

SOUTH AFRICA / JUDGMENT

July v Minister of Police (1172/2018)

[2024] ZANWHC 99 (8 April 2024)

[2024] ZANWHC 99**COURT**

North West High Court, Mafikeng

BEFORE

Mfenyana

CASE / FILE NUMBER

1172/2018

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****NORTHWEST DIVISION,****MAHIKENG****CASE NUMBER: 1172/2018****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

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Magistrates: NO

In the matter between: -

JONGILE

DAN JULY

Plaintiff

and

MINISTER

OF POLICE

Defendant

CORAM: MFENYANA J

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 14h00 on 08 April 2024.

ORDER

(1)

The arrest and detention of the plaintiff on 11 July 2015 to 28 January 2016 was unlawful.

(2)

The defendant is liable for 100% of the plaintiff's agreed or proven damages.

(3)

The defendant shall pay an amount of R1 050 000.00 in respect of damages for the plaintiff's unlawful arrest and detention.

(4)

The

defendant shall pay interest on the above amount at the prescribed legal rate, from date of judgment to date of payment.

(5)

The

defendant shall pay the costs of suit on a party and party scale to be taxed.

JUDGMENT

MFENYANA J

INTRODUCTION

- [1] This matter served before me for determination of the quantum of damages suffered by the plaintiff as a result of his arrest and detention by employees of the defendant on 11 July 2015. The defendant is thus, vicariously liable for the actions of his employees.
- [2] The plaintiff claims an amount of R6 300 000.00 in respect of emotional shock and general damages.
- [3] It is necessary to set out briefly, that the matter had initially been defended by the defendant who also filed three special pleas. Two of the special pleas were without merit and not supported by the pleadings. In respect of the third special plea of non-compliance with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act[1] the plaintiff was granted condonation for the late service of the plaintiff's notice, on 27 August 2020. The plea itself was a bare denial and shed no light on the allegations or the basis of the defence. It further stipulated that the incident could not be traced.

[4] In spite of its denial the defendant in its amended discovery affidavit, provided the contents of the case docket under CAS No. 51/07/2015 relating to the plaintiff's arrest and detention. Having filed a notice in terms of Rule 35(3), the plaintiff on 30 March 2023 obtained an order compelling the defendant to comply with

the plaintiff's notice in terms of Rule 35(3). The defendant failed to comply with the order.

[5] On 6 July 2023 the plaintiff defendant's defence was struck for failure to comply with the order issued on 30 March 2023 compelling him to comply with the plaintiff's notice in terms of Rule 35(3) within ten days of the order.

[6] Despite being served with the court order on 21 April 2023 and an application to strike out the defence on 10 May 2023, the defendant made no attempt to comply with the court order, or oppose the application, or provide an explanation for its inaction to this Court.

PLEADINGS

[7] In his amended particulars of claim, the plaintiff pleaded that he was arrested by members of the SAPS on 11 July 2015 whose further particulars he does not know. They charged him with the crime of armed robbery. Two days later on 13 July 2015, he appeared at the Magistrates' Court for a bail application. The State opposed

the application.

[8] The plaintiff alleged that he was denied bail purely on the basis that the police gave misleading and false evidence against him. He was detained at police cells at the Wesselbron police station, and

the condition of the cells was inhumane, dirty and overcrowded. He further alleged that the food was not suitable for human consumption.

He was further detained for a period of 202 days from 11 July 2015 to 28 January 2016 when charges against him were withdrawn.

[9] He consequently claims damages in the total amount of R 6 300 000.00,

R300 000.00 for emotional shock and R6 000 000.00 for general damages.

[10] The onus to prove the lawfulness of the arrest rests on the defendant. There is no duty on the plaintiff to prove that his arrest was unlawful. The defendant's defence having been struck out, the defendant failed to prove that the plaintiff's arrest was lawful. It follows axiomatically that the detention was also unlawful.

ISSUE TO BE DETERMINED

[11] What remains for determination is the quantum of damages to be awarded to the plaintiff.

- [12] At the commencement of the proceedings Mr Kwape appeared on behalf of the defendant. He informed the Court that he only held instructions to merely attend the proceedings and had no submissions to make.

EVIDENCE

- [13] The plaintiff testified that he was near Tavern Makwassie when the police arrested him on 11 July 2015. They alleged that he had committed robbery. He stated that he was initially detained at the Welkom police station and thereafter transferred to Odendaal prison. On 13 July 2015 he appeared in court and was denied bail due to false evidence presented by members of the SAPS. He was detained for a period of 202 days from 11 July 2015 until his release on 28 January 2016 when charges against him were withdrawn.
- [14] He detailed the conditions under which he was detained, stating that he was detained in a cell with 30 other inmates. He described the condition of the cell as unclean. There was no privacy as inmates would relieve themselves while others were eating. He testified that there was one toilet shared among the 30 inmates. They would all take turns to clean the toilet. He stated that on his arrival the other inmates threatened and bullied him.
- [15] With regard to the food they were given, the plaintiff testified that the food was bad, and the pap they were given to eat was not edible. He testified that at first, he did not eat the pap, but as time went by, he did, as he had no other option.
- [16] The plaintiff testified that at the time of his arrest, his girlfriend was pregnant. He later learnt that she had a miscarriage, which made him sad as he could not help her. When he returned home after his release, she had left as she was staying alone. On his return home, members of the community mocked him and stigmatized him for being a murderer, and songs were composed about his arrest.
- [17] The plaintiff stated that he feels a sense of loss as a result of his arrest and detention. First, he lost his unborn child. Thereafter his uncle also passed away while he was in prison. He could not attend to his cultural responsibilities as the eldest son in his family as he was in detention. He stated that he could not remember when his uncle passed away. He further testified that although his partner eventually returned to live with him after he was released, she too passed away three months later due to hypertension.
- [18] The plaintiff further testified that his car was at the police station when he was detained and was later delivered at his house by the police. However, when he was ultimately released from prison, the engine could not start. He was compelled to take his car to a scrapyards as it was no longer in working order. He could no longer earn income from it, as he previously used it as a maxi taxi to transport people.
- [19] According to the plaintiff, he earned an income of between R800.00 and R900.00 on weekends and R400.00 to R500.00 on weekdays from the use of his motor vehicle.

- [20] Regarding his arrest and detention, the plaintiff testified that it caused him emotional shock and traumatised him. He stated that to this day, he fears the police as he still remembers the events of the day he was arrested and his incarceration.
- [21] In accordance with Rule 38(2), an order was made for the evidence of Ms Mashudu Malivha (Ms Malivha), a clinical psychologist who assessed the plaintiff, to be given on affidavit in accordance with Rule 38(2) of the Uniform Rules of Court.
- [22] In her report, Ms Malivha, states that she assessed the plaintiff on 31 October 2022. She records that the plaintiff suffers from secondary “moderate mental and behaviour impairment in the form of depression and Post Traumatic Stress Disorder (PTSD).” She further records that the plaintiff has reached the maximum medical improvement. He still has moderate signs of anxiety. His prognosis is good due to absence of neuro cognitive impairment. Ms Malivha recommended 35 sessions of future individual psychotherapy at an estimated cost of R1 600.00 per session to a total of R56 000.00.
- [23] In the case docket discovered by the defendant, it is recorded that the plaintiff was arrested on 11 July 2015 with two other accused for robbery with aggravating circumstances. It further appears from the docket that investigations ensued, and the plaintiff and his co-accused stood trial. On 28 January 2016 charges against the plaintiff were withdrawn while his two co-accused were convicted and each sentenced, to ten years imprisonment.

DETERMINATION

OF DAMAGES

- [24] In determining what could be an appropriate amount of damages to be awarded to the plaintiff for an infraction of his rights, the Court must have regard inter alia, to the manner in which the arrest was carried out, the duration of the detention, the age of the plaintiff, and the conditions of the cell where the plaintiff was kept.
- [25] In his evidence, the plaintiff contended that when he appeared in court on 13 July 2015, bail was denied due to false evidence tendered by members of the SAPS. This led to him being detained for a further 200 days. The plaintiff provided no details of the false evidence led by the police. As such, this allegation remains unproven. However, his arrest and detention are common cause. His testimony regarding the conditions he was detained in remains unchallenged.
- [26] It is trite that the determination of damages presents of difficulties, occasioned by the fact that there is no fixed method of ascertaining the amount of damages. Courts are also not able to gaze into a crystal ball in order to determine the appropriate award. Neither can they ascertain the amount with mechanical precision or mathematical accuracy. What is certain is that the award of damages is notionally viewed as a means of providing some form of solace to the aggrieved party for their injured feelings. The aim is not to enrich the aggrieved party. I previously had occasion to note that no price can be tagged to a person's liberty and

injured feelings.

[27] The courts in general, view infractions to constitutionally entrenched rights and deprivation of liberty in a serious light. Where the circumstances of the arrest themselves are atrocious, it makes the violation all the more abhorrent.

[28] In *Minister of Safety and Security v Tyulu*[2], Bosielo AJA cautioned that:

“...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.”[3]

[29] The learned Judge of Appeal went further to acknowledge that it is impossible to determine an award of damages for this kind of injury with mathematical accuracy, and that previous awards may serve as a guide, cautioning further that they should however not be followed slavishly as that would be treacherous. The facts of each case should be considered, and the quantum of damages determined on those facts. Ultimately, the extent lies within the discretion of the court seized with the determination.

[30] In this matter the plaintiff relies on a variety of decisions from various divisions. The essence of the authorities relied on is that the Constitution views the deprivation of personal liberty as a serious infraction. He contends that he is entitled to conditions of detention that are consistent with human dignity, adequate accommodation, nutrition, reading material and medical treatment at the expense of the state as enshrined in the Constitution.[4]

[31] Notably the awards in the authorities cited by the plaintiff vary markedly. From R300 000.00 for an hour’s detention in *Swarts v Minister of Police*, R450 000.00 for 40 minutes’ detention in *Juanita Wigg v Minister of Police*; R250 000.00 for detention of nine hours’ detention in *Mpange v Minister of Police*, to cite a few. What can be gathered from these previous awards is that there is no ‘one size fits all’ method of ascertaining damages and each case will largely depend on its own merits.

[32] More recently, in *Diljan v Minister of Police*[5], in awarding R120 000.00 arrest and detention of three days the SCA noted as follows:

“...A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes

awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be “thumb-sucked” without due regard to the facts and circumstances of each case. Practitioners ought to know the

reasonable measure of previous awards, which serve as a barometer in quantifying their clients' claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above."

- [33] On that note in *Motladile v Minister of Police*[6] the SCA lamented what it described as trend to fix a daily rate for damages, similarly, noting an attempt to strive for conformity and similarity. The SCA cautioned against this tendency. The plaintiff in that case was awarded R200 000.00 for four days' detention by the SCA.
- [34] In this case, the plaintiff's claim is for R 6 300 000.00 for a period of six months and eighteen days. That amount as earlier indicated represents amounts for 'emotional shock and general damages'. It is trite that emotional shock is an element of general damages, it being the case that it is non-patrimonial loss. The generality of general damages lies in the fact that they cannot be measured with precision. They cannot be touched or replaced. There is thus no merit in separating the two heads of damages as the plaintiff did.
- [35] With regard to actual damages, there was a belated attempt by the plaintiff to claim what appears to be loss of earnings. No proper case was made for loss of income, and the plaintiff provided no evidence or proof of past earnings as alleged. If the plaintiff's warning statement as contained in the docket is anything to go by, it reflects that the plaintiff was unemployed at the time of his arrest.
- [36] Notwithstanding the fact that no two cases are exactly the same, there can be no doubt that the amount is out of kilter with previous awards in comparable circumstances. I am equally mindful of the inordinately long time which the plaintiff spent in detention.
- [37] In *Mtolo v Minister of Police*[7] the Kwa-Zulu Natal division in Pietermaritzburg awarded an amount of R3 367 200.00 to the plaintiff for arrest and detention of 2 years and eight months on charges of housebreaking with intent to steal and theft of a motor vehicle. The plaintiff's application for bail was refused. He remained in custody. Eighteen months later, the charge of housebreaking was withdrawn. He remained in custody for the theft of a motor vehicle. His application for bail was once again refused as the police provided false evidence against him to the effect that he was arrested in the stolen vehicle, when he had in fact been arrested at his house. That charge was also withdrawn a year later. He appeared in court approximately 37 times. On the day of his arrest upon arrival at prison, he was made to strip naked and jump around in front of prison warders and other inmates to prove that he did not conceal any prohibited substance on his body.
- [38] In *Maghoti and Another and Another v Minister of Police*[8], this division awarded an amount of R1 000 000.00 for unlawful arrest and detention spanning eighteen months.
- [39] Looking at the specific circumstances of this case, I do not find that there is any nexus between the death of the plaintiff's girlfriend and the plaintiff's detention. There is also no medical evidence linking her death with the arrest of the plaintiff. Once again, there is no nexus between the plaintiff's arrest and detention and the death of his uncle. To the extent

that the plaintiff seems to suggest that as the eldest in his family, he was expected to play a leading role in his uncle's burial, he did not provide any evidence to support this allegation which in itself is too remote. The damages he allegedly suffered are not close enough.

[40] Save for what is reflected in the docket, and a belated allegation that the plaintiff sustained injuries on his wrists as a result of being handcuffed, he did not provide further details pertaining to his arrest. No evidence of such injuries was presented. The police took no heed of the fact that his rights were continuously infringed by his incarceration, only for the charges to be withdrawn 200 days later. Surely, at some point during the course of their investigation, the police ought to have realised that they had no evidence to sustain the charge against the plaintiff. Despite such knowledge they persisted with his detention. I am of the view that this shows wanton disregard for the importance of personal liberty entrenched in the Constitution.

COSTS

[41] The general rule with regard to costs is that costs follow the result. No facts in this case justify a deviation from the general rule.

[42] In the result, I make the following order:

- (1) The arrest and detention of the plaintiff on 11 July 2015 to 28 January 2016 was unlawful.
- (2) The defendant is liable for 100% of the plaintiff's agreed or proven damages.
- (3) The defendant shall pay an amount of R1 050 000.00 in respect of damages for the plaintiff's unlawful arrest and detention.
- (4) The defendant shall pay interest on the above amount at the prescribed legal rate, from date of judgment to date of payment.
- (5) The defendant shall pay the costs of suit on a party and party scale to be taxed.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTHWEST DIVISION, MAHIKENG

APPEARANCES:

For the plaintiff: TT Tshivhase Instructed by: Makapan Attorneys makapan.attorneys@gmail.com
rabelanin@makapaninc.co.za c/o Zisiwe Attorneys For the defendant: T Kwape Instructed by:
State Attorney, Mmabatho LMatshinyatsimbi@justice.gov.za Date reserved: 04 September 2023
Date of judgment: 08 April 2024

[1] Act 40 of 2002.

[2] 2009

- (5) SA 85 (SCA).
- [3] Paragraph 26.
- [4] Section 35(2)(e) of the Constitution provides: “35. Arrested, detained and accused persons (2) Everyone who is detained, including any sentenced prisoner has the right (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment;”
- [4] Section 35(2)(e) of the Constitution provides:
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- [5] (746/2021) [2022] ZASCA 103 (24 June 2022).
- [6] (414/2022)
- [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023).
- [7] (10144/2015)
- [2023] ZAKZPHC 86; 2024 (1) SACR 317 (KZP) (23 August 2023).
- [8] Unreported: Case No. KP407/2018 (handed down on 07 July 2022)

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