

SOUTH AFRICA / JUDGMENT

Mahlanza v Minister of Police (EL1326/2017) [2019] ZAECELLC 32 (26 November 2019)

[2019] ZAECELLC 32

COURT

Eastern Cape High Court, East London Local Court

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

EL1326/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
[EAST LONDON CIRCUIT
LOCAL DIVISION: EAST LONDON]
CASE
NO. EL1326/2017

In the matter between:

PHUMZILE
MAHLANZA
Applicant
And
MINISTER OF
POLICE
Respondent

JUDGMENT

JOLWANA J

- [1] The plaintiff alleges in his particulars of claim that on 17 August 2017 at 13h00 he was arrested by unknown members of the South Africa Police Services who were in full uniform and were armed with rifles. He was thereafter detained at Fleet Street police station overnight until he appeared at the East London Magistrate's Court the following day where he was released on warning. He now claims damages for the said arrest and detention which he alleges, were unlawful.

- [2] The plaintiff further alleges that the said arrest even with a warrant of arrest was wrongful, unlawful, irrational and malicious in that the police officers did not exercise their discretion on whether to arrest him or not properly. The very manner of his arrest was calculated to degrade, embarrass and humiliate him. He was arrested during the lunch hour in full view of his colleagues at work, his senior managers who became aware of his arrest and he had to account to them about it, as well as members of the public in the nearby taxi rank whose attention would be attracted by the presence of so many police vehicles.
- [3] The police that arrested him came in a fleet of eight marked vehicles with sirens blaring. He was handcuffed and some of the police officers were singing as he was walked to a waiting police vehicle. The sheer number of the police officers involved was grossly disproportionate considering that the very warrant of his arrest was issued for his alleged failure to appear at a Maintenance Court for a maintenance enquiry.
- [4] The defendant pleaded that indeed the plaintiff was arrested in terms of a warrant of arrest at his place of employment in the normal way by police officers who were in their uniform and armed with their standard service pistols which were holstered. The defendant denied that they were armed with rifles. The defendant further pleaded that the reason for the arrest of the plaintiff was his failure to appear at the East London Maintenance Court for a maintenance hearing in respect of which the plaintiff had been summonsed to appear and had ignored the summons. Furthermore the plaintiff had been warned in the subpoena that his non-appearance at the maintenance hearing could result in his arrest.
- [5] The plaintiff called Sandelwa Tupha a security guard who was on duty at the time of his arrest at the Road Accident Fund where the plaintiff is employed. She testified that on the day of the plaintiff's arrest she was at work at her desk at the main entrance to the building. Approximately thirty police officers including traffic officers entered the building some of whom came to her desk. They told her that they were looking for a certain gentleman who worked for the Road Accident Fund. They did not tell her the name of the person they were looking for. She asked them to complete the visitor's register after which she referred them to the 4th floor of the building where the Road Accident Fund reception was located.
- [6] She later saw them coming out of the lift with the plaintiff surrounded by the police and handcuffed. When they were outside of the building the police started singing "Wathint' abafazi, wathint' imbokodo". Loosely translated this means you strike a woman you strike a rock. There were many police and traffic officer's vehicles and she heard sirens of the police vehicles turned on.
- [7] The plaintiff testified that he has been working for the Road Accident Fund since 2013 and has lived in Amalinda which is one of the residential areas of East London for about three years. He lives with his wife and children.

- [8] On 17 August 2017 at about lunchtime he was at his desk at his place of work when he received a call from the receptionist asking him to come to the reception which is on the 4th floor. When he opened the door at the reception he was shocked to see a group of so many police officers standing in a parade like formation.
- [9] The receptionist told her that those police officers were looking for him. One sergeant Mbuli introduced herself and told him that they were there to arrest him for a child maintenance case. She also showed him a warrant of arrest. He told sergeant Mbuli that he is not supposed to be arrested because he is maintaining his child and that proof that he pays maintenance for the child was at his desk that very moment and that he could bring that proof of paying the maintenance for the child. Sergeant Mbuli responded that such proof would be evidence in court and that they were not there for that purpose, they were there to arrest him. She then took out handcuffs and handcuffed him with his hands to the back. They took him into the lift down to the ground floor. All the police officers were women.
- [10] When he was taken out of the building he saw many marked police and traffic officers' vehicles which turned on their sirens. He was taken into one of the police vehicles and he battled to sit because he was handcuffed to the back. He asked the police officers what that was all about as he did not think it was about the maintenance of his child as he was paying maintenance for the child.
- [11] He testified that he had been summonsed to go to the maintenance court before. The complainant in respect of the maintenance case was captain Zimkitha Mbishe who is also a police officer and she is the mother of his child. When he received the maintenance summons from the sheriff he collected all his proof of payments and took them to the maintenance court and placed them in the file. He thought that if the magistrate received proof that he was paying maintenance that would be the end of the matter. On the second occasion he was summonsed he did not go to the hearing this time because he had missed the hearing date.
- [12] He paid maintenance for his child although he would miss a month here and there in which case he would communicate with the complainant through an sms to inform her. He has five children that he is looking after including the complainant's child and he is responsible for all five of them.
- [13] After his arrest he was taken to Fleet Street police station where he was processed and taken to a holding cell. The conditions in the cell were very bad with a dirty toilet next to him and his cell mates. The toilet had no toilet paper and there was no privacy at all. He had to sleep on a thin mattress with a dirty smelly blanket. One of the inmates in that cell was arrested for a drug related offence. He could not sleep because other detainees were being brought into the cell throughout the night. He did not know what to expect from those inmates.

- [14] The following day he was taken to an office in the magistrate's court building where he was given a date and warned to appear on a specific date for the maintenance hearing. On that date he was never charged for failing to appear in court on the previous occasions. After the hearing he consented to pay R1 000.00 per month.
- [15] The arrest had a negative effect on him in that at his place of work he had to account to his general manager for the arrest. His relationship with his wife suffered as he struggled to be intimate with his wife. His relationship with his daughter for whose maintenance he had been arrested also suffered in that it deteriorated.
- [16] Under cross examination he testified that he is aware that August is women's month. He is aware of the song that was sung at the time of his arrest which is normally sung during ordinary celebrations especially during women's month celebrations but was unhappy that it was sung by those female officers whilst arresting him.
- [17] The defendant called sergeant Mbuli, the arresting officer. She testified that on 17 August 2017 they had an operation as they normally do as female police officers in August each year at Fleet Street police station. They decided to include as part of the operation the execution of warrants of arrest which were her responsibility. The operation included the female members of the South African Police Service, the municipal law enforcement unit and the traffic officers. They decided to go to certain taverns, visited old age homes and executed warrants of arrest. The other arrest made that day was at Kidd's Beach and no other arrest was effected in the CBD other than that of the plaintiff.
- [18] She could not remember how many they were in total as members from all these branches of the law enforcement agencies. When she arrested the plaintiff she was with sergeant Bester. They arrived at the plaintiff's work place and spoke to the security officer there. She already knew the floor they were going to as she had been there before.
- [19] She and sergeant Bester went to the Road Accident Fund at 4th floor. They went to the receptionist at the 4th floor and enquired about the plaintiff who was called and they had to wait for him. After some time the plaintiff arrived. She informed him that he was under arrest and showed him the warrant of arrest. She handcuffed him and told him that she was arresting him due to his failure to appear at the maintenance court. They took him to their vehicle and proceeded to the police station with him where he was eventually detained.
- [20] When they went to the 4th floor she thinks they were about six police officers but could not be sure as she was focusing on the arrest. Other police officers who were with her at the 4th floor went down with her and the plaintiff and others had already exited the building at that time. She did not hear any song being sung. She was focusing on arresting the plaintiff and there were many people there who were standing some distance away. Some of those people were police officers and others were members of the public. The police did sing the song alleged by the plaintiff when they visited the old age home. On that day they were not carrying any rifles and they did not turn on the sirens of their vehicles. She and sergeant Bester and the plaintiff proceeded to the police station in their vehicle while other officers

continued with other operations.

- [21] She testified that she knows the complainant in the maintenance case but did not know that she was the complainant in the case to which the warrant of arrest pertained when she went to execute the warrant. She became aware of it when the plaintiff mentioned her in the police vehicle on the way to the police station. The plaintiff accused her of arresting him because she is friends with the complainant. The plaintiff further said that he was paying maintenance for his child and did not know why he was needed in court. He also said he wanted to fetch proof to show that he was paying maintenance for the child. The plaintiff further mentioned that he had received summons but saw no need to go to court when he was paying maintenance.
- [22] Under cross examination she was referred to the police Standing Orders which, in part, stipulates that although an arrest is one of the ways of securing an accused's attendance in court it was the most drastic infringement of the rights of a person and therefore it should be used as a last resort. She confirmed being aware of it, however, a warrant of arrest is an authorization from court for the arrest of a person. She therefore felt that she had to arrest the plaintiff. She could not recall enquiring from the plaintiff about his place of residence.
- [23] The plaintiff did tell her that he was paying maintenance for the child. However, the warrant of arrest was due to his failure to appear in the maintenance court. Although the plaintiff said to her that he had proof that he was paying the maintenance for his child, he never asked to be allowed to fetch the proof and she did not think of giving him an opportunity to fetch the proof of the alleged payments. If it was still possible for her to take the plaintiff to court she would have done so but after 14:00 they were not allowed to bring arrested persons to court, they have to detain them until the following day.
- [24] She further testified that she had gone to the Road Accident Fund's offices on three previous occasions to look for the plaintiff and on those occasions she spoke to a receptionist. However, she could not remember the name of the receptionist or even the dates on which she went there. It might very well be that he did not get the message on all those three occasions. When asked if there was no other less invasive way of securing the plaintiff's attendance in court other than arresting him, her response was that at the time of arresting and detaining the plaintiff she could not take him to the magistrate as it was after 14:00. She testified that her discretion did not allow her to warn the plaintiff to come to court as against arresting and even detaining him. She was obliged to arrest the plaintiff with a possibility of taking him to court if time allowed. If time did not allow her to take him to court she had to arrest and detain him in the cells for the following day.

[25] The issue in the main is whether sergeant Mbuli, armed with a warrant of arrest had any discretion at all regarding whether or not to arrest the plaintiff. If she had a discretion to exercise, whether she exercised such discretion properly and did not arrest the plaintiff arbitrarily and thus abused her power to arrest in execution of the warrant of arrest. It was contended on behalf of the defendant that there was no discretion at all and sergeant Mbuli was obliged to arrest the plaintiff in terms of the warrant of arrest.

[26] Section 43 of the Criminal Procedure Act[1] (the CPA) provides for a warrant of arrest as follows:

“(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police –

- (a) which sets out the offence alleged to have been committed;
 - (b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
 - (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offense.
- (2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offense set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.
- (3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or if such person is not available, by any person with like authority, or until it is executed.”

[27] It is common cause that the plaintiff was arrested on 17 August 2017 on the basis of a warrant of arrest issued by the magistrate in East London on 17 July

2017. The said warrant in part reads thus:

“THESE ARE THEREFORE, in the name of the State, to command you that immediately upon sight hereof you arrest and bring the above

–mentioned, person or cause him/her to be arrested and brought before the said court to be dealt with according to law.”

It is also common cause that the warrant of arrest was issued after the plaintiff had been served two times with a summons requiring him to appear in the maintenance court for the maintenance hearing in respect of his child.

[28] It was argued on behalf of the defendant that courts are enjoined to intervene when the interests of children are imperiled to protect them. Counsel for the defendant referred to the case of *Bannatyne v Bannatyne*[2] in which the Constitutional Court expressed itself as follows:

“[27] Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

[28] It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system”

[29] Maintenance orders and maintenance enquiries are very important for the reasons stated in *Bannatyne*. Therefore they must be enforced and those required to attend maintenance enquiries have an obligation to present themselves at the maintenance courts for those enquiries. That is why failure to respond to a maintenance summons or to attend a maintenance enquiry may lead to possible arrest and could also lead to detention.

[30] However, does that mean that the society’s abhorrence of the failure of so many men in particular, in society to maintain their children and be there for them should result in those men being arrested in a ridiculing manner as a quid pro quo for the disgraceful conduct of those men? I do not think so and certainly our constitutional and legal framework makes no particular exception for the necessary arrests of those men. Their right to dignity must still be respected in my view and are equally entitled to the presumption of innocence which is not taken away by an arrest with a valid warrant.

[31] The legal position regarding arrests on the basis of a warrant was stated authoritatively as follows in *Minister of Safety & Security v Sekhoto*[3]:

“[23] It may be convenient to interpose a further mention of s 43. As said, it deals with the issue of a warrant for arrest upon the written application of a director of public prosecution, a public prosecutor or a commissioned officer of police. The further jurisdictional facts for the warrant are that the application must set out (i) the offence alleged to have been committed (which need not be a Schedule 1 offence,) (ii) that the offence was committed within the area of jurisdiction of the magistrate or that the suspect is known or is on reasonable grounds suspected to be within such area of jurisdiction, and (iii) that from information taken upon oath there is a reasonable suspicion that the suspect has committed the alleged offence. If the fifth jurisdictional fact is part of s 40(1) (b) it must also by parity of reasoning form part of s 43 but there is no way in which the wording of the section can be manipulated to achieve

this result.

[24] ...

[25] ...

[26] ...

[27] ...

[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in *Groenewald v Minister of Justice*.”

[32] This legal position is so important that it forms part of the Standing Orders for all police officers. Standing Order (G) 341 subparagraph 3 reads as follows:

“3 Securing the attendance of an accused at the trial by other means than arrest

- (1) There are various methods by which an accused’s attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.
- (2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3)”
- (3) A member, even though authorized by law should normally refrain from arresting a person if –
 - (a) the attendance of the person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or
 - (b) the member believes on reasonable grounds that a magistrate’s court on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette, in which event such member may hand to the accused a written notice [J534] as a method of securing his or her attendance in the magistrate’s court in accordance with section 56 of the Criminal Procedure Act, 1977.”

- [33] It seems to me that sergeant Mbuli left his office already determined to arrest the plaintiff at all costs. Even when the plaintiff indicated to her that he was paying maintenance and that he had proof of payments on his desk, sergeant Mbuli did not take that into consideration and weigh her options. Her evidence that had the magistrate's court still opened at the time of the arrest she would have taken the plaintiff to the magistrate to deal with the alleged proof of payments is not helpful. By that time it was too late because the arrest had already been effected, all that remained was his detention which was also a foregone conclusion on the part of sergeant Mbuli. She did not explain in her evidence why she had to arrest the plaintiff that day knowing fully well that she would have to detain the plaintiff overnight for the following day for the very reason that she could not take him to court after 14:00.
- [34] At the very least the evidence suggests that the arrest of the plaintiff was possibly an elaborate well designed and carefully executed plan to embarrass the plaintiff possibly at the behest of the complainant in the maintenance matter who incidentally is a colleague of sergeant Mbuli within the same cluster and who is known to her. The plaintiff being arrested in execution of a warrant of arrest on a day in which as female law enforcement officers from the various law enforcement structures such as SAPS, municipal police and traffic police had a women's month inspired operation is too much of a coincidence. She went to arrest the plaintiff with a very large number of female officers from these groupings some of whom actually entered the
- building, went all the way to the 4th floor where the plaintiff worked. I do not accept sergeant Mbuli's attempt at playing down her proximity to the complainant in the maintenance case.
- [35] The plaintiff was made an epicentre of this operation, handcuffed and walked to the police vehicle. This whole exercise was clearly not only about sergeant Mbuli executing her duties as a police officer but also about embarrassing the plaintiff. This was not only a women's month celebration inspired operation but also an abuse of police power using the important celebrations for an unintended purpose. In the process she even forgot the obligation to exercise her discretion properly which could have resulted in her not arresting the plaintiff but warning him to come to court the following day, if she had applied her mind to properly executing her duties.
- [36] It is worth emphasizing that the plaintiff resides in East London and works in the East London CBD not very far from Fleet Street police station. The vague reference to previous visits to the plaintiff's place of work even if they actually happened, which is doubtful, did not mean that the plaintiff must be arrested without more. Even on those days sergeant Mbuli claims to have gone to the plaintiff's place of work and left messages, she could not say with whom she left those messages. She could have asked to speak to the plaintiff's superiors and left a message with them. She did not do any of that which begs the question, did she ever go there before and left those messages as she claims to have done? The evidence suggests otherwise.

[37] Sergeant Mbuli's evidence shows that she never even considered how best to secure the plaintiff's attendance at court other than by arresting him. She acted in total disregard of the plaintiff's rights in circumstances in which she had no reason to believe that the plaintiff would not co-operate for she never investigated the possibilities. In the result the plaintiff had to spend the night in police cells when that was totally uncalled for. She seems to have taken into consideration extraneous factors such as the women's month celebrations which played a huge role in how she performed her duties.

[38] Clothed with state authority that could negate a citizen's constitutional rights police officers are in general expected at all times to act in a reasonable manner as explained comprehensively in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[4]. In that case Lord Greene MR said:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance,

a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably."

Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority.

Warrington LJ in *Short v Pool Corporation* (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable it might almost be described as being done in bad faith; and in fact all these things run into one another."

[39] Sergeant Mbuli clearly did not apply her mind to whether or not it was necessary to arrest and detain the plaintiff. She operated on the basis that the warrant of arrest directed her to arrest the plaintiff and therefore she arrested him. In so doing she ignored even the Standing Orders which as indicated above, called upon her to think and make an appropriate decision. The large group of women officers who thronged into the Road Accident Fund building was not only an unnecessary show of force but was also clearly an abuse of police powers of arrest by arresting a man in circumstances in which it ought to have been clear that there was no need to arrest him. The show of women power during a women's month inspired operation was in and of itself an extraneous consideration to the extent that it played a negative role in the arrest of the plaintiff.

[40] The plaintiff had a permanent employment as a claims' handler at Road Accident Fund. He had a fixed place of residence in which he had lived with his wife and children for about three years and in East London he had lived even longer. That the plaintiff had ignored

previous maintenance court summons issued and served on him by the sheriff did not mean that he should be arrested without consideration of the relevant issues for the determination of whether or not arresting him is appropriate in the circumstances. In any event on her own evidence sergeant Mbuli was not aware of the summons which had been ignored by the plaintiff resulting in the warrant of arrest being issued. Her evidence was that she had gone to the plaintiff's place of work on three previous occasions about the warrant leaving messages.

- [41] In the circumstances sergeant Mbuli clearly did not exercise her discretion rationally. I do not think that taking a warrant and executing it by effecting an arrest without applying her mind to the facts before her was an exercise of the discretion. Exercising a discretion includes weighing all the options and choosing the best option in the circumstances as dictated by the facts. The plaintiff was unnecessarily humiliated and his dignity imperiled when he was made a centre piece of those celebrations. All this renders the arrest of the plaintiff unlawful because of the irrational exercise of the discretionary power or even the abuse of the powers vested in her as a police officer.
- [42] This brings me to the consideration of the appropriate award of damages for the unlawful arrest and detention, mental anguish, discomfort and humiliation. At the risk of repetition it is necessary to recap the evidence. The plaintiff's case is that he was humiliated among his colleagues at his place of work. The arrest was effected during the lunch hour at the Road Accident Fund building which is adjacent to the taxi rank. The police who went there to arrest him handcuffed him, he was held by one officer on his right hand side while another was holding him on his left hand side. Some police officers who were evidently part of the operation started singing a song wathint' abafazi wathint' imbokodo, you strike a woman you strike a rock. He was taken to a police vehicle and driven to the police station with police sirens being turned on in a manner that was akin to a scene from a movie.
- [43] On his arrival at the police station he was processed and taken to a cell. That cell was filthy and the toilet was smelly and very close to them in the cell. He could not sleep that night as other arrested persons were brought in during the night. The following morning he was taken to court where he was released on warning. This whole incident affected his relationship with his wife as he would have visions of those female police officers when he tried to be intimate with his wife. His relationship with his daughter was also negatively affected by the whole episode as it deteriorated.
- [44] In *Zealand v Minister of Justice and Constitutional Development and Another*[5] Langa CJ had this to say:

“[24] There is another more important reason why this court should rule in the applicant’s favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient for this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred. The burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant

complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law

concerning the rei vindicatio a useful analogy. The simple averment of the plaintiff’s ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.”

[45] The defendant has not been successful justifying the arrest and detention and therefore the invasion of the plaintiff’s right to dignity, freedom and security of his person. He must therefore be compensated for the humiliating violation of his constitutional rights to freedom, security and dignity as well as the arbitrary detention for which there was no justification. The detention of the plaintiff merely because he could not be taken to court due to the lateness of the hour without any consideration and weighing whether if he was warned to come to court the following day he would not do so was in itself an abuse of public power in a manner that is contrary to its intended purpose.

[46] This principle was expressed as follows by Swain JA in *Wojiv Minister of Police*[6]:

“[28] The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights such as the right to life, human dignity and freedom and security of the person. This is termed public law duty. See Carmichele v Minister of Safety & Security and Another (Centre of Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC) para 44. On the facts of this case Inspector Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Wojiv’s right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Wojiv’s right not to be unlawfully detained which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a

compelling reason to deviate from the norm. Mr Woji was entitled to have his right to freedom protected by the state. In consequence, Inspector Kuhn's omission to perform his public duty was wrongful in private law terms. See Minister of Safety & Security an Another v Carmichele 2004 (3) SA 305 (SCA) paras 34-38 and 43."

- [47] The plaintiff was arrested in a humiliating and degrading manner. He was frogmarched by a large group of female police officers in handcuffs and in the process he was made a public spectacle in violation of his inalienable right to dignity. In *Minister of Safety and Security v Tyulu*[7] Bosielo AJA (as he then was) expressed the following sentiments which explain the philosophical and legal reasoning and considerations on compensation that must inform cases like this one:

"[26] In the assessment of damages for unlawful arrest and detention it is important to bear in mind that the primary purposes 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 attempt 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 the arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages of this kind of injuria with any 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 determine the quantum of the damages on such facts."

- [48] A compensation of R75 000.00 is in my view appropriate in the circumstances for the unlawful arrest and detention, injury to the plaintiff's dignity and the general violation of his constitutional rights.

- [49] In the result the following order will issue:

1. The defendant is directed to pay to the plaintiff the sum of R75 000.00 as and for damages in respect of unlawful arrest and detention.
2. The defendant is directed to pay interest on the amount of R75 000.00 to be calculated at the prescribed rate of interest from a date fourteen
- (14) days after the date of judgment to date of payment.
3. The defendant is directed to pay the plaintiff's costs of suit together with interest thereon, such interest to be calculated at the prescribed rate of interest from a date fourteen (14) days after allocatur to date of payment.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: L. VAN VUUREN

Instructed by: CINGA NOHAJI ATTORNEYS

East London

Counsel for the Respondent: L. BURGER

Instructed by: STATE ATTORNEY

East London

Heard on: 01 October 2019

Delivered on: 26 November 2019

[1] Criminal Procedure Act 51 of 1977

[2] Bannatyne v Bannatyne 2003 (2) SA 363 (CC)

[3] Minister of safety & security v Sekhoto and Another 2011 (1) SACR 315 (SCA)

[4] Association Provincial Picture Houses Ltd v Wednesburg Corporation

[1947] 1 KB 223 (CA) at 229

[5] Zealand v Minister of Constitutional Development and Another

[2008] ZACC 3; 2008 (4) SA 458 at 468 (CC)

[6] Woji v Minister of Police 2015 (1) SACR 409 (SCA)

[7] Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)

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