

SOUTH AFRICA / JUDGMENT

Molefe v Minister of Police (433/2019)

[2020] ZANWHC 63 (22 October 2020)

[2020] ZANWHC 63**COURT**

North West High Court, Mafikeng

BEFORE

Noncembu

CASE / FILE NUMBER

433/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
CASE
NUMBER: 433/2019
In
the matter between: -
KENNETH
THABANG MOLEFE
Plaintiff
And
MINISTER
OF POLICE
Defendant

JUDGMENT**ON QUANTUM****NONCENBU AJ****INTRODUCTION**

[1] The plaintiff instituted a damages claim in the amount of R150 000 for unlawful arrest and detention against the defendant. The defendant conceded to the merits of the matter on the 13 October 2020 and judgment in favour of the plaintiff was granted accordingly. The plaintiff led evidence on quantum and the defense case was closed with no evidence led. Counsel for the plaintiff submitted heads of argument, I am much indebted to her for her assistance; and defense counsel argued the matter from the bar. This is the judgment on quantum in the matter.

SUMMARY OF FACTS

- [2] The plaintiff testified that on the 07 of June 2018 he was arrested by the police whilst sleeping at his home at 3 am. About 4 police vans attended to his house and he was arrested by the police in full view of community members. He was put at the back of the van and the police went on some patrols with him before taking him to the police station where he was detained in the police cells around 6 am. They were about 30 detainees in one police cell.
- [3] On his arrival at the police cells he was bullied by one detainee who took his cigarettes and his cap. He had no place to sleep but one elderly man offered to share his space with him. They slept on the floor with one blanket serving as a mat and another to cover themselves with. He could not sleep well as the blankets were dirty and had ticks. During the day they were given proper meals which included breakfast, a full lunch and dinner, although the bully took their meat during the lunch meal. There was no privacy in the cell and they had to use one toilet in full view of everyone. The showers were broken and he did not wash because he had no toiletries. He was released from detention the following day between 2 and 3 in the afternoon. The police did not tell him why he was arrested they simply said that he knew what he had done.
- [4] The incident affected him in that the community members lost trust in him. He lost his employment because his employer could not trust him. His son who was a year old at the time was also affected. Whenever the two of them were walking around and they see police, his son would ask him if the police were coming to take him away. He wanted to be a role model to his children. He was 25 years at the time of his arrest.
- [5] Counsel for the defense cross examined him on various aspects of his evidence. In particular, on how a one-year-old child was able to comprehend what was happening at 3 in the morning and still have a recollection of it 3 years later. His response, one can say, was far from satisfactory in this regard. He was further questioned on how it came about that

community members were at the scene at that time of the morning, when ordinarily most people would be sleeping. His response was that the police were talking and their voices were not soft.

THE APPLICABLE LEGAL PRINCIPLES

- [6] The claim for unlawful arrest and detention is premised on the provisions of section 12 (1) (a) of the Constitution of the Republic of South Africa ('the Constitution'). [1] This section provides that everyone has the right to freedom which includes the right not to be deprived of freedom arbitrarily or without just cause. It provides both substantive and procedural protection. This dual protection was articulated as follows in the case of *Bernstein and Others v Bester and Others NNO* [2]:

'In my view, freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other Constitutional aspect of freedom lies in a recognition that, in certain circumstances, even where fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.'

- [7] It is trite that a person's liberty is one of the most cherished and guarded constitutional rights. Various courts have pronounced on the importance of ensuring that the rights contained in the Bill of Rights are respected, protected, promoted and fulfilled at all times (subject to the limitation in section 36 of the Constitution); not only by the courts, but by the State as well as the Executive.[3]

- [8] In *Minister of Police v Du Plessis*[4] the Supreme Court of Appeal of the Republic of South Africa held as follows:

'Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which have always even in the dark days of apartheid been judicially valued, and to ensure that excesses of the past would not recur. The right of liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values human dignity, the advancement of human rights and freedom. Put simply, we as society place a premium on the right of liberty.'

- [9] That having been said however, it has to be noted that a claim for damages in these matters is not meant for the enrichment of one who has been aggrieved, it is mainly to give some much needed solace for the injury suffered. One thus has to be very considerate of this aspect in determining what is a fair and adequate award under the circumstances. This was enunciated as follows in the case of *Olgar v Minister of Safety and Security*:[5]

'In Modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the Constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, extent and

degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called 'horn of plenty', at the expense of the defendant.'

[10] This could not be more true, especially at a time such as this for our country when there are so many demands on the public purse, and as correctly contended by counsel for the defense, most of which have been added by the Covid-19 pandemic.

QUANTUM

[11] Unlawful detention is a form of iniuria and the amount of compensation is calculated according to what is fair and just in the circumstances of a particular case.[6] It is incumbent upon the plaintiff to lead detailed evidence regarding his personal circumstances, the events surrounding the arrest as well as all relevant details concerning the detention including its nature, duration and incidences that may have occurred.[7] A determination of the plaintiff's damages for unlawful arrest and detention, involves an assessment of the extent of the violation of affected personal rights and the duration of the infringement. It necessitates an inquiry into the following objective and subjective factors: loss of reputation in the eyes of others; the emotional effect of the infringement on the plaintiff; the manner of arrest; and conditions under which he was detained. [8]

[12] The plaintiff testified to all of the above and was cross examined extensively. The defendant led no evidence to gainsay his testimony. However, there were some aspects of the plaintiff's evidence which were questionable and for which he could not give satisfactory answers. He could not give a satisfactory answer as to how a 1-year-old child who could not talk, who was sleeping in a separate building was able to see and comprehend what was happening during his arrest to the extent of remembering it three years later. In my view this is highly improbable.

[13] There was no evidence tendered that the police vehicles came to his house with sirens on, or that the police were causing a loud commotion so as to awaken and alert his neighbours and community members to what was happening, other than the evidence that they were talking and their voices were not soft. This begs the question as to how the community members got to be at the scene of his arrest at that time of the morning. It is also not clear how community members lost trust in him as no evidence was tendered in this regard. One would have expected evidence to the effect that he was a trustworthy member in the community in one respect or another and that the arrest led to his image being tarnished in their eyes, leading to them losing trust in him. Other than his say so, I still do not know how the lack in trust by community members was manifested.

- [14] Whilst one can never downplay the infringement of the constitutional right to personal liberty and dignity, its effect on an individual and the importance of its protection, one cannot help but wonder if some of the plaintiff's evidence was not simply designed to try and influence the award of a much higher quantum than what is fair and just in the present circumstances.
- [15] In coming to an appropriate award in these matters, courts are often guided by awards made in previous decided cases. This however, as courts have often cautioned, by no means give strict rules that can be applied in a mechanical fashion to come up with an appropriate award. They merely serve as a guide on what other courts have awarded in similar cases, but have no greater value than that. A court has a wide discretion to decide on an appropriate award based on the particular facts of each case. [9] What is important is that facts of each case must be looked at as a whole and that the quantum of damages has to be determined on such

facts.

- [16] I have been referred to various previous awards and I have considered these as a guide in exercising my discretion in determining what I consider to be a fair and just amount in the present circumstances.
- [17] In *Tlhaganyane v Minister of Safety and Security* [10] the plaintiff who was the son of a Minister in a prominent church in the area was awarded R140 000 for 19 hours detention. In *Mathe v Minister of Police* [11] an adult female who was detained for approximately 37 hours on allegations of prostitution was awarded R120 000 in damages. In *De Klerk v Minister of Police* [12] the applicant who was detained for 9 days was awarded R300 000 in damages by the Constitutional Court.
- [18] Taking into account the peculiar facts of this matter as a whole, in particular the age of the plaintiff, the duration of his detention (approximately 36 hours), the fact that he suffered no more harm than that which is inherent in being detained in unhygienic overcrowded police cells, the previous awards referred to and the relevant case law, I am of the view that a just and fair award in the circumstances would be an amount of R90 000.
- [19] I invited counsel to address me on the issue of costs in the matter. This was born by noting that the amount of the claim (R150 000) also falls squarely within the jurisdiction of the Magistrates' Court, specifically the District Court. In her address, counsel for the plaintiff argued that the claim raised an important constitutional issue of one's right to personal liberty and as such the amount of the claim becomes irrelevant in determining jurisdiction.

[20] She referred me to various cases in this regard, all of which she conceded, were considered in the Nedbank Ltd v Thobejane and Related Matters case.[13] Counsel for the defense argued that the claim does not raise any constitutional issues and could have been dealt with in the District Court. He therefore, argued that the plaintiff should be awarded costs on the Magistrates' Court scale.

[21] As a starting point, the view given in the heads submitted by counsel for the plaintiff in this regard is that the Nedbank matter is less important compared to a matter such as the present one in that it dealt with matters revolving around financial institutions seeking redress due to, inter alia, breach of credit agreements and debts due; whilst the current matter deals with important constitutional issues of one's right to personal liberty. This is clearly misleading and totally inaccurate. At the very core of the Nedbank matter was the very pertinent constitutional issue of access to justice,[14] where poor litigants (respondents) were effectively denied access because financial institutions took their matters to High Courts

which are far and financially inaccessible to them in matters where the High Courts had concurrent jurisdiction with the Magistrates'

Court; and this also causing congested rolls in the High Courts, resulting in delayed justice.

[22] Without getting into much detail on the arguments submitted, I can find nothing to persuade me as to why this matter could not have been heard in the Magistrate's Court. There were no novel legal and constitutional issues to be dealt with in this matter. It is trite law that arrest and detention are prima facie unlawful, and hence in such matters the onus rests on the defendants to prove the justification and lawfulness thereof. This matter could have been dealt with in the Magistrates' Court.

[23] The High Court rolls are congested because of matters like these which could have been dealt with in the Lower Courts. This in turn causes delays in finalization of matters, especially those that legitimately belong in the High Courts. Whilst this Court could not decline to hear this matter in the absence of any legal authority in that regard, nothing stops it in finding a solution elsewhere,[15] and in my view, such a solution lies in the cost order where this Court has a discretion. In my view the plaintiff is only entitled to costs on the scale of the Magistrates' Court in the matter.

ORDER

[24] Therefore, the following orders are made:

- a) The plaintiff is awarded damages in the amount of R 90 000 for unlawful arrest and detention;
- b) Interest on the said amount at 10% per annum from the date of service of summons to date of final payment;

c) Costs of suit on the Magistrates' Court scale.

V P NONCEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING

: 13 OCTOBER 2020

DATE OF JUDGMENT : 22 OCTOBER 2020

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Counsel for the Defendant : Adv. S. Mpakane

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[1] 108 of 1996.

[2] 1996 (2) SA 751 (CC) (1996) 4 BCLR 449; [1996] ZACC 2 at para 145.

[3] MR v Minister of Safety 2016 (2) SACR 550 (CC).

[4] 2014 (1) SACR 217 (SCA) 223 at B (para 15).

[5] Unreported judgment, Eastern Cape High Court, case number ECD 608/2007 delivered on 18 December 2008.

[6] Singatha and Another v Minister of Police and Another (284; 285/2012) [2015] ZAECBHC 19 (26 March 2015).

[7] Ibid.

[8] Magagula v Minister of Safety and Security (A68/2012; 33724/2006 [2016] (17 May 2016) at para 62.

- [9] Minister of Safety and Security v Seymour 2006 (6) SA 320 SCA.
- [10] (1661/2009) North West High Court, Mahikeng, handed down in 2013.
- [11] (33740/14) [2017 ZAGPJHC 133; 2017 (2) SACR 211 (GJ); [2017] 4 All SA 130 (GJ) (24 May 2017).
- [12]
- [2019] ZACC 32.
- [13]
- [2018] ZAGPPH 692 (26 September 2018).
- [14] Section 34 of the Constitution, 1996.
- [15] Standard Credit Corporation Ltd v Bester and Others 1987 (1) SA 812 (W).
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