

SOUTH AFRICA / JUDGMENT

Booyesen and Another v Minister of Police (486/2017) [2023] ZANWHC 23 (3 March 2023) [2023] ZANWHC 23

COURT

North West High Court, Mafikeng

BEFORE

I Matlapeng

CASE / FILE NUMBER

486/2017

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IN

THE NORTH WEST HIGH COURT, MAHIKENG
(REPUBLIC
OF SOUTH AFRICA)

Case

Number: 486/2017

Reportable:

YES/ NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In

the matter between: NEO
 LOOSEBOY
 BOOYSEN
 1ST
 PLAINTIFF
 NEO
 LOOSEBOY
 BOOYSEN
 2ND PLAINTIFF
 And
 MINISTER
 OF
 POLICE
 DEFENDANT

Delivered: This judgment was handed down
 electronically by circulation to the parties' representatives
 by way of e-mail. The date and
 time of the handing down of judgment
 is deemed to be 10H00 on 03 March 2023

JUDGMENT

Matlapeng AJ

- [1] This is the second judgment in respect of this matter. In the first judgment that was handed down on 20 October 2021 dealing with the merits, I made a finding that I could not grant judgment in favour of the plaintiffs without their testimony.
- [2] For clarity's sake in respect of my conclusion, a brief background is given. The two plaintiffs, who share names and a surname issued a summons against the defendant for damages arising from their alleged unlawful arrest and detention without a warrant. Quantum and merits were separated and the onus to prove the lawfulness of its act rested upon the defendant.
- [3] This matter deals with the merits and quantum. The genesis of the trial was on 06 August 2019 when a witness by the defendant was called namely; Warrant Officer Van Staden. Van Staden did not conclude her testimony as there was a problem with the Afrikaans interpreter. She again testified on 15 March 2021, but the matter was postponed several times as a result of various reasons but mostly because of the unavailability of Van Staden.
- [4] The trial was again set down for the 10 – 12 August 2021 but Van Staden was again not available and no reasons for her non availability were provided. An application for a postponement was made but declined and the defendant closed its case. Van Staden was never cross examined on her previous testimony. The plaintiffs applied for judgment without closing their case. I declined to grant judgment on the basis that I found that Van Staden's testimony was pro non scripto. As a result, there was no evidence upon which I

could grant judgment.

- [5] In this segment of the trial, the first plaintiff testified. His testimony is briefly that on 18 November 2016 he was arrested without a warrant by Warrant Officer Van Staden under the following circumstances: He was at a scrapyard in Vryburg with his two nephews namely, his namesake and Johannes Booysen. He and his namesake had gone to the scrapyard to meet Johannes and thereafter to go to Mafikeng with him to fix a motor vehicle. Johannes approached them from the scrapyard with a small plastic bag containing wires.
- [6] Johannes informed them that he was going to sell those wires which he had picked up from a dumping site. The plaintiff instructed Johannes to throw the plastic away as it was going to dirty his motor vehicle. Johannes declined and put the plastic in the boot of the motor vehicle. Another motor vehicle approached, and a lady alighted, knocked at the window, and showed them her appointment card. She was a police officer. She asked to search their motor vehicle and her request was acceded to.
- [7] He opened the boot of his motor vehicle, and she took the plastic bag and threw its contents on the ground. The woman said the contents were cables and Johannes claimed its ownership and informed the Warrant Officer that my nephew and I knew nothing about it. The woman said that she did not believe him. They were then arrested. A police van was called but the plaintiff refused to get into it and drove in his motor vehicle to the police station.
- [8] He and his two nephews were locked up that Friday. He stated that he suffers from hypertension and when he asked for his medication, his request was refused. He was also denied the use of a phone. On Sunday evening the police visited their cells and they were ordered to strip naked after which they were searched. He was released on 23 November 2016 after paying bail.
- [9] He described the living conditions in the cells as follows: they were sleeping like pigs in a small cell, there were no beds and he slept on the floor with one filthy blanket, and he was bitten by things at night. They shared one toilet which had no running water and no door, as a result, there was no privacy for anyone using the toilet.
- [10] The toilet was smelly, and he could not eat the food provided by the police. There was no reading material, no provision made to exercise. It was for the first time that he was arrested. He states that it was not necessary for the police to arrest him. He is employed by the government and would have heeded an instruction that he submit himself to the police station.
- [11] His testimony was, in the main, especially relating to their arrests, confirmed by his namesake and nephew, namely Neo Looseboy Booysen, who further added that they were about 6 or 7 in the cell and there were no beds. The cell was small, and they were so packed that one was unable to scratch oneself. Although there were two toilets, one was outside the cell and when the cell was locked at night, they had no access to it. The toilet inside the cell

had no running water and people kept on using it and was full of excrement and smelly. Some of his close family members are not treating him well since his arrest.

- [12] They were both taken under cross examination. Nothing much came out of the cross examination, except that it was pointed out that any one arrested would find the condition in the cells intolerable, and further that a police officer is entitled to effect an arrest without a warrant if an explanation given to him is not acceptable. This last statement is far from what the legal position is.
- [13] Every person living in the Republic of South Africa is afforded the right to freedom. This is a constitutional imperative found in section 12(1) of the Constitutional of the Republic of South Africa 1996 which provides:
- (1) “Everyone has the right to freedom and security of the person, which includes the right— (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and”.
- [14] Any police officer who arrests a person without a warrant, must follow the precepts of section 40 (1) (e) of the Criminal Procedure Act 51 of 1977 as amended which provides”.
- (1) “A peace officer may without warrant arrest any person-
- (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing; “
- [15] It is repugnant for the state to arrest its inhabitants without a warrant, as a result, it is saddled with the onus to justify its action. See among others Minister of Law-and-Order v Hurley and Another 1986 (3) 568 AD at 587 B-C. The defendant, through Van Staden attempted to justify its action. This court found Van Staden’s evidence to be inadmissible with the result that the defendant fell flat on its face in its attempt at justification.
- [16] In De Klerk v Minister of Police 2019 (12) BCLR 1425 (CC) paragraph 14 was held that:
- “A claim under the actio iniuriarum for unlawful arrest and detention has specific requirements:*
- (a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;[17]
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not;[18] and
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which

compensation is sought.[19]

[17] The two plaintiffs testified that they were arrested and detained on the day in question. They remained in detention for a period of six

(6) days. The only evidence of what transpired from the time of their arrest, detention and release is their uncontradicted testimony. Their evidence is cogent and sufficient to leave me with no hesitation but to conclude that they have succeeded on the balance of probability in proving their case. As a result, I conclude that the arrest and detention of the first and second plaintiff from 18 November 2016 to 23 November 2016 was unlawful.

[18] The next issue to be decided is how much solatium are the two plaintiffs each entitled to. The amount claimed in their particulars of claim is R300 000.00 each. I was urged by their Counsel that this is an amount that I should award. The defendant on the other hand submits that they are entitled to a lesser amount taking into account what the courts have awarded in previous similar instances.

[19] As a starting point, I will refer to an authority also referred to by the defendant namely Minister of Safety and Security v Tyulu

[2009] 4 ALL SA 38 (SCA) paragraph 26 where the court held;

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008)

[2009] ZASCA 39 (31 March

2009) (paras 26-29".

[20] However, there is a perceptible shift by the courts from equating solatium with the enrichment of a claimant. In this regard see Security [2013] ZANWHC 51 (6 June 2013) paragraph 22 where it was held.

“It is trite that a Court, when determining the quantum for general damages, is exercising a broad discretion when considering what is fair and adequate compensation. The Court considers the facts and circumstances and the injuries suffered by the plaintiff, including their nature, permanence, severity and impact on the plaintiff’s life. The Court must also bear in mind the recent tendency by Courts to award higher damages. See Peterson v Minister of Safety and Security 2011 (6k6) QOD 1 (ECG) at 13 paragraph [7]; Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) at paras 23–25, 27–29”.

- [21] Previous awards in cases of almost similar facts are a good guidance. The plaintiffs were arrested on 18 November 2016 at 12h15, detained and were released on 23 November 2016 at 17h00, they spent a total of six (6) days in detention. Both plaintiffs testified about the conditions under which they were detained. They described how the cells in which they were kept were in the most appalling condition. It was the first time that both were arrested and detained.
- [22] The first plaintiff was clearly emotionally affected by what happened to him. In the face of all this, the defendant could only say that what the plaintiff described is how the condition of the cells are. Anyone arrested will find himself having to live under such conditions. This, by implication, means that the plaintiffs must grin and bear with it and not complain about the squalor. This attitude disregards the fact that the plaintiffs found themselves in the cells through no doing of their own.
- [23] The condition in which the plaintiffs found themselves is similar to the condition the plaintiff in *De Klerk v Minister of Police* 2019
- (12) BCLR 1425 (CC) found himself. De Klerk, an adult male, was unlawfully arrested and detained for seven days. His phone was confiscated, he had to pay money to fellow prisoners for protection, the cell in which he was detained was not clean as he had bite marks, upon his release. He became socially withdrawn, was anxious and appeared to be suffering from mild depression. The Constitutional Court awarded him R300 000.00 compensation in 2019.
- [24] In *Kenneth Wilson v Minister of Police* Case No. 2016/2018 unreported judgment of the North West High Court handed down on 26 November 2020, an unemployed adult male was unlawfully arrested and detained for 6 days. He was with other inmates in a cell and slept on the floor with blankets infested with lice. The toilet could not flush, had no door, as a result, a person using it did not have privacy. The toilet was smelly and the food not good. He was awarded R240 000.00 compensation in 2020.
- [25] Coming to the present matter and having regard to what was awarded in previous similar cases, I am of the view that a fair and reasonable compensation is in the amount of R300 000.00 for each plaintiff.
- [26] Costs

Counsel for the plaintiffs submits that although the quantum in this matter would ordinarily fall within the jurisdiction of the Magistrates Court, I should award costs on the High Court scale. As authority for the proposition, he refers to the De Klerk matter supra in both the Supreme Court of Appeal and the Constitutional Court.

- [27] He further referred to the pretrial minutes where the parties agreed that the matter should not be transferred to a different court and further submitted that the Magistrates Court tariffs do not make adequate provision for costs of Counsel.
- [28] I have great sympathy with the plaintiffs' Counsel. A litigant can choose where to litigate in a case where both the Magistrate and the High Court have concurrent jurisdiction. The authorities are clear that generally a High Court may not refuse to hear a matter where it had concurrent jurisdiction with the Magistrates Court. A High Court may, however, make an appropriate order of costs. See in this regard *Standard Credit Corporation LTD v Bester and Others* 1987(1) SA 812 (W) and authorities referred to therein. This approach was referred to with approval by the Supreme Court of Appeal in *Standard Bank SA LTD & Others v Mpongo and Others* and a related matter. (*South African Human Rights Commission and Others as amici curiae*) 2021 (3) All SA 812 (SCA) paragraph 30
- [29] A general rule relating to costs is that costs should follow the cause. I do not see any reason why it should not be so in this case. However, there is also a little matter of reserved costs when this matter was postponed on several occasions for various reasons.
- [30] Coming to reserved costs, on 08 October 2018 the defendant's witness was absent and no reason given for her absence. On 14 October 2019 she was again absent, and it was alleged that she was ill though no proof was provided. On 15 March 2021 the matter was postponed because the plaintiffs' Counsel became indisposed during the course of the trial. On 10 August 2022 the defendant's witness was again absent and an application for a postponement was refused. The costs were reserved flowing from an application for judgment.
- [31] The plaintiffs submitted that they are entitled to all the reserved costs. It is axiomatic that an award for costs is a discretion to be exercised by the court. When one looks at all the postponements and the reasons why the matter was postponed, it will be pernicious were the plaintiffs to be awarded the costs emanating from all these postponements.
- [32] On 14 October 2019 the defendant's witness was allegedly ill. Although I was not provided with proof that Warrant Officer Van Staden was ill, I cannot ignore the information. On 15 March 2021 the plaintiffs' Counsel was ill. This was due to no fault on the part of the defendant. On 10 August 2022 costs were reserved when application for judgment was made. It will be inimical to saddle the defendant with the costs incurred on these days. As a result, it will only be equitable to allow costs incurred on those days as costs in the cause. The same cannot be said about the costs of 08 October 2018.

[33] I am inclined to unreserve the reserved costs of 08 October 2018, 14 October 2019, 15 March 2021 and 10 August 2022 and to find that the defendant should bear the costs of 08 October 2018. The costs of 14 October 2019, 15 March 2021 and 10 August 2022 should be costs in the cause. The applicable scale shall be as per order which I will make shortly.

[34] Interest

I was also urged by the plaintiffs to grant interest at the prescribed rate from the date of a letter of demand alternatively from the date of summons on the amount awarded. I decline to do so. The claim instituted by the plaintiff is not a liquid claim nor a claim for a liquidated amount. They cannot claim interest as from date of letter of demand or summons as if the defendant was placed in mora. I believe that it will be more equitable were the defendant ordered to pay interest from the date of judgment.

[35] Order

As a result, I make an order in the following:

1. that the defendant pays the first plaintiff an amount of R300 000.00.
2. that the defendant pays the second plaintiff an amount of R300 000.00.
3. that the defendant pays interest on the amounts stated above at the prescribed interest rate from the date of judgment to the date of payment.
4. that the reserved costs of 14 October 2019, 15 March 2021 and 10 August 2022 are hereby unreserved and are costs in the cause.
5. that the defendant pays the plaintiffs costs of suit including costs of 08 October 2018.
6. the applicable costs shall be on the Magistrates' Court scale except for Counsel's costs which shall be on High Court scale.

D I MATLAPENG

ACTING JUDGE

North West Division Court, MAHIKENG

APPEARANCES:

DATE OF HEARING:

06 NOVEMBER 2022

DATE OF JUDGMENT:

03 MARCH 2023

FOR THE PLAINTIFF:

ADV G.V MAREE

INSTRUCTED BY:

NIENABER & WISSING ATTORNEY

FOR THE DEFENDANT:

ADV K.F MAGANO

INSTRUCTED BY:

STATE ATTORNEY (MAFIKENG)

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Prepared on 12 October 2026 · Esheria