

SOUTH AFRICA / JUDGMENT

Motlhaolwa and Another v Minister of Police (2037/2019) [2024] ZANWHC 179 (12 July 2024)

[2024] ZANWHC 179

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana

CASE / FILE NUMBER

2037/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION,

MAHIKENG

CASE NUMBER: 2037/2019

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In the matter between: -

LESEGO

GIRLIE MOTLHAOLWA

1st

Plaintiff

MPUNZIE

NOBANDLA

2nd

Plaintiff

and

MINISTER

OF POLICE

Defendant

Coram:

Mfenyana J

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 14h00 on 12 July 2024.

ORDER

(1)

The arrest and detention of the first plaintiff on 27 March 2018 to 3 April 2018 was unlawful.

(2)

The arrest and detention of the second plaintiff on 27 March 2018 to 3 April 2018 was unlawful.

(3)

The defendant shall pay an amount of R275 000.00 for damages in respect of the first plaintiff.

(4)

The defendant shall pay an amount of R275 000.00 for damages in respect of the second plaintiff.

(5)

The defendant shall pay interest on the amounts in (3) and (4) above at the applicable interest rate payable from date of judgment to date of payment.

(6)

The defendant shall pay the costs of suit at the magistrates' court scale.

JUDGMENT

MFENYANA J

Introduction

- [1] This matter served before me for determination of the quantum of damages suffered by the first and second plaintiffs (plaintiffs) as a result of their arrest and detention by employees of the defendant on 27 March 2018.
- [2] The summons was sued out on 28 June 2019. The plaintiffs claim a combined amount of R450 000.00 in respect of each of the plaintiffs.
- [3] Having defended the matter, the defendant on 21 November 2023, conceded the merits.
- [4] Each of the plaintiffs testified in support of their respective claims, and to a large extent, in corroboration of each other. A brief background is warranted.

- [5] The plaintiffs are lovers. On the night of 27 March 2018, at approximately 22h00 while they were at home, going about their own business, employees of the defendant arrived at their home, uninvited. From the undisputed evidence of the plaintiffs, it appears that the employees of the defendant uninvited as they were, did very little to conceal their arrival, announcing their presence, with a convoy of no less than ten police vehicles and piercing police lights. They had come to 'catch a killer'.

Evidence of the first plaintiff

- [6] According to the first plaintiff upon arrival, one police officer, identified as Mr Legodi entered the house and informed them that they were under arrest for murder. They cooperated and handed themselves over to the officers, although they had no idea of the details of the alleged murder. They proceeded to the Mahikeng police station, leaving their children behind, unattended. There, they were detained, the first plaintiff in the women's section, and the second plaintiff in the men's section. Before going to the police station, they embarked on a drive about, picking up other suspects who were apparently also linked to the alleged murder, but who were unknown to the plaintiffs. Ultimately, they were taken to the Mahikeng police cells and detained.
- [7] It was not until 3 April 2018 that they were released without appearing in court. They were however taken to court and held in the holding cells at court, until they were released at approximately 11h00 or 12h00, apparently on the basis that the public prosecutor declined to prosecute.
- [8] The first plaintiff further testified that when the police arrived at their home, neighbours and other bystanders came out to witness what was happening as there were ten police vehicles in attendance. She testified that there were a lot of people who came to watch, and some saw her inside the police vehicle when they were driving around. She

stated that the police did not explain why they considered it necessary to come in 10 police vehicles. They only stated was that

they were there to arrest murderers.

- [9] Regarding the condition of the cell and the circumstances of her detention, the first plaintiff testified that the conditions were bad as the cell was dirty with little running water. She further testified that the toilet did not flush, so they used 2 litre bottles to fetch water from the shower to flush the toilet. They followed the same process for bathing. There were four of them in the cell, and they took turns to clean the cell, she further testified. She further stated that the blankets were smelly.
- [10] As for the food, she testified that it was tasteless and very little. She told the court that they only ate 2 meals a day; in the mornings and afternoons for the entire time of her detention.
- [11] The first plaintiff further testified that the arrest had a negative effect on her, as she is now considered a killer by her neighbours and members of her community.

- [12] Regarding her employment status, the first plaintiff testified that at the time of her arrest, she was unemployed, and was selling chickens to sustain herself and her family.
- [13] During cross-examination, she testified that although they reported their dissatisfaction about the food and the state of the cell to the prison authorities, their complaints fell on deaf ears. She contended

that she suffered emotional shock as a result of her arrest as she had never been arrested before then. She however conceded that she did not seek any medical attention for trauma.

Evidence of the second plaintiff

- [14] The second plaintiff's evidence was essentially that when the police arrived, he and the first plaintiff were watching television, about to go to bed. He stated that he heard screams from the street

and was alerted that something was happening when he saw the blinding lights from the police vehicles penetrating through the window into their house. He corroborated the evidence of the first plaintiff that the police accused them of murder, arrested them, and took them to the Mahikeng police station in separate police vehicles. Essentially, the second plaintiff corroborated the first plaintiff in all material respects with regard to the details of the arrest.

- [15] Concerning the neighbours and bystanders, the second plaintiff's evidence was however that there were approximately 4 to 5 people who came out to watch what was happening.

- [16] He further testified that he was detained with approximately 15 other inmates. The cell was filthy and although the toilets were in working order, they had no doors and therefore he enjoyed no privacy. As a

result of this he opted to only use the toilet at night. In this regard, he says that he and other inmates resorted to using as

shields to simulate a door whenever they had to use the toilet. This meant that another person had to stand at the entrance of the toilet and hold the blanket up while the other was in the toilet. He stated that the condition of the entire cell was unhygienic, and he had no soap or toothpaste and no blankets for the whole duration of his detention as other inmates took all the blankets for themselves.

- [17] The second plaintiff testified further that he was assaulted and bullied every night by other inmates who asked him for money and cigarettes. He was also instructed to do chores for other inmates. He later learnt that the bullying was because he was not part of the "Zisebenzi" gang. Others tied bottles

of water to his private parts, mocking him, and telling everybody that he was a killer

- [18] According to the second plaintiff, he only managed to eat for only 3 of the 7 days he was in detention, as the gang members took his food from him. At one stage he witnessed his other inmate being ill-treated far worse than he was, and was scared that the gang members would do the same to him. He stated that his arrest caused him emotional shock and trauma.
- [19] In cross examination, the second plaintiff conceded that the assault only endured for the first day, as he met an acquaintance who was detained in another cell, who pleaded with the gang members on his behalf. In response to a question from Mr Kwape, counsel for the defendant, the second plaintiff further conceded that he did not seek medical attention for the assault and emotional shock and trauma. He however added that he reported the assault and the bullying to the prison authorities, to no avail.

Defendant's case

- [20] The defendant closed its case without calling any witnesses.

Determination

of damages

- [21] In determining an appropriate amount of damages to be awarded, the court is granted a wide discretion. In exercising its discretion, the court should consider the available evidence and determine whether

the plaintiff has discharged the onus which rests upon it.

- [22] As wide as the court's discretion may be, this must be exercised judicially within the available evidence and the prevailing circumstances of each case. The award of damages is thus, case-specific.

- [23] In the particulars of claim, the plaintiffs claim a total amount of R900 000.00; comprising R450 000.00 for unlawful arrest and detention of the first plaintiff and R450 000.00 for the second plaintiff. In respect of each plaintiff, these amounts are made up of R150 000.00 for arrest and detention, R100 000.00 for loss

of dignity, R100 000.00 for deprivation of liberty, R50 000.00 for emotional trauma, and R50 000.00 for loss of amenities of life.

- [24] The plaintiffs place reliance on decisions of the court in various divisions. Among the decisions relied on by the plaintiffs, is the decision in *Takawira v The Minister of Police*[1] for the proposition that the status of a plaintiff in any particular matter, is not a dominant factor when the court is tasked with the duty of determining the fair amount of damages.
- [25] Thus, they rely on *Masisi v Minister of Safety and Security*[2] in which the plaintiff in 2010 was awarded R65 000.00 for unlawful arrest and detention spanning 4 hours and 30 minutes. The

plaintiffs further rely on Mofokeng and Another v Minister of Police. In that matter the plaintiff was awarded an amount of R90 000.00 for arrest and detention of 2 days. In Lindiwe Ndlovu v Minister of Police the court in 2016 awarded the plaintiff R240 000.00 for arrest and detention of 8 days. The list is not exhaustive, and the awards vary from case to case.

[26] The plaintiffs contend that the detention of the plaintiffs under the harsh conditions described in their evidence is not justifiable.

Neither is the defendant's failure to bring them before court within 48 hours in accordance with section 35(1) (d) of the

Constitution[3]. They argue that this court should, in the circumstances, send a strong message to the defendant regarding the deliberate breach of the Constitution by members of the South African Police Service (SAPS).

[27] The defendant, on the other hand avers that the circumstances of this case should be considered holistically, in line with the evidence tendered and the infringement of the plaintiff's rights. It is

contended that on the evidence of the plaintiffs, no psychologist's report was submitted to indicate that they suffered long-term effects from their arrests and detention. It is further argued that their evidence was limited to the circumstances of the arrest which was witnessed by no more than 5 neighbours. Their 'unemployed' status should also be considered in determining a fair amount of damages, so contended the defendant.

[28] Given these circumstances, an amount ranging between R280 000.00 and R320 000.00 would be appropriate in the circumstances, the defendant contends. The only decision relied on by the defendant is in Olivier v Minister of Safety and Security and Another to drive home the proposition that the court is implored to exercise some form of restraint as the damages 'would be coming from the taxpayer's pocket'. This indeed, is the sad reality of this kind of infraction. What is disturbing about this specific case is that the defendant offered no justification whatsoever, having elected not to lead any evidence. This, after going to extreme lengths to have the plaintiffs arrested. Equally, no justification was provided for the delay in timeously bringing the plaintiffs before court or freeing them from detention.

[29] In considering a fair amount of damages, I have considered the amounts contended for on behalf of the plaintiffs. I do not intend to deal individually with the heads of damages cited by the plaintiffs, save for those I consider to warrant my dictum.

[30] The first is that on the facts of this case, no case was made out for loss of amenities of life, and no evidence was led to demonstrate how the plaintiffs may have been affected such that they would no longer

be able to no enjoy the niceties of life. This head of damages as claimed for in the particulars of claim is therefore without merit.

[31] The second is the claim for deprivation of liberty (in addition to arrest and detention). In my considered view, deprivation of liberty is a direct consequence of the plaintiffs' unlawful arrest and detention and cannot in this case, be separated. As was aptly noted by the Constitutional Court in *J E Mahlangu and Another v Minister of Police*[4]

"The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person."[5]

[32] As I have already stated, no two cases are the same. Naturally, the cases relied on by the plaintiffs are distinguishable from the present case. Where they converge is on the fact that unlawful arrest and detention is a constitutional infraction. It is inexcusable. When such constitutional breaches happen without justification at an extravagant use of state resources, merely for pomp and show, it is even more indefensible.

[33] I have also taken note of the manner in which the police descended at the plaintiffs' home, late at night, in a fleet of 10 police vehicles. Surely, they ought to have considered that this would spark an interest in the members of the community, and cause a spectacle. Not only is this humiliating to the plaintiffs, but it was also unnecessary.

[34] It is trite that the purpose of an award for damages is not to enrich the plaintiff, but to provide the necessary solatium for the infraction on his rights. It goes without saying that such infractions are inimical to the Constitution, which guarantees the right to personal liberty and dignity. Since the dawn of democracy, the SCA in *S v Tyulu*[6] cautioned that:

"... 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."[7].

[35] The determination of damages in these circumstances is no mean feat. The court should seek to strike a balance and 'not out pour largesse from the horn of plenty'[8]. The court must take care to see that its award is fair to both sides.[9] What can be discerned from previous awards, including those relied on by the parties, is that there is no 'one size fits all' approach to awarding damages. It is not capable of mathematical precision. It can also not be ascertained by gazing into a crystal ball. In those circumstances, previous awards only serve as a useful guide. However their value cannot be put any much higher than that.

[36] I associate myself with the observations in *Takawira* that the social status cannot be used as a dominant factor to determine what is deserved by a plaintiff whose rights have been infringed. In the specific facts of this case, the fact that the plaintiffs were unemployed at the time of their arrest cannot be used as a tool of oppression, especially not in the hands of the very courts that are there to ensure their rights are vindicated, lest we reverse the constitutional gains guaranteed in the Constitution. There can be no doubt that the unlawful arrest and detention caused embarrassment and humiliation to the plaintiffs. Their detention, no less.

- [37] I am mindful of the fact that the plaintiffs provided no evidence of the emotional shock and trauma they allegedly suffered. In my view, that cannot be a ground for saying that they were not affected negatively by their arrest and detention. While human nature may cause a plaintiff to sometimes embellish their evidence, the inconvenience and discomfort associated with unlawful arrest and detention cannot be denied. To my mind, the absence of medical evidence merely shows that the extent of the negative effect of the arrest and detention has not been proven.
- [38] Consequently, a sum of R275 000.00 for the unlawful arrest and detention of the plaintiffs should be reasonable awards in respect of each of the plaintiffs.

Costs

- [39] Costs follow the result. There is no reason on the prevailing circumstances of this case that this established principle should not apply. It was however contended on behalf of the defendant that costs should be awarded on the magistrates' court scale in view of the fact that the matter is not so complex as to warrant the attention of the High court. Further, the defendant's averment is that amount claimed and the realistic amount to be awarded fall within the jurisdiction of the Magistrates' court.
- [40] Despite the fact that unlawful arrest and detention is an invasion of a person's constitutional right to liberty, there is no suggestion ex facie the pleadings that the magistrates' court is incompetent to deal with this matter. Agreeably, this matter is not complex and could have been determined in the magistrates' court. Indeed, the amount of damages awarded falls within the jurisdiction of that court.

Order

- [41] In the result, I make the following order:
- (2) The arrest and detention of the second plaintiff on 27 March 2018 to 3 April 2018 was unlawful.
 - (3) The defendant shall pay an amount of R275 000.00 for damages in respect of the first plaintiff.
 - (4) The defendant shall pay an amount of R275 000.00 for damages in respect of the second plaintiff.
 - (5) The defendant shall pay interest on the amounts in (3) and (4) above at the applicable interest rate payable from date of judgment to date of payment.
 - (6) The defendant shall pay the costs of suit at the magistrates' court scale.

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

For the plaintiffs: B Zisiwe Instructed by: Zisiwe Attorneys Email: info@zisiweattorneys.co.za For the defendant: T Kwape Instructed by: State Attorney, Mmabatho Email: LMatshinyatsimbi@justice.gov.za Date Reserved: 14 December 2023 Date of Judgment: 12 July 2024

[1] Takawira v Minister of Police (A3039/2011)

[2013] ZAGPJHC 138 (11 June 2013).

[2] (366/2021)

[2022] ZASCA 57 (22 April 2022).

[3] The Constitution of the Republic of South Africa, 1996.

[4] J E Mahlangu and Another v Minister of Police [2021] ZACC 10.

[5] Paragraph 25.

[6] 2009

(5) SA 85 (SCA).

[7] Paragraph 93D.

[8] Pitt v Economic Insurance Ltd 1957

(3) SA 284 (D).

[9] Paragraph 287E – F.

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