

SOUTH AFRICA / JUDGMENT

Mukwevho v Minister of Police (4447/2018) [2021] ZAGPJHC 463 (15 June 2021) [2021] ZAGPJHC 463

COURT

South Gauteng High Court, Johannesburg

BEFORE

MAKUME

CASE / FILE NUMBER

4447/2018

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 4447/2018

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
17/6/2021
In

the matter between: MPFARISENI
DAVID
MUKWEVHO
PLAINTIFF
And
MINISTER
OF
POLICE
DEFENDANT

JUDGMENT

MAKUME J:

- [1] In this matter the Plaintiff claims damages against the Defendant on the basis that he was wrongfully arrested and detained for a number of days in a Correctional Services facility during which time he says he was subjected to unpleasant and harsh treatment.
- [2] The Defendant pleaded that save for admitting the arrest it is denied that such arrest was wrongful and unlawful it being pleaded that such arrest was effected pursuant to a warrant of arrest for fraud having been authorised by the Magistrate in terms of Section 43 of the Criminal Procedure Act. The pleadings remained in that state until the finalisation of the hearing.

FACTUAL**BACKGROUND**

- [3] In order to contextualise the issues in this matter it is necessary to provide a short chronology of salient events leading up to this matter. What follows is a summary of relevant facts that are either common cause or not seriously disputed.
- [4] The Plaintiff is a 39year old Television Producer. He is married and has children. On the 7th October 2017 he was placed under arrest by captain Mashele a member of the South African Police who was at that time acting within the course and scope of his employment.
- [5] He was detained at the Brixton Police cells until Monday the 9th October 2017 when he appeared in court and was remanded in custody until released on bail on the 17th October 2017.
- [6] His arrest and detention happened as a result of a complaint of fraud laid with the Commercial Crimes Unit by a certain Mr Dumakude Ndlovu (Ndlovu) with the police during August 2017.
- [7] Ndlovu is the sole director of a company known as Word of Mouth (Pty) Ltd. The Plaintiff was in his employment as a production manager. The Company Word of Mouth is the producer of one of South Africa's well-known soapies called "Muvhango."
- [8] In his statement Ndlovu said that the Plaintiff and a certain Hlongwane defrauded his company of a total amount of over R3million.
- [9] The Plaintiff had by the time Ndlovu laid the charges left his employment and had taken a position with another TV production house called Tshedza which produces "The River" which is also one of the well-known soapies on the South African screens.

[10] On receipt of the complaint the Public Prosecutor applied to the Magistrate in terms of section 43 of the Criminal Procedure Act 51 of 1977 for the authorising of a warrant to arrest the Plaintiff. The warrant of arrest was duly authorised by the Magistrate on the

3rd October 2017.

[11] Section 43(3) of the Act reads that:

“A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or if such person is not available by any person with like authority or until it is executed.”

[12] Baqwa J in *Baasden v Minister of Safety and Security* 2014 (2) SACR 163 GP at C14J said that a warrant must exist in real terms as a document that can be exhibited when necessary.

[13] The warrant authorising the police to arrest the Plaintiff has been discovered and forms part of the record. Captain Mashele on arresting the Plaintiff acted on the basis of that warrant.

[14] The Plaintiff appeared in the Magistrate Court on Monday the 9th October 2017 and when his attorney applied for his release on bail the police opposed the application citing reasons that they had to first satisfy themselves that Plaintiff is a South African National, secondly to verify his residential address.

[15] Bail was refused the Plaintiff was then held in custody at the Johannesburg Prison until his next appearance on the 18th October 2017 on which day he was released on bail.

[16] On the 10th October 2017 the story about the arrest of a manager attached to “Muvhango” appeared in the Sowetan Newspaper under the caption “Muvhango losses millions in petty cash.” The Plaintiff’s name was not mentioned in the newspaper report save for the description that the arrested person is a “former production manager.”

[17] After his release the Plaintiff went back to work for Tshedza but was requested to resign because of the allegation of fraud. Tshedza Director told him that they would like to protect the reputation of their company which was working on the production of “The River” which soapy was to be aired shortly.

[18] The Plaintiff left work but was still paid for October and November 2017 the full monthly salary.

[19] During or about February 2018 charges were withdrawn against him. On the 28th November 2018 he instituted this action against the Minister of Police and claims compensation under the following headings:

i) General Damages

R 400 000.00

ii) Future Medical Expenses R 24 000.00

iii) Emotional Shock

R 400 000.00

iv) Past Loss of Income

R 611 322.00

R1 435 322.00

THE ISSUES FOR DETERMINATION

[20] When counsel appeared before me I had become aware that on the 18th January 2021 before my brother Francis J an order was granted in the following terms:

i) The Defendant concedes liability in respect of merits 100%.

ii) The issue of quantum is postponed sine die.

iii) Costs reserved.

[21] I am quite aware that this is an order granted by a competent court. I however wanted Counsel to inform me as to precisely what was admitted and or conceded by the Defendant. I wanted to be told what were the facts placed before my brother Francis which led to the order.

[22] All that Defendant's counsel could tell me was that after consulting with Captain Mashele it was decided to concede merits. I was not told exactly what the consultation entailed Captain Mashele did not depose to any affidavit in which he on behalf of the Minister conceded liability. This aspect remained in my mind throughout the hearing as a result I requested counsel to file supplementary heads dealing with the issue why was it admitted that the arrest was unlawful when in fact a warrant of arrest had been issued and executed by a police officer.

THE EVIDENCE

[23] The Plaintiff testified and told the court that after passing matric in the year 2008 he started working as a TV Producer till today. His first employer in 2008 was with the company Word of Mouth which he left in the year 2011.

[24] Between 2011 to 2012 he was working for another company Shoe Box and in June 2014 he re-joined Word of Mouth and worked on the Muvhango Production until August 2017.

[25] Between August 2017 and 1st September 2017 he freelanced for PEU Communication and on the 1st September 2017 he took up employment with Tshedza who was preparing shoots to launch "The River."

- [26] He left Tshedza at the end of October 2017 because of the arrest and the much publicised allegation of fraud and theft against him. The Director of Tshedza told him that as soon as he has been cleared of the allegations he will be recalled. He was paid in full for October 2017 and November 2017 even though he did not do any work. He received the full salary of R30 000.00 for each month making it R60 000.00.
- [27] He then freelanced at PEU Communication for 2 weeks in December 2017 and was paid R40 000.00. He told the court that between January 2018 to June 2018 he was unemployed and received no income. This was not correct as it later was demonstrated in cross-examination.
- [28] In July 2018 he took up employment with a Durban based company that produces Uzalo one of the TV productions. He worked there until January 2020 from January 2020 until December of that year he worked for PEU Communication once more. He resigned because he felt that he was not given opportunity to advance in management.
- [29] He testified that in August 2017 he left the company Word of Mouth because a friend invited him to join Tshedza. His duty was to help set up for the new production of "The River". That production was to run for one year on 260 episodes. This means that he would have been in the employment of Tshedza until November 2018.
- [30] In this industry he would have had an opportunity to renew the engagement once the Broadcaster extends the season of the production. When he was appointed at Tshedza his duties were to get office space and studios before hiring crew members and also to manage the budget. He told the court that if he had not been arrested he would have stayed on at Tshedza as their production "The River is one of the successful soapies which is today still running.
- [32] After the charges had been withdrawn against him he went back to Tshedza but could not be hired as Tshedza had in the meantime filled up the position.
- [33] During 2018 he made a proposal to a company called Murhovhi Financial Services that operates in Limpopo to do their branding. If his proposal had been accepted, he would have earned R300 000.00 in the name of his company King Dave Production Pty Ltd. His proposal was not successful because they had discovered that he has a pending fraud case. He called the Sowetan Newspaper to remove the story about his arrest from their website and was told that they cannot remove it.
- [34] He testified further that his future in the TV production industry looks bleak for as long as his name appears on google about the fraud case because no company would like to be associated with a person who has been accused of fraud. He has applied for positions that were advertised and got no response. He only gets employed by people who know him and who are sympathetic. The arrest and accusation is an impediment and tends to limit his career development. He as a production manager deals with budgets but now no one entrusts him with budgets since his arrest.

- [35] The reason he decided to resign at PEU Communication during January 2021 is because he realised that they don't trust him with managing finance and it is all because of this fraud case. He agreed that he was well all paid and did not resign because of the money he was getting there. He resigned because he wants to grow and that situation was inhibiting him to grow. He wants to grow because he is looking forward to having his own production company.
- [36] He testified further that when he worked for PEU during 2012 the situation was different they trusted him with budget management. Since February 2021 he has been sending his CV's to various companies and has not received any offer.
- [37] He agrees that during December 2017 he was paid R40 000.00 by PEU Communication for freelance work. However, he maintained that between January 2018 to June 2018 he was unemployed.
- [38] He concluded his evidence in chief by saying that it was the first time for him to be arrested and to have spent time in a prison. Under cross-examination he responded that the amount of R311 322.00 that is stated in paragraph 9.4 of the Particulars of Claim is what the actuary had determined as possible profit for the Murhovhi Financial Services proposal.
- [39] He testified further that with Tshedza he concluded a verbal agreement. The only time he had a written contract was when he worked for PEU from January 2020 to January 2021. The R611 322.00 that he is claiming as past loss of income is made up as follows:
- R300 000.00 being loss of profit for the Murhovhi project and R311 322.00 being loss of earning from Tshedza which should actually be R360 000.00.
- [40] He conceded that according to his bank statement he was paid R34 000.00 on the 31st March 2018 by Tshedza for doing work on "The River". Again on the 9th April 2018. He explained that the R12 000.00 was for travelling expenses for the job that he did for Tshedza in Giyane.
- [41] He also conceded that on the 30th April 2018 he was paid R20250.00 by PEU Communication for freelance work that he did for them. He maintains that freelance is not employment it is part time and is not fixed employment.
- [42] He further conceded that his bank statement indicate that for September he received R70 000.00 and that between the 25th October 2017 and 25th November 2017 he received income of R63 000.00 and that between November 2017 to December 2017 his income was R100 700.00 and for the month ending January 2018 his income was R7 682.30, January 2018 to February 2018 he received R10 000.00 for the period March 2018 to April 2018 he received R57 905.00 and for the period 25 April 2018 to 25 May 2018 he received R87250.00 and lastly for the period 25 May 2018 to 25 June 2018 to he received R21 290.00.
- [43] He indicated that some of the money that he received in his account was from his wife's account and part of it was part time income as a freelancer which amount he agrees should be deducted from the R360 000.00 loss had he been working at Tshedza.

- [44] The amount of R7687-30 that he received on the 9th January 2018 was from LMK it was a loan from a friend of his and not income. The amount of R43 601.88 that he received during January 2018 not all of it is income because R4 500 was a refund from medical aid and only R40 000 was payment from PEU Communications. He confirms that he received R10 425.00 from PEU again in February 2018.
- [45] During April 2018 he was paid R15 600.00 by Tshedza Communications and R20 250.00 by PEU Communications.
- [46] In the final outcome when it was put to the Plaintiff that he did not suffer any loss of income he responded that he had a shortfall of income. He did not receive the monthly R60 000.00 that he would have received at Tshedaza. This therefore means he did receive income but not he full income. As a result, he had to now and then get money from his wife and also lend from friends in order to meet his monthly debit orders.
- [47] He testified further that the amount of R311322 stated in the Particulars of Claim is an estimate and not actual loss.
- [48] In answering question from the court he said that he resigned from PEU in January 2021 because he felt that the owner of the business did not trust him with money anymore and that did not make him happy. He did not discuss that with the owner and simply handed in a resignation.
- [49] When Captain Mashele arrested him he did not handcuff him however when he appeared in court on Monday the 9th October 2017 he was in leg chains. He was only released on bail on the 17th October 2017.
- [50] The case against him was withdrawn because he was told that the people who laid charges against him were not cooperating with the prosecution. When he resigned from PEU his monthly salary was R70 000.00 per month.
- [51] When he filed his tax returns he did not include the money that he received as a freelancer because he got bad advice. He conceded that money that he received as a freelancer is in fact income.
- [52] Mr P Makwarela testified on behalf of the Plaintiff. He is a Director at Tshedza and confirmed that during September 2017 he invited the Plaintiff to join Tshedza as they needed an experienced production manager to help them set up shoots for "The River." He cannot recall if a written contract was signed but recalls that the Plaintiff was to be paid between R50 000.00 to R60 000.00 per month.
- [53] After the Plaintiff had been arrested and the story appeared in the media they had to release him as they did not want to be associated with a person who is accused of fraud. The Plaintiff was paid the full salary for the month of October and November 2017. Thereafter they engaged him now and then between December and January 2018 as a freelancer and paid him as indicated in the Plaintiff's bank statements.

- [54] The evidence of Miss Prudence Ngoako and that of Lance Marais both Industrial Psychology practitioners can be summarised in terms of their joint minutes filed on the 23rd April 2021.
- [55] In their joint minutes the two expert witnesses confirm that the purpose of their examination was to present professional opinion with regard to pre and post morbid career prospects as well as past and future earnings in respect of the Plaintiff.
- [56] They agree that pre his arrest the Plaintiff kept a stable type of employment on a contract basis and would have continued to do so until retirement. At Tshedza he earned R60 000.00 per month.
- [57] The witnesses agree that the Plaintiff had commenced discussions with Murovhi Financial Services to do their branding however this was an anticipated business on the table and no intention to conclude a branding services agreement with Murovhi.
- [58] In respect of his position post his arrest and release the witnesses note that his contract albeit verbal was terminated because of the publicity about the cause of his arrest.
- [59] They disagree on the period that the Plaintiff remained unemployed since he left Tshedza in November
2017. Ms Ngoako says the Plaintiff remained unemployed for a period of nine months whilst Mr Marais says it was shorter than that. He says that Plaintiff secured employment during May of 2018 which will then result in a period of five months.
- [60] This evidence is contradicted by the Plaintiff himself who conceded that he did remunerative work for other companies including the very Tshedza between December 2017 till June 2018 when he decided to sign up for a contract with a Durban based TV Production Company.
- [61] Whilst Ms Ngoako notes that the Plaintiff has endured emotional and financial harm as a result of the incident which has impacted negatively on his reputation and personal brand Mr Marais notes that he is most likely to experience long term emotional difficulties due to the criminal case.
- [62] The two experts interestingly note that despite the incident the Plaintiff was still able to secure employment for two and a half years after the incident and he should still be able to continue working and earning income as indicated.
- [63] In conclusion Ms Ngoako opines that for as long as the Plaintiff's name is still associated with the alleged fraud case this will impact negatively on his ability to secure employment in the future.
- [64] I am finding it difficult to reconcile these findings with the direct evidence of the Plaintiff himself who has been in remunerative employment with the same employer and others in the industry despite the incident. The Plaintiff resigned during January 2021 from a contract that was paying him R70 000.00 per month. He does not say that he resigned because of the

salary but because he thinks that the employer does not trust him by not allowing him to manage budget. He did not call that employer to corroborate his assumption. Quite to the contrary the Plaintiff says that he wants to start his own production company.

- [65] The Clinical Psychologists also filed a joint report in terms of which the parties have reached agreement regarding the psychotherapy intervention required by the Plaintiff to treat him for the psychological effects of the unlawful arrest and detention. It has been agreed that the Plaintiff will have to attend fifteen (15) sessions at the cost of R1200.00 per session which translates to an amount of R18 000.00 (Eighteen Thousand Rand).
- [66] The Plaintiff closed his case and the Defendant only presented evidence by Mr Lance Stanley Marais the Industrial Psychologist and then closed its case after cross-examination.
- [67] Besides what I have analysed in the joint minutes between Mr Marais and Ms Ngoako the further evidence by Mr Marais is to the effect that whilst he agrees that the Plaintiff suffered loss the difficulty he has is how to quantify it.
- [68] This in my view just about summarises the problem in view of the fact that the Plaintiff has been receiving income on a part time basis between December 2017 and May 2018 whereafter he signed long term engagement renewable on a yearly basis depending as he says whether the broadcaster extends production of a particular soapie or documentary.
- [69] Mr Marais further testified that in his discussion with the people at Murovhi Financial Services he was told that the company had no intention of changing their current branding. This corroborates the joint minutes by Marais and Ngoako to the effect that Plaintiff and Murovhi only engaged in discussion and never concluded any deal.
- [70] Mr Lance also testified that freelancing is a form of income generating contract.

WAS THE ARREST LAWFUL

- [71] Paragraph 4 of Standing Order (GG) 341 of the South African Police reminds police officers that the purpose of an arrest is not to punish the person concerned.
- [72] I am mindful of the fact that the Defendant conceded that the arrest was unlawful hence an order was granted by my brother Francis J in favour of the Plaintiff. Under normal circumstances this issue becomes *res judicata*. I have decided to revisit that issue purely on the basis of procedure. It was held in *Airports Company of South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 CC at paragraph 3 that a court must give approval to a settlement agreement. This was the only reason why I directed the parties to file supplementary heads in view of the fact that the arrest had been authorised by a magistrate in terms of Section 43 of the Criminal Procedure Act.>
- [73] In the unreported case of *Botes v Minister of Police* and Another case number 9778/13 GP dated 25 April 2018 Sello AJ reminded us that arrest constitutes one of the most drastic infringements of the rights of an individual and calls for restraint where that is feasible.

- [74] It is trite law that even where a warrant for the arrest of a suspect has been lawfully obtained in terms of Section 43 this in itself does not necessarily justify an arrest to secure attendance of the suspect in court. In *Brown and Another v Director of Public Prosecution & Others* 2009 (1) SACR 218 Fourie J reaffirmed that an arrest constituted such a drastic invasion of personal liberty that it still had to be justifiable according to the demands of the Bill of Rights. A change in the flight risk of a suspect might however justify his arrest to secure attendance in court.
- [75] The Plaintiff is a South African citizen. He after receiving a call went personally to the Police Station to find out the reason why he was called. This was on a Saturday. He went there in the company of his expectant wife which showed that he did not expect to be detained. The Captain failed to exercise his discretion and opted to lock him up when he could have simply issued him with a notice to appear in court on the next court appearance. There was no justification to have him detained on Saturday and Sunday his arrest was accordingly unlawful.
- [76] When the Plaintiff appeared in court on Monday despite submission and representation from his attorney the Police opposed bail on the basis that they still wanted to confirm if the Plaintiff was a South African as well as to confirm his residential address. The Police laid no basis for this stance. The fact that they had left a message at his house and he responded, should have indicated to the police that he does have a place of permanent residence, and is not a flight risk.
- [77] Secondly the Plaintiff is known to the complainant they have been working together for a long time. He could be a source of information to the police that he is a South African citizen and not a flight risk.
- [78] I am accordingly satisfied that the arrest and detention of the Plaintiff for the period 7th October 2017 to 17th October 2017 was unlawful.

GENERAL DAMAGES

- [79] The Plaintiff is claiming an amount of R400 000.00 (Four Hundred Thousand Rand) which he says is for emotional shock. In my view this is an unnecessary splitting of issues. General damages in this instance will include emotional shock, discomfort, injured feelings, and deprivation of personal liberty.
- [80] What is in issue before me now is to determine what amount is appropriate to compensate the Plaintiff for the wrongful arrest and detention.
- [81] It is common cause that the arrest of the Plaintiff in the presence of his wife was most unceremonious and hurtful. The arrest was given publicity in the Sowetan Newspaper which is widely read in the Gauteng area. Even though he was not mentioned by name people who know him were able to immediately connect him with the article in the Sowetan Newspaper.

[82] The Plaintiff did not in his evidence describe the conditions of the cell in which he was detained at Brixton police station. He told the court that it was the first time that he had been arrested. He also did not tell the court the conditions under which he was held at the Correctional services save to say that he found himself in the presence of strangers. It is also correct that when he was taken to court on the Monday his legs were chained. These I believe must have saddened him that it happened in the presence of his attorney as well as his parents. I can think of no worse humiliation than what happened to the plaintiff on that day.

[83] The plaintiff was deprived of his liberty for a period of ten (10) days on the evidence before me during his detention he suffered no further degradation beyond that inherent in being arrested and detained. I have no doubt that the experience was traumatic and caused him great distress. Both clinical Psychologist in their joint report attest to this and have recommended sessions of therapy.

[84] Nugent JA in the matter of Minister of Safety and Security vs Seymour 2006 (6) SA 320 at paragraph 17 said the following:

“The assessment of awards for general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and a few cases are directly comparable. They are useful guides to what other courts have considered to be appropriate but they have no higher value than that.”

[85] The Plaintiff in his evidence says it is not about money all that he wants is that justice must be done.

[86] Having taken all the circumstances into consideration I have come to the conclusion that an appropriate sum for general damages is the amount of R500 000.00 (Five Hundred Thousand Rand).

PAST LOSS OF INCOME

[87] The claim in respect of the Murovhi Branding business has not been proved and is accordingly disallowed.

[88] As regards past loss of earnings between December 2017 and June 2018 the Plaintiff has conceded that he freelanced and received income as indicated in his bank account. He agrees that the difference between what he earned whilst freelancing and what he would have earned had he been with the company Tshedza is shortfall and he is entitled to receive that.

[89] It is common cause that had he not been arrested he would for the period December 2017 to May 2018 have received an amount of R360 000.00 which is made up of R60 000.00 per month for six months. He only received the following amounts:

R40 500.00 from PEU Solution on 14 December 2017

R40 500.00 from PEU Solution on 12 February 2018

R10 125.00 from PEU Solution on 06 March 2018

R 40 500.00 from PEU Solution on 28 March 2018

R 3 400.00 from The River on 31 March 2018

R 12 000.00 from The River on 09 April 2018

R 15 600.00 from The River on 26 April 2018

R 20 250.00 from PEU Solution on 30 April 2018

R 24 000.00 from The River on 07 May 2018

R 30 375.00 from PEU Solution on 28 Mary 2018

Total R237 250.00 Total

[90] The amount of R237 250.00 must be deducted from the R360 000.00 which leaves an amount of R122 759.00 which represents his loss or shortfall as he the Plaintiff puts it.

THE FUTURE LOSS OF EARNINGS

[91] The Plaintiff has succeeded to be employed after his release albeit as he says by people who knows him. He resigned his recent employment at PEU because he wants to start his own production company ultimately and believes that his position at PEU stifles his growth. I am not persuaded that by not receiving responses from prospective employers to whom he had sent CVs is because of the arrest incident. It could be for economic or other facts related to the industry.

He is an experienced TV production manager and was able to be employed by a Durban Company that paid him much more than what he was getting at Tshedza. His claim for future loss of earnings must fail.

[92] In the result judgment is granted in favour of the Plaintiff and the Defendant is ordered to pay the Plaintiff the following amounts:

i) R500 000.00 (Five Hundred Thousand Rand for general damages)

R18 000.00 (Eighteen Thousand Rand being for Psychological Therapy sessions)

R122 750.00 (Past Loss of Earning)

Total R640 750.00 Total

ii) The Defendant is further ordered to pay the Plaintiff's taxed costs which costs shall include the costs of Counsel and all the experts.

DATED at JOHANNESBURG this the 17 day of June 2021.

M A MAKUME

JUDGE OF THE HIGH COURT

DATE

: 03 MAY 2021

DATE OF JUDGMENT : 15 JUNE 2021

FOR PLAINTIFF : ADV MA TSHIVHASE

INSTRUCTED BY : MAMATHUNTSHA INCORPORATED

FOR DEFENDANT : ADV K. MTHETHWA

INSTRUCTED BY : OFFICE OF THE STATE ATTORNEYS

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