

SOUTH AFRICA / JUDGMENT

Lekala and Another v Member of the Executive Council of the Department of Community Safety and Transport Management and Another (1037/2017) [2023] ZANWHC 64 (25 May 2023)

[2023] ZANWHC 64**COURT**

North West High Court, Mafikeng

BEFORE

K Mongale

CASE / FILE NUMBER

1037/2017

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Source record**IN THE NORTH WEST HIGH****COURT, MAFIKENG****CASE NUMBER: 1037/2017****Reportable: YES/NO****Circulate to Judges:** YES/NO**Circulate to Magistrates:** YES/NO
Circulate to Regional
Magistrates: YES/NO
In**the matter between:** LETLADI ALBERT
LEKALA
1 st Plaintiff
GLADYS
MOKGATLHE
2 nd Plaintiff
and
MEMBER OF THE
EXECUTIVE COUNCIL OF
1 st Defendant
THE DEPARTMENT OF
COMMUNITY SAFETY
AND
TRANSPORT MANAGEMENT
MINISTER
OF POLICE

2 nd
Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties or parties' representatives by email. The date and time for the hand down is deemed to be 25 May 2023.

MONGALE AJ

INTRODUCTION

- [1] What appears before me is a trial on quantum for the Court to determine the appropriate amount to compensate the first plaintiff with for the damages suffered emanating from his unlawful detention.
- [2] The trial on determination of liability was heard by Chwaro AJ in April 2019 wherein he upheld the special plea raised by the defendants against the claim of the second plaintiff and dismissed the rest of the first plaintiff's claim, except the unlawful detention suffered by the first plaintiff at Mmabatho police station on 25 May 2014 until his release on 26 May 2014.
- [3] At the quantum stage of trial, it is the first plaintiff who must prove his damages arising from his unlawful detention and also satisfying this Court of the length of the period of his detention, for this Court to arrive at the appropriate amount that the first plaintiff needs to be compensated for.

SUBMISSION BY THE FIRST PLAINTIFF

- [4] At the beginning of this trial, the plaintiff's counsel, Ms Zwiigelaar indicated that, instead of leading evidence of the first plaintiff to prove his damages, both Counsel agreed to rather refer this Court, when making their submissions on quantum, to relevant parts of the evidence from the record that was led during trial on quantum.
- [5] Ms Zwiigelaar referred this Court to the plaintiff's particulars of claim from page 15 to page 26 with specific reference to page 16 and 26, where it is alleged that the plaintiff was stopped by the traffic officer at 15h00 on 25 May 2014, taken to the Mmabatho police station where he was arrested and released from custody the following day on Monday 26 May 2014 at 10h00. According to Ms Zwiigelaar the plaintiff was detained for a period of 19 hours before he was released.

- [6] Regarding the first plaintiff's personal circumstances, this Court was referred to pages 15 to 31 of the transcribed record. In brief the first plaintiff's personal circumstances can be summarised as follows: That the first plaintiff was born in 1983, he has a Bachelor of Education, senior phase, obtained from the University of Limpopo. He started working in October 2009 as an educator on temporary basis, until he was permanently employed on 08th March 2012.
- [7] He is customarily married to the second plaintiff and together they have two children. His wife is employed as a police officer, stationed at Madibogo police station. At the time of his arrest, he was in the company of his wife and their child, who was sick and they were coming from the doctor.
- [8] Mr Moloto, one of the traffic officers who later arrived at the scene in a marked motor vehicle where the first plaintiff was stopped, drove away with the first plaintiff, after he manhandled the first plaintiff and without informing the first plaintiff where they were going. The first plaintiff was concerned and worried that something terrible was going to happen to him, due to the manner in which he was handled by Mr Moloto and was even scared to ask where they were going. The first plaintiff only became aware when they arrived at Mmabatho police station where he was taken to.
- [9] He was traumatised when they arrived at the police station as he didn't know what was going to happen to him. Whilst he was still inside the car, two male police officers came to him and told him that he was under arrest. They took him to the waiting cell and denied him the opportunity to call his attorney and his wife, because his wife did not know where he was taken to at the time he was transported from the scene. They made him to sign the 'document written detainees right without the opportunity to first read it at 16h50.
- [10] The female officer told him that that night, he was going to sleep in a cell without food and without a blanket. This happened exactly as the female officer predicted because by the time the first plaintiff was in the waiting cell, people who served the prisoners with supper were already moving around with the trolley that carries food. The prisoners ate before he was taken to the cell. The toilet was not functioning well and there were no bedding and/or blankets despite that it was during winter.
- [11] He was put in a cell which is 15 square metres in size and had about 20 to 25 inmates. In the evening after they were counted, some of the inmates started to smoke what smell like cannabis (dagga) and others were smoking cigarettes, despite the fact that there were not enough windows and no sufficient ventilation.
- [12] On 26 May 2014 upon his release, he was issued with a warning to appear in court on 27 May 2014, and the charge was eventually withdrawn against the first plaintiff.

- [13] Ms Zwiigelaar contends that the first plaintiff was not able to report for duty on 26 and 27 May 2014, and that although he received his full salary for the month of May he was forced to take paid leave, the effect of which is that the two days of forced leave has reduced the number of the first plaintiff's leave days.
- [14] He felt humiliated to have been arrested in the presence of his wife and his child and was stigmatised as a result of his detention.
- [15] Ms Zwiigelaar referred to the judgment in *Minister of Police and Another v Erasmus* (366/2021) [2022] ZASCA 57 (22 April 2022) where Mr Erasmus was detained for 20 hours in unpleasant conditions and was awarded R25000-00. She contends that this judgment is comparable to what Chwaro AJ found at paragraph 16 of his judgment, where he found that the general conditions of the holding cell were inhumane.
- [16] She further referred this Court to *Diljan v Minister of Police* (Case no 746/2021) [2022] ZASCA 103 (24 June 2022), where the applicant was detained for three days. When the SCA made a ruling, it took into account that the applicant was deprived of visitation rights from her family and was arrested in the presence of the occupants of the neighbouring apartments. According to Ms Zwiigelaar, this case is also comparable to the current case in the sense that the first plaintiff was denied the opportunity to call his attorney and wife.
- [17] On the issue of costs, the first plaintiff's counsel referred this Court to *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ), where the defendant admitted that the arrest and detention were unlawful and the issue that the court had to determine, among others, was costs. The court held that the amount of the damages awarded is not the only consideration in determining the scale of costs.

SUBMISSIONS BY THE SECOND DEFENDANT

- [18] In his address Mr Mmolawa, on behalf of the second defendant, indicated that the *Mathe* case deals with basic principles of costs and should be distinguished from the case in *casu*. Mr Mmolawa further submitted that the arrest of the first plaintiff in *casu*, was found to be lawful by the Court, except the detention which was found to be unlawful. He further submitted that the first plaintiff is the author of his own misfortune, because he failed to provide the traffic officers with his particulars. On the period of detention, he contends that the first plaintiff was detained from 17h00 on 25 May 2014 to 10h00 on 26 May 2014.
- [19] On the issue of the scale upon which the costs are to be determined, Mr Mmolawa referred the Court to *Motladile v Minister of Police* case number: 794/2016 NWHC (delivered on 21 May 2021), where the court held that no special circumstances were advanced to warrant the institution of these proceedings in the High Court. He further referred the Court to *Joubert v Minister of Police and Others*, case number 659/2017 NWHC (delivered on 15 April 2021), where the court held that an amount of R15000-00 was fair for each of the seven days that the plaintiff was detained. He therefore submits that an appropriate amount to be awarded to the first plaintiff is between R 15 000-00 and R25 000-00 on a Magistrates' Court scale.

THE LAW AND ITS APPLICATION TO THE FACTS

- [20] For the Court to determine the appropriate amount of quantum to be awarded to the first plaintiff, it must first satisfy itself of the period of detention of the first plaintiff. It is evident from the submission by both counsel that they are not in agreement on the hours spent by the first plaintiff in police custody. On page 53 of the record, the first plaintiff was asked during examination-in-chief whether the information on the Notice of Rights which recorded that he was detained at 16:50 was correct and his answer was in the affirmative. This means that the first plaintiff was detained from 16:50 and released at 10:00 the following day, which gives a total number of 17 hours, which is short of 24 hours, a full day.
- [21] During trial on merits, the court (per Chwalo AJ) found that the detention of the first plaintiff was unlawful in that there was no evidence presented before the Court on what led to the decision to detain the first plaintiff by members of the South African police. By detaining the first plaintiff, he was deprived of his personal liberty, which is a right to freedom of movement enshrined in section 21 of the Constitution of the Republic of South Africa, Act 108 of 1996.
- [22] I have taken into account, as submitted by Ms Zwiegelaar, that the first plaintiff was detained in the middle of winter and was not provided with blankets to mitigate a cold winter's night, the size of the cell in which the first plaintiff was detained in, and the number of inmates kept in that cell, lack of proper ventilation, the toilet that was not functioning well, and some inmates who were smoking dagga and cigarettes in that confined space. In a nutshell, the first plaintiff was exposed to degrading and unfavourable conditions that were not conducive for habitation.
- [23] Although it is trite that when determining the appropriate amount to be awarded, the court should have regard to past awards, this Court is mindful that the circumstances of each case differ, and that there is no fixed formula for the assessment of damages for non patrimonial loss.

See: *Seria v Minister of Safety and Security & Others* (9165/2004) [2004] ZAWCHC 26 (15 October 2004)

- [24] The SCA in *Minister of Safety v Tyulu* 2009 (5) SA 85 (SCA) held 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/her some needed solatium for the injured feelings, therefore the damages awarded should commensurate with the injuries inflicted. However; our courts should be astute to ensure that the award 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.”

[25] In *Diljan supra*, the SCA held that: a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required solatium, the defendant should not be treated as a cash-cow with infinite resources. The compensation must be fair to both parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.

[26] In *Protea Assurance Co. Ltd v Lamb* 1971 (1) SA530 (A) at 535H536A-B Potgieter JA remarked:

"It should be emphasised, however; that this process of comparison does not take the form of a meticulous examination of awards made in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration."

[27] Factors that I need to take into consideration when determining the appropriate quantum are: the first plaintiff's standing in the community as an educator; he had to take two days unplanned leave for his appearance in court on two occasions which reduced the number of his leave days; he was arrested in the presence of his wife and a his young child; the appalling conditions of the cell he was detained in, and the fact that he was not provided with food upon his detention and during the period of incarceration.

[28] Taking into account all the factors placed before this Court, I am of the view that a fair and reasonable amount to compensate the first plaintiff with is R20000-00 for his unlawful detention.

COSTS

[29] In *Affordable Medicines Trust and Others v Minister of Health and Others*

[2005] ZACC 3; 2006 (3) SA 247 (CC), the Constitutional Court held that the award of costs is a matter which is within the discretion of the court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations.

[30] The scale for costs is not only determined by the amount awarded for damages. In *Mathe supra*, the court held that a number of considerations such as the rights of the party affected, public interest, the complexity of the matter, the duration of the trial and the conduct of the defendant during the course of the litigation, may motivate the court to award a High Court scale.

See: *Vermaak v Road Accident Fund* Case No 2509/03 [2006]ZAECH 10.

[31] Opperman J in Mathe remarked that:

"[62] Claassen J held as follows in Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino 2000 (4) SA 68 (1M at 86D:

"Deprivation of one's liberty is always a serious matter".

[32] Opperman J continued and held:

"[63] It is important to note that, as in R and Others v Minister of Police, unreported full-bench appeal judgment dated 21 April 2016, Case No A315/2015 [2016] ZAGPPHC 264, this matter also deals with the violation of important constitutional rights, including the plaintiff's rights to human dignity, freedom and security of the person, freedom of movement and to conditions of detention that are consistent with human dignity."

[33] Similarly, although I am mindful of the fact that in casu, the first plaintiff's arrest was found to be lawful, Chwaro AJ found that his detention was unlawful. The first plaintiff's constitutional rights to freedom of movement were violated and he was exposed to conditions of detention that are inconsistent with human dignity. Despite the fact that the arresting officer chose to detain the first plaintiff, there was no evidence tendered before Chwaro AJ to justify the detention of the first plaintiff.

[34] Section 35(2)(e) of the Constitution of the Republic of South Africa, 108 of 1996, provides:

"(2) Everyone who is detained, including every 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. "

[35] Counsel for the first plaintiff submitted that the element of public interest is applicable in this matter considering the conduct of the first defendant's witnesses. Opperman J in the Mathe case, supra, remarked that society has an interest in the High Court hearing matters that relate to state officials violating the rights enjoyed by individuals, rather than respecting and protecting such rights. The first plaintiff was detained by police officers, who were not called to justify the detention by explaining what factors they had in mind at the time they took the decision to detain the first plaintiff.

[36] In S v Dodo [2001] ZACC 16; 2001 (3) SA 382 the Constitutional Court held:

"[35] ...the human dignity of all persons is independently recognised as both an attribute and a right in s 10 of the Constitution, which proclaims that everyone has inherent dignity and the right to have their dignity respected and protected."

[37] The first plaintiff's human dignity was violated whilst in detention. Having exercised my judicial discretion and considered all the factors presented before this Court, I find that although costs to be awarded are within the Magistrates' Court jurisdiction, the costs should be awarded on a High Court scale.

ORDER

[38] In the premises, the following order is made:

1 Judgment is granted in favour of the first plaintiff in the amount of R20000-00 for unlawful detention.

2 The second defendant is ordered to pay the first plaintiff's taxed or agreed party and party costs incurred from the date of this order, on a High Court scale.

3 In the event that the plaintiff's taxed costs are not paid, the second defendant is liable to pay interest on the said taxed costs at the rate of 10,5% per annum, from the date of default to date of final payment.

K MONGALE

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the first Plaintiff Adv C Zwiegelaar Instructed by: Labuschagne Attorneys For the second Defendant: Adv Mmolawa Instructed by: State Attorney's Office DATE OF HEARING: 05 October 2022 DATE OF JUDGMENT:

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