

SOUTH AFRICA / JUDGMENT

Mjali v Minister of Police (2223, 2226 & 2227/2016) [2020] ZAECMHC 49 (29 September 2020) [2020] ZAECMHC 49

COURT

Eastern Cape High Court, Mthatha

BEFORE

N.R. Mtshabe

CASE / FILE NUMBER

2223, 2226 & 2227/2016

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION, MTHATHA)
CASE
NO: 2223, 2226 & 2227/2016
In

the matter between:

LONWABO
MJALI
PLAINTIFF
and
MINISTER
OF
POLICE
DEFENDANT

JUDGMENT

MTSHABE AJ:

INTRODUCTION

[1] On 28th September 2014 Lonwabo Mjali, Thandolwenkosi Mjali, and Wanda Mjali and at Norwood, Mthatha were arrested by the members of the

Defendant. They were arrested at about 9h00 on that day. In the Particulars of Claim they allege that the arrest was wrongful and

unlawful. It is common cause they were arrested without a warrant. It is also alleged in the Particulars of Claim that there was no reasonable suspicion on the part of the members of South African Police Services that the Plaintiffs had committed an offence referred to in schedule 1 of the Criminal Procedure Act 51 of 1977. Furthermore, it is also alleged in the Particulars of Claim that there was no information at hand which the members of the

Defendant had at the time of the arrest which pointed to the fact that the Plaintiffs had committed any offence.

[2] I must mention that initially there were three (3) cases in respect of all the Plaintiffs mentioned

above. The cases were consolidated as per the directive of the Deputy Judge President as it appeared that cause of action is the same and all the Plaintiffs were arrested at the same time by the same people.

[3] It was agreed at the hearing of this matter that the Judgment of case number 2226/2016 (Lonwabo Mjali) will have the same effect upon the matter of Wanda Mjali and Thandolwenkosi Mjali, Case Numbers 2227/2016 and 2223/2016 respectively.

MALICIOUS PROSECUTION OF LONWABO MJALI

[4] Lonwabo Mjali is also suing the National Director of Public Prosecutions for malicious prosecution. I shall first deal with this claim before I deal with unlawful arrest and detention.

[5] Malicious prosecution consists of the wrongful and intentional assault on the dignity of a person encompassing his good name and privacy. The cause of action for a claim for damages caused by malicious criminal, or civil proceedings is the *actio iniuriandi*. The plaintiff bears the onus in respect of all the elements of delict, including *animus iniuriandi*. To succeed with this claim, a claimant must allege and prove that:

- (i) The Defendant set the law in motion (instigated or instituted the proceedings);
- (ii) Defendant acted without reasonable and probable cause;
- (iii) The Defendant acted with malice (the wrongful intention to defame the injure another's reputation personality); and
- (iv) The prosecution failed;

See: *Magwabeni v Liyomba* (198/13) [2015] [ZASCA] 117 (September 2015) available on *Saflii*

- [6] Lonwabo Mjali did not allege even in the Particulars of Claim that the second defendant set the law in motion, acted without reasonable and probable cause, acted with malice and that the prosecution failed.

See: Minister of Justice and Constitutional Development v Moleko 2009(2) SACR 585 (SCA)

- [7] Reasonable and probable cause has been defined as follows by Jhawukinse Hicks Aulkener, cited with approval by Gardena Water House v Shield 1924 CPD 155 at 162:

“I should define reasonable and probable cause to be an honest belief in the guilt of the accused person upon a full conviction, founded upon reasonable grounds, of existence of a state of circumstances, which, assuming them to be true would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed.”

- [8] In the case of Mthimkhulu and another v Minister of Law and Order 1993(3) SA 432 at 440D, it was held:

“The deprivation of personal liberty has consistently been regarded by our courts as a serious injury.”

- [9] Accordingly, I find that the Plaintiff has failed to prove the elements of malicious prosecution and the claim relating to the second defendant should fail.

UNLAWFUL ARREST AND DETENTION

- [10] The plaintiffs were detained until 30 September 2014. The detention was wrongful and unlawful in that the detention was arbitrarily and unjust and in violation of the Plaintiffs' constitutional rights. The Defendant called one witness, namely, Warrant Officer Jokozela who testified that whilst he was at work on 28th September 2014, he together with another Police Officer, namely Constable Balase received information that there were fighting at 3rd Avenue, Norwood. They proceeded to Norwood and on their arrival, they found there was a gentleman who was holding 2 firearms in his hands. He informed the court that the firearms were pointed on the ground and were held on both hands. The firearms were small firearms namely, 9mm size. The man who was carrying the firearms was Lucky Maquthu. They demanded that he must put the firearms down and they took him to the van. He testified that at time they took him in the van there was a lady who was speaking inside the yard. The lady informed them that the people who have come to attack Lucky are the ones inside the yard and those next to the quantum which was parked outside the yard. Mr Jokozela testified that they called other policeman for assistance. The said policeman arrived and one of them was Investigating officer Ntombela. Lucky informed the Police officers that the reason he was carrying two (2) firearms was that the other one was taken by him from his attackers and the other one belonged to him. Lucky informed the police that he did not have the license to possess the firearms.

- [11] Mr Jokozela testified that he together with other policeman in two motor vehicles took all the people who were lying on the ground as per their instructions. According to Lucky there were five people that were taken by them to the police station excluding Lucky who was the sixth person. At the police station he and Balase took Lucky whilst Ntombela and other police officers took the other five people.
- [12] He testified that he and Balase charged Lucky for possession of firearms without a license.
- [13] According to him in his evidence in chief he stated that Thandolwenkosi Mjali, Wanda Mjali and Lonwabo Mjali were charged with attempted murder. They were detained after that and were to appear in court on 30th September 2014.
- [14] Under cross examination Mr Jokozela stated that he never arrested the Plaintiffs. According to him the reason for taking them to the police station was to “question them about the incident that took place at 3rd Avenue, Norwood, Mthatha”. He informed the court that his authority to take them to the police station was his appointment certificate. This emerged when Mr Notununu who appeared on behalf of the Plaintiffs asked him what authority or document he had to take them to the police station.
- [15] Mr Jokozela under cross examination boldly stated that he “never arrested the Plaintiffs”. According to him the Plaintiffs were arrested by Mr Ntombela. Mr Notununu under cross examination referred Mr Jokozela a to the charge sheet where it appears that Mr Lonwabo Mjali was arrested for assault not attempted murder as the evidence of Mr Jokozela stated. Jokozela could not answer.
- [16] Under cross examination Mr Jokozela agreed that the offence of assault does not appear in schedule 1 of the Criminal Procedure Act.

“[17.1] Save to admit the arrest and detention of the Plaintiff, Defendant denies that the arrest and detention were wrongful and unlawful and in amplification thereof the defendant avers that;

[17.2] The members of the Defendant acted in terms of the provisions of section 40(1)(b) of Act 51 of 1977.

[17.3] The rest of the allegations are denied, and the plaintiff is put to proof thereof.”

- [18] It appears from the Particulars of Claim that Thandolwenkosi Mjali, and Wanda Mjali never appeared in court. The purpose of arrest was not achieved. I must mention that it is trite law that the purpose of arrest is to make sure that the arrestee appears in court.
- [19] In respect of section 40(1)(b) of the Criminal Procedure Act, the position is set out as follows in *Duncan v Minister of law and order* 1986(2)SA 805(A) where it was held that the jurisdictionary facts for a section 40(1)(b) defence are that:
- (i) The arrester must be a peace e officer;
 - (ii) The arrester must entertain a suspicion;

(iii) The suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1; and

(iv) The suspicion must rest on reasonable grounds.

[20] The suspicion that must have held us, in order to be reasonable, one be objectively in the sense that it must rest on reasonable grounds See: Minister of Safety and Security v Sekhoto & another 2011(5) SA 367 (SCA).

[21] In Mabona & another v Minister of Law & Order & another 1988(2) SA 654(SE) at 658E-G, the following was said in relation to how a reasonable suspicion is formed:

“Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the Plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyze and assess the quality of the information at his disposal critically and will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain the suspicion which will justify an arrest. This is not to say that the information at his disposal must be sufficiently high quality and cogency and render in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not the reasonable suspicion.”

[22] In Minister of Police and another v Du Plessis 2014(1) SACR 217(SCA) at paragraphs 14-17 the court stated as follows:

“Police bear onus to justify an arrest and detention.”

[23] In Minister of Law and Order & Another v Hurley & Another 1986 (3) SA 568(A) at 589 E-F the court stated the following:

“An arrest constitutes an interference with the liberty of an individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

[24] Furthermore, our new constitutional order, conscious of our oppressive past, was designed to cab intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricable linked to human dignity. Section 1 of the Constitution of the Republic of South Africa proclaims as founding values, human dignity, the achievement of the quality, the advancement of Human rights and freedoms.

[25] In Zealand v Minister of Justice & Constitutional Development, 2008(4) SA 458 (CC), the court stated the following:

“The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily

without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in 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 might have been.”

[26] It is my view that the justification of detention after an arrest until first appearance in court continues to rest on the Police. I must state again that Warrant Officer Jokozela stated that he never arrested the Plaintiffs and he stated that they were arrested by Ntombela. The defendant did not call Ntombela to justify the arrest. No one was called by the Defendant to support the allegations in the Plea that the Plaintiffs were arrested in compliance and in terms of Section 40(1)(b) of the Criminal Procedure Act.

[28] The Plaintiff, Lonwabo Mjali testified to the effect that on 28th September 2014 he visited his brother at Norwood. He testified that he was arrested together with his brothers by Warrant Officer

Jokozela and they were taken to the Police Cells. He also testifies that the charges against him were withdrawn in June 2015. He further testified that when the Police arrived at Norwood, they found them outside the yard standing. According to him they went to the Police and the Police immediately informed them to lie down and thereafter they handcuffed all of them. He informed the court that from Norwood they were taken to Madeira Police Station and they were not told of the reason for their arrest. From Madeira Police Station they were taken to Central Police Station where they were detained by the Police and even at the Central Police Station they were not told of the reasons for their detention. During cross examination by Mr Calaza who appeared for the Defendant referred the Plaintiff (Lonwabo Mjali) to the warning statement. In terms of section 35 of Act 108 of 1996 which was annexure “A11” of the docket. In this annexure paragraph 3 states that:

“I have been informed and understand the reason for my detention is that I am suspected of having committed the offence of.....”

[29] The form is blank, in that the offence that was committed has not been specified in the form. It is clear from “A11” that there was no reason for detention of the Plaintiff. Similarly, “A12” which is the same warning statement in respect of Wanda Mjali the reason for detention and the offence are not mentioned. The Police who completed the warning statement in respect of the Plaintiffs, Mr T. Ntombela has not been called by the Defendant. Furthermore, the notice of rights in terms of the Constitution in respect of the Plaintiffs were completed by a Police Officer but the Police Officer who signed them was never called to confirm the offence appearing on top as being “attempted murder”. There is no evidence that the Plaintiffs were arrested for “attempted murder”.

- [30] The Plaintiff also testified to the effect that they were not carrying any weapons on the day in question (28 September 20214). He informed the court that if they went to the home of Lucky for the purposes of a fight, they would have carried weapons. On the arrival of the Police they were found by the Police without any weapons. That is an indication that at no stage they were at daggers drawn with Lucky. According to the Plaintiff the reason for the visit at Lucky's home was that Lucky wanted to see them so that they can iron out their differences.
- [31] The Plaintiff has informed the court that he was never told by the police the reason for his detention. When he was referred to the affidavit of Lucky Maquthu whereat he stated that:
- "Lonwabo said that they must kill me and I then took steps behind out of the door and because the big guy held a fire arm." Lucky was not called.*
- [32] The Plaintiff denied that he ever said that they must kill Lucky Maquthu.
- [33] Furthermore, on the Plaintiff's version, the Police did not comply with section 39(2) of the Criminal Procedure Act which states:
- "The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest..."*
- [34] The Plaintiff informed the court that when they were arrested at Norwood they were not informed by the Police of the reason for their arrest. They were simple taken to Madeira Police Station being handcuffed and thereafter to Central Police Station where they were detained.
- [35] It is trite that where an arrest without a warrant is admitted, the onus rests on the Defendant to allege facts which provides legal justification for the arrest. See inter alia Zealand v Minister of Constitutional Development and another 2008(4) SA 458(CC).
- [36] In the case of Carmichael v Minister of Safety and Security and Another 2001(4) SA 938(CC) at Para 44, It was stated as follows:
- "An arrest constitutes an interference with liberty of individual concerned and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law"*
- [37] I must also mention at this stage that justification of the detention after an arrest until the first appearance in court continues to rest on the Police. I accordingly find that arrest of the Plaintiff was unlawful. I do not accept the version of Jokozela that they did not arrest the Plaintiff at Norwood. If they were taking them for questioning why did, they handcuff them if they were not arresting them? Furthermore, even they were arrested by Ntombela at Central Police station, the reason for their detention does not appear in annexure "A11" and other related annexures like "A12". It is trite that justification for the detention after an arrest until the first appearance in court continues to rest on the Defendant. See: Minister of Police and another v Du Plessis 2014(1) SACR 217(SCA) at para (17). Furthermore, in the case of Van

Rooyen v Minister of Police (unreported judgment) of this division (CA332/2018 delivered ON 26 March 2020 at para 6, Mbenenge JP and Bloem J stated that: The onus of justifying the detention rested on the Respondent (Minister of Police)”

- [38] It is my opinion that if the arrest was unlawful, it follows that the detention until the first appearance of the Plaintiff (Lonwabo Mjali) in court was also unlawful. See: Minister of Safety and Security v Tyokwana 2015(1) SACR 597(SCA) at para 12.
- [39] In the circumstances I find that the arrest and detention of the Plaintiff (Lonwabo Mjali) was unlawful.
- [40] The evidence of the second Plaintiff namely, Thandolwenkosi Mjali to a great extent collaborated the evidence of Lonwabo Mjali. He testified that on 27 September 2014 he was assaulted by Lucky who strike him with a glass on face. Consequent thereto his clothes were full of blood. He testified that Lucky requested him to come to his home and he apologized, and he informed him that he is going to tend to clean of his clothes together with his wife. Indeed, the following day, that is, 28 September 2014 Thandolwenkosi Mjali together with his two brothers attended to the home of Lucky. At the home of Lucky, they ran away because Lucky attacked them. He testified that at the time they visited the home of Lucky they were not armed with any weapon. He collaborated Lonwabo in that the Police arrived, and they went to the Police and the Police ordered them to lie down which they did. After they have lied down the Police arrested them and put them in the Police Motor vehicle. They were then taken to Madeira Police Station. According to him they were not told at the Norwood the reason for their arrest. It is trite law that the Police Officer when arresting a person must immediately inform him of the reason for the arrest. According to Thandolwenkosi he was not informed of the reason

for his detention by the Police at Central Police Station.

- [41] On 30 September 2014 he together with his brothers were taken to Magistrate's court there they remain in cells until they were released at 16h00. According to him the Police who released him informed that he must go home as there is no charge against him. I have already indicated above that in annexures “A11, A12 and A13”, the reason for the detention of Thandolwenkosi is blank. Consequently, I find that there was no reason for him to be detained by the Police. He has also informed the court that the Police were not supposed to arrest him as he has not committed any offence. He told the court that he did not commit the offence of attempted murder. According to him he only had in 2016 that he was once charged for attempted murder when he applied for his PDP. It will be recalled that Mr Jokozela informed the court that the reason for taking them to, Madeira Police Station was to question them. Thandolwenkosi informed the court that at no stage where they asked any questions by the Police. He also informed the court that the reason for his arrest was never explained to him.

- [42] Criminal Procedure Act, section 50 thereof provides that a person who has been arrested and is in detention shall be brought before lower court as soon as reasonable possible. The Plaintiff (Thandolwenkosi) was never brought before a lower court after his arrest and detention. Consequently, the purpose of the arrest and detention was never achieved by the Police. This drives me to the conclusion that there was no need for Thandolwenkosi to be arrested and detained.
- [43] In the circumstances, I find that the arrest and detention of Thandolwenkosi was unlawful.
- [44] The third Plaintiff was Wanda Majli. His evidence corroborated the evidence of Lonwabo and Thandolwenkosi in all material respects. He confirmed that he was arrested on 28 September 2014 at Norwood. He also testified that at the time of his arrest at Norwood he was not told of the reason for his arrest by the Police. He testified that he does not know the name of the Police who arrested him, but it was not Warrant Officer Jokozela. The bottom line is that he was arrested by the Police.
- [45] He also confirmed that he was also not told by the Police of the reason of his detention. He was also taken to the Magistrate's court and remained in Police cells on 30 September 2014. He never appeared before the Magistrate. He was told at the about 16h00 that he must go as there is no one who has charged him.
- [46] As I have indicated above that the defence of the defendant is that they arrested the Plaintiffs in terms of section 40(1)(b) of the Criminal Procedure Act. The section allows a Police Officer without a warrant to arrest any person whom he reasonable suspects of having committed an offence referred t in schedule 1 of the Criminal Procedure Act. In this case if the evidence of Jokozela is accepted that he did not arrest the Plaintiffs the defendant did not call any Police who confirmed that they arrested the Plaintiffs in compliance with the said section. The onus of proving arrest and detention rests with the Police (Minister of Police) in this case.
- [47] The defendant failed to discharge the onus resting upon him to prove that the Plaintiffs were arrested in terms of the said section. Furthermore schedule 1 of the Criminal Procedure Act consists of many offences. The defendant in their Plea simply puts a bold statement that they rely on the said section without any specifics as to what offence was committed by the Plaintiffs. The offence for which the Plaintiffs were arrested ought to have appeared specifically and clear in the Plea. This was not the case.
- [48] I find that the jurisdictionally requirements for the finding of lawful arrest without warrant as provided in section 40(1)(b) have not been satisfied by the Defendant.
- [49] Accordingly, the arrest and detention by the defendant in respect of all three Plaintiffs is unlawful.

QUANTUM

- [50] I have already found that the three Plaintiffs, namely, Lonwabo Mjali, Thandolwenkosi Mjali and Wanda Mjali were unlawfully arrested and detained on 28 September 2014.
- [51] I have also found that the detention of the Plaintiffs from 28 September 2014 to 30 September 2014 was unlawful.
- [52] Thandolwenkosi Mjali and Wanda Mjali were taken from Central Police Station on 30 September 2014 to the police holding cells at Magistrate's court, Mthatha, they remained in the cells until 16h00 when they were told to go home as they were not charged.
- [53] Lonwabo Mjali did appear in court and was granted bail in the sum of R500.
- [54] The Plaintiffs were unlawfully arrested on 28 September 2014 and were detained from that date from 9h00 until 30 September 2014. They were detained for 2 days and 7 hours.
- [55] They have testified to the effect that the arrest and detention interfered with their constitutional rights. It embarrassed and humiliated them. It caused them too much grief. It impaired on their dignity as human beings and they were arrested in the full view of the members of the society who had raised eye brows and looked upon them as criminals.
- [56] They have also testified that the detention was equally embarrassing and humiliating. They were detained in a very congested cell that was very filthy. They were made to sleep with very dirty blankets with full lice and testified to the effect that they were made to eat food that was not properly cooked and were abused by some fellow inmates. Their evidence was not disputed by the defendant.
- [57] The Plaintiffs suffered an arbitrary deprivation of personal liberty and were humiliated and traumatized by virtue of their unlawful arrest and detention.
- [58] In their Particulars of Claim they claimed an amount of R900-000-00 in damages. Those damages being based on an infringement of their constitutional rights to equal protection and benefit of the law, human dignity, freedom and security of a person, freedom of movement and conditions of detention that were not consistent with human dignity. The damages are also based on infringement of their personal rights to physical integrity, dignity, privacy, reputation and sense of self-worth. The Particulars of Claim alleged that as a result of their arrest and detention they suffered contumelia.

THE GENERAL APPROACH IN ASSESSMENT OF DAMAGES FOR UNLAWFUL ARREST AND DETENTION

- [59] In general court has a wide discretion in determining fair and reasonable compensation to an injured person. The purpose of the award is to provide much needed solatium for a person's injured feelings rather than to enrich him or her.
- [60] The Supreme court of appeal held as follows in:

“Minister of Safety and Security v Tyulu 2009 (2) SA 282 (SCA) at para 26

[60.1] 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 part but to offer him or her some much-needed solatium for his or her inured feelings. It is therefore critical

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 award of damages of 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 particular case and to determine the quantum of damages on such facts”.

.See: Minister of Safety and Security v Seymour 2006 (6) SCA 325 para 17;

See: Rudolph and others v Minister of Safety and security and Another 2009(5) SA 94 SCA at paras 26-29

[61] It goes without say that an unlawful arrest and detention constitutes a serious inroad into the freedom and rights of an individual. As far back as in 1954 Broome JP in the case of May v Union Government 1954(3) SA 120(N) at 130 F the court stated the following:

“Our law has always regarded the deprivation of personal liberty as a serious injury”

[62] In this regard Nugent JA in Seymour (supra) stated the following:

“I do not think that the courts in earlier cases placed less value on personal liberty than ought to be placed on it today. Indeed, what was said in May shows the contrary. Nor do I think there is any basis for concluding that awards that were made at that time reflect a more tolerant judiciary view of incursion upon personal liberty. It was precisely because personal liberty has always been judicially valued that the incursions that were made upon it by the Legislature and Executive at that time so odious. The real import of the Constitution has not been to enhance the inherent value of liberty which has been constant, albeit, that it was systematically undermined but rather to ensure that those incursions upon it will not recur. To the extent that the Learned Judge placed a jurisprudential premium on personal liberty that was absent before now, in my view it was misdirected.”

[63] The authors of Visser and Potgieter, Law of damages have extracted from South African case law the following factors which can play a role in assessing damages:

“In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bono.

(a) Factors which can play a role are the circumstances under which the deprivation of liberty took place;

- (b) the presence or absence of improper motive or malice on the part of the defendant;
- (c) the harsh conduct of the defendants;
- (d) the duration and nature (e.g.) solitary confinement or humiliating nature of the deprivation of liberty;
- (e) the status, standing, age, health and disability of the plaintiff, the extent of the publicity given to the deprivation of the liberty;
- (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant;
- (g) awards in previous comparable cases;
- (h) the fact that in addition to physical freedom, other personality interests such as honour and in good name as well as constitutionally protected fundamental rights have been infringed;
- (i) the high value of the right to physical liberty, the facts of the case;
- (j) the fact that Plaintiff contributed to his or her misfortune;
- (k) the effect an award may have on the public purse; and
- (l) according to some, the view that the *actio iniuriarum* also has a punitive function.”

[64] Section 35(2) (a) of the Constitution of Republic of South Africa, 1996, provides as follows:

“Everyone who is detained, including every sentenced prisoner has the right...

- (e) to condition of detention that at consistent with human dignity, including at least exercise and provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment.”

[65] In *Masisi v Minister of Safety and Security* 2011(2) SACR 622 the court stated the following:

“Described the purpose of an award of general damages in the context of a matter such as the present as a process in which one seeks to compensate the claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress. The right of liberty is an individual’s most cherished right and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. It’s unlawful invasion therefore struck at the very fundamental of such ethos. Those with authority to curtail that the right had to do so with greatest circumspection and sparingly. Where members of the Police transgressed in that regard, the victim of the abuse was entitled to be compensated in full measure for any humiliation and dignity which has resulted. To this may be added that an arrest was malicious, the plaintiff was entitled to a higher amount of damages that would be awarded, absence, malice.”

CASE LAW CONSIDERED

- [66] In assessing the Plaintiff's claim, whilst no two cases are alike, guidance in the assessment of any appropriate award for general damages can be obtained by comparison of factors in different cases and reference to various volumes. I will refer to certain decided cases and work my way out in appropriate assessment of damages in these consolidated cases.
- [67] Seymour (supra) a 63-year-old man had been unlawfully arrested and imprisoned by the state for 5 days. The court held that an appropriate award was R90 000-00. An inflationary adjustment would yield approximately R220 00-00 today. He had free access to his family and a doctor throughout his detention. He had suffered no degradation beyond that which is inherent in being arrested and detained and after 24 hours he had spent and of his detention in a hospital bed.
- [68] Van Ransburg v City of Johannesburg 2009(2) SA 101 (W), the Plaintiff was a 74 year old male retiree. The Plaintiff was detained in a holding cell at the Johannesburg Central Prison. The Plaintiff spent about 6 hours in custody. The Plaintiff was awarded general damages of R75 000-00. Adjusted for inflation this is approximately R120 000-00 in today's money. In Pasha v Minister of Police, unreported judgment dated 23 November 2012, Case No. 25524/2008, an award for general damages is of R80 000-00 (in today's money it is approximately R110 000-00). The Plaintiff had spent about 9 hours in custody. He was 40 years old at the time of his arrest. He had a wife and children. He worked as a Debt Collector at the office of the State Attorney in Johannesburg. The Plaintiff knew the Police official as who arrested him as they were colleagues of this wife. After having been handcuffed, the Plaintiff was led through a shopping mall which caused him to feel humiliated, embarrassed and his dignity impaired. People who knew him were surprised to see what was happening. He was detained in the holding cells about 7 other detainees. The toilet in the cell was filthy and there was no toilet paper. The blankets provided were dirty. The Plaintiff felt that the community no longer had confidence in him and regarded him as a robber. Sometimes colleagues made negative comments towards him.
- [69] In Mandleni v Police, unreported judgment dated 27 April 2017, Case No. 37539/2008. The Plaintiff a 28 year old man who was unlawfully detained for 12 hours was awarded R110 000-00 during April 2017.
- [70] In Olivier v Minister of Safety and Security 2009(3) SA 434 (W) the court awarded a sum of R50 000-00 where the Plaintiff was wrongfully detained for a period of 5 -6 hours.
- [71] In the Minister of Police v Swarts (CA 299/2015) [2016] ZAECGHC 75 (8 September 2016) available on SAFLII: Beshe and Tshiki JJ: awarded R30 000-00 for about hour's detention: appeal dismissed.
- [72] Duarte v Minister of Police (201/34042)
- [2013] ZAGPJHC 51(7 March 2013) available on saflii: arrested Friday evening about 19h30 and released on Saturday morning at 01H15: total 5 hours 45 minutes; R75 000-00 awarded.

[73] Mahlanza v Minister of Police (EL) (1326/2017) [2019] ZAECCELLC 32 (26 November 2016) (available on saflii): R75 000-00 for one day.

[74] Minister of Police v Samanithan (CA) 60/2019) [2020] (ZAECGHC 58 (9 June 2020) (available on saflii): Smith and Lowe JJ dismissed an appeal against inter alia an award for R80 000-00 for unlawful arrest and detention for a period of about 13hours.

[75] Fuduswa v Minister of Police (155/2016)

[2018] ZAECGHC 58 (17 July 2018) (available on saflii): Malusi J delivered judgment on 17/07/2018: unlawful arrest on 15/9/2015 and detained from 10h00-10h30 the following day 24hours and 30 minutes: awarded R70 000-00.

[76] In the present case the Police arrived at Norwood 3rd Avenue in the morning of 28th September 2014. They found the Plaintiffs outside the yard. On their arrival the Plaintiffs went to the Police and the Police immediately

ordered them to lie down. They handcuffed them. They were taken to Madeira Police Station and thereafter detained at Central Police

Station at Mthatha.

[77] They were not told by the Police of the reason for their arrest. They were also not told by the Police of the reason for their detention. The conditions of cells were appalling as appearing in the Particulars of Claim as well as from the evidence of the Plaintiffs.

[78] On 30th September 2014 they were taken to Magistrate's court at about 09h00. Thandolwenkosi and Wanda remained in the holding cells. They were never made to appear before the Magistrate. They were simply told at about 16h00 to go home as they were not charged.

[79] Lonwabo Mjali was brought before the Magistrate and was granted bail. It is also clear in his case that there was no offence committed by him. As I have indicated above, I have already found that their arrest and detention was unlawful.

[80] I must mention that section 205 of the Constitution provides as follows:

“(3) The objects of the Police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure

the inhabitants of the Republic and their property, and to uphold and enforce the law.” Further, in terms of the South African Police Act, the functions of the SAPS are as follows:

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;

- (c) ensure co-operation between the Service and the communities it serves in the combating of crime; and
- (d) reflect respect for victims of crime and an understanding of their needs.

[81] At the time of the arrest of the Plaintiffs at Norwood, there is no offence which they have committed. I conclude that they were always innocent.

[82] In *RA & others v Minister of Police*, unreported judgment full bench, dated 21 April 2016, (Case Number A315/2015 available on saflii), the court stated the following:

“This case also bears a public interest element as, inter alia it relates to unlawful conduct by SAPS and the protection of the rights of citizens. An attack on the rights of the individual is an attack on the community and grinding down of individual’s rights erodes the rights of the community as a whole. Therefore, in this type of case the impact is not limited to the individuals but extends to the community of which they form part. This underscore the importance of the matter.”

[83] The Plaintiffs were locked up with other inmates in an unhygienic, dirty, stinking holding cell at the Police Station. The plaintiffs were detained under inhuman conditions.

[84] Having regard to the facts, the past awards and relevant case law, in my view a fair and reasonable amount for the damages to be awarded to the Plaintiffs is the amount of R600 000-00 in total in respect of 3 Plaintiffs. This means an award of R200 000.00 to each Plaintiff for unlawful arrest and detention.

COSTS

[85] A unanimous bench of the Constitutional Court in the case of *Affordable Medicines Trust and others v Minister of Health & others* 2006(3) SA 247(CC) held as follows:

“The award of costs is a matter which is within the discretion of the court. Considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant consideration.”

[86] The Appellant division in the matter of *Norwich Union Fire insurance Society v Tutt* 1960 (4) SA 851 (AD) stated the following:

“The basic principles that the court has a jurisdiction, to be exercised judicially upon a consideration of the facts in which case, and in essence it is question of fairness to both sides.”

[87] In terms of Rule 37 conference minute in respect of all the consolidated matters, in paragraph 6 of the said minute the following appears:

“Question of transfer of the case to another court;

Rule 37(6)(E) at this stage the parties do not desire to transfer the matter to another court, therefore, the matter shall proceed in the above Honourable Court.”

[88] I bring the above because the amount awarded for general damages falls within the scale of Magistrate’s court.

[89] In RA (supra) which was an appeal from a single judge to a Full bench it was held that the Judge of the court aquo erred in awarding the costs on the Magistrate's court scale merely because of the quantum of damages awarded by the her. The full bench was unanimous that the Judge aquo ought to have awarded the costs to the Plaintiff on the high court scale. A number of considerations were taken into account in setting aside the costs award of the court aquo and awarding costs on High Court scale. Such considerations included the importance of the rights involved, public interest, the complexity of the matter, the duration of the trial, and the conduct of the Defendant during the course of litigation.

[90] The following was held in Seleka v The Road Accident Fund 2016 (4) SA 445 (GP):

"The only aspect that remains is the question of the scale of costs that Plaintiff is entitled to in view thereof that, so it was argued by Defendant, the amount falls within the jurisdiction of the Magistrate's court and Plaintiff should therefore have pursued her action in that forum. In this regard I am of the view that the amount of the claim is not the only factor that should be considered by this court when considering an appropriate costs order."

[91] Vermaak v The Road Accident Fund unreported judgment dated 3rd March 2006 South Eastern Cape Local Division, (Case No. 2509/03. available on saflii) the court stated the following:

"While the amount of a Judgment is always important, it is however not the only consideration. Various other circumstances- for example the complexity of the factual issues, the difficult of the legal issues, the seriousness of imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small."

[92] I believe the case of public interest, because, recognizing the injustices of our past, our society is founded on human dignity and the advancement of human rights. It is my opinion that the state must protect, respect, promote and fulfill the rights in the Bill of rights.

[93] Consequently, the society has an interest in the High Court hearing matters, that relate to State Officials violating the rights enjoyed by individual rather than respecting and protecting such rights. In S v Makwanyana 1995(3) SA 391(CC), the Constitutional Court stated the following:

"The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter

3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others, and this must be demonstrated by the State in everything he does."

[94] S v Willians and others [1995] ZACC 6; 1995 (3) SA 632 (CC), the Constitutional Court held as follows:

“The rights entrenched in chapter 3 are available to every person: that includes children and adults, women and man, prisoners and detainees. The Constitution clearly places a very high premium of human dignity and the protection against punishments that are cruel, inhuman or degrading ...The Constitution has allocated the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the state up as a model for society as it endeavors to move away from a violent past. It is therefore reasonable to expect that the state must almost in upholding those values which are the binding rights of civilized societies. Respect for human dignity is one of such value;

Acknowledging it in includes an acceptance by society that ...even the vilest criminal remains a human being possessed of common human dignity.”

[95] Constitutional court held in *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC) as follows:

“In the phrase cruel, inhuman or degrading the three adjectival concepts are employed disjunctively, and it follows that a limitation of the right occurs if the punishment has anyone of these three characteristics. This imports notions of human dignity as was correctly recognized, although in another context, by the High Court, in this case. The human dignity of all persons is independently

recognized as both an attribute a right in section 10 of the Constitution, which proclaims that everyone has inherent dignity and

the right to have their dignity respected and protected. It is also one of the founding values of the Constitution and is woven in a variety of other ways, into the fabric of our Bill of Rights, while it is not easy to distinguish between the three concepts, cruel, inhuman and degrading, the impairment of the human dignity in some form and to some degree, must be involved in all three. One should not lose sight of the fact that the three relates, in part at least, to freedom.”

[96] It is my opinion that the conduct of the Police Officials involved in these matters was unconstitutional and unlawful.

[97] The preamble of South African Police Act provides inter alia as follows:

“Whereas there is a need to provide for a Police Service throughout the National Territory to-

- (a) Ensure the safety and security of all persons and property in the National Territory;
- (b) Uphold and safeguard the fundamental rights of any person as guaranteed by chapter 3 of the Constitution.”

[98] Section 13 of the South African Police Services Act provides as follows:

“(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a Police Official...

- (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions perform such duty in a manner that is reasonable in the circumstances.”

[99] In *Phasha v Minister of Police* unreported judgment (Case No, 25524/2008 dated 21 November 2012, available on *saflii*) the plaintiff was awarded R80 000-00 for general damage. The court then remarked as follows regarding costs:

“so far as costs are concerned, the Plaintiff is required to make an estimate when issuing summons. Although the amount awarded falls

within the jurisdiction of the Magistrate’s court, the Plaintiff was in my view entitled to bring this action in the High

Court.”

[100] The parties as I have indicated above at the pre-trial conference agreed that the case should not be transferred to another court. It was on the basis of that agreement that the trial proceeded in this court instead of being transferred to Magistrate’s court. Consequently, Defendant should not be allowed to rescile from the agreement by arguing costs on Magistrate’s Court scale.

[101] The Supreme court of appeal held as follows in *Filta-Matix(Pty) Ltd v Freudbuenberg and others* 1998(1) SA 606(SCA) at 614 B-C, the court stated as follows:

To allow a party, without special circumstances, to rescile from an agreement deliberate breaches a pre-trial conference would be to negate the object of Rule 37...”

[102] In this matter the parties agreed at all the pre-trial conferences that the matters should not be transferred to another court.

[103] I am persuaded that High Court costs should be granted. I must also mention that this judgment is not intended to be authority for the proposition that no matter what quantum is achieved in an action, if wrongful arrest and detention is an issue; one is always allowed to sue out of the High Court. This decision which I have made in this matter is based on the facts of this case.

ORDER

[104] In the result I grant the following order for general damages for unlawful arrest and detention:

- (i) in respect of Lonwabo Mjali an amount of R200 000.00;
- (ii) in respect of Thandolwenkosi Mjali, an amount of R200 000,00; and
- (iii) in respect of Wanda Mjali, an amount of R200 000,00.

(v) Interest on the above amounts at the legal rate from 10 February 2016 (this being the date when the demand was received by the Defendant) to date of payment.

(vi) The above amounts in paragraphs (i), (ii) and (iii) together with interest thereon to be paid within thirty

(30) days after this

judgment.

N.R. MTSHABE

ACTING JUDGE OF THE HIGH COURT

EASTERN CAPE LOCAL DIVISION

MTHATHA

HEARD ON 31ST AUGUST 1ST, 2ND, & 4TH SEPTEMBER 2020

DELIVERED ON: 29 SEPTEMBER 202

APPEARANCES FOR THE PLAINTIFFS: MR M. NOTUNUNU

INSTRUCTED BY:

N.M. NOTUNUNU ATTORNEYS

66 OWEN STREET

FOR THE RESPONDENT:

ADV. V.N. CALAZA

INSTRUCTED BY:

THE STATE ATTORNEY

SISSONS STREET

BROADCAST HOUSE

FORTGALE

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