilly*,[112] and *Vilakati v Swaziland Government*[113] were not successful. The shot fired in *Vilakati* was held to have been in self-defence while that, in *Magagula*, was justified in terms of the law because the game ranger was under a contractual duty to secure game on behalf of their employer.[114] These cases are not dealt with in the present context, but there are at least two cases from Eswatini, which command attention in this discussion.

Although the plaintiff's house in *Simelane v COP*[115] was searched without a warrant and without her permission, it was the torture, inhuman and degrading treatment which were the focus of her claim and which she contended were in violation of her fundamental rights as enshrined in the Constitution. The constitutional provisions implicated include: section 16(3) which deals with the release of an arrested or detained person or one arrested but not yet brought to court; section 18 which guarantees the right not to be subjected to torture or inhuman treatment or punishment; section 22 which guarantees protection against arbitrary search and entry;[116] and sections 22*(b)*, 30(1) and (2) of the Criminal Procedure and Evidence Act No 67 of 1938. She proved on a balance of probabilities that she was assaulted and the assault not only humiliated her, it also caused her shock, pain and suffering. She was, however, not severely injured nor did she suffer any permanent injuries; her injuries were minor.[117] She was awarded E50 000 general damages to encompass the whole sequence flowing from the unlawful arrest, namely: humiliation, shock, pain and suffering. She was awarded E123 in respect of what she could prove as special damages but not in respect of the E2 000 she claimed, but could not prove.[118] So, too, the plaintiff in *Mayisela v COP*[119] was awarded a total of E115 000 for pain and suffering arising from the assault, humiliation and loss of dignity, and permanent disability and disfigurement inflicted upon him by police officers in full view of members of the public minutes after a football match.

In *Mkhwanazi v Army Commander, Swaziland Umbotfo Defence Force,*[120] the plaintiff had claimed damages for E2 000 000 for assault and shooting by members of the Defence Force without any reasonable or probable cause.[121] Government conceded liability and Maphalala J was called upon to determine the quantum of damages including pain and suffering, discomfort, loss of earning capacity both past and future, as well as prospective loss and *contumelia*.[122] The learned judge expressed the view similar to that of Watermeyer JA some

110 2010 LSHC 99 paras 6–7 and 11–12.
111 (1464/95) [2007] SZHC 24 (23 March 2007).
112 (1211/2010) [2017] SZHC 211 (2 November 2017).
113 (1858/2009) [2018] SZHC 60 (4 April 2018).
114 *Magagula v Reilly* paras 161 and 168.
115 2013 SZHC 135 (11 July 2013) paras 31 and 34.
116 *Simelane v COP* para 30.
117 *Simelane v COP* para 33.
118 *Simelane v COP* para 34.
119 2010 SZHC 212 (28 May 2012). Attention is hereby drawn to this case and the more recent case with similar parties – *Mayisela v COP* [2017] SZHC 248 (14 December 2017) which concerned the arrest of the plaintiff on reasonable suspicion and whether the arrestors justified the lawfulness of the arrest, the answer to which was given in the positive, hence the plaintiff's claim for damages for wrongful arrest and detention was dismissed.
120 2009 SZHC 21 (27 February 2009) para 23.
121 *Mkhwanazi* paras 1–2.
122 *Ibid* paras 23–24.

74 (seventy four) years ago about the difficulty of measuring pain and suffering in monetary terms.[123] In effect, the amount to be allowed for damages for pain and suffering is hardly an estimate but a guess in most cases; there being no scales to measure pain and suffering neither is there a relationship between pain and money such that it is impossible "to express the one in terms of the other with any approach to certainty."[124] The difficulty of quantification in this case manifests in the fact that the court could actually not find a suitable comparator with the amount the plaintiff sought to recover in this case. Yet, the peculiar circumstances of the plaintiff must be analysed so as to come up with an appropriate and fair amount. As a result of the shooting, the plaintiff had to endure pain, suffering, discomfort and was unattended to. The bullet had ripped through his abdomen entering one side and coming out on the other side. The plaintiff had to crawl from the spot of shooting to his homestead. He was bleeding profusely from the shot wound, eyes, nostrils and mouth. What is more, the plaintiff had to undergo an operation and an object or tube was placed in his body to enable him to release human waste. As a result of this assault, the plaintiff cannot properly hear or see, his right eye having gone partially blind.[125] To cap it all, the plaintiff remained unemployable and could not walk like an able-bodied human being and had consequently suffered loss of income so that an award for future income would be appropriate.[126] Having found no comparative case from among the "run of the mill" cases of unlawful detention such as *Gina v Commissioner of Correctional Services*,[127] Maphalala J held that a different measure ought to attach to the facts of the present case where the plaintiff was violently attacked by members of the armed forces such that he now suffers from life-threatening ailments some of which are highly embarrassing. Considering the totality of the facts, the judge found that the amount of E2 000 000 was far excessive, rather, what was appropriate and fair would be an award of E290 000 made up of: (a) pain and suffering, E200 000; (b) discomfort, E50 000; (c) *contumelia,* E25 000; and (d) attorneys costs, E15 000.[128]

TO BE CONTINUED

123 *Sandler v Wholesale Coal Supplier Ltd* 1941 AD 194 at 199.
124 *Mkhwanazi* para 25.
125 *Ibid* paras 27–28.
126 *Ibid* para 29. See also *Burger v Union National South British Insurance Co Ltd* 1975 4 SA 72 (W).
127 2006 SZSC 17 (15 November 2006).
128 *Mkhwanazi* paras 32–34.