

SOUTH AFRICA / JUDGMENT

September v Minister of Police (2054/2021) [2024] ZANWHC 272 (22 October 2024) [2024] ZANWHC 272

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana

CASE / FILE NUMBER

2054/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL

DIVISION, MAHIKENG

CASE

NO: 2054/2021

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In the matter between: -

SIYABULELA

SEPTEMBER

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 time and date for hand-down are deemed to be 22 October 2024 at 14h00.

ORDER

i)

The arrest and detention of the plaintiff from 19 July 2016 to 2 March 2020 was unlawful.

ii)

The defendant is liable for payment of the plaintiff's damages for his unlawful arrest and detention in the sum of R2 200 000.00.

iii)

The defendant shall pay interest on the aforesaid amount of R2 200 000.00 at the prescribed legal rate calculated from date of demand to date of payment.

iv)

The defendant shall pay the costs of suit on a party and party scale.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] This is an application for default judgment against the defendant, sued in his official capacity as the executive head for the South African Police Service (SAPS). The plaintiff instituted proceedings

against the defendant for damages arising from his alleged arrest and detention by members of the SAPS on 19 July 2016 until 2 March 2020.

[2] The summons was served on the defendant on 18 November 2021, and at the office of the state attorney on 24 November 2021. On 1 December 2021 the plaintiff served the summons on the provincial commissioner

for the SAPS.

[3] Prior to instituting the proceedings, the plaintiff on 8 July 2021 served a notice in terms of section 3(1)(a) of the Institution of Proceedings Against Certain Organs of State Act (the Act) [1].

[4] On 24 January 2022 the office of the state attorney, acting on behalf of the defendant, entered appearance to defend. The dies for delivering a plea expired on 21 February 2022.

- [5] On 3 March 2022 the plaintiff served a notice of bar in terms of rule 26, for the defendant to file its plea within five days. The five days stipulated in the notice of bar for filing a plea expired on 10 March 2022. The defendant did not deliver a plea.
- [6] The notice of set down for default judgment was served on the defendant on 18 October 2023 despite the fact that the defendant had not filed its plea. The service of the set down as well as the index,

and a further notice stipulating that evidence would be led at the hearing of the matter did not prompt the defendant to respond.

- [7] The plaintiff now seeks judgment for payment of an amount of R3 000 000.00, interest thereon, and costs of suit.

FACTS

- [8] Although the particulars of claim are not a model of clarity, the essence of the plaintiff's case is that on 19 July 2016, and at Jouberton, he was arrested and detained by members of the defendant

without a warrant. He was charged for possession of unlicensed firearm and ammunition.

- [9] The plaintiff pleads that his arrest was wrongful and unlawful as it was without just cause as there were no reasonable grounds for the police officers to suspect that he had committed the offence of possession of unlicensed firearm and ammunition and suspected stolen property.

- [10] As for his detention, the plaintiff avers that the police officers failed to properly apply their minds as to whether or not the interests of justice permitted that he be released from detention. The particulars of claim are silent on the particulars of the arrest.

- [11] It is further pleaded that as a result of the plaintiff's wrongful arrest and detention, his corpus, fama and / or dignitas were infringed. The plaintiff alleges that further as a result of his wrongful arrest and detention, he experienced discomfort, fear, anxiety, emotional shock and loss of basic amenities of life, which continues to experience. He further alleges that he has been inconvenienced by the conduct of the members of the defendant, and that he experiences feelings of hopelessness and despair as his occupational, social and domestic activities have been compromised.

- [12] A larger part of the particulars of claim are devoted to pleading the law and setting out the applicable constitutional and legal framework.

- [13] In the notice in terms of section 3 of the Act the plaintiff states that on 19 July 2016 he was arrested in Jouberton without a warrant on a charge of possession of an unlicensed firearm and ammunition.

[14] It is further stated that on the day of his arrest the plaintiff was travelling in a taxi with five other people when they were followed by a bakkie. Gunshots were fired and one of the passengers in the taxi fled. According to the plaintiff, he was on his way to church when the incident occurred. He did not see any firearm or ammunition in the taxi. He was arrested and detained until 2 March 2020. He testified that the police officers did not inform him why he was being arrested until he got to the police station. It is then that they informed him that they found firearms in the taxi he was travelling in. He was charged with unlawful possession of firearms and ammunition as well as business robbery. Although he, the driver, and the other passengers informed the police officers that they had no knowledge of any weapons or ammunition, the police simply ignored

them and proceeded to arrest them.

[15] He was detained at Jouberton police cells until the next day. He appeared in court whereafter he was transferred to Klerksdorp prison and further detained for a period of seven days. On his second appearance he was informed that he had a right to apply for bail. The police opposed bail. He remained in prison for a period of nine months. He was later transferred to Potchefstroom prison and detained there for approximately three months before he was sent back to Klerksdorp prison until his release on 2 March 2020.

[16] The plaintiff further testified that he appeared in court and was acquitted on all charges.

[17] In the heads of argument submitted on behalf of the plaintiff it is submitted that there were no reasonable grounds to justify the plaintiff's arrest and detention. It is further submitted that the plaintiff's prolonged detention of over 3 years was not only unlawful but also unnecessary.

[18] Relying on the decision in *Le Roux v Minister of Safety and Security* and another[2] the plaintiff submits that the arresting officer was required to exercise caution when depriving him of his liberty without a warrant and exercise their power to arrest in accordance with established constitutional principles.

[19] In respect of quantum the plaintiff avers that during his arrest he informed the police officers that he was not involved in any criminal activity and had no knowledge of such incident, but the police ignored him. He further stated that he was detained in an overcrowded cell at Jouberton police station and shared a prison cell with various people as some were released and others brought in. Some appeared to be members of dangerous gangs. He further testified that he did not have sleep peacefully for the duration of his incarceration as he was sleeping on the cement floor due to overcrowding and had to always be on guard.

[20] Regarding the condition of the cell, the plaintiff testified that the cells in general were poorly maintained and were dirty; there was a foul smell which was exacerbated by the fact that some detainees opted not to shower as there was no hot water; there was only one toilet for all of the detainees; some of the detainees smoked unknown substances which caused irritation to his eyes.

[21] The plaintiff testified further that the food was tasteless and not enough. He stated that he sometimes went on for several days without food as some of the detainees forcefully took his food. He testified further that he was traumatised by his detention and suffers from “stress”. He further stated that the incident has left him scarred emotionally and financially and his life will never be the same. The plaintiff expressed lack of respect and trust respect for the SAPS because of the incident, stating further that it would take a long time before he regains respect for the police.

testified that he was unemployed at the time of his arrest and remains unemployed.

[22] It was argued on behalf of the plaintiff that the members of the defendant failed to consider less invasive methods of bringing the plaintiff before court.

DISCUSSION

[23] At the outset, it must be stated that the plaintiff’s particulars of claim are not a model of clarity and are scanty on the facts of the arrest. A larger part thereof is devoted to pleading law and not facts. This is bizarre. It is an established principle that facts, and not law, should be pleaded. There is simply no reason for the legal representative to recite the law in particulars of claim as this is a preserve for counsel in argument. The plaintiff can

however take comfort in the fact that pleadings must be read as a whole. That being the case, the cause of action is discernible in the plaintiff’s particulars of claim as they stand. It is however imperative to stress that the elaborate legal exposition in the particulars of claim is absolutely unnecessary and runs the risk of rendering the summons excipiable.

[24] What is apparent from the facts of this matter as outlined by the plaintiff, is that the police officers provided no plausible explanation for the arrest. The defendant having elected not to file a plea, the evidence of the plaintiff stands undisputed. What is even more concerning is the lengthy period for which the plaintiff remained in detention. No explanation has been provided why it was considered necessary to detain the plaintiff for a period of over 3 years.

[25] The plaintiff has discharged the onus of proving on a balance of probabilities that there were no reasonable grounds for his arrest and detention. The deprivation of the plaintiff’s liberty is not only unlawful but also objectionable in these circumstances.

[26] Consequently, the defendant is liable for 100% of the plaintiff’s agreed or proven damages arising from his unlawful arrest and detention.

- [27] In respect of quantum the plaintiff claims an amount of R3000,000.00. it is trite that an award for damages is not to enrich the plaintiff, but to provide a solatium for the infraction on his rights. Such infractions go against the spirit of the Constitution which guarantees inter alia, the right to personal liberty.
- [28] In *S v Tyulu*[3] the Supreme Court of Appeal (SCA) cautioned that the courts should ensure that the awards they make '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'. The court should seek to strike a balance and take care to see that its award is fair to both sides. As Holmes J stated in *Pitt v Economic Insurance Ltd*[4] the court 'must give just compensation to the plaintiff but must not pour out largesse from the horn of plenty at the expense of the defendant.'
- [29] It is also so that as distressing as these sorts of cases often are, in *Hulley v Cox*[5] Innes CJ warned that the courts should not allow their 'sympathy for the claimants in this very distressing case to influence their judgment'. The award should be fair, not just to the plaintiff, but also to the defendant. In order to achieve this the court should take into account the specific circumstances of each case and exercise its discretion in a manner that seeks to provide the necessary solace to the claimant for the infringement of their rights, while sending a message to the defendant that such wanton disregard for the rights of others will not be tolerated by the courts.
- [30] In this case the plaintiff was 39 years old at the time of the arrest. The arrest took place when he was going about his own business on his way to church. As it was submitted on behalf of the plaintiff, the deprivation of his liberty was arbitrary. Members of the defendant took no care to enquire into the circumstances of the alleged offence and the plaintiff's involvement, if any.
- [31] The duration of the plaintiff's detention endured for a period of three years and seven months. This makes a mockery of the constitutional gains and the seriousness with which the Constitution view the deprivation of liberty.
- [32] I take note of the plaintiff's evidence that he remains traumatised by the incident. In the absence of any medical evidence to that effect, the extent of his trauma cannot be determined. There can however be no doubt that any detention and deprivation of rights in the a manner as arbitrary as what the plaintiff endured would have a negative impact on any person.
- [33] In arriving at a fair award, it is trite that no two cases are the same. Previous awards have no higher value, than to serve as a guide of what the various courts have considered reasonable in like circumstances of those cases.
- [34] In *Mtolo v Minister of Police*[6] the court in Pietermaritzburg awarded the plaintiff an amount R3 367 300.00 for arrest and detention of two years and

eight months on charges of housebreaking and theft of a motor vehicle. The plaintiff's bail was refused, and he remained in custody. Eighteen months later the charge of housebreaking was withdrawn. He remained in custody for the theft of a motor vehicle

when he had in fact been arrested at his house. The theft charge was only withdrawn a year later. He appeared in court approximately 37 times. On his arrival in prison he was made to strip naked and jump around in front of prison warders and other inmates. It stands to reason that this decision is distinguishable from the present case.

[35] In *Maghoti and Another v Minister of Police*[7] this Division per Djae DJP awarded an amount of R1 000 000.00 to the plaintiff for arrest and detention of eighteen months.

[36] In *Diljan v Minister of Police*[8], in awarding R120 000.00 arrest and detention of three days the SCA noted as follows:

"...A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes

awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be "thumb-sucked" without due regard to the facts and circumstances of each case. Practitioners ought to know the reasonable measure of previous awards, which serve as a barometer in quantifying their clients' claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above."

[37] In the present matter the plaintiff was not informed of the reason for his arrest until he was taken to the police station. What is striking is that the police paid no regard to the plaintiff's rights for the entire duration of his detention. No evidence was provided that they made any attempts bring him before court. There can be no doubt in the circumstances that the members of the defendant flagrantly disregarded the plaintiff's right to liberty.

[38] In the result I make the following order:

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the plaintiff : Adv J Du Bruin Instructed by : Rinnie Benade Roux Attorneys Orkney c/o Van Rooyen Tlhapi Wessels Tel: 018 381 0804 Email : litigation@vtwinc.co.za c/o Loubser-Ellis Attorneys
For the defendant : No appearance Date reserved : 27 May 2024 Date of judgment : 22 October 2024

[1] Act 40 of 2002.

- [2] 2009
- (4) SA 491 (N).
- [3] 2009
- (5) SA 85 (SCA).
- [4] 1957
- (3) SA 284 (D).
- [5] 1923 AD 234.
- [6] (10144/2015)
- [2023] ZAKZPHC 86; 2024 (1) SACR 317 (KZP) (23 August 2023).
- [7] Unreported: Case No. KP407/2018 NWHC (handed down on 07 July 2022).
- [8]
- (746/2021) [2022] ZASCA 103 (24 June 2022).

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