

SOUTH AFRICA / JUDGMENT

Motladile v Minister of Police (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) [2023] ZASCA 94

COURT

Supreme Court of Appeal

BEFORE

Mbatha, Gorven, Nhlangulela, Kathree-Setiloane,
Mali

CASE / FILE NUMBER

414/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 414/2022

In the matter between:

DANIEL MALEBADI MOTLADILE

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

Neutral citation: Motladile v Minister of Police (414/2022) [2023] ZASCA 94 (12 June 2023)

Coram: MBATHA and GORVEN JJA and NHLANGULELA, KATHREE-SETILOANE and MALI AJJA

Heard: 5 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for the hand-down of the judgment is deemed to be 11h00 on 12 June 2023.

Summary: Damages claim – unlawful arrest and detention – award not commensurate with damages suffered – failure of trial court to consider facts and circumstances of case – mechanical approach adopted by following trend in the North West Division of the High Court to award damages in the amount of R15000 a day – principles of determining appropriate award – restated – amount substituted.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Mahlangu AJ, sitting as court of first instance):

1 The appeal is upheld with costs including those of two counsel.

2 The order of the high court is set aside and replaced with an order in the following terms:

‘(i) The defendant is ordered to pay the plaintiff the amount of R200 000 together with interest at the prescribed rate of 7% per annum from date of service of summons to date of payment.

(ii) The defendant is ordered to pay the plaintiff’s costs on the high court scale.’

Kathree-Setiloane AJA (Mbatha and Gorven JJA and Nhlangulela and Mali AJJA concurring)

[1] This appeal concerns the question of whether damages in the amount of R60 000 awarded by the North West Division of the High Court, Mahikeng, per Mahlangu AJ (the high court) to the appellant, arising from his unlawful arrest and detention, are fair and reasonable having regard to the circumstances of the case.

Background

[2] On 23 December 2014, Mr DM Motladile (the appellant) who was, at the time, in the business of transporting passengers, was requested by a man whom he did not know to transport him to a farm to purchase cattle, which he did. The man purchased the cattle, but unbeknown to the appellant the man apparently defrauded the seller of the cattle. On reporting the incident to the police, the seller approached the appellant for his contact details, as he considered him to be a potential witness in his criminal case against the man who defrauded him.

[3] On 24 December 2014, the appellant travelled to Gaborone (Botswana) to attend to the wedding arrangements of his sister-in-law. The wedding was to take place two days later, on 26 December 2014. On the same day, Warrant Officer Ngkodi (the investigating officer), from the Mahikeng Police Station (the police station), visited the appellant’s home. On being advised by his wife, Mrs Motladile, that the appellant was in Gaborone, the investigating officer provided her with his telephone number and asked that the appellant call him on his return. On his return from Gaborone that evening, the appellant called the investigating officer and arranged to meet him the next morning (Christmas Day) at the police station.

- [4] On Christmas morning, the appellant travelled to the police station where he expected to be of assistance in the investigation. But instead, on his arrival at the police station at 8h30, the investigating officer promptly arrested and detained the appellant for the offence of theft under false pretenses. The appellant attempted to explain his version of events to the investigating officer, but it was to no avail. The investigating officer advised the appellant that he would not be released until he pointed out the man who allegedly defrauded the complainant. The appellant was unable to do this, as he did not know the man.
- [5] The appellant managed to inform his wife and brother of his arrest and detention. They attempted to visit the appellant in the police cells but were not allowed to see him or communicate with him for the duration of his detention. The appellant's brother instructed a lawyer, at his own expense, to apply to court for the appellant's release on bail. The bail application could not be brought as the investigating officer did not permit the appellant to consult with the lawyer.
- [6] The appellant spent the following four days (and nights) in detention in the police cells. On the morning of 29 December 2014, the appellant was taken to the magistrates' court, where he was detained in the holding cells for the rest of the day. The appellant did not appear in court as the prosecutor refused to enroll the case. He, however, remained in detention in the holding cells until 17h45 that evening, when he was transported back to the police station. The appellant was released from detention at around 18h00 that evening without receiving an explanation. As a result of his detention, the appellant had remained in custody for five days
- and four nights.
- [7] According to the appellant's unchallenged testimony, during the period of his detention he shared a filthy cell with five other inmates, who assaulted him and stole his food. He did not report this to the police as he feared further assaults. He was severely traumatised by his arrest and detention in the police cells.
- [8] As a consequence of his incarceration, the appellant and his wife were unable to attend his sister-in-law's wedding in Gaborone. As elders, the appellant and his wife had a particular standing at the wedding. His failure to attend the wedding due to his arrest and detention was a source of great embarrassment to him and his family. It was also traumatic for him not to spend Christmas with his wife and children. He broke down and cried while in detention and was unable to eat or sleep. The appellant's wife and children were also traumatised by the appellant's arrest and subsequent detention.
- [9] The appellant was a traditional healer who enjoyed the respect of his community. Once his arrest and detention became known to his community, he lost their respect. The appellant felt 'undermined and degraded' by his arrest and detention, and this has affected him psychologically.

[10] As a result of his unlawful arrest and detention, the appellant instituted an action against the Minister of Police (the respondent), in June 2016, for damages in the amount of R 250 000. On 26 November 2020, the high court, after making an order in terms of rule 33(4) of the Uniform Rules of Court separating the determination of the merits from the quantum, made an order that the respondent is liable for the appellant's proven or agreed damages arising from his unlawful arrest and detention. It postponed the determination of the quantum of damages to 5 May 2021.

[11] The appellant and his wife testified at the trial in support of his case on the issue of quantum. The respondent elected to lead no evidence at the trial. The high court made an order awarding the appellant damages in the amount of R60 000 plus costs on the magistrates' court scale. It reasoned as follows in making this award:

'In this present matter and having due regard to the particular facts of this matter, an award of a large amount of compensation is not called for and not warranted. The [appellant] suffered unwarranted inconvenience, injury to his feelings and personal humiliation with no future consequence.'

The appellant appeals against the judgment and order of the high court (on quantum) with the leave of this Court.

The appeal

[12] The amount of damages to be awarded to a plaintiff in a deprivation of liberty case, as we have here, is in the discretion of the trial court. That discretion must naturally be exercised judicially. The approach of an appellate court to the question of whether it can substitute a trial court's award of damages is aptly summarised by the Constitutional Court in *Dikoko v Mokhatla* as follows:

'... [S]hould an appellate Court find that the trial court had misdirected itself with regard to material facts or in its approach

to the assessment, or having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate court, it not only has the discretion but is obliged to substitute its own assessment for that of the trial court. In its determination, the Court considers whether the amount of damages which the trial Court had awarded was so palpably inadequate as to be out of proportion to the injury inflicted.'

[13] At the outset of the appeal, and in the heads of argument, the respondent conceded that the damages the high court awarded to the

appellant are so disproportionately low, that this Court can infer that the high court did not exercise its discretion properly. The high court found that having regard to the facts and circumstances of the case, an adequate award would be an amount of R15 000 per day, which amounts to R60 000 for the four days that the appellant spent in detention. In adopting the amount of R15 000 per day, the high court followed a practice that has developed in the North

West Division of the High Court, Mahikeng (North West Division) of applying a 'one size fits all' approach of R15 000 per day to damages claims for unlawful arrest and detention. This practice is conveniently described in *Mocumi v Minister of Police and Another*.^[2] That matter concerned a 28-year-old plaintiff, who was arrested and detained for three days under appalling conditions. The court awarded him damages in the amount of R45 000 calculated at R15 000 per day. The court observed as follows in relation to the practice of the North West Division 'to strive for similarity' in awarding damages for unlawful arrest and detention:

'In *Ngwenya v Minister of Police* (924/2016) [2019] 3 ZANWHC 3 (7 February 2019) this Court awarded R15 000.00 per day for unlawful arrest and detention. The same amount was awarded in the matter of *Gulane v Minister of Police*, CIV APP MG 21/2019, in an appeal which emanated from the Magistrate Court, Potchefstroom and decided by Petersen J et Gura J. Petersen J et Gura J did also in the matter of *Matshe v Minister of Police*, case number CIV APP RC 10/2020, likewise, awarded an amount of R15 000.00 per day for each of the two days that the appellant was detained.'

^[3]

...

Much as there are also different amounts awarded by this Court as compensation or solatium, there is of late an attempt to strive for similarity or conformity. Each case must however be decided on its own facts, merits, and circumstances. The examples quoted above in the case of *Ngwenya v Minister of Police*, *Gulane v Minister of Police* and *Matshe v Minister of Police* underscore this. R15 000.00 per day, is a reasonable amount to be awarded.'

^[4]

^[14] This practice was also followed in *Tobase v Minister of Police and Another*,^[5] which concerned a 30-year-old man who was unlawfully arrested at his place of employment and detained for three days. The North West Division, sitting as a court of appeal, awarded him damages calculated at R15 000 per day, amounting to R45 000. In *Nnabuihe v Minister of Police*,^[6] also a decision of the North West Division, the plaintiff was arrested and detained from Friday 12 April 2019 at about 12h40 and

released on Monday, 15 April 2019, without having appeared in court. The plaintiff was assaulted by the police and the inmates. He was squeezed into a cell with one toilet. The inmates shared a single sponge mattress. The plaintiff never took a bath for the duration of his incarceration, nor did he eat. The court awarded an amount of R50 000 which appears to be commensurate with the practice of the North West Division.

^[15] What is plain from the high court's judgment, in the present matter, is that it followed the trend in the North West Division to award an amount of R15 000 a day for damages suffered as a result of an unlawful arrest and detention. The high court cited comparable case law of other divisions of the high court, where the compensation awarded was commensurate with the harm suffered by the respective plaintiffs due to their unlawful arrest and detention. This notwithstanding, in quantifying the damages to award, the high court relied exclusively on the approach adopted in *Minister of Police v Joubert* (Joubert),^[7] where the North West Division awarded R15 000 for each of the seven days the plaintiff was detained. In *Joubert*

the plaintiff was 48 years old when he was arrested. On a Friday morning, while the plaintiff was busy erecting a shack in the company of two friends, two police officers arrested him and took him to the police station at approximately 10h00. He was detained in a cell together with 14 other inmates. The inmates confiscated his food and severely assaulted him that evening. He did not report the assault to the police. He had to share a blanket with a fellow inmate and was not given toiletries. He was detained until his release by the court on Monday, 31 August 2015, at approximately 11h00.

[16] More recently, in *Spannenberg and Another v Minister of Police (Spannenberg)*[8] Hendricks DJP sought to disavow this trend in the North West Division when he said this:

‘There is a misnomer that the High Court in the Ngwenya judgment set as a benchmark an amount of 15 000.00 per day as the norm for unlawful arrest and detention. This is incorrect and misplaced. Each case must be decided in its own peculiar facts and circumstances (merits). This cannot be emphasized enough. There is no benchmarking nor is there a one size (or amount) fits all practice that must be followed. This will most definitely erode the judicial discretion of presiding officers.’

Notably, the court in *Spannenberg* awarded the two plaintiffs damages in the amount of R18 000 each for being unlawfully detained for the duration of day. Despite deviating from the practice of awarding R15 000 a day, the court in *Spannenberg* had no regard to awards in comparable cases.

[17] The assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred;

(b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff.[9]

[18] It is as well to remember what this Court said in *Tyulu v Minister of Police*:[10]

‘In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to

determine an award of damages for 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 the particular case and to determine the quantum of damages on such facts. . .’

[19] The high court’s award of damages in respect of the unlawful arrest and detention of the appellant was not commensurate with the injuries suffered by him. This is largely because the high court had scant regard to the facts and circumstances of the case which were germane to its assessment of damages. Crucially, the high court gave no consideration to the circumstances under which the appellant was arrested, and that he had volunteered his name and contact details to the complainant, ostensibly to be called upon as a witness. The high court also failed to consider that on his return from Gaborone, the appellant readily contacted the investigating officer. And that he met with him on Christmas day, to assist him in his investigation. Little did the appellant know that he would be victim to an unlawful arrest and detention that would separate him from his family over the Christmas period.

[20] The way the investigating officer dealt with the appellant was suggestive of an improper motive and malice which justified a higher amount of damages. The uncontested evidence of the appellant, on this aspect, was that the investigating officer had threatened that should he not disclose the name of the perceived suspect, he would be arrested – not as a suspect – but simply as punishment. The high court, however, simply ignored this evidence in the assessment of the damages suffered by the appellant.

It also ignored the fact that the appellant was deprived of his fundamental right to be assisted by a legal representative for, inter alia, the purposes of bringing an application for his release on bail. And that he was denied access to members of his family who were not allowed to see him or communicate with him while in custody.

[21] Peculiarly, the high court remarked that ‘it cannot be said that the [appellant’s] experience was harrowing’. This remark is difficult to fathom given the appellant’s uncontested evidence on the condition of the cell and the harrowing reception from the other inmates in the cell. It, therefore, comes as no surprise that the high court had no regard to the humiliation and degradation that the appellant suffered at the hands of his fellow inmates who assaulted him; stole his food; and would have assaulted him again if he reported them to the police. As the appellant’s evidence on this aspect was uncontested, there was simply no basis for the high court’s finding that his evidence relating to his detention ‘was not convincing’,

and that ‘[n]o evidence was proffered that the situation and circumstances were such that it rendered the cell unfit for

occupation’.

[22] The high court held that ‘having due regard to the particular facts of this matter, an award of a large amount of compensation is not called for and not warranted’,

as the appellant ‘suffered unwarranted inconvenience, injury to his feelings and personal humiliation with no future consequence’.

In holding as such, the high court disregarded the unchallenged evidence of both the appellant and his wife in respect of the trauma,

mental anguish and distress suffered by him in custody and thereafter. The high court, moreover, failed to appreciate that the

unlawful deprivation of the appellant’s liberty is, in itself, a serious injury which constituted an impermissible infringement of his constitutional rights to freedom and security of the person, and to human dignity. To regard the deprivation of liberty as ‘an unwarranted inconvenience’ as the high court did, is to undermine the importance and protection that the right enjoys in our constitutional democracy.

[23] Moreover, the high court disregarded the appellant’s standing and status in the community as a traditional healer, and the extent to which his unlawful arrest and detention caused mistrust in the community and diminished his good reputation and honour. The high court also failed to take into consideration the implications of the appellant not attending the family wedding on 26 December 2014, and the shame and embarrassment that he and his wife had to endure consequent upon his unlawful arrest and detention.

[24] The high court furthermore attached no weight to the fact that the appellant had committed no crime, yet he received neither an apology nor a satisfactory explanation for his arrest and detention from the respondent following his release from unlawful custody. The high court, accordingly, misdirected itself by not taking all the relevant facts and circumstances into account, in its assessment of the damages suffered by the appellant pursuant to his unlawful arrest and detention.

[25] On consideration of the facts and circumstances of this case, as well as recent awards made by our courts in comparable cases and the steady decline in the value of money, I consider an award of R200 000 to be fair and reasonable compensation for the damages arising from the appellant’s unlawful arrest and detention.

Costs

[26] The high court ordered the respondent to pay the appellant’s costs on the magistrates’ court scale on the basis that the matter was not of such complexity that it warranted the attention of the high court; that the amount claimed and awarded fell within the monetary jurisdiction of the magistrates’ court; and that no special circumstances were advanced to warrant the institution of the proceedings in the high court. What the high court failed to grasp in arriving at this conclusion, is the importance that our courts accord to the deprivation of a person’s liberty when determining the scale on which to award costs. In De

Klerk v Minister of Police,[11] which also concerned an unlawful arrest and detention, this Court said – regarding costs – that although the total quantum awarded [R30 000] is far below the jurisdiction of the high court, the appellant was justified in approaching the high court because the matter concerned the unlawful deprivation of his liberty. For this reason, this Court is entitled to interfere with the high court’s costs order.

[27] The appellant seeks the costs of two counsel in the appeal. I consider this to be justified because, as submitted by counsel for the appellant at the hearing, an enormous amount of research was necessary to unmask the ‘trend’ or ‘practice’ of the mechanical approach, that has been followed in the North West Division to damages’ awards in unlawful arrest and detention cases. We are grateful to counsel for both parties for the constructive assistance given to us during the hearing.

[28] In the result, the following order is made:

2 The order of the high court is set aside and replaced with an order in the following terms:

‘(i) The defendant is ordered to pay the plaintiff the amount of R200 000 together with interest at the prescribed rate of 7% per annum from date of service of summons to date of payment.

F KATHREE-SETILOANE

ACTING JUDGE OF APPEAL

Appearances

For appellant A B Rossouw SC and J H P Hattingh Instructed by: WJ Coetzer Attorneys, Mahikeng Du Plooy Attorneys, Bloemfontein For respondent: M E Mmolawa The State Attorney, Mafikeng The State Attorney, Bloemfontein.

[1] Dikoko v Mokhatla 2006

(6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 57.

[2] Mocumi v Minister of Police and Another Case number CIV APP9/2021 (3 December 2021).

[3] Mocumi fn 2 above para 15.

[4] Ibid para 20.

[5] Tobase v Minister of Police Case number CIV APP MG 10/2021 (3 December 2021).

[6] Nnabuihe v Minister of Police Case number 2273/2019 NWHC (9 March 2022).

[7] Joubert v Minister of Police and Others Case number 659/2017 NWHC (15 April 2021).

[8] Spannenberg v Minister of Police Case number 2993/2019 (24 February 2022) para 20.

[9] JM Potgieter et al, Visser & Potgieter Law of Damages 3 ed (2012) at 545-548; HB Klopper Damages

(2017) at 255-259.

[10] Minister of Safety and Security v Tyulu [2009] ZASCA 55; 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA); 2009

(5) SA 85 (SCA) para 26.

[11] De Klerk v Minister of Police [2018] ZASCA 45; [2018] 2 All SA 597 (SCA); 2018 (2) SACR 28 (SCA) paras 18 & 55.

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