

SOUTH AFRICA / JUDGMENT

Skosana v Minister of Police (391/2019) [2021] ZANWHC 79 (23 November 2021)

[2021] ZANWHC 79**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

391/2019

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IN THE NORTH WEST

HIGH COURT, MAFIKENG

CASE

NO: 391/2019

In the matter

between:

THABANG

EMMANUEL SKOSANA

Plaintiff

and

MINISTER

OF

POLICE

Defendant

DATE

OF HEARING

:

28 OCTOBER 2021

DATE

OF JUDGMENT

:

23 NOVEMBER 2021
FOR
THE PLAINTIFF
:
ADV. MOLOTO
FOR
THE DEFENDANT
:
ADV. MADLANGA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 23 NOVEMBER 2021.

ORDER

- (i) The arrest and detention of the plaintiff for approximately one (1) hour in a police motor vehicle was unlawful.
- (ii) The defendant is ordered to pay an amount of R5 000.00 (five thousand rand) as compensation to the plaintiff for the unlawful arrest and detention.
- (iii) The defendant is ordered to pay interest on the amount of R5 000.00 (five thousand rand) at the prescribed rate of 7.75% from the date of this judgment until date of final payment.
- (iv) The defendant is ordered to pay the costs of suit on a party-and-party basis on the Magistrate Court scale.

HENDRICKS DJP

- [1] The plaintiff, Emmanuel Skosana, instituted an action for damages resulting from unlawful arrest and detention as well as assault. The amount of damages claim is R1, 2 million. At the inception of the trial the defendant accepted liability for the unlawfulness of the arrest and detention however, the assault was disputed. The plaintiff, his mother and the medical practitioner Dr. Makome, testified in the plaintiff's case.
- [2] Their evidence can be succinctly summarized as follows: According to the plaintiff, he was at his place of abode on the 28th day of June 2017. He planned to wash his clothes. Outside the house was his father David Skosana and his friend, Maja. A contingency of police officers arrived in a Quatum motor vehicle. They were looking for Maja. His father David pointed out Maja to the police officers. The police officers assaulted Maja and his father.

- [3] The police officers also questioned him about a firearm. He denied any knowledge of a firearm. They then searched the house but could not find any firearm. They then assaulted him too. Another police van arrived and ultimately they were handcuffed and loaded into the police motor vehicles. He was in the back of the van, whilst his father David and Maja were placed inside the Quantum. They then drove off.
- [4] They were taken to Slovopark where they were again assaulted. Ultimately, they were taken to Odi hospital for Maja to receive medical treatment. In the parking area at Odi hospital, he was again assaulted. He was then taken home. The police informed him that he should remain at home the following day because they will come and fetch the firearm which he admitted that he know where it is.
- [5] The following morning, on 29th June 2017 at around 10H00, the police arrived. They were also in possession of a police dog. They searched the house including his room for a firearm but could not find any. They then took him along. His mother who was at home gave him a cellular phone in order to stay in contact, as they were supposed to go to church. They took him to the BP Garage (filling station) where Maja's brother was. After some discussions, he was released and he got a lift from Maja's brother. He then went home.
- [6] The plaintiff's mother Maureen Skosana testified that on the 28th June 2017 she was at work when she received a phone call from the plaintiff, who reported that there were police officers at their home. She then asked permission to go home, which she was granted. Upon her arrival at home she met with the police officers. Because there were children who were terrified by the presence of the police, she decided to take them to a friend's house. Later on she was called by the plaintiff who went to the place where she was. He was accompanied by the police. Ultimately, a police officer said that they are taking the plaintiff along for questioning. They then left.
- [7] Later that evening there was a knock on the door. She opened. It was the plaintiff. She observed that his face was swollen and that he was in pain. She made hot water and massaged him. They then went to sleep. The following morning, the 29th June 2017, the police again paid a visit to their homestead. A search was conducted but all in vain as nothing was found. The police then said that they are taking the plaintiff along.
- [8] She gave her cellular phone to the plaintiff in order to stay in contact. After a passage of time, she phoned the plaintiff. She also managed to speak to one of the police officers. She requested that the plaintiff be returned home so that they can go to church. After some time, the plaintiff arrived at home. No assault was perpetrated in her presence.
- [9] Acting on advice of her neighbour, she took the plaintiff to the police station to lay a criminal charge against the police. This, according to her, happened on the same day, the 29th June

2017. She was given a medical form (J88) to be completed by a medical practitioner (doctor). They consulted a doctor, Dr. Makame, who examined the plaintiff and completed the J88 medical report (form).
- [10] Dr. Makame testified and confirmed that he examined the plaintiff and observed some bruises around both wrists, which were caused by handcuffs. The plaintiff said that he was assaulted. He detected some tenderness on both cheeks, at the back at the scapulae, around the abdomen and the plaintiff also complained about his ears but Dr. Makame could not detect anything wrong with the ears. The J88 was handed in as exhibit "A". That concluded the evidence tendered by and on behalf of the plaintiff in the plaintiff's case.
- [11] Constable Enoch Mabasa testified that on the 28th June 2017 he was on duty. A report of a business robbery was received and he and two other colleagues were dispatched to attend to the complaint. They visited the scene and were informed that there were two assailants, who were known to the victims. The house of the assailants were pointed out to them. They were also informed that one of the assailants shot himself in his hand. Armed with this information they then proceeded to the house of David Skosana, in search of him and one Maja.
- [12] They found David and Maja in the premises of David's house and interrogated them, after they introduced themselves as well as the purpose for their visit. Maja said to David that it will not help to deny anything. He ended up admitting his involvement. He also said that two spent cartridges were thrown onto the roof by David. He then climbed up onto the roof and saw the two spent cartridges. The Local Criminal Record Centre (LCRC) forensic personnel of the South African Police Services (SAPS) were summoned.
- [13] Upon realizing the fate that befell his father, the plaintiff confronted Maja and assaulted him. A scuffle ensued between them. It resulted in a physical fight between Maja on the one side and the plaintiff and his father David. They as police then intervened. In order to quell the tension, the plaintiff was handcuffed. So too were Maja and David. Maja said that they (he and the plaintiff) used to commit offences and he volunteered to point out certain places. The police officers were then joined by their seniors in a van. They decided to go to the scenes that Maja wanted to point out. They drove with their respective motor vehicles, the Quantum and the van, to the police station and dropped the van. They all went into the Quantum minibus motor vehicle and drove to Slovopark. Because it was dark, nothing could be pointed out or pointed at. They then decided to call it off.
- [14] Because Maja was bleeding profusely from his hand that was shot and injured (although he had a glove on), they decided to take him to Odi hospital. En route to the hospital, they dropped the plaintiff at his homestead. He denied that he or any of his colleagues assaulted the plaintiff. According to him, there was no need for any assault on the plaintiff, seeing that Maja admitted his involvement in the commission of the offence and he was cooperative. The injuries that the plaintiff sustained was as a result of the physical altercation he had with Maja.

- [15] He denied that they went back to the homestead of the plaintiff on the 29th June 2017 and conducted a search for a firearm. Likewise, he also denied the version of the events of the 29th June 2017, as testified to by the plaintiff and his mother Maureen Skosana. This he said is a fabrication in order to bolster plaintiff's case. The plaintiff was not arrested and detained at any police station. He was taken along to Slovopark based on the information volunteered by Maja. The time that the plaintiff spent with them as police could not be more than one (1) hour.
- [16] The evidence with regard to the events of the 28th June 2017 tendered by the plaintiff and his mother is to a large extent parallel to that of Constable Mabasa. Whilst it is common cause that the police did attend at David Skosana's house and found him, Maja and the plaintiff there, it is denied that they as police assaulted the plaintiff. The evidence of the mother, Maureen Skosana, is not very helpful insofar as the assaults are concerned, as it did not happen in her presence. The evidence of the plaintiff that he was assaulted by the police is diametrically opposite to that of Constable Mabasa. These two versions are mutually destructive in the sense that only one can be true. Likewise, the medical evidence is also neutral as to the assaults perpetrated allegedly by either the police or by Maja.
- [17] In this regard, this Court must look at the probabilities in order to determine where the truth lies. At first it should be borne in mind that the information received was that one of the perpetrators of the business robbery shot himself in the hand. When the police saw Maja, they observed that his hand was injured although he was wearing a glove on it. Blood were oozing through the glove. Maja was cooperative and surrendered. He also volunteered the information about the spent cartridges which David threw onto the roof. The spent cartridges was seen by Constable Mabasa. All this points to Maja. It is improbable that the plaintiff, who was a minor at that stage, would be confronted and assaulted by the police to take out a firearm, when Maja admitted that he handled the firearm and even shot himself in the process.
- [18] Furthermore, it is highly improbable that the police who were so desperately in search of the firearm, would allow the plaintiff to go home and instruct him not to leave the following day because they would come back and continue their search for the firearm. Logic dictates that they would not allow it to happen because the plaintiff could easily dispose of the firearm in order to protect himself and his father. It also defies logic that the police would return on the 29th June 2017 and pick up the plaintiff allegedly for questioning and even allow his mother to give him a cellular phone to phone her or that she could call him. So too, is the fact that she did call him and spoke not only to him but also to a police officer over the phone and tell him to let go of the plaintiff as they were to attend church, highly improbable.

- [19] Even more improbable is the evidence that whilst the plaintiff ended up admitting knowledge of the firearm on the 28th June 2017, the police would so generously transported him home and let him, who is a suspect who admitted knowledge of where the firearm was hidden, sleep at home and not be detained. Without any stretch of the imagination, this is highly improbable.
- [20] Another aspect that militates against the alleged assault by the police is the fact that the assaults were allegedly perpetrated on the 28th June 2017. The mother Maureen Skosana arrived at home and was aware that the plaintiff was taken away by the police on that day. The plaintiff arrived home that evening with a swollen face, bruised and he was in pain. On her version she took him, on advice by the neighbour, to lay a charge at the police station on the 29th June 2017. That very same day she took the plaintiff to consult Dr. Mapane. This evidence is however not borne out by the J88 medical report (form), which indicates that Dr. Makome examined the plaintiff on the 01st July 2017 at 21H30 in the evening. This is three (3) days after the alleged assaults on the 28th June 2017.
- [21] On the probabilities therefore, it is more probable that the events unfolded as testified to by Constable Mabasa. The assaults were not perpetrated by the police but instead by Maja, who fought with the plaintiff. As for the injuries sustained by the handcuffs on the wrists, the version of Constable Mabasa is also more probable. He testified that he even warned the complainant that the handcuffs might injure him if he does not keep still, which he ignored. According to the plaintiff, the police officer twisted his arms and hands and pressed on the handcuffs in order to inflict pain. As to why the police had to do it seeing that Maja had already admitted guilt, defies logic. Especially so because the plaintiff was a minor and according to the observations of Dr. Makome he was of tiny built with a small body structure. There was no need to use any force on the plaintiff.
- [22] There are also contradictions in the evidence tendered by the plaintiff and his mother Maureen Skosana. The plaintiff also exaggerate the events that unfolded. According to him the number of police officers were many, more than as testified to by Constable Mabasa. So too, are the injuries also exaggerated. According to him, because of the assaults his ears were damaged so much so that he can't hear properly, even on the day that he testified. Although Dr. Makome did record on the J88 that the plaintiff complained about his ears, he could not detect anything wrong. There was no indication of any trauma or swelling or perhaps blood oozing or even redness. This is a fabrication in order to exaggerate the alleged injuries.
- [23] Speaking of which, there were no visible injuries that Dr. Makome observed, save for those on the wrists caused by the handcuffs. The 'tenderness' recorded by the doctor is when mild pressure is applied to the specific area. There was no swelling or bruises detected. This is not at all consistent with the brutality of the assaults perpetrated on him, as testified to by the plaintiff. There are therefore no credible acceptable evidence that it was the police who assaulted the plaintiff. This Court conclude that the 'tenderness' on the body of the plaintiff was as a result of the physical altercation between him and Maja.

[24] The defendant conceded that the arrest and detention of the plaintiff was unlawful. On the version of Constable Mabasa, the plaintiff was loaded into the van and ultimately into the Quantum and transported to Slovopark. This happened on the 28th June 2017. The reason for this was because Maja said that he wanted to point out or point at the places where they had committed offences. This lasted for approximately one (1) hour. The plaintiff was at the time presumably a scholar aged fourteen (14) years. He is currently a student doing a trade. Being asked about the effect this arrest had on him, he said he was negatively affected as he is seen as a criminal. He also hate the police. He was never employed.

[25] The deprivation of liberty is viewed in a very serious light by our courts, especially when it concerns a minor. However, the circumstances under which it happened must be taken into consideration. The fourteen (14) year old plaintiff was handcuffed

not because he was suspected of being a robber, but because the police needed to contain him as he was aggressive towards Maja. He was placed in a police van and driven away and later on placed in the Quantum motor vehicle. They kept him for approximately one (1) hour in these police motor vehicles and then returned him to his homestead. He was never criminally charged or placed in a police cell, nor did he appear in a criminal court or that his fingerprints were taken to be entered as a criminal record. That he suffered humiliation is beyond question. These factors must be considered when determining an amount to be awarded as solatium or compensation.

[26] In *Rahim and 14 others v The Minister of Home Affairs* 2015 (7K6) QOD 191 (SCA), at para 27, it was held:

"[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. Inter alia the following factors are relevant:

27.1 circumstances under which the deprivation of liberty took place;

27.2 the conduct of the defendants; and

27.3 the nature and duration of the deprivation.

Having regard to the limited information available and taking into account the factors referred to it appears to me to be just to award globular amounts that vary in relation to the time each of the appellants spent in detention."

(Underlined for emphasis)

[27] In *Olgar v The Minister of Safety and Security* 2008 JDRJ582 (E) at para 16, Jones J remarked that:

"In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant."

[28] The following statement by Bosielo AJA, as he then was, in *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA), at para [26], is apposite:

"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 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 (*Minister of Safety and Security v Seymour* 2006

(6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA

39) paras 26-29)."

[29] The awarding of general damages have by no means as its purpose or object to enrich the plaintiff or seeing that the solatium is to be paid from State coffers, to let it be the proverbial pour from the 'horn of plenty'. In *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP) the following is stated:

"[10] The purpose of an award for general damages in the context of a matter such as the present is to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress."

*"[18] The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly. In *Solomon v Visser and Another* 1972*

(2) SA 327 (C) at 345A it was remarked that where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which result. To this I add that where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice.”

[30] The assessment of awards of 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 few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.

See: Minister of Safety and Security v Seymore 2006 (6) SA 320 (SCA)

[31] To reiterate, each case must therefore be decided on its own facts and merits. In Visser & Potgieter, Law of Damages, Third Edition on pages 545 - 548 the following factors are listed that can play a role in the assessment of damages:

“In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bona.

Factors which can play a role are the circumstances under which the deprivation of liberty took place; 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 (eg solitary

confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality

interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function.

[32] The plaintiff's claim is for non- patrimonial damages. These damages relating to infringement of a person's fama or dignitas, are not proved in the same manner as patrimonial damages. Awards are assessed by the courts in an endeavor of effecting retribution for the injury.

See: Masiu v Ramos (A217/11) [2012] ZAFSHC 79 (26 April 2012).

[33] The fact that he was a minor who was transported at the back of a police van and being handcuffed weighs heavily with this Court. He ought to have been treated differently seeing that he was still a child. Having considered all of the aforementioned facts, factors and circumstances, I am of the considered view that an amount of R5 000.00 (five thousand rand) should be awarded as compensation. Costs should also follow the result and be awarded in the favour of the plaintiff, as the successful party. The costs should be on the Magistrate

court scale and as between party-and-party, due to the amount awarded.

[34] In the matter of Mathe v Minister of Police 2017 (2) SACR 211 (GJ) costs were awarded on the High Court scale although the amount awarded as damages fall within the jurisdiction of the Magistrate

Court. Opperman J in the Mathe matter stated at the end of her judgment, and I quote:

“This judgment is not intended to be authority for the proposition that no matter what quantum is achieved in an action, if wrongful arrest and detention is at issue, one is always allowed to sue out of the High Court. This decision is based on the facts of this case.”

I align myself with the contents of this paragraph.

Order

[35] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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