IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG

CASE NO.: CIV APP MG 20/22
MAGISTRATES CASE NO: 1242/2020
Reportable: YES / **NO**
Circulate to Judges: YES / **NO**
Circulate to Magistrates: **YES** / NO
Circulate to Regional Magistrates:**YES** / NO

In the matter between

VUSI WILLIAM MBATA **APPELLANT**

and

THE MINISTER OF POLICE **RESPONDENT**

CIVIL APPEAL

CORAM: HENDRICKS JP AND PETERSEN J

ORDER

(i) The appeal is dismissed.

(ii) No order as to costs.

JUDGMENT

PETERSEN J

Introduction

[1] This is an unopposed appeal against the quantum of damages awarded to the appellant by the District Court Magistrate, Matlosana (the Magistrate), following his arrest and detention by a member in the service of the defendant on **29 November 2019**.

[2] The Magistrate was presented with a damages affidavit, pursuant to Rule 12(4) of the Magistrates' Court Rules which provides that:

> *"The registrar or clerk of the court shall refer to the court any request for judgment for an unliquidated amount and the plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the claim, whereupon the court shall assess the amount recoverable by the plaintiff and give an appropriate judgment."*

[3] On **15 March 2022**, the Magistrate granted default judgment on the merits and quantum in favour of the appellant in respect of his unlawful arrest and detention. The order reads as follows:

> *"Having read the documents before me and having considered the Plaintiff's damages affidavit and heads of argument in the above matter, the court orders as follows:*
>
> *1. Judgment is hereby granted in favour of the Plaintiff and the Defendant is ordered to pay the Plaintiff an amount of R100 000,00 which includes interest at a rate of 7.25% from date of*

service of summons, as per date on the sheriff's return which is 19th November 2020, until date of final payment;

2. *The Defendant is further ordered to pay the Plaintiff's wasted costs on a party-party scale to be taxed and payable with immediate effect."*

[4] The appellant requested the Magistrate to provide reasons for the judgment on **09 June 2022**, in terms of Rule 51(1) of the Magistrates' Court Rules. The Magistrate furnished the requested written reasons on **13 June 2022**. Hence the present appeal.

Background Facts

[5] The facts leading to the arrest and detention of the appellant are set out in the damages affidavit. The content thereof which constitutes the evidence in support of quantum, relevant to the determination this appeal is as follows:

"1.

I am a major male person currently unemployed; I was 34 years old at the time of my arrest. I make this Affidavit voluntarily and without undue influence.

2.

The contents of this affidavit falls within my personal knowledge and is both true and correct.

3.

3.1 On the 29th of November 2019, at about 10:00am, I was at a mall in Jouberton when I was approached by several police officials. These police officials informed me that they were arresting me on a charge of robbery and possession of stolen property. I confirm that the police officers began to beat us infront of all the customers in the mall. It was extremely

embarrassing and humiliating. The police officials would not even give me an opportunity to speak and ignored me when I tried to inform them that I had not committed any criminal. activities. The police officials searched me and found nothing on my person but still proceeded to arrest me. I was arrested in a mall on black Friday, it was extremely full and everyone was watching what was going on. This unlawful arrest has ruined my reputation in the community.

3.2 I was then detained at the Jouberton police station for 11 days whereafter I was released from Klerksdorp magistrate court.

3.3 I was held in custody at Jouberton police cells for most of my period of detention. I was released on the 9th of December 2019.

3.3 I was detained for a period of 11 DAYS.

3.4 The police arrested me for robbery and possession of stolen property and had no evidence to link me to this offence.

4.

It is submitted that the arresting officer did not have any grounds to arrest me and charge me for robbery and possession of stolen property.

5.

The arresting officer ignored me when I tried to tell him that I had no involvement in this alleged offence. My rights to freedom were violated by the police.

6.

I was surprised that a charge of robbery and possession of stolen property was made against me, as I have not committed any criminal

activities. The arresting officer refused to listen and ignored me despite him not having sufficient evidence to charge me. I was searched by the arresting officer who found nothing on my person, there was no evidence to link me to this offence but despite this the arresting officer still proceeded to arrest me.

7.

The arresting officer did not do a thorough investigation and was at all times aware that I denied my involvement in the alleged offence, but still decided to arrest me.

8.

My family including my 4 children aged 11 years, 7 years, 10 years and 4 years respectively were extremely worried as they never knew where I was. I further confirm that I was arrested at the mall on black Friday infront of my entire community and all the people who were shopping and that to this day no one looks at me or treats me the same. I further confirm that people assume that I am a hardened criminal which has made it extremely difficult for me to find employment.

9.

9.1 *I spent three nights at the Jouberton police station before my first appearance at court whereafter my matter was remanded for confirmation of my address. L was sleeping on the cold and hard floor without a mattress. The toilets in the cells was dirty, smelly and blocked. We had to use a bucket of water to try and flush the toilet as the toilet could not flush.*

9.2 *I can confirm that my matter was withdrawn due to the state not having sufficient evidence to prosecute me. I was detained with awaiting trial prisoners, whom were gang members, and they were talking to me in gang language which I did not understand.*

9.3 At the prison, I was afraid because the gang violence is serious, as the rival gangs fight and stab each other with sharp objects. I could not sleep properly for the whole period of my detention.

9.4 I can confirm that the only thing we were given to eat was dry bread and sometimes rice. The food was not fresh or tasty. We were also given extremely small portions and I spent most of my period of detention hungry.

10.

I confirm that this was a very traumatic experience. The facilities in the prison cells was of poor quality, unhygienic and there were bad odours in the cells. I further confirm that I was threatened by the gangster since I was not a gang member. I confirm that all my toiletries were taken by the gangsters in the cells and that my shirt was also taken. The gang members would threaten me because I am not a gang member and I was too afraid to say anything to them as I did not know what they would do to me.

11.

I was afraid for my life, as I was held with other detainees who have been held in custody for awaiting trials and most of the detainees were gangsters. I was also afraid of being injured by the detainees as some of them had knives or sharp instruments. The gang members would fight early in the morning and stab each other, I was tormented by the gang members; they were threatening me because I was not a gang member.

12.

I was placed in a cell with almost 100 detainees, I can confirm that the cells were extremely overcrowded. The cells were so overcrowded there was not even place for me to sleep. All of the detainees were squished up against each other. It was extremely unhygienic and uncomfortable.

13.

I slept uncomfortable on the floor during my detention. I could not sleep properly during the period of my detention, as the gangsters would fight in the cells at night, whilst I'm trying to sleep and I had to be on guard all the time, as I was afraid of being attacked. I confirm that we were not given any mattress and had to spend the entire period of detention sleeping on the cold hard floor.

14.

There were no matrasses supplied by the police officers and I can confirm that I had to spend the entire period of detention sleeping on the cold floor. I further confirm that the cells were extremely cold at night. I further confirm that this was the first time that I had been arrested, I have never experienced such a traumatic ordeal before, this unlawful arrest has ruined my reputation in the community.

15.

I was held in custody for a period of 11 days and the charges were withdrawn against due to the state not having sufficient evidence to prosecute me.

16.

I confirm that I have suffered from stress as a result of me being detained.

17.

I confirm that I was tremendously traumatized, as a result of the unlawful detention.

18.

I have lost my trust and respect towards the South African Police Services.

19.

Instead of the state protecting my interest I was unlawfully arrested and placed in the police cells with dangerous criminals. I suffer from stress and I have been emotionally, financially scarred due to the conduct and unprofessional behavior of the police. I have suffered more damages as claimed, as my life will never be the same again.

20.

It will take a long time for me to regain respect for the police."

The approach on appeal

[6] The general rule is that a court of appeal will not interfere with the findings of the trial court unless a material misdirection has occurred. The assessment of quantum, in particular, remains a matter for the discretion of the trial court and a court of appeal will not interfere with the exercise of that discretion unless there is a striking disparity between the award ordered by the trial court and what the appeal court would award. A decade ago Innes CJ succinctly captured this approach as follows in *Hulley v Cox* 1923 AD 234 at 246:

> *"An appellate tribunal is naturally slow to interfere with the discretion of a trial judge in the matter of damages. But this is not the verdict of a jury; and we are bound to intervene if we think that due effect has not been given to all the factors which properly enter into the calculation; or if the final award is in our opinion excessive. Some deduction is, therefore, inevitable.* ***We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment****."*
>
> (my emphasis)

[7] In *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA) at paragraph [11], Nugent JA re-affirmed the salient approach of a court of appeal as set out in *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H - 535A

and *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para 23 when he said:

> *"[11] In Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A) at 534H - 535A. Potgieter JA said the following in relation to general damages for bodily injury (the principles apply equally to a case like the present one), which was repeated more recently by this Court in Road Accident Fund v Marunga 2003 (5) SA 164 (SCA) para 23:*
>
> *'It is settled law that the trial Judge has a large discretion to award what he in the circumstances considers to be a fair and adequate compensation to the injured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a "substantial variation" or as it is sometimes called a "striking disparity"' between what the trial Court awards and what this Court considers ought to have been awarded."*

The grounds of appeal

[8] The appellant appeals the judgment of the Magistrate in the Notice of Appeal on a multiplicity of grounds. For purposes of this judgment, although the grounds are prolix, it is appropriate to repeat them, to appreciate the view this Court ultimately takes of the appeal:

> *"1. That the Learned Magistrate respectfully erred in finding that the amount of R100000-00 awarded was sufficient compensation taking into consideration the Plaintiff's/Appellants period of detention of 11 days, personal circumstances and previous awards mentioned in the Judgement of the Magistrate.*
>
> *2. The Learned Magistrate respectfully erred and did not apply the facts and quantum of cases mentioned in her Judgment*

appropriately, such as the following cases: ***Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA)****, in that the facts of the aforesaid matter relates to a magistrate who was awarded R15 000-00 for being detained for a period of 15 minutes. In* ***Napo Matsietsi v Minister of Police A3103/15*** *handed down in Gauteng Local Division of the High Court of South Africa on 20/02/2017, the learned judge awarded the amount of R40 000-00 to the Plaintiff for 21 hours of detention. In the unreported decision of* ***MM v Minister of Police 1002/2012*** *handed down in Limpopo Division of the High Court of South Africa on 23/08/2017, the Plaintiff was awarded the amount for R300 000-00 for 25 days for unlawful detention in custody. The Appellant/ Plaintiff herein was assaulted by members of the police at a shopping mall in front of members of his community as it was Black Friday. Should the case law have been applied appropriately, the quantum would have been much more than what was awarded under the court a quo.*

3. *The Learned Magistrate respectfully erred in awarding such a low amount, as it is shocking compared to other awards made in cases mentioned in her judgement and current case law. The Learned Magistrate's award does not tally with the other awards mentioned in her Judgement. It is quite clear that in terms of the considered cases mentioned in her Judgment a higher award should have been awarded.*

4. *The learned Magistrate erred in relying on the matter of* ***Rahim and 20 Others v Minister of Home Affairs 2015 (4) SA 433 (SCA)*** *as proper guidance in determining an appropriate award on behalf of the Plaintiff/Appellant. The said case dealt with the question of if illegal foreigners can be unlawfully detained pending their deportation in terms of Section 34(1) of the Immigration Act 13 of 2002. Subsequent to this being found in*

the affirmative, the court made the following comment at paragraph 27:

> *"Having regard to the limited information available and faking 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."*

5. *The Learned Magistrate erred and did not attach proper weight to the factors surrounding the Plaintiffs arrest as well as his personal circumstances which was accepted by the Learned Magistrate and outlined on page 2 of her judgement.*

6. *The Learned Magistrate erred and did not consider all recent case law in determining the quantum, as recent developments in our case law such as the* ***Mofokeng and another v Minister of Police (2014/ A3084) 2015 ZAGPJHC (17 February 2015)*** *"if was confirmed that in recent times 10 that the low end of compensation has been R40 000-00 per day while the broad range of usual awards where detention lasts up to a few days is between R 65 000-00 to R1 10 000-00 per day if no especially alleviating or egregious factors are disclosed. The court did not consider and apply sufficient weight to the egregious factors as set out in the Plaintiff / Appellant's damages affidavit.*

7. *The quantum awarded by the Learned Magistrate respectfully bears little correlation to any of the cases of the last number of years in which the detention lasted for a period of 11 days. The Learned Magistrate misdirected herself and did not appreciate the fact that the Plaintiff's/Appellant's right to personal liberty, right not to be arbitrarily arrested without just cause, the right to dignity and the right to one's reputation which includes the right not to be defamed should be jealously protected. More recent*

awards reflecting the weight to be attached by our courts in respect of such damages caused by our police are:

7.1 ***BRYAN JAMES DE KLERK v MINISTER OF POLICE 2021 (4) SA 585 (CC)*** *The Appellant was awarded R300 000 for 8 (eight) days confirmed on Appeal by the Constitutional Court.*

7.2 ***MATLOU v MINISTER OF POLICE AND ANOTHER (56822/13) (2019) ZA.GPPHC 303 (12 JULY 2019)****, the Plaintiff issued summons for his unlawful arrest detention from 13 Qecmber2012to 18 December 2012. The court herein awarded an amount of R300 000-00 which roughly equates to R50 000-00 per day.*

7.3 *NDLOVU AND ANOTHER v MINISTER OF POLICE (A3171/2018) (201 9) ZAGPJHC 21 (12 AUGUST 2019), the Plaintiff issued summons for damages suffered due to an unlawful arrest and detention from 18 July 2016 to 20 July 2016. The court in this regard granted judgement in favour of the. Plaintiff in the amount R100 0.00-00 for damages. This again equates to a general approach of R50 00000 per day.*

7.4 *JACOBS V MINISTER OF POLICE AND OTHERS (71322/2015)(2021) ZAGPPHC 74 (22 February 2021), the Plaintiff issued summons for damages suffered due to an unlawful arrest and detention which occurred on 27 January 2015 to 29 January 2015. The court in this regard awarded damages in the amount of R120000-00. This roughly equates to R60 000-00 per day in 2021.*

7.5 *In the matter of BARNARD v MINISTER OF POLICE AND ANOTHER 2019 (2) SACR 362 (ECG), the Plaintiff issued summons in Uitenhage Magistrates court for damage's he suffered from an unlawful arrest and detention which occurred*

on 13 June 2014 @1 4h20 to 14 June 2014 @ 11h50. The court aqua dismissed the Plaintiffs claim and on Appeal to this court an award of R58 000-00 was granted as an appropriate award for damages. This in essence is also in line with the ratio of Judge Spilg in the matter as discussed in Ad Paragraph 4 above.

7.6 ***MOTHIBI v MINISTER OF POLICE (730/2015) (2021) ZANCHC (30 JULY 2021),*** *the Plaintiff issued summons for damages suffered from his unlawful arrest and detention from 1 February 2015 to 6 February 2015. The court also recorded and took into account that the Plaintiff in this matter was a previous detainee. Despite this the court granted an amount of R250 000-00 for the period of 5 days in custody. This again is in line with the above matter from the various provinces, being/equating to R50 000-00 per day.*

7.7 ***MOLEFE v MINISTER OF POLICE (433/2019) (2020) ZANWHC 63 (22 OCTOBER 2020****) the Plaintiff issued summons for damages suffered due to his unlawful arrest and detention from 7 June 2018 @ 03h00 to 8 June 2018 @1 4h00. In this regard the court granted judgement in the amount of P90 000-00, for a period of 35 hours.*

7.8 ***NAGEL v MINISTER OF POLICE (CIV/APP/MG1 4/1 9) (2020) ZANWHC 66 (23 OCTOBER 2020)****, the Plaintiff issued summons for damages suffered as a result his unlawful arrest and detention from 22 November 2016 @ 09h30 to 23 November 2016 @ 1 2h30. In the court a quo he was awarded P30 000-00 in damages, and on Appeal to this court he was awarded R80 000-00.*

7.9 ***THABANG EMMANUEL SKOSANA v MINISTER OF POLICE (391/2019) (2021) ZANWHC 79 (23 November 2021)****. The*

Plaintiff issued summons for damages suffered as a result of his unlawful arrest and detention, which lasted for approximately 1 Hour. He was awarded R5000 for 1 hour in custody.

7.10 ***BRITS v MINISTER OF POLICE & OTHER (759/2020) (2021) ZASCA 161 (23 November 2021)****. The Plaintiff issued summons for damages suffered as a result of his unlawful arrest and detention, 4 July 2015 to 5 July 2015 (1 day), for which the Supreme Court of Appeal awarded him an amount of R70 000-00 in damages.*

7.11 ***AVRIL EDITH DILJAN v MINISTER OF POLICE (746/2021)[20221 7ASCA 103 (24 June 2022)****. The Plaintiff issued summons for damages suffered as a result of her unlawful arrest and detention, 18 September 2015 to 21 September 2015 (3 days), for which the Supreme Court of Appeal awarded her an amount Of R120 000-00 10 in damages. This equates to R40 000 per day.*

7.12 ***ELPACINO VICTOR MAPHOSA v MINISTER OF POLICE (10505/18) JOHANNESBURG HIGH COURT (26/07/2022).*** *The Plaintiff issued summons for damages suffered as a result of hit unlawful arrest and detention, 25 January 2017 to 20 February 2017 (26 days), for which the Learned Judge awarded him an amount of R500 000-00 in damages."*

The award of damages

[9] In *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D), Holmes J said the following in respect of the award of damages:

> *"(T)he Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."*

[10] In quantifying the award of damages, the sum awarded must be commensurate with the premium placed on the right to liberty and human dignity. This much has been confirmed in *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) at paragraph [15], where Navsa ADP emphasized the sanctity of the right of liberty as follows:

> *"Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which have always even in the dark days of apartheid been judicially valued, and to ensure that excesses of the past would not recur. The right of liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values human dignity, the advancement of human rights and freedom. Put simply, we as society place a premium on the right of liberty."*
>
> *(my emphasis)*

[11] The primary purpose of awarding damages (*solatium*) in unlawful arrest and detention claims is succinctly captured by Bosielo AJA (as he then was) in *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at paragraphs [26] and [27], where he said:

> *"[26] 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 cases to serve 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) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).*

"[27] Having given careful consideration to all relevant facts, including the age of the respondent, the circumstances of his arrest, its nature and short duration, his social and professional standing, the fact that he was arrested for an improper motive and awards made in comparable cases, I am of the view that a fair and appropriate award of damages for the respondent's unlawful arrest and detention is an amount of R15 000.

(my emphasis)

[12] It is inevitable that reliance is placed on awards in previously decided cases. This was the approach adopted by the appellant's counsel before the Magistrate and remains the approach on appeal. The guiding of words of Nugent JA in *Seymour supra* with emphasis on *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A), regarding reliance on previously decided cases remains trite:

"[17] 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. As pointed out by Potgieter JA in Protea Assurance, after citing earlier decisions of this Court:

'The above quoted passages from decisions of this Court indicate that, to the limited extent and subject to the qualifications therein set forth, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. ***It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters****. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.'*

…

[20] Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."

(my emphasis)

[13] The Supreme Court of Appeal has recently expressed itself very strongly in respect of the comparative award approach in the assessment of quantum of

damages in unlawful arrest and detention matters. In *Diljan v Minister of Police* (746/2021) [2022] ZASCA 103 (24 June 2022), Makaula AJA, writing for the Court was very emphatic in respect of exorbitant amounts claimed by litigants in comparable cases, when he said:

> *"[14] … What remains to be decided therefore is the quantum thereof. On this score, Counsel for the appellant, inter alia, urged this Court to have regard to past awards in assessing the appropriate amount to be awarded. Counsel referred us to several previous judgments, including the judgment of Lopes J in Khedama v The Minister of Police. The plaintiff in that matter had issued summons for unlawful arrest and detention against the defendant, claiming an amount of R1 million. She was arrested and detained for a period of 9 days from 3 December 2011 and released on 12 December 2011.*
>
> *[15] In Khedama, the court, in large measure, had regard to the appalling conditions in the country's detention facilities, such as lack of water, blocked toilets, dirty and smelling blankets, sleeping on the cement floor, bad quality of food, and lack of sleep. Having considered various heads of damages, Lopes J awarded damages for wrongful arrest and detention of R100 000, deprivation of liberty and loss of amenities of life of R960 000 (R80 000.00 per day for 12 days); defamation of character including embarrassment and humiliation of R500 000 and general damages in an amount of R200 000. In total, he assessed the total damages suffered at R1, 760 000. However, because the amount claimed was limited to R1 000 000 he was awarded the latter amount.*
>
> *…*
>
> *[18] The acceptable method of assessing damages includes the evaluation of the plaintiff's personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party's reputation*

and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

…

[20] ***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 a particular 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****.*

[21] *The facts relating to the damages sustained by the plaintiff in Khedama are largely similar to those in this matter. However, the excessive amount awarded in Khedama cannot serve as a guide in a matter like the present. Even the length of the period during which Ms Khedama was incarcerated, was overstated and, as a result, she was awarded an amount which was, in my view, significantly more than what she deserved."*

(my emphasis)

[14] A court in exercising its discretion must balance the premium placed on the right of liberty and human dignity, whilst avoiding extravagance in compensating for loss of liberty. The peculiar facts of each matter should prevail as a general rule with comparative analysis being secondary thereto.

Application of the authorities to the facts of the present appeal

[15] The mathematical calculations by the appellant's legal representative in the Magistrates' Court is mindboggling and illogical. The legal representative embarks upon a lengthy exposition of case law on quantum from mainly the Gauteng Division and Local Division of the High Court and concludes with two cases from this Division, *Molefe v Minister of Police* (433/2019) [2020] ZANWHC 63 (22 October 2020) and *Nagel v Minister of Police* (CIV/APP/MG14/19) [2020] ZANWHC 66 (23 October 2020). In *Molefe*, the plaintiff on appeal, was awarded an amount of R90 000.00 for his unlawful and arrest detention from 7 June 2018 at 03h00am to 8 June 2018 at 14h00pm (35 hours). In *Nagel*, the plaintiff on appeal, was awarded an amount of R80 000.00 for his unlawful and arrest detention from 22 November 2016 at 09h30am to 23 November 2016 at 12h30pm (27 hours).

[16] After the exposition of the cases as aforesaid, the legal representative refers to a number of judgments from this Division and applies very illogical arithmetic. In an appeal before myself and Gura J, *Gulane v Minister of Police* an amount of R15 000.00 was awarded to the plaintiff for a period of six (6) hours of detention following his unlawful arrest. According to the legal representative this equates to an amount of R60 000.00 per day. On my calculation of this illogical arithmetic, it implies that if R15 000.00 is divided by the 6 hours of detention which equals R2500.00 per hour, R2500.00 per hour multiplied by 24 hours equates to R60 000.00 per day. A further non-sensical calculation is applied to an award of R5000.00 granted by the Judge President for 1 hour's detention in *Skosana v Minister of Police*. Again on my calculation of this illogical arithmetic, it implies that if R5 000.00 is granted for one hour, R5000.00 multiplied by 24 hours equals R120 000.00 per day. The legal representative concludes in his heads of argument that *"With due consideration of the above, it's our submission that an amount of* ***R200 000.00*** *is fair and reasonable in the circumstances, and as such the court is requested to grant such award."*

[17] I respectfully do not align myself with the awards granted on appeal in the *Molefe* and *Nagel* matters. I am edified in this view by what Tsoka AJA said in

Minister of Police and Another v Erasmus (366/2021) [2022] ZASCA 57 (22 April 2022):

> *"[3] … **Mr Erasmus cross-appealed against the judgment and order in respect of the arrest and the first period of detention. On 19 January 2021, the appellants' appeal was dismissed and the cross-appeal upheld. The high court awarded Mr Erasmus damages in the amount of R50 000 for unlawful arrest for the first period of detention** …*
>
> *…*
>
> *[17] It remains only to consider the award of R50 000 in respect of the arrest and detention of the first period. Mr Erasmus was detained for approximately **20 hours** in unpleasant conditions. **Nevertheless, there is a striking disparity in the amount of damages that I would award (R25 000) and that of the high court. This justifies this Court's interference with the exercise of the discretion of the high court in this regard. The appeal against the quantum of damages in respect of the arrest and detention for the first period must also succeed and the award must be replaced with one in the amount of R25 000**."*
>
> *(my emphasis)*

[18] The attack in the grounds of appeal of the Magistrate's reliance on *Rahim and 14 others v The Minister of Home Affairs* 2015 (7K6) QOD 191 (SCA), on the basis that it did not deal with an unlawful arrest and detention is misplaced and lacks insight into the principles set out in the judgment. The sentiments expressed at paragraph [27] of the judgment are apposite and equally applicable to claims predicated on unlawful arrest and detention:

> *"[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."

(my emphasis)

[19] Having regard to the evidence of the appellant as set out in the damages affidavit *supra*, an amount of **R200 000.00** in my view would not be justified. If a comparison had to be drawn to demonstrate the disproportionality of such an award, the awards of **R550 000.00** and **R500 000.00** awarded in *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021) by the Constitutional Court where the plaintiffs were incarcerated in the most appalling circumstances and in solitary confinement for eight months and ten days, is apposite.

Conclusion

[20] The Magistrate in my view carefully considered the peculiar facts placed before her with due regard to all relevant authorities. I can find no misdirection on the part of the Magistrate. This Court would also not have considered an

award higher than the **R100 000.00**. The award of **R100 000.00** is fair and reasonable in the circumstances.

[21] The appeal accordingly stands to be dismissed.

Costs

[22] The appeal was unopposed and the appropriate order would be no order as to costs.

Order

[23] In the result, the following order is made:

(i) The appeal is dismissed.

(ii) No order as to costs.

A H PETERSEN
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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Instructed by	**:**	Brand & Lambrechts Attorneys c/o D C Kruger Attorneys 29 North Street MAHIKENG
DATE OF HEARING	**:**	**10 MARCH 2023**
DATE OF JUDGMENT	**:**	**12 APRIL 2023**