



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### JUDGMENT

**Not Reportable**

Case No: 115/2021

In the matter between:

**MINISTER OF POLICE**

**APPELLANT**

and

**XOLILE MZINGELI**

**FIRST RESPONDENT**

**LUTHANDO NDAYI**

**SECOND RESPONDENT**

**MPUMEZO XABADIYA**

**THIRD RESPONDENT**

**Neutral citation:** *Minister of Police v Mzingeli and Others* (115/2021) [2022] ZASCA 42 (5 April 2022)

**Coram:** Petse DP, Van der Merwe and Hughes JJA, and Tsoka and Makaula AJJA

**Heard:** 16 February 2022

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down are deemed to be 10h00 on 5 April 2022.

**Summary:** Delict – claim for damages – quantum of unliquidated damages – no oral evidence – stated case – whether properly formulated in terms of Rule 33 – requirements restated.

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## ORDER

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**On appeal from:** The Eastern Cape Division of the High Court, Mthatha (Zono AJ sitting as court of first instance):

- 1 The appeal succeeds with no order as to costs.
- 2 The order of the court a quo is set aside.
- 3 The matter is remitted to the court a quo for the determination of the quantum of damages.

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## JUDGMENT

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**Hughes JA (Petse DP, Van der Merwe JA, and Tsoka and Makaula AJJA concurring):**

[1] This appeal is with the leave of this Court, granted on the following terms:

‘The leave to appeal is limited to the following:

- (a) Whether it was permissible for the court to determine the quantum of unliquidated damages without hearing oral evidence in light of the decision of *EFF and Others v Manuel* [2020] ZASCA 172;
- (b) Whether the stated case was properly formulated in accordance with the rules of court and the requirements for such a stated case, so as to be sufficient to enable the court to determine the issue of the quantum of damages;
- (c) The quantum of damages awarded to each of the plaintiffs.’

[2] The respondents did not file heads of argument and opted to abide by this Court’s decision. The appellant sought condonation in terms of rule 12 of the Rules of the Supreme Court of Appeal for the late filing of the record and heads of argument. Both applications were unopposed by the respondents. In support of the condonation

application, the appellant stated that the courier company entrusted with the task of delivering the record to the Court failed to provide a plausible explanation for the late delivery to the Court. This Court, having satisfied itself that a proper case for condonation was made out, grants condonation in both instances.

[3] Briefly, the following are the facts. The respondents, Messrs Xolile Mzingeli, Luthando Ndayi and Mpumezo Xabadiya, instituted an action against the appellant, the Minister of Police, claiming damages for unlawful arrest, detention and malicious prosecution.

[4] And this is how the claims came about: On 13 September 2009 the respondents were arrested and charged with housebreaking, theft and murder. They were detained and, on 17 September 2009, the first and third respondents were found guilty of theft and were sentenced to 12 months' imprisonment. The murder charge was still being investigated. After serving their sentence of 12 months, the first and third respondents remained incarcerated together with the second respondent in respect of the murder charge. The respondents remained in custody until 24 July 2014, when the murder charge was withdrawn against them. The first and third respondents claimed damages for the period 14 September 2010 to 24 July 2014 and the second respondent for the period 13 September 2009 to 24 July 2014.

[5] The trial was scheduled to proceed on 15 October 2019. However, the parties attempted to settle both the issue of liability and quantum, but were not successful in respect of quantum. The court a quo (Zono AJ) made an order in terms of rule 33(4) of the Uniform Rules of Court, thereby separating the issues of liability and quantum. It was further recorded in the order that the appellant was found liable on the merits and the only issue left for determination was the quantum for general damages arising from the detention of the respondents. The respondents did not persist with the claim for malicious prosecution and the issue of quantum was then adjourned to the following day.

[6] On 16 October 2019, the court a quo acceded to hear the issue of quantum by way of a stated case as formulated by the parties. After hearing oral argument, the court a quo awarded the first and third respondents an amount of R3 000 000 as a

reasonable and fair compensation, whilst, the second respondent was awarded an amount of R4 000 000 as reasonable and fair compensation.

[7] I now turn to the merits of the appeal. Rule 33(1) and (2) of the Uniform Rules provides:

‘(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party, or where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient

(c) ...’

[8] It is important to restate the approach to be adopted whenever litigants request a court to invoke rule 33 and determine the issues by way of a stated case. It is incumbent upon the parties to ensure that the stated case contains adequate facts as agreed upon between them. Further, the statement ought to also contain the question of law in dispute between the parties and their contentions regarding these questions of law. Wallis JA reaffirmed this in *Minister of Police v Mboweni and Another*.

‘It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane v D’Ambrosi*, where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request. The proceedings in *Bane v D’Ambrosi* were only saved because the parties agreed that in any event the evidence that was excluded by the

judge's ruling should be led, with the result that the record was complete and this court could then rectify the consequences of the error in deciding the special case.<sup>1</sup>

[9] In the present matter it is prudent to point out that there were facts included in the stated case which were disputed by the appellant. There were also unsubstantiated statements and no evidence advanced to substantiate these statements. Though the statement of facts informed the court a quo of the detention of the respondents and the period thereof, it did not provide details of the allegations of the acts of assault perpetrated on the respondents by both the police and the inmates, nor did it deal in detail with the acts of sodomy alleged by the respondents. Further, no details can be found in the statement demonstrating the 'inhumane, degrading and unhygienic' conditions to which the respondents were allegedly subjected. In essence, the factual material presented in the stated case was not sufficient for a court to make a determination on the quantum and required evidence to be adduced to substantiate the respondents' claims.

[10] Notably, the court a quo acknowledged that the stated case was lacking in details and evidence relating to the manner, extent and duration that the respondents were allegedly subjected to assault, torture and sodomy whilst in detention. Despite these shortcomings in the stated case, the court a quo proceeded to make assumptions and draw inferences in order to arrive at the ultimate conclusions reached. The court a quo acknowledged this in its judgment.<sup>2</sup>

[11] The court a quo, in finding for the respondents, made the awards set out above and stated:

'It is the parties' minds that all three plaintiffs must be compensated *but they do not agree on the amounts*. I am called upon and I set out to decide this case *on the basis of the contended amounts*. It is from *the contentions of the parties that the question of law sought to be decided emerges.....*

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<sup>1</sup> *Minister of Police v Mboweni and Another* [2014] ZASCA 107, 2014 (6) SA 256 (SCA) at para 8; *Bane and Others v D'Ambrosi* [2009] ZASCA 98; 2010 (2) SA 539 (SCA) at para 7.

<sup>2</sup> Paras 5, 9, 10, 22 and 23 of the judgment of the court a quo by Zono AJ.

On the conspectus of the agreed facts, parties' contentions and relief sought in the stated case coupled with the authorities I have considered on the subject, I find as follows....<sup>3</sup> [My emphasis.]

[12] Therefore, I find that the approach adopted by the court a quo to be inappropriate, especially so, in respect of determining the quantum of unliquidated damages. It is correct that a court may draw inferences from the facts in a stated case, however, these are to be drawn from satisfactorily and adequately stated facts, as would have been proven at trial.<sup>4</sup>

[13] In this case the quantum of the unliquidated damages claimed by the respondents was hotly disputed. Evidently, damages of the kind claimed by the respondents are by their very nature indeterminate and, as such, require proper assessment by the court. The court a quo acknowledged this much. However, even in the face of such acknowledgement, no evidence was adduced to aid with the assessment and quantification of these damages.

[14] It was accepted by the parties during argument on appeal that determining quantum in this matter by way of a stated case – such as it was – was not the correct approach to adopt. This stance was correct as nowhere in the stated case or the pleadings had the parties agreed on the relevant facts necessary to determine and prove the quantum awarded by the court a quo.

[15] I must express this Court's displeasure at the state of the record that included some 178 pages unnecessarily incorporated into the record. This Court has repeatedly admonished practitioners for including unnecessary documents in the appeal record. It would seem that some of the practitioners have not heeded these warnings and, thus, need to be reminded of this Court's previous admonitions.<sup>5</sup>

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<sup>3</sup> Para 40 and 41 of the judgment of the court.

<sup>4</sup> *Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO and Another* [2016] ZASCA 32 at para 9 & 10.

<sup>5</sup> *Government of the RSA v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A) at 692E–693A; *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA) paras 16–17; *Nkengana v Schnetler* [2010] ZASCA 64; [2011] 1 All SA 272 (SCA) para 16.

[16] Turning to the issue of costs, I am mindful of the fact that the respondents sought to abide with this Court's decision. In the circumstances the appeal was unopposed. In addition, during the appeal the parties conceded that the stated case was an incorrect course of action to have adopted for which they must share equal blame. The proper order in these circumstances is that there be no order as to costs.

[17] Accordingly, the following order is made:

- 1 The appeal succeeds with no order as to costs.
- 2 The order of the court a quo is set aside.
- 3 The matter is remitted to the court a quo for the determination of the quantum of damages.

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W HUGHES  
JUDGE OF APPEAL

## APPEARANCES

For the Appellant:

D V Pitt (heads of argument prepared by  
Z Z Matebese SC with him D V Pitt)

Instructed by:

State Attorney, Mthatha  
State Attorney, Bloemfontein

For the Respondent:

A M Bodlani

Instructed by:

T A Noah & Sons Attorney, Mthatha  
No correspondent in Bloemfontein