

Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 924/2016

In the matter between:

CLEMENT NGWENYA

Applicant

and

MINISTER OF POLICE

Respondent

DATE OF HEARING : 29 JANUARY 2019

DATE OF JUDGMENT : 07 FEBRUARY 2019

FOR THE APPLICANT : ADV. MONTSHIWA

FOR THE RESPONDENT : MS. SEBEKEDI

JUDGMENT

HENDRICKS J

Introduction

[1] On the 02nd day of November 2017 this Court granted an order that the arrest and subsequent detention of the plaintiff from 28th August 2015 to 31 August 2015 were unlawful and that the defendant is liable for 100% of plaintiff's proven damages. The trial on *quantum* resumed on 29th January 2019.

[2] In the particulars of claim attached to the summons, the plaintiff claim that “as a consequent of the unlawful and wrongful arrest and detention, the plaintiff suffered damages in the amount of one million rand (R1 000 000.00) which is made up as follows:

Unlawful arrest and detention R 500 000.00

Contumelia, inhuman treatment and emotional shock R 500 000.00.

The plaintiff's rights to libertas or freedom, trauma or good name, privacy, dignity, bodily and psychological integrity and environment which is detrimental to his health or well-being was also infringed.”

[3] The plaintiff testified that he was born in 1967 and was therefore 48 years of age in 2015 when he was arrested. He was in the company of his two friends busy erecting a shack when two police officers arrived. He was arrested and taken to the police station at approximately 10:00 am. It was on a Friday. He was detained in a cell together with fourteen (14) other inmates. He did not had a good reception. The inmates confiscated his food that evening and he had to share one blanket with a boy. He was severely assaulted by the inmates but did not report the matter to the police. This was however not the first time that he was arrested and detained. He was not given toiletries. He was detained until his release by Court on Monday, 31st August 2015, at

approximately 11:00 am. He was emotionally hurt as a result of his arrest and incarceration.

[4] He was self-employed and was by then manufacturing bath tubs which he sold for R750.00 a piece. During cross-examination he stated that he would have sold sixty (60) bath tubs during the period of his incarceration. He derived an income of between R8000.00 to R15 000.00 per month depending on how many tubs he sell. This cannot be true. Sixty (60) tubs multiply by R750.00 each amounts to R45 000.00 which is much more than his monthly earning. This simply does not add up and cannot be mathematically correct. Not much reliance, if any, can be placed on this evidence especially because no documentary proof of such income was presented. Adv. Monsthiwa on behalf of the plaintiff submitted that an amount of one hundred thousand rand (R100 000.00), as general damages, should be awarded in favour of the plaintiff. Ms. Sebekedi on behalf of the defendant submitted that an award of R10 000.00 per day be awarded.

[5] The plaintiff 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).

[6] 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)

[7] 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."

[8] 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)."

[9] The plaintiff can only claim for unlawful arrest and subsequent detention from Friday 28th August 2015 at 10:00 am to Monday 31st August 2015 at 11:00 am, which equates to three (3) full days although it stretched over four (4) days (Friday to Monday). Having assessed all the circumstances of this case, the plaintiff's age, the circumstances under which he was arrested, the nature and the duration of detention relevant for consideration, the alleged assault and emotional effect of the arrest on him, bearing in mind that no expert or medical evidence was provided in this regard, and the evidence regarding the cell in which he was placed during that weekend, I am of the view that it would be fair and appropriate to award damages in the amount of fifteen thousand rand (R15 000. 00) per day.

[10] In so far as costs are concerned, it should follow the result and be awarded in favour of the plaintiff. However, it must be borne in mind that the amount falls within the jurisdiction of the Magistrate Court. The costs should therefore be on the Magistrate Court scale.

Order:

[11] Consequently, the following order is made:

(i) The defendant is ordered to pay the sum of forty-five thousand rand (R45 000.000) to the plaintiff, as damages.

(ii) The defendant is ordered to pay interest, in respect of the aforesaid amount, at the prescribed rate from date of judgment until date of final payment.

(iii) The defendant is ordered to pay the costs of suit on a party-and party basis and on the applicable Magistrate Court scale.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG