



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 HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

Case No.: 144/2018

In the matter between:

THEKOFULO SIMANYANA BUSANG

Plaintiff

and

MINISTER OF POLICE

Defendant

ORDER

In the result the following order is made:

1. The defendant shall pay a sum of R140 000.00 as general damages for the unlawful arrest and detention of the plaintiff.
2. The defendant shall pay interest on the above amount of R140 000.00 at the prescribed legal rate *a tempora morae* to date of payment.

3. The defendant shall pay costs on the Magistrates' Court scale, including the costs reserved on **1 February 2021**.

JUDGEMENT

MFENYANA AJ

Introduction

- [1] This is an action for damages arising from the unlawful arrest and detention of the plaintiff by employees of the defendant.
- [2] The matter serves before this court for the determination of the quantum of damages suffered by the plaintiff, it being the case that the issue of merits has become settled between the parties with the defendant conceding 100% liability of the agreed or proven damages. The defendant is thus vicariously liable for damages suffered by the plaintiff.
- [3] On **18 August 2021** the court per Petersen J, granted the following order:

"It is ordered:

*That the Defendant is 100% liable for the agreed/proven damages of the Plaintiff as a result of his unlawful arrest and detention from the **23rd day of September 2017 to the 26th day of September 2017**.*

That the Defendant shall pay the costs of the action to date, which scale shall be determined upon finalisation of the action on quantum.

That Plaintiff shall apply for a date for the hearing of quantum with the Registrar."

- [4] It is common cause that on **22 September 2017** the plaintiff, 18 years at the time, was arrested by members of the South African Police Service (SAPS). Following his arrest, he was detained in a police vehicle for approximately six hours whereafter he was detained at the police station in Mahikeng for a period of four days. He was subsequently released from custody on **26 September 2017** without appearing in court.
- [5] The plaintiff's particulars of claim do not shed much light on the circumstances surrounding the plaintiff's arrest. On perusal of the docket and statements submitted as part of the docket, it transpires that the plaintiff was arrested on a charge of armed robbery having been found at the scene of the crime together with other persons suspected of having committed the same offence. He did not resist arrest and was recommended for release on bail in the amount of R300.00. The record gives no indication whether or not the plaintiff was in fact released on bail as recommended. It is further common cause that he was released from custody on **26 September 2017** without appearing in court.
- [6] In his particulars of claim, the plaintiff claims an amount of R520 000.00 for his arrest and detention.

- [7] In support of his claim the plaintiff deposed to an affidavit setting out the circumstances of his arrest and detention, in order to prove the general damages he claims. In the said affidavit, the plaintiff set out details of his qualifications and personal circumstances. He stated that he is presently 23 years, has a grade 12 qualification, and is currently employed. He is not married and has no children. He did not provide any further details in relation to his employment.
- [8] With regard to the nature of his arrest the plaintiff states that the arrest took place in public, in the early hours of the morning and in the presence of his friend who was also arrested with him. He confirmed what is contained in his particulars of claim, and that he was left in the police vehicle for approximately five hours before being taken to the police station in Mahikeng.
- [9] In great detail, he described the condition of the cell he was put in. He stated that it was so small that there was not enough room for the inmates who were in it to move around or lie down. There was also no mattress available to sleep on, which he considered irrelevant as there was in any case no space to do so. The taps were broken, no functional toilet and no enclosure to ensure privacy. He had to contend with the stench from the toilet whenever any of the inmates made use of it. The plaintiff further stated that it was a cold night and they did not have blankets to keep warm. He further stated that he had to inhale cigarette smoke although he is a non-smoker, as other inmates were smoking.

[10] Concerning the effects of the arrest and detention, the plaintiff stated that he suffered emotional shock which has scarred him for life, and has lost all trust and confidence in the SAPS. He recalled that he felt hopeless during his detention as all his complaints were ignored by the police officials, who labelled him a criminal. His operation with the police did not help him either. The plaintiff states that he is still haunted by dreams of the incident.

Quantum

[11] It is trite that arrest and detention are infringements of constitutionally entrenched rights to freedom of movement and dignity. Where the arrest and detention are unlawful and unwarranted, it makes the infringement all the more intrusive. When it comes to an award for such infringements, it must be borne in mind that the purpose of an award is not to enrich the plaintiff, but to provide the necessary *solatium* for the infraction on his rights. The Supreme Court of Appeal in *Minister of Safety and Security v Tyulu*¹ stated:

"... 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."

¹ 2009 (5) SA 85(SCA)

[12] In considering what would be an appropriate award of damages the court must take into account the specific circumstances of each case, including the personal circumstances of the plaintiff and the circumstances surrounding his arrest and detention. There is however no magic formula. Previous awards by the courts do provide a guide but "*have no higher value than that.*"² That being the case, a court seized with determining the *quantum* of damages for a contravention or unlawful arrest and detention should endeavour to strike as much a balance as possible between various competing interests, ranging from the nature and extent of the infraction, providing the necessary solace to the plaintiff, as well as the burden imposed on the fiscus. These factors need to be considered as a whole in order to arrive at what could be considered a fair amount of damages.

[13] It is now common cause that the plaintiff was arrested and detained without justification for a period of four days. While the order that was granted by agreement between the parties in respect of the merits, states the date of arrest as **23 September 2017**, the defendant has subsequently conceded that the plaintiff was arrested on **22 September 2017**. Consequently, an amended order was granted by agreement between the parties.

[14] One of the distinguishing factors of the plaintiff's arrest is that he was caged in a police vehicle for approximately five hours before being transferred to a police cell. Neither of these stations in his life

² *Minister of Safety and Security v Seymour* [2007] 1 All SA 558 (SCA)

the matter was settled in the amount of R100 000.00 in arguably what the plaintiff refers to as 'the exact same conditions'.

[16] The defendant conceded that a person's liberty is an important constitutional right contained in the Bill of Rights, but contended that the award must be fair to both parties. He further contended that the amount claimed by the plaintiff is excessive and that an amount of R15 000. 00 for each day that the plaintiff was detained would be reasonable in the circumstances, to a total of R60 000.00. In this regard he further contended that the plaintiff did not advance any special personal circumstances to justify a higher award than those already awarded by various courts. He cited the decisions in *Thlaganyane*⁶, *Mathe*⁷, *Duma*⁸ and *Molefe*⁹ where the courts made awards of R140 000.00 for 19 hours, R120 000.00 for 37 hours, R300 000.00 for 9 days and R90 000.00 for a day's detention.

[17] The difficulty with this approach is that it overlooks the fact that no two cases are the same. As the defendant has correctly pointed out, there is no mechanical application possible. To my mind, while it has somewhat become habitual to link awards to the time of incarceration, the period of detention is but one of the factors to be considered. In fact, the very cases relied on by the defendant vary to such an extent that no mathematical precision is possible. One

⁶ *Thlaganyane v Minister of Safety and Security* [1661/2009] NWHC, Mahikeng (2013)

⁷ *Mathe v Minister of Police* (33740/14) [2017] ZAGPJHC 133; 2017 (2) SACR 211 (GJ); [2017] 4 All SA 130 (GJ) (24 May 2017)

⁸ *supra*

⁹ *Molefe v Minister of Police* (433/2019) [2020] ZANWHC 63 (22 October 2020)

on the day and the days that followed were warranted. Without any justification he was left to linger in a police cell in the terrible conditions he described, until his release, four days later on **26 September 2017**. His description of the prison paints a picture of unsavoury conditions and his stay there was far from comfortable. There is therefore little wonder why the plaintiff is still haunted by dreams of the ordeal. I was however not referred to any evidence of the psychological effect of the arrest and detention on the plaintiff bearing in mind that each person is unique.

- [15] I was referred to various decisions of this and other divisions by both counsel, in a bid to persuade this court on what a fair amount of damages would be. The plaintiff on the one hand relied on various decisions from various divisions where the plaintiffs were awarded amounts ranging from R30 000.00 to R90 000.00 per day in differing circumstances. I confine myself to those that I consider to bear close resemblance to the present case. I hasten to add that the specific facts of each case play an important role. In *Ngwenya v Minister of Police*³ this division made an award of R45 000.00 for arrest and detention spanning three days. In *Duma v Minister of Police and Another*⁴ where the plaintiff was arrested and detained for nine days, the plaintiff was awarded damages in the amount of R300 000.00. The plaintiff also sought to rely on a judgement of this division in *Karabo Mogapi v Minister of Police*⁵ and contended that

³ (924/2016) [2019] ZANWHC 3 (7 February 2019)

⁴ (41429/2011) [2016] ZAGPPHC 428 (13 June 2016)

⁵ Case No. 241/2018

might even suggest that they do not support the defendant's argument.

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

"[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 bona. 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.*

[19] The truth of the matter is that no amount can reasonably be attached to an individual's constitutionally entrenched right to freedom of movement and dignity or any right for that matter. I have given due consideration to comparative awards made by this division and other divisions in relatively comparative circumstances and the decisions relied on by the parties. None of the circumstances fit

squarely within the circumstances of this case. I have also considered the available evidence in respect of the personal circumstances of the plaintiff including his age, the fact that at his young age of 18, he had to endure the humiliation and indignity associated with arrest and detention, the fact that he was detained in a police vehicle for five hours, and the duration of his further detention, all for no reason valid in law.

[20] In arriving at a fair amount of compensation I am further guided by the words of Innes CJ in *Pitt v Economic Insurance Co. Ltd*¹⁰ that:

"...the court must take care to see that its award is fair to both sides- it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense."

[21] Taking into account the time value of money I conclude that in the circumstances an amount of R140 000.00 would be appropriate in the circumstances.

Costs

[22] As regards costs there appears to be no reason why costs should not follow the cause. There is no dispute raised in this regard. The only dispute relates to the scale thereof. The plaintiff however seeks costs at the High Court scale as he contends that there was agreement between the parties during a pre-trial conference that the matter should not be transferred to the Magistrates' Court and the

¹⁰ 1957 (3) SA 284 (D) at 287E-F

defendant did not object when the matter was before the court in respect of merits. He further argues that the matter is a complex matter and includes the constitutional rights of the plaintiff. The defendant on the other hand avers that costs should be awarded on the Magistrates' Court scale.

[23] When the order on the merits was granted by the court on **18 August 2021** the scale of costs was left for later determination upon finalisation of the matter on quantum. What this suggests is that there was no agreement on this aspect.

[24] It is trite that costs are within the discretion of the court. Inevitably, that includes the scale of such costs. It is also trite that where a litigant has a choice of forum in which to bring a claim, "a plaintiff may formulate his or her claim in different ways and thereby bring it before a forum of their choice"¹¹ though it might turn out that the claim is bad. In that case the plaintiff is entitled to bring it before the court where that claim is enforceable. The import of this is that in the present matter the plaintiff's claim is for an amount of R520 000.00. This notwithstanding the fact that in his written submissions, plaintiff's counsel submitted that an amount of R220 000.00 would be reasonable in the circumstances. Embedded in that belated submission is a tacit concession that the higher amount claimed in the particulars of claim was not warranted. There can be no better

¹¹ *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 4 All SA 146 (SCA) para 34.

justification for directing that the plaintiff be awarded costs at the magistrates' court scale than that.

[25] In *Goldberg v Goldberg*¹² Schreiner J said that in such circumstances, "not only could a 'successful applicant be awarded only magistrate's court costs but he may even be deprived of his costs..." . Such an order is meant to serve as a deterrent that claims which fall within the jurisdiction of the magistrates' court should be sued out in that court.

Order

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

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1. The defendant shall pay a sum of R140 000.00 as general damages for the unlawful arrest and detention of the plaintiff.
2. The defendant shall pay interest on the above amount of R140 000.00 at the prescribed legal rate *a tempora morae* to date of payment.
3. The defendant shall pay costs on the magistrates' court scale, including the costs reserved on **1 February 2021**.

¹² 1938 WLD 83.


S MFENYANA
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 2 NOVEMBER 2022
JUDGMENT RESERVED : 2 NOVEMBER 2022
DATE OF JUDGMENT : 20 FEBRUARY 2023

For the Applicant : Mr GG Labuschagne
Instructed by : Labuschagne Attorneys

For the Respondents : Adv. GI Mothibi
Instructed by : State Attorney, Mmabatho