

SOUTH AFRICA / JUDGMENT

Xaba and Another v Minister of Police (788/2021; 789/2021) [2023] ZANWHC 154 (31 August 2023)

[2023] ZANWHC 154

COURT

North West High Court, Mafikeng

BEFORE

Morgan AJ

CASE / FILE NUMBER

788/2021; 789/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHWEST

DIVISION, MAHIKENG

CASE

NO: 788/2021 & 789 /2021

[1]

Reportable: YES
/ NO
[2]

Circulate to Judges: YES
/ NO
[3]

Circulate to Magistrates: YES / NO
[4]

Circulate to Regional
Magistrates: YES / NO
DATE
SIGNATURE
In

the matter between:

LEBAKA
XABA
FIRST PLAINTIFF
LEBESE
DONALD LETHOKOE
SECOND PLAINTIFF
and
MINISTER
OF POLICE
DEFENDANT
Neutral
Citation: Lebaka
Xaba and Another v Minister of
Police ZANWHC (31 August 2023)

Coram:

MORGAN AJ

Heard:

23 August 2023

Delivered:

31 August 2023

Summary:

Civil trial – delictual damages –
unlawful arrest, detention and assault of plaintiffs (adolescent
youth) by members
of the South African Police Service on duty –
determination of quantum of damages- court ordered, inter alia, that
the Head
of Independent Police Investigative Directorate to submit
report within 3 months.
This
judgment was handed down in physical court and copies thereof
circulated electronically to the parties’ representatives
via
email. The date and time of hand-down are deemed to be 10:00 am on
Thursday, 31 August 2023.

JUDGMENT

MORGAN AJ:

INTRODUCTION

- [1] Before me is a narrow issue for determination, particularly the quantum of damages suffered by the plaintiffs due to their unlawful arrest, detention, and assault by members of the South African Police Services (police officers) before their arrest and during their brief incarceration at the Itsoseng Police Station, North West Province between 23h00 and 02h00 in the late night of 3 October 2020 and early morning of 4 October 2020.

[2] This matter came before me on trial for the determination of quantum arising from delictual damages suffered by the Plaintiffs at

the hands of police officers when they were arrested, assaulted, and detained.

BRIEF OVERVIEW OF THE

FACTS

[3] The First and Second Plaintiffs are adult males who were eighteen and twenty-two years old, respectively, at the time of the incident.

[4] On 3 October 2022 at about 23h00, the Plaintiffs and their friends, travelled in a Toyota Quantum combi from a friend's birthday celebration. They were followed and stopped by a police vehicle at Itsoseng Township while travelling back to Boikhutso Township.

[5] Upon being stopped, they were instructed to come out of the vehicle and lie on the ground. The police officers then violently searched the Plaintiffs and their friends' whilst kicking them around. The officers asked them to produce a girl they alleged was kidnapped and hand over a firearm they alleged the Plaintiffs had stolen.

[6] The police officers, unhappy with their response, arrested and escorted them into the police van, which took them to the Itsoseng

Police Station, where they were further detained and assaulted until their release in the early hours of 4 October 2020. They were

detained and released without being arraigned or brought before a court of law.

[7] It also transpired that the girl they alleged was kidnapped happened to be the First Plaintiff's girlfriend, who they picked up that evening from a local tavern on their way back home. Further, that the police officers, after searching the combi they were travelling in, did not find any firearm they alleged the Plaintiffs stole and possessed.

[8] After their release, the Plaintiffs instituted a delictual claim for damages against the Minister of Police.

[9] The first plaintiff claimed a total amount of R 826 078.70 (Eight hundred and twenty-six thousand and seventy-eight rand and

seventy cents) for damages made up as follows:

- a. R200 000 (two hundred thousand rands) for unlawful arrest, detention and assault (general damages);
- b. R301 800 (three hundred and one thousand eight hundred Rands) for future medical expenses; and

- c. R326 078.70 (three hundred and twenty-six thousand and seventy-eight Rands and seventy cents) for past and future loss of earnings.
- [10] The second plaintiff claimed a total amount of R290 000 (two hundred and ninety thousand) for damages made up as follows:
- a. R200 000 (two hundred thousand rands) for unlawful arrest, detention, and assault (general damages); and
 - b. R90,000 (ninety thousand rands) for future medical expenses.

LEGAL PROCEEDINGS

[11] On 30 January 2023 before Mfenyana AJ (as she then was), the defendant conceded to 100% liability of proven damages regarding the

unlawful arrest, detention and assault of the plaintiffs referred to above.

EVIDENCE PRESENTED BY THE PLAINTIFFS

[12] Ms Moagi for the plaintiffs, called the plaintiffs to testify on the quantum of the general damages claimed and further submitted

various expert reports accompanied by confirmatory affidavits to justify the quantum of damages for medical expenses and loss of earnings.

The first plaintiff's testimony and expert evidence

[13] The first plaintiff testified on the events that transpired on 3 October 2020 and 4 October 2020. He further testified on the

injuries he had sustained due to the assault.

[14] Further, he testified to the events that led to the arrest, detention and release from police custody in the early hours of 4 October

2020. He further testified on the doctors and experts he consulted due to the injuries he sustained and the fact that since his assault he lost hearing in one of his ears.

[15] This was evident before me as even when he was testifying from the witness box, he struggled to hear counsel's questions in

examination-in-chief, cross-examination and re-examination. Further, he found it difficult to hear me in certain instances, without

raising my voice beyond my normal tone to hear me from where I was sitting.

[16] The hospital records at Thusong General Hospital indicate that upon his admission soon after the incident occurred, he presented a red eye on the left side and bruises on his face, bruises on the body, leg injury and pain on the right ear. In corroboration, a picture taken on the day was discovered in the trial bundle. Further, what one could see from the picture, was his white

jersey filled with blood.

[17] Dr Makgafola, the Ear, Nose and Throat specialist's report diagnosis includes right ear severe to profound mixed hearing loss. He recommended CROS hearing aids which he believes the first plaintiff will benefit from. The costs of the hearing aids are R61 560 which must be replaced every five years.

[18] Ms Mqhayi, the clinical psychologist's report provides that the first plaintiff's hearing difficulties limit his social interactions. That he also suffers symptoms of moderate Post Traumatic Stress Disorder (PTSD) symptoms with comorbid moderate anxiety and mild depression which are attributable to the incident. His emotional well-being has been negatively affected. His physical

impairments, hearing difficulties and emotional difficulties have limited his enjoyment of life and social functioning. Personality

changes will have a negative influence on his personal and work relationships should he secure employment.

[19] On the future medical expenses claimed, Ms S Mphofela, the Occupational Therapist's report provides computations that add up to the total claimed for first plaintiff's medical expenses and include the cost of the hearing aids, psycho therapy sessions and travelling costs.

[20] On his future earning capacity, she states that the cognitive and emotional difficulties linked to his ongoing ear pain, may furthermore negatively affect his general functioning and motivation and therefore his work pace cover productivity efficiency in any setting if not adequately managed. Further that, his depression moods and PTSD will negatively affect his interpersonal relationships with

people (employers, employees and colleagues) should it not be attended. He also presented with impaired concentration as per finding by the clinical psychologist, due to the injuries sustained.

[21] Mr. T Kalanko, the Industrial Psychologist report gave two employment scenarios pre (had the incident not occurred) and post morbid (status quo after the occurrence of the incident) situation due to the incident.

[22] On the premorbid scenario, he states that the first plaintiff would have continued with his education, where he would have eventually completed matric qualification. Thereafter, with the drive, motivation, and financial availability, he could pursue a

tertiary qualification as a means improve his vocational standpoint in the open labour. He further appends that it is likely that he would have completed this matric with the probability of attaining a tertiary qualification and thereafter, following marked periods of unemployment, he would have secured gainful employment relevant to his highest level of education, personal aspirations and general skills and abilities.

[23] In the postmorbidity employment scenario, Mr. T Kalanko states that the first plaintiff will not be able to perform in the same capacity scholastically or occupationally. He will be disadvantaged in respect to his employability and in future, especially in comparison to his health and injured peers in the open labour market. Considering the physiological and psychological limitations, the plaintiff will be regarded as a vulnerable competitor.

[24] In support of the calculation of the quantum of the first plaintiff's past and future loss of earning an Actuarial Report by Mr Wim Loots was submitted which provided two scenarios (scenario 1 based on him obtaining a Diploma and scenario 2 based on him obtaining a Higher Certificate). The first plaintiff proposed the application of scenario 2 (Higher Certificate) which applied a 5% split on contingencies. The computations contained in scenario 2 justified the R326 078.70 difference in earnings on the claimed

amount for past and future loss of earnings.

The second plaintiff's testimony and expert reports

[25] The second plaintiff testified and gave evidence on the quantum claimed for the injuries he had sustained as a result of his unlawful arrest, detention and assault (general damages) and for future medical expenses.

[26] The second plaintiff testified that he sustained injuries to his neck, jaw, teeth and other soft tissue injuries on his face and

body. His diagnosis included the right-hand side of his face bleeding and jaw pain. He further testified that he currently struggles to eat because of the painful jaws and teeth. His oral evidence was corroborated by the expert's reports and hospital records

discovered in the proceedings.

[27] Dr Mqhayi (clinical psychologist) report states that the second plaintiff currently suffers from symptoms of moderate PTSD with comorbid severe anxiety and moderate depression, which are attributable to the incident. He's well-being has been negatively affected by this traumatic experience as he suffered cognitive and physical impairments, chronic pains, and emotional difficulties that have limited his enjoyment of life and social functioning. He further opines that the second plaintiff has emotional fallouts that left him with inconveniences that negatively continue to impact his enjoyment and quality of life, interpersonal relationships and occupational levels and he has severe long-term behavioural disturbances or disorders.

[28] Regarding future medical expenses, the clinical psychologist states that the second plaintiff will benefit from psychotherapy (60

sessions). Psychotherapy is recommended to go on a duration of 5 years, which would constitute the amount claimed in respect of future medical expenses.

[29] All the expert reports referred to above in respect of the plaintiffs' claims were introduced and referred to in argument by Ms Moagi for the plaintiffs' and supported by the Mr Letsoalo for the defendant in his argument.

[30] Mr Letsoalo also did not object or refute the version of the injuries sustained by the plaintiffs and that they were attributable

police officers in totality. He further submitted to the court that his client did not object to the report filed by the Plaintiffs'

experts and placed it on record that the did not see it befitting to obtain further expert reports on the injuries suffered in the quantum claim as defendant believes that there are minimal prospects of success in of other experts arriving at a different opinion. Therefore, they endorsed and supported the content of the reports stated in the expert's reports.

THE LAW

[31] In the first instance, it is crucial to remember that the Constitution[1] "enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause." [2] Furthermore, in *Thandani v Minister of Law and Order*, it was held that:

"[T]he liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement". [3]

[32] A delict encompasses the commission of wrongful and blameworthy conduct by an individual, resulting in demonstrable harm to another

individual, the causal nexus of which remains proximate.[4] In instances where said harm entails a transgression of personal interests due to deliberate actions, the aggrieved party must

initiate the *actio iniuriarum* (action for non-pecuniary damages) to seek redress for the endured non-pecuniary detriment.[5]

[33] As articulated in *De Klerk v Minister of Police*:

"A claim under the actio iniuriarum for unlawful arrest and detention has specific requirements:

- (a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally;

- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.”[6]

[34] As stated earlier, the defendant conceded that members of the police service assaulted and injured the Plaintiffs. It is also uncontested that the plaintiffs were unlawfully arrested and detained without just cause. Thus, the only issue for determination is quantum.

[35] In assessing assessment of quantum, it is imperative to bear cognisance of the fundamental purpose underpinning the adjudication

and dispensation of damages. Said purpose, herein, does not find its zenith in the aggrandisement of the aggrieved party, but rather in the bestowal of recompense akin to solatium, aimed at mitigating their affronted sensibilities. The quantum thus granted should, by necessity, correlate commensurately with the inflicted transgression.

[36] However, in the process of quantifying such indemnification, due regard must also be accorded to the elevated import of the sacrosanct right to personal liberty within our burgeoning constitutional democracy, and the zealous vigilance with which it is safeguarded. A retrospection of our historical narrative serves to apprise us of the regrettable instances wherein a pervasive State unjustly curtailed the liberty of its citizenry. Such a nadir must categorically not be countenanced anew, and any malevolent or capricious abridgment of the right to personal liberty must be met with the gravitas it warrants.

[37] In *Ferdinand v The Minister of Police*, the Court remarked that:

“In deprivation of liberty the amount of damages is in the discretion of the Court. Factors which play a role are the circumstances under which the deprivation of liberty took place; the presence of absence of improper motive or malice on the part of the Defendant; the duration and 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; and awards in previous comparable cases.”[7]

In cautioning courts in the determining quantum, Seegoblin J asseverated:

“While I consider the Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom, in my view, courts should be careful not to overemphasise the right in order to punish a guilty party unduly. A delicate balance must be struck between the rights of an aggrieved party on the one hand and the guilty party on the other, in order to arrive at an assessment which is fair and reasonable in the circumstances.”[8]

[38] Within the short space of time that the Plaintiffs were arrested and later released, the first plaintiff suffered serious head injuries that led to him being partially deaf on the one ear and the second plaintiff losing a tooth.

CONCLUDING REMARKS

[39] The physical injuries suffered by the plaintiffs were without some emotional or psychological damage to both. As one would imagine,

although their injuries healed, they remain emotionally and psychologically scarred for life for the traumatic experience they

endured in the short period which they were incarcerated and detained.

[40] The first plaintiff testified that he was seemly assaulted the most because he was more vocal than the others in questioning the

police officers on their authority to arrest and detain them. He further testified that at the Police Station he was dragged by his foot into a room he was slapped and beaten with belts all over his body to a pulp until a female police officer stepped in and reprimanded her colleagues to discontinue assaulting him. He testified that it was only after they were reprimanded that he left alone and escorted to a cubicle where his statement was taken and soon thereafter released without being arraigned and brought before a court.

[41] The present situation exemplifies a paradigmatic instance of alleged police misconduct against individuals asserting their innocence. A substantial body of evidence demonstrates that recurrent occurrences of this nature have led to a diminished threshold for tolerating such incidents within our societal framework. When our judicial system confines its response primarily to pecuniary compensation in the aftermath of such instances of alleged brutality, without adopting more comprehensive measures to mitigate this phenomenon, it is my considered perspective that this course of action inadvertently compounds the prevailing lack of faith that segments of our populace harbour towards our law enforcement institutions.

[42] It is, indeed, incumbent upon those individuals appointed to serve in the capacity of law enforcement officers, individuals who have solemnly sworn an oath to uphold the precepts enshrined within the Constitution, and to safeguard the principles of the rule of law and the wellbeing of both the citizenry and denizens of the Republic. However, what course of redress becomes available when these very law enforcement agents themselves become implicated as perpetrators of acts constituting violence? In my estimation, the Independent Police Investigative Directorate (IPID), an institution constitutionally mandated with overseeing the conduct of law enforcement agencies, emerges as the designated custodian in such matters.

[43] In *Thulagano Edward Mokomele vs the Minister of Police*[9], where the facts are similar to this case, FMM Snyman J aptly stated that members of the SAPS are tasked with the duty to protect and serve the community members, and there's no excuse for excessive force, and assault, by a member of the SAPS towards a member of the public.”[10]

[44] The failure to undertake meaningful action in response to instances of alleged police misconduct inadvertently fosters an environment wherein tacit endorsement may be perceived, potentially prompting members of the community, either individually or collectively, to usurp the role of law enforcement in addressing such grievances. This trajectory is incongruous with the aspirations of our burgeoning constitutional democracy.

[45] In my view, the time has come for the IPID to adopt a resolute stance in countering such alleged transgressions through assertive

and publicized measures, aimed at purging the Police Service of elements whose conduct deviates from the core tenets inherent to the Police Service's mission.

[46] This course of action is pivotal to restoring the confidence of the citizenry in this indispensable constitutional institution responsible for law enforcement.

[47] Regrettably, a perceptible pattern has emerged wherein the general populace has progressively relinquished their reliance on the

efficacy of the Police Service in addressing criminal incidents, with instances of exemplary dedication by law enforcement personnel

constituting a minority. By and large, the narrative that prevails is one wherein the malfeasance of select officers, and even their implication in grave transgressions, garners the lion's share of attention.

[48] Police brutality has also been bemoaned and berated by our Courts. Most court rolls are clogged up and inundated with these type

of matters (unlawful arrest, detention and / or assault by police officers) against the Minister of Police. Surely, something needs to be done, as it does not only prejudice the parties affected but also courts and other litigants. These matters eat into the limited resources allocated to courts, which must be shared amongst other litigants who approach courts for justice. Also concerning is that, taxpayers have to bear the ever increasing fiscal brunt for the unscrupulous police officers incompetency and gross misconduct as the monetary orders given in these matters are paid from the public purse. This inevitably burdens the taxpayer.

[49] This unfortunate reality has ramifications extending beyond domestic borders, exerting a deleterious influence on our nation's economic prospects and investor confidence, thereby diminishing our appeal as a destination for capital investment. The concerns articulated above serve to validate the rationale underpinning the order enunciated in paragraph 7 below.

[50] I have considered the psychological effect the unlawful arrest detention and assault may have had on the plaintiffs. Further the duration of the detention and the period within which the assault occurred, the evidence discovered and the severity of the assault, the physical consequences, and restrictions that the assaults have placed on the plaintiffs' ability to enjoy life. Taking all the above-mentioned factors into account I hold the view that the quantum awarded would be fair and just in compensation and solatium for the damage suffered.

[51] In respect of the computation of the total amount for general damages to be awarded, FMM Snyman J further stated that:

"It is trite that the trial court should not look at the incidents in isolation, and it would also not be practical to separate the assaults from the arrest. To award a specific amount for compensation of the assaults and, an additional amount for compensation of the arrest and detention, detracts detract from the holistic view of damages suffered by the plaintiff as a result of the defendant's [SAPS] employees' actions."[11]

[52] I also find it apposite in this case, that one composite amount be awarded in respect of the general damages suffered by the plaintiffs in each claim.

In the premise, I make the following order:

1. The Defendant is ordered to pay the First Plaintiff the sum of R 100 000.00 (one hundred thousand) for his unlawful arrest, detention, and assault for the period 3 October 2020 to 4 October 2020.
2. The Defendant is ordered to pay the First Plaintiff the sum of R 426 078.70 (four hundred and twenty-six thousand and seventy-eight and seventy cents) for his medical expenses and loss of earnings.
3. The Defendant is ordered to pay the Second Plaintiff the sum of R 50 000.00 (fifty thousand) for his unlawful arrest, detention, and assault for the period 3 October 2020 to 4 October 2020.
4. The Defendant is ordered to pay the Second Plaintiff the sum of R 90 000.00 (ninety thousand) for his medical expenses.
5. The defendant is ordered to pay interest on the aforementioned amounts at the prescribed rate of interest (10.5%) per annum, from date of this judgment until date of final payment.
6. The Defendant shall tender the Plaintiffs' costs on a party and party scale for the action proceedings, including the costs of counsel where so employed, and medico-legal and expert reports obtained and discovered in the court processes.

7. The Registrar is to submit a copy of this judgment to the Political Head (the Defendant) and the Executive Director of the Independent Police Investigative Directorate to investigate this matter within three (3) months of this order, and provide the Court with a written report on what steps (disciplinary or otherwise) have been taken against the members of the Police Service who are responsible for the unlawful arrest, detention, and assault of the plaintiffs.

MORGAN AJ

PARTIES REPRESENTATIVES

For the First and Second Plaintiffs: Adv Moagi instructed by Molefakgotla Attorneys Inc. For the Defendant: Mr Letsoalo instructed by State Attorney, North West Province.

- [1] The Constitution of the Republic of South Africa, 1996.
- [2] Zealand v Minister for Justice and Constitutional Development and another
[2008] ZACC 3; 2008 (4) SA 458 (CC) at para 24.
- [3] Thandani v Minister of Law and Order 1991
(1) SA 702 (E) at 707B; and recently confirmed by Constitutional Court in De Klerk v Minister of Police 2021 (4) SA 585 (CC) at para 13.
- [4] Oppelt v Head: Health, Department of Health, Western 2016 (1) SA 325 (CC) at para 34.
- [5] De Klerk v Minister of Police 2021 (4) SA 585 (CC) at para 13.
- [6] Ibid at para 14
- [7] Ferdinand v The Minister of Police
[2018] ZALMPPHC 58 (7 March 2018).
- [8] Latha and another v Minister of Police and others 2019 (1) SACR 328 (KZP) at para 8.
- [9] Unreported Judgment, Case No 1/2018, North West Division of the High Court of South Africa, Mahikeng.
- [10] Ibid at para 39.
- [11] Ibid at para 39.

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