

SOUTH AFRICA / JUDGMENT

Tsele and Another v Minister of Police (680/2019) [2021]

ZANWHC 8 (18 March 2021)

[2021] ZANWHC 8

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

680/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy

IN THE NORTH WEST HIGH

COURT, MAFIKENG

CASE NO: 680/2019

Reportable: YES/NO

Circulate to Judges: YES/NO
Circulate toMagistrates: YES/NO
Circulate to Regional
Magistrates: YES/NO

In the matter between: TSELE
OMPHITLHETSE
1st
Plaintiff
TSELE
OLEBILE
2nd
Plaintiff
and
MINISTER
OF POLICE
Defendant
DATE
OF HEARING
:
09 MARCH 2021
DATE
OF JUDGMENT
:
18 MARCH 2021
FOR
THE APPLICANT
:
MR
GURA
FOR
THE RESPONDENTS
:
ADV. MATIDZA

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 18 March 2021.

ORDER

Consequently, the following order is made:

(i)

Judgment

is granted in favour of the plaintiffs.

(ii) The defendant is ordered to pay the sum of Sixty Thousand Rand (R60 000.00) to the first plaintiff.

(iii) The defendant is ordered to pay the sum of Fifty-Two Thousand Five Hundred Rand (R52 500.00) to the second plaintiff.

(iv) The defendant is ordered to pay interest on the aforementioned amounts (R60 000.00 and R52 500.00) at the prescribed applicable rate of 7% per annum, from date of this judgment until date of final payment.

(v) The defendant is ordered to pay the plaintiffs costs of suit on a part-and-party basis, on the scale as applicable in the Magistrate

Court.

HENDRICKS DJP

[1] Mr. Omhitlhetse Tsele (1st plaintiff) and Mr. Olebile Tsele (2nd plaintiff) are brothers. They were both arrested on 29th day of November 2018 and released on the 03rd day of December 2018. Subsequent thereto, they instituted an action for damages against the Minister of Police (defendant). Merits were conceded at 100% of the plaintiffs' proven damages and an order to that effect was granted by this Court on the 09th day of September 2020. The trial on quantum resumed on the 09th day of March 2020.

[2] The 1st plaintiff testified and said that he is currently [...] years old and he was [...] years of age at the time of his arrest. He is unmarried and has no children. He is unemployed but he is doing some informal work ("piece jobs") from time to time, for which he derives an income of approximately R700.00 per month. This may vary and be even more depending on the work done. It can even go up to R 1 200.00 per month. On the morning of the 29th November 2018 after 08H00, the police arrived at his place. They were in uniform and were driving a marked kombi motor vehicle. He was informed that they are arresting him for assault with intent to do grievous bodily harm perpetrated on his mother. He was placed inside the kombi motor vehicle and taken to the Lehurutshe Police Station. They placed him in a holding cell and informed him that they are going to look for his brother, the 2nd plaintiff. Later on they returned with him. At approximately 20H00 they were taken to Groot Marico Police Station where they were

detained. They were approximately fifteen (15) in the police cell. They were supposed to appear in court the following day being Friday, the 30th November 2018, but were not taken to court.

[3] They were detained until Monday, the 03rd December 2018 when they were taken to the District Court at Lehurutshe. When they appeared in court, they were informed that the case against them are withdrawn. They were then released at approximately 10H00. The condition of the cell where they were kept

were not good. They had to share one blanket and they slept on the floor. Meals were served but the food was not good. It was mainly

porridge and beans as well as tea and bread. They did not have toiletries and shared a face cloth (“waslap”) which they got from a fellow inmate. Upon the release of the 1st plaintiff, the people in the community didn’t take him well for the bad thing he had allegedly done. He asked to be compensate in the amount of R300 000.00 although in the summons an amount of R500 000.00 is claimed. This he based on the fact that in the event of an eventually of him becoming sick as a result of the stay in the police cell, he can use the money. This amount is also for compensation for the humiliation that he suffered.

[4] The evidence of the 1st plaintiff is to a large extend corroborated by the evidence of the 2nd plaintiff. There are however some differences. Unlike the 1st plaintiff, the 2nd plaintiff was arrested at about 14H30 in the afternoon of the 29th day of November 2018. They then spend the time together in the police cells at Lehurutshe Police Station and at Groot Marico Police

Station. His personal circumstances also differ from that of the 1st plaintiff. He is [...] years of age, unmarried but have six (6) children. He is also unemployed. When he was arrested, he was looking after his three (3) year old child at home. His child who was by then twelve (12) years old came to him and informed him that the police are looking for him (2nd plaintiff). He was arrested and placed at the back of the police van. He was alone. He was then taken to Lehurutshe Police Station where he met his brother, the 1st plaintiff. The rest of his evidence tallies with that of the 1st plaintiff. Like the 1st plaintiff, he also claims compensation in the amount of R300 000.00 for what he had to endure and suffered, although an amount of R500 000.00 is claimed in the particulars of claim attached to the

summons.

[5] Mr. Gura on behalf of the 1st and 2nd plaintiffs submitted that an amount of R300 000.00 as compensation for damages suffered is reasonable, as testified to by each of the respective plaintiffs. This was for the deprivation of their liberty and the humiliation that they suffered. Mr. Matidza on behalf of the defendants contended that an amount of R300 000.00 for each of the plaintiffs is excessive. Reliance was placed on the judgment of this Court in the matter of Clement Ngwenya vs Minister of Police, case number 924/2016, delivered on the 07th February 2019 in which an amount of R 15 000.00 per day was awarded. He also referred to the case of Hoco v Mtekwanan and Another 2010 (2) SACR 536 (ECP) where an amount of R80 000.00 was awarded for four (4) days unlawful detention in 2010, as well as other cases.

[6] The case at hand is distinguishable from the Ngwenya matter, supra. In the Ngwenya matter, Mr. Ngwenya was severely assaulted by his fellow inmates. They confiscated his food. He was, unlike the plaintiffs in this

matter, self-employed deriving an income of between R8 000.00 to R15 000.00 per month from manufacturing and selling bath tubs. He was arrested whilst he was in the company of his two friends. Each case must be decided on its own merits.

[7] 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)

[8] 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."

[9] 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)."
- [10] 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."
- [11] 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)

- [12] 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 exaequo 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."

[13] The plaintiffs claim 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).

[14] The 1st plaintiff was detained for just over four (4) days whilst the 2nd plaintiff was detained for approximately three-and-a-half (3½) days. Having regard to all the circumstances of this case; the circumstances under which the 1st and 2nd plaintiffs were arrested; the humiliation suffered and the effect of the arrest and subsequent unlawful detention had on the plaintiffs;

as well as the appalling circumstances in the cell over a weekend, I am of the view that it would be fair, reasonable, just and

appropriate to award damages in the amount of R15 000.00 per day, or part thereof, as the case may be.

[15] Insofar as costs are concerned, it should follow the result and be awarded in favour of the plaintiffs as the successful litigants. However, the amount awarded falls within the jurisdiction of the Magistrate Court. The costs should therefore be awarded on the Magistrate Court scale. 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

[16] Consequently, the following order is made:

(iv) The defendant is ordered to pay interest on the aforementioned amounts (R60 000.00 and R52 500.00) at the prescribed applicable rate of 7% per annum from date of this judgment until date of final payment.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2021/8.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tsele-and-another-v-minister-unknown-topic-anwhc-2021--6a3ea5123b1caa912980a26f>

Prepared on 14 October 2026 · Esheria