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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 1)

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Abstract

The common law has, for decades, protected anyone in police or prison custody. Such protection has been afforded, at least, to the extent that the imprisonment had not taken away the right sought to be protected. This position has not only been fortified by the Bill of Rights and relevant statutory and international instruments in modern times; it has also been acknowledged and affirmed by the highest court in South Africa. The crucial questions that arise in the present context are two-fold. First, to what extent does the law afford protection to the arrested person from injuries arising from the unlawful conduct of the police officer in whose custody the arrested or detained person is; or the prisoner who has been physically assaulted or raped by prison officer(s) or fellow inmates? Having determined that the right claimed is protected and that the State is therefore liable, the second question is: how would the court compensate, in monetary terms, the victim(s) of the constitutionally guaranteed right(s) implicated in these circumstances – human dignity; freedom and security of the person; freedom from slavery, servitude and forced labour; privacy rights and the right to life? Even though the circumstances where the prison authorities had failed to exercise due care in preventing harm to prisoner(s) are not the focus of this study, yet, there are abundant reported and unreported Southern African case law that provide answers to the vexed questions raised in this investigation.

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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1 INTRODUCTION

The judgment of the Supreme Court of Appeal (SCA) in *Minister of Safety and Security and Others v Craig and Others*[1] has affirmed the long-standing principle of the South African common law that State officials who have prisoners in their charge are under a duty to see to their well-being and that courts should be vigilant to ensure that those officials, including the police, who have in their charge persons whose freedom of movement has been restricted, comply with the obligation to ensure their well-being. There is thus a duty owed to the prisoner or person in police custody to ensure his or her safety and to take all reasonable steps to prevent foreseeable harm to the prisoner or person in custody.[2] This is more or less the essence of the common-law *residuum* principle whereby prisoners are entitled to all their personal rights and dignity except those temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed;[3] the necessary intendments of the constitutional guarantee of section 12 of the Constitution as interpreted and applied by the Constitutional Court in *Zealand v Minister of Justice and Constitutional Development;*[4] and, the injunction under section 4(2) of the Correctional Services Act 111 of 1998 that the department should take such necessary steps to ensure the "safe custody of every inmate and to maintain security and good order in every correctional centre".

The critical issues for discussion in this presentation can be phrased in two questions: first, to what extent has the arrested and detained person suffered injury at the hands of his or her arrestors and during the period of detention; or the prisoner in a correctional centre has been physically assaulted by a prison officer(s) or fellow inmates; or the prison authorities has failed to exercise due care to prevent harm to the prisoner? Second, to what extent has the right(s) of the individual prisoner involved in each instance been adjudged by the courts to be protected by the law? More importantly, where the person in police or prison custody has succeeded in establishing liability in any of the circumstances postulated, what was the amount of compensation or damages awarded to vindicate his or her right(s)? Although the inquiry would normally include negligent acts and omissions on the part of the police and prison officers; the emphasis in the present context is on those deliberate acts committed against persons in custody. Again, such deliberate acts would ordinarily encompass those rape cases committed against persons in custody. However, because of the bulky nature of the materials unearthed in the process of research, the rape cases are omitted in the present circumstances. In spite of that, the scope of the study remains so extensive that this presentation cannot be made in a single article thus compelling the adoption of a three-piece presentation approach. It is also important to mention that the extent to which the discussion is conducted in each case is dictated by the question whether the judgment dealt with the assessment of quantum of damages recovered as compensation. In simple terms, as much as this research examines to some extent the issues surrounding the determination of liability, that aspect is not canvassed in any detail including its inherent attribute of factual and legal causation. These limitations inform the reason why a case, such as *Lee v Minister of Correctional Services*[5] – the most modern and highest authority on the subject – is not exhaustively discussed in the present context. At the same time, this exercise is not an inquiry into injuries sustained at work by employees of the relevant departments of government as in *Minister of Defence and Military Veterans v Thomas*;[6] nor is it concerned with claims for damages by a prison officer against his commander for an alleged unwarranted search upon the prison officer's person as was in issue in the Lesotho Court of Appeal judgment in *Officer Commanding Correctional Services, Mothotlong v Selepe*.[7] Rather, this enquiry is more akin to an investigation into the liability of

1 2011 1 SACR 469 (SCA) para 60. See also *Geldenhuys v Minister of Safety and Security* 2004 1 SA 515 (SCA); *Jaftha v Minister of Correctional* 2012 2 All SA 286 (ECP).

2 *Cf* in *Pitzer v Eskom* 2012 ZASCA 44 (29 March 2012) para 17; *Kruger v Carlton Paper of SA (Pty) Ltd* 2002 2 SA 335 (SCA) para 9.

3 Per Innes JA, *Whittaker & Morant v Rees & Bateman* 1912 AD 92 122–123; per Corbett JA, *Goldberg & Others v Minister of Prisons & Others*1979 1 SA 14 (A) 39C-E; per Jansen JA, *Mandela v Minister of Prisons* 1983 1 SA 938 (A) 957D-F; per Hoexter JA, *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 138E-142C. See Okpaluba "The Right to Residual Liberty of a Person in Incarceration: Constitutional and Common Law Perspectives" 2012 *SAJHR* 458.

4 2008 4 SA 458 (CC).

5 2013 2 SA 144 (CC).

6 2016 1 SA 103 (CC).

7 LAC 2009–2010 364.

the prison authorities whose lack of due care towards prisoners held in unsanitary conditions brought about tuberculosis in the prison as in *Lee*.[8] The research focus is literally captured by the views expressed by the SCA in *Lee* to the effect that, when a person becomes a prisoner, he is at the mercy of the State, which bears the concomitant obligation to see to the physical welfare of its prisoner. A person who is imprisoned is delivered into the absolute power of the State and loses his or her autonomy. A civilised and humane society demands that when the State takes away the autonomy of the individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner.[9] South Africa being such a society recognises that obligation in various legal instruments. For instance: section 12(1) of the Correctional Services Act 111 of 1998 obliges the prison authorities to "provide within its available resources, adequate healthcare services, based on the principles of primary care, in order to allow every inmate [of a prison] to lead a healthy life"; and section 35(2)*(e)* of the Constitution of South Africa 1996 confers in all prisoners the right to "conditions of detention that are consistent with human dignity."[10]

However, as much as the liability issues in *Lee* remain attractive and are appropriately referred to in this discussion, an extensive engagement on such issues is not the primary concern of this study nor is it necessary to enter into the difficult terrain of the "but for" causation enquiry[11] as the Constitutional Court did, and on the basis of which that case was ultimately decided on a slim majority.[12] The quantum of damages awarded is the subject of this enquiry and where a case has no record of any award or that the reason(s) why a certain award was made is not available or ascertainable, the process of elimination automatically dictates non-inclusion or non-discussion, and at best, mere mention in the present article.

2 SOME PRELIMINARY ISSUES

Before entering into the maze that is quantification of damages, it is necessary to lay the foundation for this discussion by: (a) briefly outlining the common-law *residuum* principle of the rights of a person in custody; and (b) briefly discussing the modern constitutional framework to set the background for a clearer understanding of the study. In this regard also, there is a brief discussion of the rights of suspects in police custody as articulated in the 1964 *Judges' Rules* of the English vintage and the legal propositions emanating from the analysis of the said *Judges' Rules* by the Lesotho Constitutional Court. A further illustration of the extent to which the law can protect the prisoner in modern times is embedded in the answer which the Botswana High Court gave to the novel question: whether a prisoner can be wrongfully arrested and/or detained?

8 2013 2 SA 144 (CC).
9 2012 3 SA 617 (SCA) para 36.
10 *Lee* para 36.
11 *Lee* para 38; *Mashongwa v PRASA* 2016 3 SA 528 (CC) para 68; *Life Healthcare Group (Pty) Ltd v Suliman* 2019 2 SA 185 (SCA) paras 12 and 17.
12 See e.g. Fagan "Causation in the Constitutional Court: *Lee v Minister of Correctional Services*" 2015 *Constitutional Court Review* 5.

2 1 The Common-Law *Residuum* Principle

The South African law has for over a century regarded prisoners as persons entitled to rights. In *Whittaker & Morant v Rees & Bateman*,[13] Innes JA enunciated the principle that prisoners were entitled to all their personal rights and dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. It is true that a prisoner's freedom had been greatly impaired by the legal process of imprisonment, but he/she was entitled to demand respect for what remained. Therefore, the fact that the prisoner's liberty had been lawfully curtailed was no excuse for "further encroachment upon it."[14] Several decades after, Corbett JA coined the "*residuum* principle" when in his dissent in *Goldberg & Others v Minister of Prisons & Others*,[15] he spoke of "a substantial *residuum* of basic rights which [the person in incarceration] cannot be denied; and, if he is denied, then he is entitled … to legal redress."[16] Expressing similar views in *Minister of Justice v Hofmeyr*,[17] Hoexter JA held that Corbett JA's dictum represented the law. He went further to explain the dictum of Innes JA to be a salutary reminder that in truth the prisoner retains all his personal rights save those abridged or prescribed by law. "The root meaning of the Innes dictum", he held, "is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his common law rights."[18]

These pronouncements pre-dated the constitutional state. Thus, according to Navsa JA, they have been given "fresh impetus by a number of our constitutional values such as dignity, equality and humanity" in the democratic era.[19] The residuum principle was subsequently amplified by Plasket J in *Ehrlich v Minister of Correctional Services*[20] in the spirit of the "fresh impetus". Plasket J reviewed these pre-1993 cases whereby the courts pronounced on these rights in the face of the then prevailing and overbearing principle of parliamentary sovereignty, and in comparing then with now, he held that:

> In the era of democratic constitutionalism, in which fundamental rights are justiciable and in which they may only be limited by law of general application, "that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", the *residuum* principle has stronger protection than before. There can be no doubt that it is in harmony with the Constitution's values.[21]

If there were any lingering doubts, as to the operation of the *residuum* principle in the contemporary democratic State, such doubt must have been cleared by the Constitutional Court judgment in *Zealand* which represents the constitutional era version of the residual liberty of the prisoner as has been extensively discussed elsewhere.[22] *Zealand*, however, remains the pertinent Constitutional Court judgment on the subject to warrant its brief mention in introducing the constitutional obligation of the police and prison officers to take due care of the persons in their respective custodies. But before delving further into the constitutional jurisprudence surrounding the *Zealand* case, there is the corollary question the answer to which is deeply related to the *residuum* principle; that is, whether a prisoner can claim to have been wrongfully arrested or detained? Although the Constitutional Court did not advert to that issue in *Zealand* because it did not directly arise, there is now a case from Botswana where the court was confronted with the question head-on.

13 1912 AD 92 (*Whittaker*).
14 Per Innes JA, *Whittaker* 122–123.
15 1979 1 SA 14 (A).
16 *Ibid* at 39C-E.
17 1993 3 SA 131 (A).
18 *Ibid* at 138E-142C.
19 *Minister of Correctional Services and Others v Kwakwa and Another* 2002 4 SA 455 (SCA) at 461I.
20 2009 2 SA 373 (ECD).
21 *Ehrlich* para 7.
22 See Okpaluba *SAJHR* 458 466–468.

2 2 Constitutional and Statutory Background

The Constitution of South Africa, 1996 is the link between the Bill of Rights and the development of the common law including the law of delict. The Constitution does not only embody an enforceable Bill of Rights; it enjoins the State in terms of section 7(2), to respect, protect, promote and fulfil the rights in the Bill of Rights.[23] Section 10 of the Constitution guarantees everyone the inherent dignity and the right to have their dignity respected and protected.[24] Again, section 12 guarantees freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause and the right not to be treated or punished in a cruel, inhuman or degrading manner. Section 35(2)*(e)* protects every detained person and sentenced prisoner to be held in conditions that are consistent with human dignity, "including at least exercise and the provision, at state expense, of adequate accommodation, nutrition,[25] reading material[26] and medical treatment."[27]

The culmination of the linkage between the Constitution and the law of delict can be found in the unique provision which distinguishes the South African Constitution from the other constitutions in the Commonwealth. It mandates the courts in interpreting the Bill of Rights not only to promote the values of human dignity, equality and freedom but also the spirit, purport and objects of the Bill of Rights when interpreting any legislation or in developing the common law.[28] This constitutional injunction has had a tremendous impact not only on the enforcement of the individual rights but also on the law of delictual liability of the State and its

23 *F v Minister of Safety and Security* 2012 1 SA 536 (CC) paras 1–2 and 33.

24 See generally, Ackermann *Human Dignity: Lodestar for Equality in South Africa* 2012 paras 3.1–3.3.

25 See the discussion by Maseko, "Inmates' Right to Adequate Nutrition in South Africa: Is the Enforcement of this Right Constitutional?" 2016 *SAPL* 178–188.

26 Does the use of the internet fit into "provision" of reading material to enable a prisoner to complete his studies? Answering this question in *Thukwane v Minister of Correctional Services* 2003 1 SA 51 (T) para 39, Van Loggerenberg AJ held that a prison is first and foremost a place of incarceration and not an "internet Café". In other words, "the prisoner cannot play, walk, run, move about, phone, study new scientific research, express himself … in ways he could have done before his imprisonment. His life, as of necessity, gets regulated by prison hours and infrastructure." This should be contrasted with the recent judgment of Swanepoel AJ in *Pretorius v Minister of Justice and Correctional Services* 2018 2 SACR 501 (GJ) paras 40–44 which is illustrative of the modern way in which the law protects a person in custody. Here, were three prison inmates serving lengthy terms of imprisonment and who were registered for tertiary educational courses and had made significant progress in their studies whilst incarcerated. They had argued that the policy procedures on formal education programmes made by the National Commissioner of Correctional Services, insofar as they related to the use of a personal laptop computer (without a modem) in any communal or single cell, constituted unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Pepuda). Although they were allowed to be in the computer centre of the prison from 07h00 to 14h00 daily, they were not allowed to use their laptops in their cells. They complained that they were often deprived of sufficient time to study due to unforeseen events in the prison, such as riots that caused shutdowns, delay in having breakfast, or other obligations they had to attend to. They calculated that in a two-month period, they had lost approximately 52 hours of study time. It was held that the import of ss 37 and 38 of the Correctional Services Act 111 of 1998 was that each sentenced prisoner had to be treated as an individual, and, where a prisoner had a spotless record, as was evident in the case of the applicants, that fact should have been considered when the applicants requested for the use of computers. It was not proper to simply determine that all sentenced prisoners were subject to the same policy on the use of computers, immaterial of the needs and security record of the individual prisoner. Such a blanket approach was contrary to the purpose of the Act. Further, that the respondent had instituted a policy that limited the applicants' basic rights, and they had the burden to justify the limitation by placing facts before court, but had failed to do so. The policy probably constituted an unjustified limitation of the right to further education of all inmates and constituted an unfair discrimination in accordance with the provisions of Pepuda.

27 It is vital to mention the recent Supreme Court case from Zambia – *Mwanza v Attorney General* [2019] ZMSC 33 (9 December 2019) – which involved the rights of two HIV positive prisoners on Anti-Retroviral Treatment (ART) who alleged violations of their rights to nutrition, good food and medical treatment which turned out to be decided on the question whether those rights are justiciable. Suffice it to mention some of the findings of the Zambia Supreme Court upholding their appeal on all claims. It was held that the State had violated and continued to violate the two prisoners' rights to life guaranteed by Article 12; the right against inhuman and degrading treatment under Article 15 and to special dietary needs as persons living with HIV; and Article 11. The right to life entails that the two prisoners should have the right to decent food – adequate nutritious food. Being incarcerated is punishment enough; being served bad, inadequate, or unsafe food or being kept in inhumane conditions is unfairly punitive. Prisoners with special dietary needs because of conditions like HIV, diabetes, high blood pressure, cholesterol problems, allergies, religious dietary requirement, general nutritional concerns and vegetarian preferences, all require preferential consideration in furtherance of their right to life.

28 Section 39(1) and (2).

servants.[29] The development of the prevailing constitutional/delict jurisprudence owes its origin to this constitutional mandate and the Constitutional Court judgment in *Carmichele (1)* which removed the erstwhile common-law obstacles that rendered delictual damages for negligent acts and omissions of the government and other public authorities practically unrealisable.[30] It then directed the courts to develop the common law by virtue of the constitutional injunction. Thereafter, the burden shifted to the High Court and the Supreme Court of Appeal to carry out the constitutional mandate of developing the common law having regard to the values and norms of the constitutional order.[31] And, as Neethling points out, these fundamental values could, and have indeed, been implemented by the courts to good effect to fashion "important policy considerations in the determination of wrongfulness, legal causation and negligence."[32]

A clear illustration of the marriage between the Constitution of South Africa and the law of delict since the *Carmichele (1)* judgment through which route a plaintiff/prisoner can claim private law damages – although this might turn out to be a more circuitous way of establishing liability – is the Constitutional Court decision in *Zealand v Minister of Justice and Constitutional Development and Another.*[33] The appellant who was erroneously treated as a sentenced prisoner was remanded into maximum security prison when he had no conviction of any serious criminal offence. The only possible legal basis on which to justify any deprivation of the applicant's freedom was that he was awaiting trial in the first case. This additional encroachment on his liberty was undoubtedly greater than was necessary to secure his attendance at trial. Moreover, other awaiting trial prisoners of his class were not subjected to similar treatment which, for all practical purposes, amounted to a form of "punishment".[34]

The Constitutional Court unanimously held in *Zealand* that his detention was unlawful for the entire period. In his judgment, Langa CJ emphasised the distinction between an awaiting trial prisoner and a convicted prisoner, something the majority of the Supreme Court of Appeal thought was not within the ambit of what they were called upon to decide, but which formed the basis for Poonan JA's dissent.[35] Langa CJ held that the detention of Zealand, an awaiting trial detainee, in a maximum security facility together with sentenced and convicted prisoners amounted to a deprivation of his freedom. It was arbitrary, without just cause[36] and in violation of section 12(1)*(a)* of the 1996 Constitution.[37] The breach was sufficient in the circumstances to render the applicant's detention unlawful for the purposes of a claim for delictual damages.[38] Like in *Carmichele (1)*, the fundamental rights breaches in *Zealand* form the basis for wrongfulness and breach so that the court determining delictual liability would then investigate the factors of damage, contributory fault and causation. Similarly, where the wrongful conduct comprises a breach of an entrenched constitutional right, clearly, the policy consideration as to whether liability should attach becomes academic as the court determining the matter would not have

29 In addition to *Carmichele (1)* and the subsequent cases, the common law of vicarious liability was another beneficiary of the development of the constitutional-delict jurisprudence. In *K v Minister of Safety and Security* 2005 6 SA 419 (CC), the Constitutional Court reformulated the common-law test for imposing liability on the employer to incorporate the deliberate or criminal conduct of the employee insofar as it has sufficient link with the business of the employer. The reformulated test was recently applied in *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

30 Okpaluba and Osode, *Government Liability: South Africa and the Commonwealth* 2010 para 1.6.2.

31 See e.g. Okpaluba and Osode, *Government Liability* para 5.5.1; Carpenter, "The Carmichele Legacy – Enhanced Curial Protection of the Right to Physical Safety: A Note on *Carmichele v Minister of Safety and Security; Minister of Safety and Security v Van Duivenboden; and Van Eeden v Minister of Safety and Security*" 2003 *SAPL* 252.

32 Neethling, "Delictual Protection of the Right to Bodily Integrity and Security of the Person Against Omissions by the State" 2005 *SALJ* 572 574.

33 2008 4 SA 458 (CC) (*Zealand*).

34 Per Langa CJ, *Zealand* para 34 citing per Innes JA, *Whittaker* 121.

35 2007 2 SACR 401 (SCA) para 28.

36 *Cf* per O'Regan J, *S v Coetzee* 1997 3 SA 527 (CC) para 159; *De Lange v Smut NO* 1998 3 SA 785 (CC) para 18.

37 *Cf* Article 10(2), International Covenant on Civil and Political Rights 1966 (ICCPR). See also ss 82 and 83, Correctional Services Act 8 of 1959 applicable to the present case; now replaced by Chs 4 and 5, Correctional Services Act 111 of 1998 which commenced on 31 July 2004. All these laws draw significant distinctions between the two classes of prisoners in terms of privileges and restrictions necessary for the maintenance of security and good order in the prison.

38 *Zealand* paras 52 and 53. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 2 SA 359 (CC) where Langa CJ applied similar principles in arriving at the conclusion that there may be instances where delictual relief may be the appropriate relief for the infringement of constitutional rights, hence the conduct of the defendants in not taking responsibility for the safety of rail commuters constituted wrongfulness as could give rise to a delictual action in damages.

the luxury of exercising such discretion. By entrenching the right, the community must have pre-determined the value it places on the right and the courts cannot be seen to upset what is already settled as the legal convictions of the community.[39]

Thus, Pillay J held in *Maharaj v Minister of Safety and Security*[40] that detaining a child or any human being longer than is necessary or under inhumane and hazardous conditions will be unjustified under various sections of the Bill of Rights including the rights to human dignity in section 10; to freedom and security of the person in section 12; to freedom of movement under section 21; to a safe and hygienic environment in section 24; and to the protections afforded to arrested and detained persons under section 35(1) and (2) of the Constitution.[41] The court found that the detective's exercise of his discretion to arrest her without a warrant was irrational, unreasonable and a disproportionate limitation of her right to freedom and security of the person in section 12 and her right to freedom of movement under section 21. And, that her arrest and detention violated section 35(1)*(f)* being the right to be released from detention when the interests of justice permitted, subject to reasonable conditions if necessary.[42] Pillay J finally held that the intolerably unhygienic environment in the cells, in both police stations the plaintiff was held, were inhumane and intolerable. These conditions, coupled with the sexual harassment and the failure to allow the plaintiff access to her family impugned her human dignity in terms of section 10 as well as violating section 35(2)*(f)*(ii), amounts to cruel and unusual treatment in terms of section 12, a denial of her rights as a detainee under section 35(2)*(e)*, and a violation of her environmental rights under section 24 of the Constitution.[43]

39 The facts of *Alves v LOM Business Solutions (Pty) Ltd* 2012 1 SA 399 (GSJ) literally replicated those of *Zealand* and was decided accordingly.
40 2017 ZAKZDHC 38 (5 October 2017).
41 *Maharaj* para 28.
42 *Maharaj* para 37.
43 *Maharaj* para 53.

In addition to the constitutional protections,[44] section 4(2) of the Correctional Services Act 111 of 1998 enjoins the Department to take such steps as are necessary to ensure the "safe custody of every inmate and to maintain security and good order in every correctional centre." Section 26(1) not only assures every inmate the right to personal integrity and privacy, but also subjects those rights to "the limitations reasonably necessary to ensure the security of the community, the safety of the correctional officials and the safe custody of all inmates." In order to achieve these safety objectives of every member of the prison community, subsection (2) of section 26 empowers the correctional services officials to "search the person of an inmate, his or her property and the place where he or she is in custody and seize any object or substance which may pose a threat to the security of the correctional centre or of any person, or which could be used as evidence in a criminal trial or disciplinary proceedings." The frequency of the searches and other related information are stated in the Standing Orders made pursuant to the Act.[45] It must also be mentioned that there are many international conventions and instruments for the protection of persons deprived of their liberty either as a result of lawful arrest and detention or as a result of being imprisoned following upon a conviction for an offence. These include: the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and the African Charter of Human Rights, 1981. There are also a number of resolutions passed by the United Nations (UN) dealing with minimum standards for the treatment of prisoners, such as the Standard Minimum Rules for the Treatment of Prisoners, 1955 and Basic Principles for the Treatment of Prisoners, 1990.

2 3 Rights of Suspects in Police Custody

While the *residuum* principle was designed for the protection of a person in prison custody, the protection the law offers to those in police custody was encapsulated in *The Judges' Rules* published by the Lord Chancellor as *Practice Note (Judges' Rules)* in 1964,[46] ostensibly focussing on the care of persons in police custody by way of providing the police officers valuable guidelines when conducting investigations. For, quite apart from laying down the rule that a written statement of charges must be supplied to the accused person; and that facilities of defence must also be afforded the accused; these *Rules* made clear at the outset, in the form of a preamble that they were not meant to affect the well-known principles:

44 Quite recently, the Supreme Court of New Zealand was confronted in *Smith v Attorney General* 2018 NZSC 40 (7 May 2018) paras 7–8 with the question whether the refusal to allow a prisoner to wear a hairpiece was a breach of rights under the New Zealand Bill of Rights Act 1990 (NZBORA)? It was argued that failure to take into account s 14 of NZBORA which affirms the freedom of expression; and a breach of his rights under s 23(5) of NZBORA to be treated with humanity and respect for inherent dignity. Apart from requesting the court to quash the decision to revoke the permission for his hairpiece, the applicant sought damages for the breach of s 23(5). Wylie J held that when the applicant was wearing a hairpiece, he was "trying to say – this is who I am and this is how I want to look". He, therefore, concluded that by wearing a hairpiece, the applicant was exercising his right to freedom of expression; that freedom of expression was a mandatory consideration which the prison manager failed to take into account when deciding whether to revoke the hairpiece; and the prison manager failed to consider whether revoking the hairpiece decision would be a justifiable limitation on that freedom. The learned trial judge had quashed the hairpiece decision of the prison manager – *Smith v Attorney General* 2017 2 NZLR 704 (HC) paras 70, 88 and 98–99. Allowing the appeal – *Attorney General v Smith* 2018 2 NZLR 899 (CA) – on the single question whether the applicant's wish to wear a hairpiece engaged s 14 of NZBORA, the Court of Appeal concluded that the right to freedom of expression applies only to conduct which conveys, or attempts to convey, a meaning to others and that the wearing of the hairpiece was not of that character. The Supreme Court had no doubt that s 14 protects only expression, and thus expressive conduct, but that whether expressive conduct encompasses how a person presents to others, for instance, the wearing of a particular attire, the use of make-up, hair length, or, as in the instant case, a hairpiece, may be open to debate and indeed, as the Court of Appeal recognised, may depend on the circumstances. The approach of the Supreme Court was that the case was moot as there was no dispute that the applicant may wear a hairpiece and that the combination of the absence of a life issue and the impracticability of dealing appropriately with s 23(5) issue creates the impression that the proposed appeal would have to be addressed on an artificial basis.

45 See Regulations 15 and 16 of the Regulations Gazette No. 8023 of 30 July 2004.

46 [1964] 1 WLR 152.

(a) That citizens have a duty to help a police-officer to discover and apprehend offenders;
(b) That police-officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;
(c) That at any stage of an investigation every person should be able to communicate and consult with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;
(d) That when a police-officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;
(e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

2 3 1 Legal Propositions Emanating from the Lesotho Constitutional Court

After extensively discussing the said *Judges' Rules* including access to legal advice and the privilege against self-incrimination among other issues that arose in *Ramakatsa v COP*,[47] the High Court of Lesotho sitting as a Constitutional Court, took time to summarise the requisite principles in the form of an eight-point legal proposition:[48]

- A peace officer is entitled to arrest without warrant any person reasonably suspected to have committed a Schedule 1 Part II offence. Robbery being in the listed offence, the police would have been entitled to arrest the 3rd and 4th applicants without a warrant: section 24*(b).*
- It was mandatory for the police to inform the 3rd and 4th applicants forthwith about the cause of the arrest and not to detain them beyond 48 hours without laying any charge. It is wrong not to promptly inform an arrested person of the reasons for arrest and to leave it to him to gather the reasons from the drift of interrogation, which may involve the putting of various alternative assertions and even exaggerated accusations.[49]
- The purpose of arrest is to bring the suspect to trial and the police's role is limited. It is not the business of the police to decide whether the suspect has to be detained further pending trial. This is the role of the court.[50]
- A request for further detention must be made by way of an application based on sworn information that there are reasonable grounds for suspicion. Further detention may be ordered only if the court is satisfied that there are exceptional circumstances which warrant it and its purpose to bring the arrested person to trial upon the charge of a stated offence. A detention for any purpose other than eventual trial is improper.[51]

47 [2019] LSHCCONST 1 (16 April 2019) paras 60–65.
48 *Ramakatsa v COP* para 66. Incidentally, these propositions are to an extent within the contemplation of s 35(1), (2) and (3) of the Constitution of South Africa refers to as the rights of the arrested, detained and accused persons; s 12(2) of the Lesotho Constitution (right to a fair trial); Articles 11 of the Constitution of Namibia (rights of the arrested and detained persons) and 12 (right to a fair trial).
49 *S v Mattawe* 1989 2 SA 883 (BGD).
50 *Minister of Safety and Security v Sekhoto* 2011 5 SA 367 (SCA) para 44. See further the discussion by Okpaluba "Reasonable Suspicion and Conduct of the Police Officer in Arrest without Warrant: Are the Demands of the Bill of Rights a Fifth Jurisdictional Fact?" 2014 27 (3) *SACJ* 325–345 especially 326–333.
51 *Minister of Law and Order v Kadir* 1995 1 SA 303 (A).

- An arrested person in police custody is entitled to be given notice of the application of further detention and to appear in court in person or through a legal representative to oppose it.[52]
- No further detention can be made if the prior detention had already expired or was based on a prior unlawful arrest.[53]
- A detained person retains the common law right of access to a lawyer and the privilege against self-incrimination. The right of access for purposes of obtaining legal advice exists even where the right to legal representation has been lawfully excluded. The onus of justifying a statutory derogation from the right of access to legal advice or privilege against self-incrimination is on the party who asserts an entitlement to their attention.[54]
- Generally, the right to be presumed innocent until proven guilty or pleaded guilty does not feature at the pre-trial stage of arrest and investigation provided that no premature expressions of guilt are made by public authorities and the police. Any evidence collected after denial of access to legal advice, or in violation of the right to silence and the privilege against self-incrimination, may be excluded at trial.[55]

2 4 Can a Prisoner be Wrongfully Arrested and/or Detained?

From a bird's eye-view, this question would appear to be redundant as it is difficult to conceive of a wrongful arrest in the circumstances of a lawful incarceration. However, on a second look, it would appear not to be so in light of the point made at the beginning of this article that a prisoner enjoys those residual rights that are not taken away by his or her incarceration. It means that the "wrongful arrest" referred to in the present context is quite apart from the original arrest that led to the detention, the subsequent trial, and the conviction that led to the imprisonment in the first place. It follows therefore that the "wrongful arrest" contemplated here is an entirely different arrest, one that takes place while the arrestee is already serving as a prisoner and in the custody of the prison authorities. The circumstances that led to this question is the action for damages brought by a prisoner in the Botswana case of *Monyadiwa v The Attorney General,*[56] where the prison authorities received information that certain prisoners including the plaintiff were planning an escape. During the course of the investigation, the plaintiff was assaulted by two prison officers, for several hours in order to extract a confession. The prisoner was suffocated with a blanket, beaten with batons, throttled, kicked, punched and his genitals were pulled and twisted while he was handcuffed. He claimed damages for pain and suffering and *contumelia* flowing from the assault, as well as for his alleged wrongful arrest and detention during the period when he was being assaulted. The State had argued that a sentenced prisoner could not conceivably be unlawfully arrested or detained.

Chinhengo J dismissed the submission that under no circumstances could a sentenced prisoner be arrested or detained since circumstances may arise in which it could be clear that such a prisoner is unlawfully arrested or detained. The court did not give such instances but held in the present case that the alleged arrest and detention of the plaintiff were not separate acts, divorced from the main purpose of handcuffing him, namely, to assault him. He was, and still is, a serving prisoner such that when he was called and confined in the storeroom, it was for the purpose of assaulting him in the course of the botched investigation into the alleged plot to escape from prison. There was therefore no separate act of arrest and detention involved in this case; and hence, a separate claim for wrongful arrest and detention is incompetent and must fail in the circumstances of this case. The treatment which the plaintiff received in the hands of the two prison officers was a species of torture such that there was a need to award exemplary damages where the basic human rights of the person, including a prisoner are needlessly violated. Without resorting to the *residuum* principle, or expressly referring to it as the basis for its finding of liability, the court nonetheless upheld its essence when it said that prisoners do have human rights and must be treated with the dignity befitting other human

52 *Khodorkovisky and Lebedev v Russia* 2013 ECHR 747.
53 *Minister of Law and Order v Mathebe* 1990 1 SA 114 (AD) 122B-D.
54 *Commander, Lesotho Defence Force v Rantuba* LAC (1995-1999) 687; *Timothy v The State* 2001 1 WLR 485 (PC).
55 *Metsing v Director-General, Directorate on Corruption and Economic Offences* Const. Case No. 11 of 2014 (25 February 2015); *Timothy v The State*.
56 2010 2 BLR 326 (HC).

beings albeit with the recognition that they are in an institution in which they are serving time for crimes they have committed. The court pointed out that there are many international conventions and instruments for the protection of persons deprived of their liberty either as a result of lawful arrest and detention or as a result of being imprisoned following upon a conviction for an offence some of which are mentioned above.[57] Having considered that the injuries sustained by the plaintiff/prisoner were not of a grievous nature and that at the time he was assaulted, he suffered severe pain, the trial judge made a global award of P25 000 for the plaintiff's pain, suffering and *contumelia*.

3 GENERAL PRINCIPLES GOVERNING THE ASSESSMENT OF DAMAGES

The principles which guide the courts in the difficult task of assessing damages are not set out in the Constitution, the Criminal Procedure Act nor any other statutory or international instruments; the guidelines available and often deliberated upon by the High Courts are those set by the appellate courts. Examples of cases that have been deliberated upon by the High Courts on the principles of quantification are so overwhelming that only a cautious approach is needed to keep the discussion in line with the prevailing trend in this presentation. It is for that reason that the case of *Latha v Minister of Police*[58] is discussed below even though it ordinarily falls within the class of cases where the State admitted liability but challenged the quantum of damages due to the plaintiff. The case is not only recent,[59] it is also inspiring in its approach to the issues involved and as to what it brings to the debate. It does not only deal with the vexed question of assessing damages for wrongful arrest, unlawful detention, assault and other claims often encountered in this branch of the law, but the trial judge also spent quality time in canvassing the general principles surrounding the award of damages. It similarly discusses *in extenso* the awards made in previous cases as well as the quantification of damages for non-patrimonial loss. All these impelled this author to consider it an appropriate case for particular analysis in this discussion.

3 1 *Latha and Another v Minister of Police*

As already stated, the State conceded liability in the more recent case of *Latha v Minister of Police*[60] where the plaintiffs were arrested on several serious charges and were held in custody for six years and eleven months before they were acquitted. Whilst in incarceration, they were viciously assaulted and tortured by members of the police and were held in squalid conditions. Although they claimed R7 million each, the State offered them R3.8 million each which they rejected. Before arriving at the amount to award the plaintiffs, Seegobin J extensively conducted a useful review of the principles governing the assessment of damages including: (a) the familiar speeches which the reader of this series would encounter reading literally every case decided since the judgments of Nugent JA in *Minister of Safety and Security v Seymour*[61] and Bosielo JA in *Minister of Safety and Security v Tyulu*[62] both of which set the appellate court's approach to quantification of damages in this area of law; (b) that it is not helpful to calculate a daily tariff or what has been termed a "flat rate" in arriving at an award; referring to per Willis J in *Alves v Lom Business Solutions (Pty) Ltd*[63] as well as per Mbenege JP in *Mkwati v Minister of Police*[64] in support; and (c) Seegobin J pointed out what has become "a notorious

57 See the discussion in para 2 2 above.
58 2019 1 SACR 328 (KZP).
59 On the SAFLII website, this case is cited as *L and Another v Minister of Police* 2018 ZAKZPHC 33 (15 August 2018), the plaintiffs being referred to as "SL and MH". It is only a careful scrutiny of the judgment that will bring it home to the reader that it is the same case as *Latha and Another v Minister of Police* 2019 1 SACR 328 (KZP) – the case under discussion. It is also worthy to note that the paragraphs (14–57) of this judgment omitted in the law report are intact on the SAFLII website.
60 2019 1 SACR 328 (KZP).
61 2006 6 SA 320 (SCA) paras 14–16, 20.
62 2009 2 SACR 282 (SCA).
63 2012 (1) SA 399 (GSJ) para 36.
64 2018 ZAECMHC 2 (23 January 2018) para 18 where the Judge President had said: "It is also incumbent on me to give heed to the principle recently enunciated by the Supreme Court of Appeal that the amount of the award is not susceptible of precise calculation; it is arrived at in the exercise of a broad discretion – *Minister of Safety and Security v Augustine* 2017 2 SACR 332 (SCA). In *Phillip v Minister of Police and Another* (unreported) Case Nos. 457 and 676/2012 (Limpopo HC), it was observed, in relation [to] whether the court should calculate the award on a daily tariff or a single all-inclusive award, that the nature of the compensation

fact" in relation to the assessment of damages based on the experience of "this division" that claims for personal injuries are being pitched at such "exorbitant levels, thus making it extremely difficult for courts to make a proper determination."[65] Making the point further, the trial judge said that:

> This relates not only to claims of the kind under consideration herein but also to claims against the Road Accident Fund, as well as those arising out of medical negligence in public hospitals. The notion seems to be that since the state is held liable the claims should be as high as possible. In my view, much of the blame for this must be laid at the doors of the claimants' legal representatives and the experts employed. The difficulty posed in such matters is that it creates unrealistic expectations in the minds of the claimants concerned. The further difficulty with such an approach … is that it loses sight of the fact that such damages are not there to enrich but to serve as some form of *solatium* to the injured person for the pain and loss suffered.[66]

3 1 1 Factors in Favour of the Plaintiffs

Based on the evidence placed before court, the trial judge then proceeded to take into account in favour of both plaintiffs, the following: first, right from the moment they were arrested on 12 June 2006, both plaintiffs were subjected to the most humiliating, degrading and dehumanising treatment at the hands of the police. They were subjected to severe forms of assaults right from their homes in the sugar-cane fields of Buffelsdale. It was also in these cane fields that the barrel of a gun was placed in Mr Latha's mouth accompanied by a threat of being shot. So, too, a rope was attached to his handcuffs and a police-dog was set on him. He was subsequently treated of the dog-bite injuries without applying any form of anaesthetics.[67] Second, the assaults persisted throughout their detention in the police cells. Although their applications for transfer to another prison was acceded to, the conditions in this other prison was nothing short of appalling given that the cells were overcrowded with 40 to 60 inmates in one cell with only 20 beds, such that the rest of the inmates slept on the bare floor and were all subjected to the indignity of using an open toilet and shower in the view of everyone. What is more, the cells were filthy, unhygienic and infested with lice and cockroaches.[68]

Third, the plaintiffs were victims of gangsterism and constant threats of assaults and reprisals. Both of them have scars to show as a result of the prevalence of the activities of gangsters in the prisons.[69] Fourth, both plaintiffs suffered the pain and distress for not: (a) having any contact with their loved ones; (b) being able to bury their loved ones who passed away while they were in detention; and (c) being able to establish any meaningful relationship with their children who were young at the material time. Both of them suffered a loss of amenities of life especially in the case of Mr Hlongwa who enjoyed playing soccer, volleyball and cricket prior to their incarceration. He also testified that he now finds it difficult to wear short-sleeve shirts and shorts due to his tattoos as a member of a prison gang. They both found it difficult to reintegrate themselves into their communities as they felt that community members were afraid of them and viewed them as criminals given the length of time they spent in detention.[70]

Five, both plaintiffs were about 25 years old when they were detained and were

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and the inherent variables applicable in each would be maintained by trying to place an average daily tariff on such a determination. The court went on to state that 'the fact that each case must be considered on its own merits militates against a so-called average flat rate per day' and that 'a single all-inclusive award would appropriately address and express all the factors to be considered.'"

65 *Latha v Minister of Police* para 13.

66 *Ibid* para 13. A related point which might arise is: what is the effect of the continued expansion of delictual liability of the state for harm arising from crime such as that committed by the police? As much as this question did not arise in this investigation and thus not tackled in this presentation, it is, however, dealt with in the recent works of Wessels "Reconstructing the State's Liability for Harm arising from Crime: The Potential Development of the Law of Delict" (2019) *Stellenbosch Law Review* 361–391; by the same author in *Developing the South African Law of Delict: The Creation of a Statutory Compensation Fund for Crime Victims* (LLD dissertation, University of Stellenbosch 2018). In these writings, Wessels analyses the development of the common law and argues that the expansion of delictual liability of the state for harm arising from crime is undesirable; and that existing statutory mechanisms to claim compensation for harm caused by a criminal act is unsatisfactory from a crime-victim compensation perspective; and suggests that it might be sensible to consider a statutory crime compensation victim scheme as an alternative solution.

67 *Ibid* para 58.1.

68 *Ibid* para 58.2.

69 *Ibid* para 58.3.

70 *Ibid* para 58.4.

approximately 32 years old by the time they were released. The trial judge then observed that six years and eleven months is indeed a long time to deprive a person of his liberty and personal freedom; it is also a long time to be deprived of an opportunity to establish a career, to strengthen personal relationships and, in general, to create a sense of self-worth and well-being.[71] In support of the foregoing observations, the trial judge had to draw a parallel from Van der Byl AJ who, in assessing the damages to award in *Zealand v Minister of Justice and Constitutional Development*,[72] had said that:

> If there is any doubt in one's mind as to the effect of some 5½ years' imprisonment, particularly, the suffering and anguish a person so imprisoned, must endure, one can only cast [one's] mind back in [one's] own life over such a period and consider how much has happened to [one] in those years and how long ago it has seemed. In the words of Holmes JA in *S v V*:[73] '… enlivened by domestic happiness and the free pursuit of their avocations … (n)o such ameliorations attend the slow tread of years you are locked up.'

Another instructive passage came from the case of *S v Martin*[74] where it was said that:

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

3 1 2 Findings of the Trial Judge

After evaluating the evidence presented to court by the plaintiffs and their experts under cross-examination, the trial judge made the following findings which were not necessarily in their favour. First, since this was not the first time the plaintiffs were arrested on charges, it is obvious that the conditions in police cells then were no different from that encountered by them this time around.[75] Second, with respect to the appellants' complaint that they were not released on bail, it was not clear what steps were taken by them and their legal representatives to that effect nor is there evidence to suggest that the delay in finalising their trial lay with the prosecuting authorities or the State.[76] Third, the court did not accept that the difficulty of the plaintiffs reintegrating into their community might have lasted that long and there is no evidence to back up their complaint to the contrary. Rather, there was evidence that both plaintiffs, sooner than later after release, secured employment for fairly long periods.[77] Fourth, the trial judge's impression is that both plaintiffs, rather than being filled with bitterness as to how they have been treated by the authorities, seemed to be keen to get on with their lives as, indeed, they have done with their family relationships.[78] Fifth, the court did not accept the diagnosis of the expert that these plaintiffs suffered severe post-traumatic disorder, certainly nothing near the psychological *sequelae* suffered by the plaintiffs in *Minister of Safety and Security v Augustine*.[79] However, there is no gainsaying the fact that having spent a long time in detention, the plaintiffs would need a few sessions of psychotherapy to assist them in alleviating the painful memories and discomfort of the past and to allow them to look to the future with a renewed sense of purpose and positivity.[80]

Sixth, insofar as the plaintiffs' claims for past and future earnings or earning capacity are concerned, the court considered the following relevant factors. First, in the absence of any shred of evidence, far less collaborative evidence, the court accepted as fair the defendant's suggestion that Mr Latha should be treated as falling into the category of "unskilled labour",

71 *Ibid* para 58.5.
72 2009 JOL 23423 (SE) para 13.
73 1972 3 SA 611 (AD) 614G.
74 1996 2 SACR 378 (W) 385*i*-386*a*.
75 *Latha v Minister of Police* para 59.1.
76 *Ibid* para 59.2.
77 *Ibid* para 59.3.
78 *Ibid* para 59.4.
79 2017 2 SACR 332 (SCA).
80 *Latha v Minister of Police* para 59.5.

which medium according to Robert J Koch,[81] translates to a salary of R2 150 per month.[82] Second, with regard to Mr Hlongwa's claim as a taxi driver who earned R500 per week before his incarceration, there was no evidence collaborative or otherwise to back up his claim. The court adopted the same approach as in Mr Latha's case.[83] Third, there seems to be no convincing evidence to support the plaintiffs' claim for future loss of earning as if they were both unemployable whereas evidence showed that they could hold on to their employment. The court also rejected the evidence of an expert on the projections made by her regarding the possible employment prospects of both plaintiffs.[84]

3 1 3 Damages for Non-patrimonial Loss

After all is said and done, the courts have always made it clear that a claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability and loss of amenities of life and to attach a monetary value to it so as to do justice to the case. The claim for non-patrimonial damages relates to infringement of *fama* or *dignitas*, is not proved in the same manner as patrimonial damages. Awards are assessed by the courts in an endeavour to effect retribution for the injury suffered.[85] The exercise by its very nature is both difficult and discretionary, thus involving "wide-ranging permutations."[86] This is epitomised by the popular flexibility-approach devised by the Appellate Division when faced with the difficulty of laying down guiding rules as to how to tackle the matter, to the effect that the amount to be awarded must remain the figment of the imagination of the trial judge having regard to the circumstances of the case and the trial judge's sense of fairness.[87] The ultimate aim being to balance the justice to the plaintiff who must be compensated rather than enriched, with that of the defendant who must provide a *solatium* for the injury caused but not to be impoverished in the process.[88] Again, in spite of these difficulties, the courts have maintained that previous awards in similar or comparative circumstances do not have a binding effect but could guide the judge in the case at hand.[89]

The court in *Latha* then embarked on the difficult task of determining what would represent a fair and reasonable compensation for the plaintiffs arising out of their extraordinarily long period of detention having regard to fixing a globular amount in respect of non-patrimonial damages rather than attempting to fix a flat rate per day.[90] Although the trial judge did not refer to every case relied upon by the parties "as no two cases are alike and past cases merely serve as a guide and nothing more",[91] those discussed by the court in the present context were so extensive as to literally cover the different awards in wrongful arrest, detention and malicious prosecution. The first previous award referred to[92] is that of *Mkhize v Minister of Justice and Constitutional Development*[93] where, in awarding the plaintiff the sum of R2 million [the equivalent in today's value of R2 500 000] in general damages for having been unlawfully incarcerated for a period of 27 months, Bezuidenhout AJ referred to:

81 *Quantum Year Book* (2018).
82 *Latha v Minister of Police* para 59.6.1.
83 *Ibid* para 59.6.2.
84 *Latha v Minister of Police* para 59.6.3 and 59.6.4.
85 *Ngwenya v Minister of Police* [2019] ZANWHC 3 (7 February 2019) para 5. See also *Masiu v Ramos* [2012] ZAFSHC 79.
86 Per Davis J, *Mashigo v Road Accident Fund* [2018] ZAGPPHC 539 (13 June 2018) para 10.
87 *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 AD; *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 199.
88 *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (CC) 475E; *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) 287E-F. These principles among others, enabled the trial judge, Mavundla J, to reject the plaintiff's claims totaling R2 946 000 for unlawful arrest, detention, further detention, assault, future medical expenses, emotional shock, psychological stress, trauma, past loss of income, future loss of income and general damages, for detention for three and a half days plus another 21 days, and instead awarded him the sum of R150 000 in general damages – *Mokiyi v Minister of Police* [2019] ZAGPPHC 440 (12 August 2019).
89 *SA Eagle Insurance Co v Hartley* [1990] ZASCA 106; 1990 (4) SA 833 (A) at 841D; *Protea Assurance Co Ltd v Lamb* 1971 SA 530 536A-B.
90 *Ibid* paras 12 and 60.
91 *Ibid* para 61.
92 *Ibid* para 61.1.
93 (Unreported) KZP 10386/2009 (14 March 2014) para 18.

(a) *Thandani v Minister of Law and Order*[94] where an organiser of a general workers union was detained for 88 days and an amount of R22 000 was awarded which approximates to R80 000 [the present value of R 124 468];
(b) *Mthimkhulu v Minister of Law and Order*[95] where a 26 year old male with limited education was detained for 144 days was awarded R40 000 which translates to R132 000 [present day equivalent of R181 247];
(c) *Minister of Justice v Hoffmeyer*[96] the plaintiff was detained for 5 months and was awarded R50 000 which translates to R165 000 [present value of R226 558]; and
(d) *Manase v Minister of Safety and Security*[97] where a 65 year old grandfather was detained for 49 days and R90 000 was awarded which translates to R137 000 [R204 162 present value].

The second[98] is *Van Alphen v Minister of Safety and Security*[99] – an unlawful arrest, detention and malicious prosecution claim – where the plaintiff was awarded a total of R200 000 in May 2011, the present day equivalent of R295 000. The third previous award[100] – *Borain v Minister of Safety and Security*[101] – where the plaintiffs who were held between 10h00-22h00 when they were released, alleged that they suffered emotional distress, embarrassment and public humiliation, and were unable to attend to their respective work-related responsibilities. The court identified the following relevant facts in assessing damages in the matter, such as: the age of the plaintiffs, the circumstances, nature and duration of their arrest, the conditions under which they were detained, their frustrated attempts to be released on bail, their professional standing and the conduct of the police towards them. The court considered the awards in four SCA judgments. namely: (a) *Minister of Safety and Security v Seymour*[102] where although the plaintiff, a 63-year-old man was detained for five days but spent four of those days in hospital, was awarded R90 000 – equivalent of today's R186 141; (b) *Rudolph v Minister of Safety and Security*[103] where the SCA held that an award of R100 000 [equivalent of R161 629] for general damages was appropriate when the appellants were unlawfully arrested and detained for three days and four nights under extremely unhygienic conditions; (c) *Minister of Safety and Security v Tyulu;*[104] although the detention was for a short period, the aggravating circumstances included the fact that the arrestee was a magistrate; he was manhandled by the same people with whom he normally worked; he was taken to a scene of a motor collision and made out to be a criminal; and was arrested for an improper motive. As a person of considerable standing in the community, he must have been severely embarrassed, humiliated and shocked, anguished and distressed. He was awarded R15 000 (R24 224 in today's value]; and (d) *Minister of Safety and Security v Kruger*[105] where the plaintiff was shown on a television broadcast handcuffed and led to a police vehicle. He was awarded R50 000 [R73 767] for unlawful arrest and detention and R20 000 [R29 507] for *iniuria*. Having considered these awards, the judge decided that it would be fair and appropriate to award the sum of R40 000 [R59 000] general damages in *Borain*.

94 1991 1 SA 702 (ECD).
95 1993 3 SA 432 (ECD).
96 1993 3 SA 121 (AD).
97 2003 1 SA 567 (CkHC).
98 *Latha v Minister of Police* para 61.2.
99 2011 ZAKZDHC 25 (31 May 2011).
100 *Latha v Minister of Police* para 61.3.
101 2011 ZAKZDHC 653 (28 November 2011).
102 2006 6 SA 320 (SCA).
103 2009 5 SA 94 (SCA).
104 2009 5 SA 85 (SCA).
105 2011 1 SACR 529 (SCA).

The fourth[106] is *Khumalo v Minister of Safety and Security*[107] where the plaintiff was charged with obstruction of justice and detained overnight. He was awarded the sum of R50 000 [R59 556] for his unlawful detention. In the fifth case,[108] *Mkwati v Minister of Police,*[109] the plaintiff was arrested on 29 April 2013, handcuffed and taken to the police station in a bumpy and rough-driven police vehicle and detained until his release on 30 May 2013 after being charged for robbery with aggravating circumstances. He was detained in a filthy cell and subjected to torture by fellow inmates. The court took into account that the plaintiff was a Standard 8 pupil at the time of his arrest; had spent a total of 23 days in squalid and stench-infested cells that was inhumane and degrading in the extreme. The court had regard also to previous awards including *Mtola v Minister of Police*,[110] and *Nel v Minister of Police*.[111] Further considering the purpose of award of damages in a wrongful arrest and detention situation such as this, which includes the reflection of the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in the law;[112] Mbenege JP awarded the plaintiff in *Mkwati* the sum of R560 000 for that lengthy period he was deprived of his liberty and separated from his friends and family.[113]

The sixth previous award[114] referred to by Seegobin J is the case of the 65-year-old businessman – *Manase v Minister of Safety and Security*[115] – where the plaintiff was awarded R90 000 [the equivalent of R216 000 in present day value] for malicious arrest and detention which was a traumatic experience that lasted for 49 days; shattered the serenity of his life; from which he lost the esteem not only of the people in his community but also of his business associates. The court referred to three cases, two of which have already been discussed in relation to the *Mkhize v Minister of Justice and Constitutional Development*[116] and which need only a mention in the present context: *Thandani* and *Mthimkhulu,* thus leaving the third case *Tobani v Minister of Correctional Services*[117] where the plaintiff who was unlawfully detained for seven months due partly to his own fault was awarded the sum of R50 000 [R138 524] general damages for unlawful detention.

It is clear that the seventh previous award[118] referred to by Seegobin J is a typical example, though not close to the case under discussion, of an instance where a researcher can claim that the trial judge referred extensively to comparable previous awards – *Syed v Metal Ltd t/a Metro Cash and Carry*[119] – where a 38-year-old man was wrongfully and unlawfully arrested by the police and kept in custody for some four days. He also claimed damages for malicious prosecution. In assessing the plaintiff's damages the court, while bearing in mind that no two cases are alike, and that guidance in the assessment of an appropriate award can be obtained by comparison of factors in different cases, referred to several of those cases. Since some of those cases are otherwise discussed in some part or the other of this presentation, such as *Kritzinger v RAF;*[120] *Lett v Minister of Safety and Security*:[121] and *Kotswana v Minister of Safety and Security;*[122] they are for that reason omitted in the present context. Attempt is made to limit the discussion as much as possible to the actual amounts awarded with the backdrop of

106 *Latha v Minister of Police* para 61.4.
107 2015 ZAKZDHC 48 (4 June 2015).
108 *Latha v Minister of Police* para 61.5.
109 2018 ZAECMHC 2 (23 January 2018).
110 Case No. CA23/2016 (30 June 2017).
111 2018 ZAECGHC 1 (23 January 2018).
112 *Mkwati v Minister of Police* paras 5–7 and 17.
113 *Ibid* paras 19–20.
114 *Latha v Minister of Police* para 61.6.
115 2003 1 SA 567 (CkH).
116 (Unreported) KZP 10386/2009 (14 March 2014) para 18.
117 2000 2 All SA 318 (SE).
118 *Latha v Minister of Police* para 61.7.
119 2016 ZAECGHC 38 (31 May 2016).
120 2009 ZAECPEHC 6 (24 March 2009).
121 2011 6K3 QOD 1 (ECP).
122 *Latha v Minister of Police* para 61.8.

the conditions of detention being unhealthy or unsatisfactory:

- *Hoco v Mtekwana*:[123] the plaintiff and his minor child were detained for seven days and was awarded R80 000 for general damages in 2010 which has a present value of R110 000 [R123 986];
- *Bengu v Minister of Safety and Security*[124] – where a 47-year-old taxi business owner was detained for seven days and was awarded R130 000 general damages in 2010 has a present value of R178 000 [R201 447];
- *Fubesi v Minister of Safety and Security*[125] – an 18-year-old plaintiff who was detained for an effective four days was awarded R80 000 general damages in 2010 has a present value of R110 000 [R123 986];
- *Van der Merwe v Minister of Safety and Security*:[126] a builder and coffee shop owner was incarcerated for a whole weekend and was awarded R120 000 general damages in 2011 has a present value of R157 000 [R177 042];
- *Mhlabeni v Minister of Safety and Security*:[127] a 29-year-old male was arrested and detained, was awarded R70 000 (R60 000 for the arrest and detention and R10 000 for the malicious prosecution) general damages in 2012, has a present value of R74 000 [R97 824];
- In *RAF v Ruth FS Draghoender*,[128] the plaintiff, a 47-year-old woman suffered emotional shock, trauma and post-traumatic stress disorder which rendered her permanently unable to earn an income after witnessing the death of her son. The award of R80 000 made for general damages in 2007 which was confirmed on appeal, has a present value of R147 000 [R154 470];
- In *Maart v Minister of Police*,[129] it was established that as a result of witnessing the shooting of her son, the plaintiff suffered chronic and severe post-traumatic stress disorder, a major depressive disorder and psychosis with a poor prognosis, all of which made her unemployable. The award of R200 000 made for general damages in 2013 has a present value of R234 000 [R264 329].

In the last but eight case[130] cited by Seegobin J which is *Mgele v Minister of Police*, the plaintiff had claimed damages for wrongful arrest, wrongful detention, torture, humiliation, degradation and *contumelia*, and pain and suffering. The police arrested and assaulted the plaintiff at his home on 18 November 2010 without a warrant. The police attempted to suffocate him with a refuse bag. Thereafter, he was detained for four days. He sustained injuries all over his body. The court awarded him R100 000 for unlawful arrest; R150 000 for unlawful detention; and R150 000 for *contumelia*, pain and suffering, totalling R400 000 equating to R476 545 in today's value.

3 1 4 The Award in Latha v Minister of Police

Interestingly, the court in *Latha*, unearthed the very important but unreported quantification judgment of Van der Byl AJ in *Zealand v Minister of Justice and Constitutional Development*[131] which, for all practical purposes, is very similar to the present case in terms of the length of detention both plaintiffs underwent in the two cases. It may be recalled that it was in the liability judgment in *Zealand v Minister of Justice and Constitutional Development*[132] that the Constitutional Court emphasised the reverence the law places on the right to personal liberty and held that by holding an awaiting trial prisoner in the place of a convicted prisoner violated the awaiting trial prisoner's right under section 12(1)*(a)* of the Constitution so as to render the State delictually liable for such damages as the plaintiff could prove. The crux of the matter is that when the plaintiff's convictions and sentence were set aside on appeal, but due to a failure on the part of the registrar of the High Court to issue a liberation warrant following upon the success of his appeal, the plaintiff remained in custody as a sentenced prisoner for an effective

123 2010 2 SA 536 (ECP).
124 2010 6 QOD K6-24 (ECP)
125 2010 6 QOD K6-28 (ECG).
126 2010 6 QOD K6-34 (ECG).
127 2012 6K3 QOD 17 (ECG).
128 2007 5 QOD K3-16 (ECD).
129 2013 6K3 QOD 24 (ECP).
130 *Latha v Minister of Police* para 61.8.
131 2009 JOL 23423 (SE).
132 2008 4 SA 458 (CC).

period of four years and ten months. Although the plaintiff claimed the sum of R10 000 000 for his unlawful detention, loss of freedom and amenities of life, pain, suffering, humiliation and *contumelia,* Van der Byl AJ awarded him the sum of R2 000 000 in 2008, the current value being R3 233 000. In doing so, the learned trial judge made the following findings:

> Whilst in prison, particularly, during the period of his unlawful detention, he joined one of the prison gangs, namely the "26" gang. The circumstances under which and reasons for joining the gang are not quite clear from the evidence. At first, he said he had done that to protect himself, but later in cross examination-in-chief indicated that he had done that out of his own choice … Furthermore, he testified on the difference in privileges and treatment of awaiting prisoners as opposed to privileges of sentenced prisoners.[133]

In light of the factual situation prevailing in *Latha*, the nature of the evidence adduced by both plaintiffs, the regard to the awards in previous cases, the unprecedented duration of the detention and the enormous injustice done to both of them, and without in any way trying to punish the defendants for the wrongs committed by their servants, the trial judge considered that a fair and reasonable amount for non-patrimonial damages should be the sum of R3 500 000 for each plaintiff.[134] An amount of R10 800 was also awarded as special damages for psychotherapy/psychological counselling based on 12 sessions at the rate of R900 per session.[135] The final award on loss of earnings was based on unskilled earnings of R2 150 per month over a period of six years and 11 months which translates into R178 450 with a contingency deduction of 20% making it R142 760 for each plaintiff.[136] In other words, each plaintiff was awarded: (a) damages for non-patrimonial loss at R3 500 000; (b) special damages for: (i) psychological counselling at R10 800; and (ii) past loss of earnings at R142 760; totalling R3 653 560 for each plaintiff.[137]

TO BE CONTINUED

133 2009 JOL 23423 (SE) 22.
134 *Latha v Minister of Police* para 65.
135 *Ibid* para 66.
136 *Ibid* para 67.
137 *Ibid* para 68.