IN THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISON, MAHIKENG

CASE NO: 1046/2020
Reportable: NO
Circulate to Judges: NO
Circulate to Magistrates: NO
Circulate to Regional Magistrates: NO

In the matter between

TSHEPANG MOUMAKWE **PLAINTIFF**

And

THE MINISTER OF POLICE **DEFENDANT**

JUDGMENT

REDDY AJ

Introduction

[1] The plaintiff in this action, Mr. Tshepang Moumakwe sued the Minister of Police, the defendant, for his unlawful arrest and detention, by the members of the South African Police Services ("SAPS") on 5 January 2018. The arrest of the plaintiff on an allegation of pointing of a firearm, unfolded in the immediate vicinity of his residence. Subsequent, to the arrest the plaintiff was detained at Mafikeng South African Police cells until 8 January 2018. On the latter date, the plaintiff was taken to court, but did not make a first appearance before the Magistrate, resultantly he was released. Pursuant to his release, the plaintiff instituted an action for damages in an amount of R600 000.00.

The merits were conceded by the defendant, what remained was the issue of quantum.

[2] On 13 Mach 2023, I was presented with the following draft order:

1. The defendant is ordered to pay the Plaintiff the sum of **R450 000-00 in full and final settlement of all damages claimed by the Plaintif**f.

2. The amount referred to in paragraph 1 shall be paid within 30 days failing which the Defendant shall pay the interest on the said amount at the rate of 10.25 per annum calculated from the day the 30 days expires.

3. The Defendant shall pay Plaintiff's taxed or agreed party and party costs.

[3] I perused the compromise which addressed the merits of the action, inclusive of the quantum analogous to the particulars of claim. I held no reservations regarding the essence of the compromise in respect of the merits. It certainly extinguished the dispute between the parties. A court when approached has the power to make a compromise, or part thereof, an order of court. This power must, of course, be exercised judicially, that is, in terms of a fair procedure and with regard to relevant considerations. The merits, therefore are not deserving of further attention. Regarding, quantum, I formed the *prima facie* view that the compromise was out of sync with the *facta probanda*. To reinforce this preliminary view I quote, from particulars of claim from paragraph [4] onwards:

4.

Plaintiff was arrested on 6 July 2018 by a member of the South African Police Services who identified herself as Maduo Throlly Mogwerane whose rank, full and better particulars are unknown to the Plaintiff. The member is an employee of the Defendant.

5.

The arrest was said to be for pointing of a firearm at a person referred to as Mothusi and registered under Cas no: 05/01/2018 at the Mmabatho Police Station.

6.

Following the arrest, Plaintiff was then detained at Mafikeng until the 08 of January 2018, being a total of **four (4) days**, this at the instance of the said police officers and various police officers whose names and ranks are unknown to the Plaintiff. (My underlining)

7.

On the 08 January 2018 Plaintiff was taken to appear at court but was told his matter was not on the roll and he was then released home.

8.

Plaintiff had then, and over a period, made enquiries with the court as to the status of the matter until he was informed that the prosecutor had declined to prosecute the matter on the 30th of July 2018.

9.

The said members of the SAPS were acting within the scope of their employment with the 1st Defendant.

10.

As a result of the wrongful arrest by the members of the SAPS the 1st Defendant, the Plaintiff suffered the following damages,

10.1 Psychological trauma.

10.2. Severe emotional shock and trauma.

10.3 Deprivation of his personal liberty for a period not less than t**hree (3) days**.

As a result of the aforesaid, Plaintiff suffered damages in the amount of R600-000.00(six hundred thousand) being in respect of the damages.

(My underlining)

[4] Resultedly, I raised my concerns with both representatives and further enquired if either any damages affidavits accompanied by any expert reports justifying the compromise on quantum had been filed. Both counsel reaffirmed the absence of same and that the compromise on quantum for the non-patrimonial damages was based solely on compromise between the parties. This compromise was **not** reinforced by an iota of evidence.

[5] This Court, is cloaked with the necessary judicial power to make a compromise an order of court. This is indisputable. The issue of compromise in our jurisprudence was revisited in *Road Accident Fund v Taylor and other matters* (1136/2021; 1137/2021; 1138/2021; 1139/2021; 1140/2021) [2023] ZASCA 64 (8 May 2023). Van der Merwe JA stated as follows regarding the issue of compromise at paragraphs [36], [38] and [39]:

[36] The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. Our courts have for more than a century held that, irrespective of whether it is made an order of court, a compromise has the effect of *res iudicata* (a compromise is not itself *res iudicata* (literally 'a matter judged') but has that effect).

[38] In *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 270, Innes CJ referred to the common law and proceeded to say:

According to that law a *transactio*, if established and valid, is an absolute defence to the action compromised. It has the effect of *res judicata*.

The next important case is *Estate Erasmus v Church* 1927 TPD 1. The full bench (at 25-26) extensively referred to common law authorities, had regard to *Cachalia v Harberer* and *Western Assurance* and concluded:

The object therefore of a compromise is to end, or to destroy, or to prevent a legal dispute. The effect of a compromise is *res judicata*; and, according to *Domat*, the effect is even stronger than that of a judgment inasmuch as, unlike in the case of judgments, the parties have consented to the terms on which they intend to compromise.

[39] These dicta have repeatedly been approved by this court. See *Van Zyl v Niemann* 1964 (4) SA 661 AD at 669H and, in particular, *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 915 AD at 921A-D and 922C. See also *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; 2017 (5) SA 508 SCA para 14 and *Watson NO v Ngonyama and Another* [2021] ZASCA 74**;** 2021 (5) SA 559 (SCA) para 60. In *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) para 10, it was stated that our courts encourage parties to deal with their disputes by way of compromise. This court proceeded to say, with reference to *Estate Erasmus v Church*, that when concluded, such a compromise disposes of the proceedings. The culmination of all of this, for purposes of this judgment, as stated in *Legal-Aid South Africa v Magidiwana and Others* [2014] ZASCA 141; 2015 (2) SA 568 SCA para 22, is that once 'the parties have disposed of all disputed issues by agreement *inter se*, it must logically follow that nothing remains for a court to adjudicate upon or determine'.

[6] The parties wished that the compromise receive the *imprimatur* of the court. In so doing, the court is vested with a judicial oversight role not to simply function as a conveyer belt on mass producing court orders that may be legally objectionable. A compromise should only be made an order of court, if it complies with the Constitution and the law.

[7] In *Taylor supra*, Van der Merwe JA, postulated as follows:

> [40] When requested to do so, a court has the power to make a compromise, or part thereof, an order of court. This power must, of course, be exercised judicially, that is, in terms of a fair procedure and with regard to relevant considerations. The considerations for the determination of whether it would be competent and proper to make a compromise an order of court, are threefold. They are set out in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 25-26 (*Eke v Parsons*).
>
> [41] **The first consideration is whether the compromise relates directly or indirectly to the settled litigation. An agreement that is unrelated to litigation, should be made an order of court. The second is whether the terms of the compromise are legally objectionable, that is, whether its terms are illegal or contrary to public policy or inconsistent with the Constitution. Such an agreement should obviously not be made an order of court. The third consideration is whether it would hold some practical or legitimate advantage to give the compromise the status of an order of court. If not, it would make no sense to do so**.

[8] The compromise before me, fell squarely within the exceptions as set out in *Taylor supra* and was certainly legally objectionable, put differently it was inconsistent with public policy and the Constitution. The Constitution is the supreme law of our country. Section 1 of the Constitution provides that South Africa is a Republic founded on the value of constitutional supremacy. Section 2 of the Constitution provides that the Constitution is **supreme law in the Republic; law or conduct inconsistent with it is invalid**, and the obligations imposed by it must be fulfilled.

[9] In Eke v Parsons (CCT214/14) [2015] ZACC 30 at paragraphs [26] [27] and [28] the issue of whether a compromise is legally objectionable was addressed as follows:

[26]**Secondly, "the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must "hold some practical and legitimate advantage**".

[27] The less restrictive approach adopted in this judgment is in line with the wide power that courts have to regulate their process. This power is expressed in section 173 of the Constitution, which provides:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[28] This is what this Court has said about the inherent power:

"**[T]he power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction." (**Footnotes omitted**)**

[10] Notwithstanding my concerns as regards the compromise on quantum, both parties had no objections to my continued participation in the matter. The plaintiff then sought to introduce *viva voce* evidence regarding quantum. The defendant indicated that no rebutting evidence would be presented. Further thereto, the plaintiff requested permission to belatedly introduce an affidavit of the plaintiff. I acquiesced, allowing the defendant to do the same if so inclined.

The plaintiff's evidence on quantum

[11] On 5 January 2018, the plaintiff was the recipient of a telephone call from his partner, which necessitated that he immediately return to their common home. Fearing the worst, the plaintiff did so. A few metres from his residence, he noticed six (6) motor vehicles, all of which had been branded with the South African Police Services (SAPS) logos. The police officers driving these motor vehicles, with the aid of each of their respective motor vehicles, cordoned off the motor vehicle of the plaintiff. Alighting from the various motor vehicles the police officers, ordered the plaintiff to exit his motor vehicle, and to lie on the ground, with his hands behind his head. Heavily armed police officers combined with fear ensured the plaintiff's compliance.

[12] Whilst in a supine position, the plaintiff observed that community members gathered at the scene. Some of the latter were members of the Community Protection Forum, of which, the plaintiff was part of. The plaintiff's children were privy to the arrest of the plaintiff from the gate of his residence. The handcuffing of the plaintiff followed, it was explained that he was being arrested for the pointing of a firearm. An unsuccessful search of the plaintiff's motor vehicle followed, resulting in no firearm being recovered. The plaintiff was ordered to enter into a police motor vehicle which was driven to Ottoshoop Police Station. After the passage of approximately two (2) hours, the plaintiff still handcuffed, was placed in the back of a police van. On route to an undisclosed destination, the journey proved to be uncomfortable as the plaintiff was moved from side to side being unable to secure himself at the back of the police van owing to him being handcuffed.

[13] On exiting the police van, the plaintiff recognized that he was at the Mafikeng Police Station. The standard protocol post arrest was followed. Due to continued interrogation by police officers, the plaintiff missed supper. The plaintiff was then placed in cell with seven (7) detainees. He slept on the floor as no mattress was provided. The blanket that he used was infested with lice, which bit him, causing pain and a lack of sleep. This blanket was used to sleep for the next two nights. Food was provided. The lactrine was not in a

working condition. The overall conditions in the cell were inhumane. On 8 January 2018, the plaintiff was taken to court, but did not make a formal first appearance before the court. He was released.

[14] On release, the plaintiff acquired much relief from the Dischem Pharmacy to rid the lice that still occupied his body. The entire experience resulted in reputational damage as the plaintiff was labelled with derogatory appellations. He was also shunned from community associations that he was previously intimately involved in. His businesses were also negatively affected.

The law

[15] The right to liberty is a precious right, consequently, a high premium is placed on the right to freedom. The supreme law of our country enshrines this and failsafe's the right of everyone to freedom and security of person and the right not to be deprived of freedom arbitrarily or without just cause and not to be treated in a cruel, inhuman or degrading way as provided in s 12 (1) (a) of the Constitution. See *Minister of Home Affairs v Rahim* 2016 (3) SA 218 (CC)

[16] In *Rahim and 14 others v The Minister of Home Affairs* 2015 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."

[17] 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."

[18] 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.”

And

“[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."

[19] The homely legal metaphor that each case will be adjudicated on its own peculiarities and exigencies always finds application. In *Visser & Potgieter, Law of Damages, Third Edition*, on pages 545 to 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 ex aequo 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".

[20] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para [26] the following was advanced regarding the assessment of damages:

"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 -needed *solatium* for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are consummerate 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 as viewed in our law. I readily conceded that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical precision. **Although it is always helpful to have regard to awards made previously 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.** See: *(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) para (26-29).

[21] In *Diljan v Minister of Police* [2022] ZASCA 103 at paragraph [20] Makaula AJA, addressed exorbitant claims in particulars of claims as follows:

[20] A word has to be said about the progressively exorbitant amounts that are being 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 a 'thumbsuck' without due regard to the facts of the 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 above principles enunciated above."**

[22] The caution enunciated in *Diljan supra* fits squarely within the four corners of the action before this Court. The initial draft order presented to this court spoke of a settlement amount in respect of quantum of R450 000.00. In written heads the defendant concluded as follows:

[18] **In the premise it is the defendant's submission that the Plaintiff be awarded and amount of R60-000 00(Sixty Thousand Rand) which is R15 000 per day taking into consideration that there are no expert reports to prove the damage allegedly suffered**.

[23] The stark contrast in the disparity of the amounts in respect of quantum is to say the least concerning. It however reinforces the oversight role of the Court in judiciously considering a draft order when it is served. A going rate, per day is a judicial fallacy.

[24] In *Tobase v Minister of Police and Others* CIV APP MG 10/2021 (3 December 2021) Hendricks DJP (as he then was) addressed this notion wherein the following was stated:

> *"[15] In* ***Ngwenya v Minister of Police*** *(92412016)* [2019] 3 ZANWHC 3 *(7 February 2019) this Court awarded R15 000.00 per day for unlawful arrest and detention. The same amount* was *awarded in the matter of* ***Gulane v Minister of Police*** *CIV APP MG 21/2019, in an appeal which emanated from the Magistrate Court, Potchefstroom and decided by* ***Petersen J*** *et* ***Gura J. Petersen J*** *et* ***Gura J*** *did also in the matter of* ***Matshe v Minister of Police,*** case *number CIV APP RC 10/2020, likewise, award an amount of R15 000.00 per day for each of the two days that the appellant* was *detained.*
>
> *[16] The award of an appropriate amount of damages as* ***solatium*** *is within the discretion of the presiding Magistrate or Judge, which discretion must be exercised judicially, taking into account all the factors and circumstances relevant for the impositioning of a reasonable amount. Although there is no*

exact mathematical formula that can be applied, courts should nevertheless strive to achieve a balanced and fair amount, to be awarded as compensation.

…

[20] Difficult as *it may be to exercise one's discretion in the same way* as *any other person or presiding officer would do, there need to be a concerted attempt to at least strive for some degree of similarity, if not conformity with regard to the amount to be awarded* as *compensation.* ***To award amounts under similar circumstances that are miles apart does not create or instil confidence in the public and may lead to*** **a** ***wrong perception or even forum shopping, which is not at all good for the administration of justice. Much*** **as** ***there are*** **also** ***different amounts awarded by this Court*** **as** ***compensation or solatium, there*** **is** ***of late an attempt to strive for similarity or conformity. Each case must however be decided on its own facts, merits and circumstances****. The examples quoted above in the* case *of* ***Ngwenya v Minister of Police, Gulane v Minister of Police and Matshe v Minister of Police*** *underscores this. R15 000.00 per day,* is a *reasonable amount to be awarded. In* ***Skosana v Minister of Police*** *391/2019, an amount of five thousand rand (R5 000.00)* was *awarded for* a *young scholar aged fourteen (14) years that* was *arrested and detained for one (1) hour in* a *police motor vehicle, whereas he (and his legal team) claimed R1.2 million. There is of late* a *tendency to thumb-suck any amount and claim it as damages without justification, which amount* is *always way too much.*

…

[22] The following circumstances were placed on record and need to be taken into account in determining an appropriate amount of compensation. The appellant was arrested at his place of employment. He was detained in a *police cell for three (3) days under appalling conditions. He lost his employment where he earned R200 per day* as a *result of his incarceration, although no proof thereof was submitted. His arrest and subsequent detention was traumatic, although no expert evidence* was *presented in this regard. He was 30 years of age. His reputation* has *been damaged. Much* as *R25 000.00 for three (3) days detention following an unlawful arrest, which*

equates to less than R8 400.00 per day, is *too little, an amount of R200 000.00 which equals to more than R66 000.00 per day,* is *grossly excessive. These two amounts does not at all relate to each other and that coming from the* same *Magistrate's (District) Court. So much to* say *about conformity. Why this case was not consolidated with* case *number* ***C/V APP MG10/2021 Khukwane Joseph Tobase v Minister of Police*** *on appeal in this Court (and even in the Magistrate (District) Court) is mindboggling. This creates problems.*

...

[25] Having considered all the facts and circumstances of this case, as well as the personal circumstances of the appellant, which is paramount and which must be considered, I am of the view that an amount of R15 000.00 per day, *totalling* ***R45 000.00,*** *should be awarded as reasonable and appropriate* ***solatium.*** *The appeal against quantum should therefore be upheld. The appeal is unopposed and no costs order with regard to the appeal should therefore be made."*

[25] I now revert to the ventilated salient facts of this case and by implication the absence of rudimentary details. Logically both the latter undoubtedly has a bearing on the quantum. The plaintiff was arrested in full view of his partner, children (although the ages have not been disclosed) and community. This must have been humiliating. The plaintiff suffered an arbitrary deprivation of personal liberty and was humiliated and traumatized by virtue of his unlawful arrest and detention.The conditions in which the plaintiff was detained was inhumane. The entire episode negatively affected the plaintiff and his businesses. The period for which the plaintiff was detained is not insignificant, four (4) days.

[26] In the final analysis in assessing damages in a claim for unlawful arrest and detention the court considers what is fair and reasonable to both the plaintiff and the defendant with due regard to public policy, off course the courts should be astute that the public purse is not a horn of plenty. Afore, a consideration of all the factors and circumstances relevant to the assessment

of damages referred to earlier in this judgment and considering past awards, I deem the amount of R80-000.00 to be appropriate. In this regard I am guided by the recent decision of the Supreme Court of Appeal (SCA) in *Minister of Police and Erasmus* 2022 JDR 0979.

Costs

[27] Regarding costs, there is no justification warranting a deviation from the general rule that costs follow the result.

Order

[28] In the premises, I make the following order:

(i) Judgment is entered in favour of the plaintiff against the Defendant.

(ii) The defendant is hereby ordered to pay the plaintiff a sum of R80.000.00 as damages for the wrongful arrest and detention.

(iii) The defendant shall pay interest at the legal rate on the said amount from the date of judgment to date of payment.

(iv) The defendant is hereby ordered to pay the costs of the action on party – and party, on the Magistrate's Court's scale to be taxed.

A REDDY
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances:

Date of Hearing: 13 March 2023

Heads of Argument filed:	24 and 31 March 2023
Date of Judgment:	24 May 2023
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