



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 011820/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

29 August 2023

.....
SIGNATURE

.....
DATE

In the matter between:

WANDILE YANI

First Applicant

ZANELE MPANGASE

Second Applicant

SOMIKIZI DEPANE

Third Applicant

SIFISO MHLANGA

Fourth Applicant

SIYABONGA CHIYA

Fifth Applicant

ERENCE TILOTSHANE

Sixth Applicant

TSHEPO MOTSAKE

Seventh Applicant

LINA KHETHIWE WIBATA

Eighth Applicant

BETHUAL KGOTSO MOSIMA

Ninth Applicant

PATRICK NDWANEWE

Tenth Applicant

PINKY HLONGWANE

Eleventh Applicant

and

THE MINISTER OF POLICE

First Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**THE PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

JUDGMENT

FORD, AJ

Introduction

- [1] This is an application for default judgment against the respondents who are sued in their representative capacities.
- [2] I refer to the parties, for ease of reference, as in convention.
- [3] The plaintiffs served their combined summons on the defendants as follows:
- 3.1. On the first, second and third defendants on 8 August 2022;
- 3.2. On the office of the State Attorney on 11 August 2022.
- [4] The State Attorney, acting on behalf of the defendants entered an appearance to defend on 2 September 2022. The *dies* for the defendants to deliver a plea, expired on 30 September 2022. And by that date, no plea was delivered.
- [5] The plaintiffs served a Notice of Bar in terms of Rule 26, on 10 October 2022. The Notice of Bar was served on the State Attorney, acting on behalf of the defendants.
- [6] The defendants failed to deliver a plea in response to the plaintiffs' Notice of Bar, which expired on 17 October 2022.
- [7] The plaintiffs accordingly approach this court for default judgment seeking:

- 7.1. payment in the sum of R1000 000.00 (One million rand) in respect of each plaintiff; (R11 Million in toto.);
- 7.2. payment of interest on the total amount awarded to each Plaintiff calculated at 7.26% per year calculated from 12 August 2019.
- 7.3. Cost of suit, including the use of counsel and that of such costs, together with the interest thereon calculated at the legal rate of interest, calculated as from the date of taxation to the date of payment in full.

The facts

- [8] The plaintiffs' claim, as set out in their Particulars of Claim, is occasioned by their unlawful arrest and detention, by the agents and employees of the defendants on 11 August 2019.
- [9] On the 10 August 2019, the plaintiffs were party to a peaceful and legal protest action at the site of the Norwood Police Station, condemning the violent and brutal conduct of the South African Police Services in suppressing a protest by the Norwood community, earlier that day.
- [10] Without probable cause or provocation, the agents of the defendants, arbitrarily arrested the plaintiffs on 11 August 2019 and detained them until 13 August 2019, when they were taken to the Hillbrow Magistrate's Court. The State Prosecutor declined to institute any prosecution against the plaintiffs who were subsequently released.
- [11] The plaintiffs contend that an attempt was made to lay spurious criminal charges against them, but the prosecutor wisely demurred, as the plaintiffs had broken no laws.
- [12] The plaintiffs testified that their constitutional rights were violated for the ostensible motive and purpose of quashing their and their community's right to

protest. Further that the police be held accountable for their actions, and otherwise intimidating, punish and degrade the humanity and dignity of the plaintiffs.

[13] It was argued, on behalf of the plaintiffs that the damages prayed for are not just meant to console and ameliorate the consequences of the abuse they suffered at the hands of a State Institution ostensibly existing to protect the individuals that they harmed but must serve as a salutary message to law enforcement officials and organisations of the high standards that is expected of our policemen and women, and that severe retribution will be meted out to governmental entities that stray from their duty and mission.

[14] The plaintiffs testified that they suffered deprivation of liberty and discomfort; reputational damage, pain and suffering; and *contumelia* and that as solatium for damages they suffered, that each plaintiff be paid the sum of R1,000 000.00, as the severity of both the conduct of the agents of the defendants and the attending socio-legal imperatives demanding that such conduct be curbed and disincentivized.

Analysis

[15] State institutions are our constitution's primary agents. The men and women who occupy roles of authority in our institutions, yield significant amounts of power and influence and have a noble duty to promote and protect the rights of citizens enshrined in our constitution. Policemen and women are, especially when uniformed, the visible face our protection services and often the first port of call for anyone seeking protection of rights under our constitution. When the very people who ought to uphold the constitution, promote personal interest above the rights of others and perpetrate acts that violate the constitution, we are operating on extremely dangerous turf and place our constitution, and hard-earned freedoms, at risk. A person who abuses the authority, imbued on him, by virtue of a constitutional designation, is a disgrace. The willy-nilly, baseless and often soul-destroying conduct of arrests, when there is no probable cause,

cannot be allowed to continue unfettered and drastic steps need to be taken to avoid this disgraceful state of affairs.

[16] On the facts as outlined by the plaintiffs, there can be no doubt that their arrest was not only unlawful, but it was humiliating and baseless. The plaintiffs had their freedom and security of person deprived in a most objectionable manner and suffered damages as a result.

[17] On 2 February 2023, Judge Adams, in our division, penned a very useful article, which I have relied upon in respect of this judgment. The brevity of the article and its potency has persuaded me, to quote it *verbatim*. The learned judge said:

[1]. *A hundred years ago Innes CJ – in Hulley v Cox 1923 AD 234 – warned that 'we cannot allow our sympathy for the claimants in this very distressing case to influence our judgment'. And 65 years ago, Holmes J in Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D) commented as follows: -*

'(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.'

[2]. *In awarding general damages generally, but especially in cases of unlawful arrest and detention, judicial officers would be well advised to heed these caveats. One's award should always be fair not just to the claimant, but also to the defendant, whilst, at the same time not losing sight of the fact that in these type of cases there would have been a serious infringement of the arrestee's constitutional rights to equal protection and benefit of the law, human dignity, freedom and security of the person, freedom of movement.*

[3]. *The way to achieve that is simply to have regard to any and all of the relevant circumstances in each matter. Bear in mind that, in relation to general damages, 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 the sequelae of his injuries. An Appeal Court will not interfere unless there is a 'substantial variation' or as it is sometimes called a 'striking disparity' between what the trial Court awarded and what the Appeal Court considers ought to have been awarded.*

What then are the factors that should be taken into consideration when awarding damages?

[4]. *In the oft-quoted case of Minister of Safety and Security v Tyulu 2009 (5) SA 85, the SCA held as follows: -*

'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'.

- [5]. *As was held by the SCA in Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA), 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.*
- [6]. *'The process of comparison [should] 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.'* (Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A)).
- [7]. *Other factors that can and should play a role in the assessment of damages as per the Authors Visser & Potgieter: Law of Damages, who have such factors from South African case law, are the following factors: -*

'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: -

- (a) *the circumstances under which the deprivation of liberty took place;*
- (b) *the presence or absence of improper motive or "malice" on the part of the defendant;*

- (c) *the harsh conduct of the defendant;*
- (d) *the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty;*
- (e) *the status, standing, age, health and disability of the plaintiff;*
- (f) *the extent of the publicity given to the deprivation of liberty;*
- (g) *the presence or absence of an apology or satisfactory explanation of the events by the defendant;*
- (h) *awards in previous comparable cases;*
- (i) *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;*
- (j) *the high value of the right to physical liberty;*
- (k) *the effects of inflation;*
- (l) *the fact that the plaintiff contributed to his or her misfortune;*
- (m) *the effect an award may have on the public purse; and,*
- (n) *according to some, the view that the actio iniuriarum also has a punitive function.'*

With these general principles in mind and having regard to the above mentioned considerations, let's see how these translate into rands and cents. The SCA awards, I think, is a good starting point.

[8]. *In Seymour above, a 63-year-old man had been unlawfully arrested and imprisoned by the state for a period of five days. He had had free access to his family and a doctor throughout his detention. He had suffered no degradation beyond that which is inherent in being arrested and detained, and after 24 hours he had spent the remainder of this detention in a hospital bed. In 2006, the SCA awarded him R90 000 – reducing the award of R500 000 made by this Division.*

[9]. *In Tyulu above, a 48-year-old magistrate who had served for 12 years was arrested while walking in the early hours of the morning. The police alleged that he was drunk and that he matched the description of a person who had fled the scene of a motor accident in the vicinity. He was first arrested for being drunk in public and then later, at the charge-office and after having been identified by the witness, arrested a second time for drunken driving. The arrestee admitted to consuming six beers, his blood-alcohol level was tested to have been substantially more than the legal driving limit and he was moderately under the influence when examined shortly after the arrest. He was detained for a few hours and released the next day. In 2009, the SCA awarded R15 000 – reducing the award from R280 000 made by the High Court.*

- [10]. *In Diljan v Minister of Police 2022 JDR 1759 (SCA), a lady, suspected of having committed the offence of malicious damage to property, was arrested on Friday afternoon and detained until Monday, when she was released from custody. She was kept in appalling circumstances. The condition of the police cell in which she was detained was filthy with no hot water; the blankets were dirty and smelling; the toilet was blocked; she was not provided with toilet paper, and she was not allowed visitors. She could not eat the bread and peanut butter that was the only food provided to her. She was deprived of visitation rights by her family, and that resulted in her not receiving medication for her heart condition. She was deprived of her liberty for 3 days. On 24 June 2022, the SCA awarded R120 000.*
- [11]. *Importantly, in Diljan, the SCA criticised the excessive award in a High Court matter, to which it had been referred, namely Khedama v The Minister of Police 2022 JDR 0128 (KZD), in which the High Court awarded to a plaintiff, who was arrested and detained for a period of 9 days, a whopping R1 000 000. The SCA commented as follows on the said award: -*
- '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.'*
- [12]. *Closer to home, in Mathe v Minister of Police 2017 (2) SACR 211 (GJ), a 31-year old mother of two children, arrested on suspicion of prostitution, and detained for 37 hours before release at court after charge of prostitution was dismissed, was awarded R120 000. That award was made by the Court after considering awards in comparable matters up to that point.*
- [13]. *There is also Minister of Police and Another v Erasmus 2022 JDR 0979 (SCA), in which the plaintiff was suspected of having committed the crime of housebreaking with intent to steal and theft. He was arrested and detained in unpleasant conditions for approximately 20 hours and the High Court awarded R50 000. The award was reduced to R25 000 by the SCA.*
- [14]. *Lastly, Minister of Police v Mzingeli and Others 2022 JDR 0603 (SCA), makes for interesting reading, not only because the High Court in Mthatha awarded the two plaintiffs R4 million and R3 million respectively for being unlawfully incarcerated for lengthy periods of time, but also because the SCA found it wholly unacceptable to quantify damages on the basis of a 'stated case'.*

Conclusion

[15]. *If the awards by the SCA are anything to go by, erring on the side of caution and conservatism seem to be advisable¹.*

[18] In the matter before me, I have considered the egregious infringement of the plaintiffs' constitutional rights and their entitlement, as a right, to equal protection and benefit of the law, human dignity, freedom and security of the person and freedom of movement. These rights were violated by persons who ought to have protected them. I have also considered the fact that there appears to have been an improper presence or absence of improper motive or "malice" on the part of the police when the plaintiffs' arrests were effected. The conduct by the police was harsh and unnecessary.

[19] I am satisfied, on the cogent evidence presented that the conduct of the police caused the damages suffered by the plaintiffs.

[20] In the result, I make the following order:

Order

1. The defendants are ordered, jointly and severally, to pay the plaintiffs R30,000,00 (Thirty thousand rand) each for their unlawful arrest and detention, as follows:

Wandile Yani	R30,000.00
Zanele Mpangase	R30,000.00
Somikizi Depane	R30,000.00
Sifiso Mhlanga	R30,000.00
Siyabonga Chiya	R30,000.00
Erence Tilotshane	R30,000.00
Tshepo Motsage	R30,000.00
Lina Khethiwe Wibata	R30,000.00
Bethual Kgotso Mosima	R30,000.00
Patrick Ndwanewe	R30,000.00
Pinky Hlongwane	R30,000.00

¹ Article by Judge L. Adams *The Quantum of Damages in Unlawful Arrest and Detention cases* (2 February 2023)

2. The payments reflected in prayer 1 above are to be paid to the plaintiffs' attorneys on or before 30 September 2023.
3. Payment of interest on the total amount of R330,000.00 (three hundred and thirty thousand rand) awarded to the plaintiffs shall be calculated at 7.25% per year, calculated from 12 August 2019.
4. The defendants shall pay the plaintiffs' cost of suit on the ordinary scale (party-and-party) and that such costs, together with the interest thereon calculated at the legal rate of interest, be calculated as from the date of taxation to the date of final payment.


B. FORD

Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 29 August 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 August 2023

Date of hearing: 3 May 2023

Date of judgment: 29 August 2023

Appearances:

For the applicant: Adv. D. Snyman
Instructed by: BDK Attorneys

For the respondent: No appearance