

SOUTH AFRICA / JUDGMENT

Pholo v Minister of Police (687/2021) [2024] ZANWHC 203 (5 August 2024)

[2024] ZANWHC 203**COURT**

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

687/2021

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Source record**Latest****amended version: 12 September 2024****IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NUMBER: 687/2021****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional

Magistrates: NO

Revised: YES

In the matter between: -

MODISE

SAMUEL PHOLO

Plaintiff

and

THE

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 05 August 2024.

ORDER

(1)

The arrest and detention of the plaintiff on 23 October 2019 to 11 May 2020 was unlawful.

(2)

The defendant shall pay an amount of R725 000.00 for damages suffered by the plaintiff as a result of his unlawful arrest and detention.

(3)

The defendant shall pay an amount of R154 180.40 for future medical expenses in respect of the plaintiff.

(4)

The defendant shall pay interest on the amounts in (2) and (3) above, at the prescribed legal rate, from date of demand to date of payment.

(5)

The defendant shall pay the costs of suit on a party and party scale as prescribed in the High Court tariff.

JUDGMENT

MFENYANA J

Introduction

- [1] The plaintiff sued out a summons against the defendant for damages arising from his alleged arrest and detention by employees of the defendant on 23 October 2019 to 11 May 2020.
- [2] In the particulars of claim, the plaintiff alleges that he was arrested by captain Motsumi, Sergeant Mothebe and Constable Rampai. He was subsequently detained at the Wolmaranstad police cells until his appearance in court on 25 October 2019. On that day, the case was postponed for further investigation, and thereafter further postponed several times. At that stage, the plaintiff had been transferred to the Potchefstroom prison where he was further detained until his release on 11 May 2020.
- [3] The plaintiff further alleges that he applied for bail twice, but both applications were refused by the magistrates' court in Wolmaranstad.

The charges against him were subsequently withdrawn on 11 May 2020 and he was released from custody.

- [4] He claims an amount of R3 000 000.00 (three million rand) for his arrest and detention, made up of an amount of R1 100 000.00 (one million one hundred thousand rand) for unlawful arrest and detention spanning 200 days, and R1 900 000.00 (one million nine hundred thousand rand) for contumelia, including emotional and psychological trauma, loss of employment and freedom, inconvenience, humiliation and injury to dignity.
- [5] Despite entering appearance to defend and filing a plea, the defendant was not in attendance at the trial. The defendant's plea incorporates two special pleas. The first special plea is to the effect that the plaintiff did not comply with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act (the Act)[1] which requires the plaintiff to serve on the defendant, a written notice of his claim within six months "of the delictual occurrence". The second is that the plaintiff failed to comply with the State Liability Act and the Judicial Matters Amendment Act[2] in that it failed to serve the summons on the provincial commissioner, and / or the regional branch of the defendant, and the office of the state attorney within five days.
- [6] It is common cause that the statutory notice in terms of section 3 of the Act was served on the defendant on 13 October 2020. The undisputed evidence of the plaintiff is that he was released from custody on 11 May 2020. The notice was thus delivered within a period of six months from the date on which the debt became due.
- [7] As regards the second special plea, it is common cause that the defendant represented by the office of the state attorney, on 9 June 2021 served its notice of intention to defend on the plaintiff's attorneys of record. The plaintiff's contention, in resisting this contention by the defendant is that the summons was served on the provincial commissioner, the national commissioner, and the office of the state attorney. The plaintiff further averred that nothing turns on this point as the defendant was represented and took part in the litigation. For this proposition, Ms Smit, counsel for the plaintiff referred this court to the decision in Minister of Police and Others v Samuel Molokwane[3] where the Supreme Court of Appeal (SCA) noted:

"(The purpose of s 2(2) of the State Liability Act) especially the requirement that a summons must be served on the State Attorney within seven days after it was issued, is clearly to ensure that the relevant 'executive authority' (the Minister in this case) is afforded effective legal representation in the matter by the State Attorney. If the State Attorney provides such legal representation, in any manner whatsoever, despite it not having been served by the sheriff within seven days of the process commencing such proceedings, this purpose would have been served..."[4]

- [8] This, in my view, disposes of the defendant's contention that the summons was not served on the state attorney. With regard to the remainder of the second special plea, there is no merit to it. It appears to be as a result of a conflation by the defendant of the provisions of the Act, and the State Liability Act in so far as it relates to section 3 of the Act.

- [9] The plea in itself is essentially a bare denial and sheds no light on any defence raised by the defendant.
- [10] The plaintiff's discovery affidavit was filed on 19 October 2021 followed by the defendant's discovery affidavit on 11 January 2022. On 17 January 2022 the plaintiff delivered a notice in terms of rule 35(3) for the defendant discover additional documents pertaining to case number 144/2019, Wolmaranstad, the police docket for MAS 144/02/2019, and detention records of the plaintiff at Potchefstroom prison, police cells, as well as the Orkney police cells.
- [11] There is no indication that the defendant reacted to the plaintiff's notice in terms of rule 35(3). The defendant further did not respond to a request for a pretrial conference. The matter was subsequently brought for judicial case management in accordance with rule 37(8) of the Uniform Rules of Court and was certified trial ready. A trial

date was thereafter allocated.

Evidence

- [12] When the trial was called there was no appearance for the defendant. On behalf of the plaintiff, two witnesses testified; the plaintiff himself, and Ms Moyra Tsambos, a clinical psychologist who assessed the plaintiff.
- [13] The plaintiff testified that on 23 October 2019 he reported at the Wolmaranstad police station to sign in as he had been granted bail in a different matter, in accordance with his bail conditions in that matter. Upon arrival, he was assisted by sergeant Thipe (Thipe), who informed him that he could not find the document he was required to sign, and we go and look for it. He later informed him that the station commander wanted to see him. He was later confronted by sergeant Rampai (Rampai) who informed him that there was another docket against him. When he asked Rampai what he was referring to, Rampai told him, "You know what you have done". It was at that stage that Rampai arrested him. When he asked why he was being

arrested, Rampai told him that he knows too much. He did not explain anything further, and did not inform him of his constitutional

rights. He was later taken to the holding cells where he was detained. He was arrested and detained without a warrant. On 25 October 2019 he appeared at the Wolmaranstad magistrates' court. This was the first time he learnt of the charges against him. Approximately seven days thereafter, he made an application to be admitted to bail but this was refused as he had a pending case against him. This was also the first time that he learnt that he had been charged with fraud.

- [14] Describing what unfolded in court on or around December 2019 when he made a second attempt to be admitted to bail, the plaintiff told the court that the state opposed bail. Rampai deposed to an affidavit in which he stated that the plaintiff had nine pending cases against him. According to the plaintiff, this was not true as he knew of one pending case. He testified that although his legal representative required Rampai to testify, but Rampai left the courtroom and never returned. Bail was refused.
- [15] Regarding the condition of the cell and the circumstances of his detention at Wolmaranstad police station, the plaintiff testified that the cell was about 3 metres in size. There was a total of 18 inmates occupying the cell. He further testified that he could not sleep as the cell was congested and resorted to sitting on chairs until he fell asleep, as he was not used to being in a such a place. He had no mattress and had no blanket. The cell was dirty and not habitable. The toilet was leaking to an extent that the water flowed to where they were sleeping. It was further the plaintiff's testimony that there was no shower in the cell, and they were bathing from containers.
- [16] Regarding the food, the plaintiff testified that all he ate was bread and tea, in the morning and evening, which at times was not enough. He further testified that all he did was sit and eat as there was nothing else to do. There was no reading material and no gym equipment for him to exercise.
- [17] The plaintiff further testified that he was later transferred to the Potchefstroom prison although he could not recall the date of his transfer. He testified that although the cell there was bigger, it was occupied by 62 inmates. At the Potchefstroom prison he slept on the floor for a period of two months as he was bullied by other inmates who told him to sleep on the floor. He testified further that he was bullied and instructed to perform chores like sweeping, mopping and polishing the floor. He also had to clean the bathroom and the toilet. Further according to the plaintiff, both the toilet and the bathroom had no doors. Thus he enjoyed no privacy. He related an incident which took place one of the day he was cleaning the cell, where one of the inmates pressed an electric wire against the metal frame of the beds, electrocuting the plaintiff. He testified that he was saved by another detainee, who kicked him away from the bed.
- [18] He further testified that they were fed soft porridge for breakfast which he did not eat at first, but ended up eating it as the days went by. For lunch, the plaintiff testified that they were given pap and soup and sometimes, meat and 4 slices of bread. He stated that the food was served in front of the door of their cell, so he ate inside the cell. He was allowed 30 minutes of exercise.
- [19] It was further the plaintiff's testimony that when the national lockdown took place due to COVID-19, he was still in detention. He stated that they did not observe any social distancing as the cell was full. They also had no masks and no sanitizers.

- [20] In respect of the circumstances leading up to his release on 11 May 2020, the plaintiff testified that he phoned his wife at 14h00. On that day, his wife told him that she had received a 'letter' informing her to go to the Potchefstroom prison to fetch the plaintiff. The 'letter' appears to be a page from the charge sheet as well as the warrant of liberation. In the documents it is indicated that the state withdraws the charges against the plaintiff in his absence and authorised his release from custody. He testified that to date, he has no knowledge of the details of the fraud he was alleged to have committed.
- [21] Lastly the plaintiff lamented his treatment by the police, that they did not treat him fairly, including the false information provided by Rampai in his affidavit in opposing the bail application. He further lamented the fact that when Rampai realised that the plaintiff was represented in the bail proceedings, he abandoned the proceedings despite the fact that he was the investigating officer in the matter.
- [22] Ms Moyra Tsambos (Tsambos) testified that she is the clinical psychologist who examined the plaintiff on 14 July 2023. She testified that the plaintiff suffers from post-traumatic stress disorder (PTSD) with comorbidity of major depressive disorder (MDD). She described PTSD as a near death experience which causes the victim to be traumatised, whereas MDD is characterized by low mood for a period of up to two weeks, accompanied by loss of interest in normally enjoyable activities and low energy.
- [23] According to Tsambos no symptoms prior to the incident were reported. She testified that the fact that the symptoms were still present at the time of her assessment of the plaintiff on 14 July 2023, three years after the plaintiff's arrest and detention, signified the severity of its impact on the plaintiff.
- [24] In her report, which was admitted into evidence as an exhibit, Tsambos recorded that the plaintiff had no psychotic features. However he presented with feelings of suspicion, and anxiety, and portrays constant signs of consternation and a high degree of bitterness and ambiguity. She recommended a future course of psychotherapy sessions for a period of 20 months, at an estimated cost of R39 000.00. She further recommended that the plaintiff be referred to a specialist psychiatrist for specific pharmacological treatment for post-traumatic stress disorder. She estimated the costs of psychiatric treatment at R49 000.00 for 20 sessions and approximately R66 180.40 for prescription medication.
- [25] In the amended particulars of claim the plaintiff included damages suffered by the plaintiff for future medical expenses in respect of psychotherapy, pharmacotherapy, and related prescription medication as recommended by Ms Tsambos.
- [26] Rule 39(1) of the Uniform Rules of Court states:

"If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he had discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders."

[27] This court should determine whether the plaintiff has, on a balance of probabilities, made out a case for its claim against the defendant. Having said that, it is trite that the onus to prove the lawfulness of the arrest rests with the defendant. There is no duty on the plaintiff to prove the unlawfulness of his arrest. In this regard, citing the Appellate Division (as it was then known) in *Minister of Law and Order v Hurley and Another*[5], counsel on behalf of the plaintiff submitted that:

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

[28] Quite aptly in my view, it was further averred for the plaintiff that ‘every interference with physical liberty is prima facie unlawful.’[6] This is a constitutional imperative, that the defendant, having prima facie violated a constitutional right of the plaintiff, ought to be saddled with the responsibility of proving that the seeming violation was justified in law. To hold otherwise would be tantamount to placing a duty on the plaintiff to demonstrate why his constitutional rights ought not be infringed.

[29] In the absence of any evidence by the defendant, and the undisputed evidence by the plaintiff, it follows that the evidence of the plaintiff should stand. There was thus no justification for the plaintiff’s arrest and detention.

Determination

of damages

[30] In determining an appropriate amount of damages to be awarded, the court is granted a wide discretion. As wide as the court’s discretion may be, the court is enjoined to exercise its discretion judicially within the available evidence and the prevailing circumstances of each case. It should on that basis determine whether the plaintiff has discharged the onus which rests upon it. Each case is therefore to be decided on its own facts.

[31] Contending that an amount of R3 154 180.40 is justified, the plaintiff places reliance on various decided cases of this division and beyond. He avers that as his arrest and detention was unlawful, and constitutes a deprivation of his constitutional right to liberty, “the amount of satisfaction is in the discretion of the court and calculated ex aequo et bona.” It is the plaintiff’s submission further that factors such as inter alia, the presence or absence of improper motive or malice on the part of the defendant, the harsh conduct of the defendants, the duration and nature of the deprivation of liberty, the effect the award may have on the public purse, bearing in mind that the actio iniuriarum also has a punitive function.

[32] The plaintiff relies on the decision of the SCA in *Diljan v Minister of Police*[7] in which the SCA was awarded an amount of R120 000.00 arrest and detention lasting 3 days.

[33] In *Motladile v Minister of Police*[8] the SCA awarded R200 000.00 for unlawful arrest and detention lasting 5 days. In *De Klerk v Minister of Police*[9] the Constitutional Court (CC) awarded the plaintiff R300 000.00 for unlawful arrest and detention spanning 9 days. In *Woji v Minister of Police*[10] the plaintiff was awarded R500 000.00 for arrest and detention spanning 13 months. In *J E Mahlangu and Another v Minister of Police*[11] the CC awarded an amount of R500 000.00 where the plaintiffs were detained for a period of 8 months and 10 days in ‘unpleasant’

circumstances. It was pointed out on behalf of the plaintiff that the CC added in that matter that ‘no amount of compensation can undo the humiliation and human rights violations suffered by the applicants’. I align myself with these sentiments.

[34] What these decisions demonstrate is that there cannot be a no ‘one size fits all’ approach to the determination of damages, and that each case ought to be viewed within the parameters of its own peculiar facts. By themselves previous awards only serve as a useful guide and have no higher value than that.

[35] In the circumstances of the present case, it bears mentioning that the police officers who arrested the plaintiff did so under false pretences, and opted to trick him into following them, only to detain him. This they did without offering so much as an explanation for the offence he was alleged to have committed. This flies in the face of the transparency and guarantees enshrined in section 12 of the Constitution that everyone has the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. Thereafter, he was detained for 6 months and 19 days.

[36] The evidence of Tsambos, and her medico-legal report detail the effect of the incarceration on the plaintiff, in the short term and in the long term. Her evidence provides a sneak peek into the negative impact of the arrest and detention on the plaintiff, the extent of which can never be fathomed with much certainty.

[37] In considering a fair amount of damages, it is apposite to state that the heads of damages as claimed by the plaintiff overlap to some extent. Deprivation of freedom is a consequence of the plaintiff’s arrest detention and therefore not divisible. 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.[12]

[38] Ultimately, the purpose of a damages award is not to enrich the plaintiff, but to provide the necessary solatium for the infraction on his rights. In *S v Tyulu*[13] the SCA 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.”[14].

- [39] The court should seek to strike a balance and ‘not out pour largesse from the horn of plenty’[15]. The court must take care to see that its award is fair to both sides.[16] All relevant factors should be weighed up against each other, considered holistically, and balanced to whatever extent it may be possible, in order to arrive at an award that would be fair to both parties.
- [40] Taking into account the specific circumstances of this case, the previous awards, as well as the time-value of money, I consider an amount of R725 000.00 for the unlawful arrest and detention of the plaintiff to be reasonable in the circumstances.
- [41] There is nothing in the circumstances of this matter, and ex facie the pleadings to suggest that the magistrates’ court is incompetent to deal with this matter. This is notwithstanding the fact that unlawful arrest and detention is an invasion of a person’s constitutional right to liberty. The amount claimed by the plaintiff, which could, arguably, attract the monetary jurisdiction of this court, was in my view overinflated. The matter is not complex and could have been determined in the magistrates’ court. The amount of damages awarded also falls within the jurisdiction of the magistrates’ court.

Order

- [42] In the result, I make the following order:
- (4) The defendant shall pay interest on the amounts in
 - (2) and (3) at the applicable interest rate, from date of judgment to date of payment.
 - (5) The defendant shall pay the costs of suit on the magistrates’ court scale.

Postea

- [43] Consequent upon the handing down of the judgment on 5 August 2024, it was brought to my attention by the correspondent attorneys for the plaintiff that paragraph [41] of the judgment inadvertently records that the “the amount of damages awarded ... falls within the jurisdiction of the magistrates’ court.” This is not the case.
- [44] It is apparent from the Order, and the content of the judgment that the amount awarded exceeds the jurisdiction of the Magistrates’ Court. Consequently, paragraph [41] of the judgment is patently incorrect.
- [45] The incidental order as stipulated in order [5] is similarly incorrect.
- [46] It was further brought to my attention that the order erroneously granted interest from date of judgment. Patently the plaintiff prayed for interest a mora temporae. Indeed, in his letter of demand the plaintiff put the defendant in mora to pay interest from date of demand. This aspect erroneously escaped the court’s mind when judgment was handed down and ought to be corrected.

[47] I am indebted to the legal representatives for the plaintiff for pointing out these discrepancies in their correspondence.

[48] Rule 42(1)(b) of the Uniform Rules of Court confers power on this court to ‘in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) ...

(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission “

[49] Consequently, I proceed to correct the error in the above judgment, by:

(i) expunging paragraph [41] therefrom in toto.

(ii) correcting order [4] to the extent of the error.

(iii) correcting order [5] to the extent of the error.

[50] In the result, I make the following order:

(4) The defendant shall pay interest on the amounts in paragraphs (2) and (3) above, at the prescribed legal rate, from date of demand to date of payment.

S MFENYANA

JUDGE OF THE HIGH COURT

APPEARANCES: For the plaintiff : D Smit Instructed by : HG Aucamp Attorney c/o Nienaber & Wissing Attorneys Email :stefani@hgaprok.co.za For the defendant : No appearance Date Reserved : 20 February 2024 Date of Judgment : 05 August 2024 Date corrected : 10 September 2024

[1] Act 40 of 2002.

[2] Act 8 of 2017.

[3] (730/2021)

[2022] ZASCA 111 (15 July 2022).

[4] Paragraph 18.

[5] 1986

(3) SA 568 (A).

[6]Zealand v Minister of Justice and Constitutional Development

[2008] ZACC 3; 2008

(2) SACR 1 (CC).

[7] (746/2021)

[2022] ZASCA 103 (24 June 2022).

[8] (414/2022)

[2023] ZASCA 94 (12 June 2023).

[9] (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019).

[9] (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC);
2021 (4) SA 585 (CC) (22 August 2019).

[10] 2015

(1) SACR 409 (SCA).

[11] [2021] ZACC 10.

[12] J E Mahlangu and Another v Minister of Police fn.9 supra, paragraph 25.

[13] 2009

(5) SA 85 (SCA).

[14] Paragraph 93D.

[15] Pitt v Economic Insurance Ltd 1957 (3) SA 284 (D).

[16] Paragraph 287E – F.

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