

25/6/2010
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 3667/09

In the matter between:

MOSES NDUNA KWENDA

First Plaintiff

SIFISO FOSHIM MASEKO

Second Plaintiff

SIPHO GIFT KHUMALO

Third Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

DELETE WHICHEVER IS NOT APPLICABLE
PORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
25/06/2010
DATE SIGNATURE

JUDGMENT

MURPHY J

1. The three plaintiffs instituted action against the defendant alleging that they were unlawfully arrested on Saturday 11 October 2008 by Inspector Khoza, a member of the South African Police Service ("SAPS"), at Silverton police station in Pretoria. After their arrest, the plaintiffs were detained from approximately 17h15 on 11 October 2008 until approximately 12h15 on Monday 13 October 2008, when they were

released from the police cells at the Pretoria magistrate's court. They further alleged that at all relevant times Inspector Khoza was acting within the course and scope of his employment as a member of the SAPS.

2. The plaintiffs allege that as a result of the wrongful actions of the members of the SAPS they each suffered damages in the amount of R226 226,38, made up of three distinct amounts, namely R180 000 for loss of freedom due to wrongful arrest and detention, R45 000 for impairment of their dignity due to the wrongful arrest and detention and being accused of having committed theft from a motor vehicle, and special damages in the amount of R1226,38, being the reasonable and necessary fees of the plaintiffs' attorney to protect each plaintiff's rights during the period of their detention.
3. The defendant pleaded that the arrests were made on the basis of certain information regarding theft out of the motor vehicle of a complainant. The information led the police to the home of the first plaintiff where the arrests were effected. The defendant accordingly denied that the arrests were unlawful and that he was liable for any damages in that regard.
4. Shortly before the trial commenced, counsel for the defendant conceded the merits of the matter and informed the court that the only matter that remained to be decided was the *quantum* of the damages of the three

plaintiffs. The defendant further placed on record that it had conceded that the special damages claimed by the respective plaintiffs, being the reasonable and necessary fees of the plaintiffs, were also conceded.

5. In the light of those concessions, the facts are common cause. The arrest took place on 11 October 2008 at approximately 17h00 at the Silverton police station when the three plaintiffs were arrested without a warrant by Inspector Khoza who was acting in the scope and course of his employment. The plaintiffs were detained initially at Silverton police station from approximately 17h15 on Saturday 11 October 2008 until approximately 08h00 on Monday 13 October 2008 when they were taken to court. They were detained in the police cells at the Pretoria magistrate's court until approximately 12h15 on that day. The charges against them were dropped. It is further common cause that the detention was initially at the instance of Inspector Khoza, but various other members of the SAPS whose names and ranks are unknown to the plaintiffs, were also acting in the course and scope of their employment, and facilitated the arrest and detention.
6. Although nothing much turns on the point, various reasons were given for the arrest. The first plaintiff testified that on Saturday 11 October 2008, Constable Golele initially told the plaintiffs at the first plaintiff's home that they had come there in response to a report that there had been fighting at

the first plaintiff's home. Later it was suggested that they were arrested for hi-jacking. The plaintiffs' attorney at some point was informed that they were arrested for armed robbery. However, while in detention the plaintiffs were given a written notice explaining their constitutional rights, upon which it was written that they had been arrested on a charge of theft out of a motor vehicle.

7. In view of the concessions that the arrest and detention were indeed unlawful, all that remained in issue at the trial was the appropriate amount to compensate the plaintiffs for the wrong that was done to them; in other words, the *quantum* of damages. The concession in relation to the special damages narrowed the matter further to require determination only of the amount of general damages to be awarded in respect of the loss of freedom and the impairment of the plaintiffs' dignity due to the arrest and accusation of having committed theft from a motor vehicle.
8. All three plaintiffs testified, as well as the plaintiffs' attorney and the employer of the second and third plaintiffs. The defendant closed his case without calling any witnesses. Much of the evidence is not contested, and any differences that do exist between the parties relate more to the interpretation and weight to be attached to certain aspects of the evidence.

9. The first plaintiff is employed as a tracing agent by a firm of attorneys in Pretoria. At the time of the arrest he was 45 years of age. He is reasonably well educated, having matriculated and completed artisan courses qualifying him as a plumber. He worked in various positions as a plumber in the past and at one point ran his own business. He has been employed as a tracing agent since 2005. He is married and is the father of three children. He has never been arrested before for any reason and thus the arrest that took place on 11 October 2008 was his first unpleasant brush with the law in this fashion. His employer, Mr de Klerk, the managing director of attorneys De Klerk & Marais Inc., testified that the first plaintiff was a trustworthy worker upon whom he placed much reliance and about whom he had never received any complaint. The first plaintiff testified that the arrest and accusations humiliated him and that he was affected significantly by the fact that his arrest occurred in the presence of his 11 year old granddaughter who lives with him. He testified that the members of the SAPS who were in attendance at the time of the arrest ignored his attempts to explain to them that none of the plaintiffs had been involved in any alleged crime.
10. The second plaintiff is 28 years old. He achieved grade 10 at school and since 2005 has been working as a fitter fitting tyres on rims and as a wheel balancing technician at a company called Supa Quick in Montana Crossing in Pretoria. He is not married and lives with the third plaintiff, to

whom he is related. He has been previously arrested on charges of the theft a video cassette recorder. He explained that the owner of the video cassette recorder had owed him money and was aware of the fact that he took it when he refused to pay him. He remained in custody for a period of 5 months and was then cautioned and discharged. With regard to the arrest on 11 October 2008, he testified that he too felt humiliated by the arrest, detention and accusations leveled against him. Because of the arrest and detention he was absent from work on Monday 13 October 2008. He was thus required to account for his absence. He fears that this has led to a lack of trust between himself and his employer. Contrary to this, the second plaintiff's employer, Mr Horn, testified that he regarded the employees (the second and third plaintiff) as trustworthy and good workers. Nevertheless, the second plaintiff remains concerned about perceptions.

11. The third plaintiff was 33 years of age at the time of the arrest. He has grade 7 education. Since February 1997, he has been in stable continuous employment, working with Supa Quick, initially at Centurion as a fitter and alignment technician, but he too later transferred to Montana Crossing. He is married and has nine minor children, six of whom currently live him and his wife. He too has previously been arrested. This arrest arose as a result of a false complaint by a woman with whom he had had a love affair, who alleged that he had abducted her 9 year old

child. Nothing came of this allegation and he was detained for only one night and then released without charge. He also testified that his arrest, detention and the accusations made against him on 11 October 2008 caused him to feel humiliated. He complained further that the police had ignored his protestations of innocence. While he was in custody he was permitted to call his wife. On the night of his arrest his eight month old daughter had a fever and this weighed heavily on his mind because he could not care for his child while his wife was required to work that evening and again the following day. He too was concerned about his reputation at the workplace when he was required to account for his absence.

12. It is common cause that the plaintiffs' loss of freedom lasted from their arrest at about 17h00 on 11 October 2008 to their release at 12h15 on 13 October 2008, being approximately 44 hours.
13. All three plaintiffs testified that they were detained in the same cell at the Silverton police station in conditions that were less than satisfactory. The undisputed evidence establishes that each plaintiff only had a thin sponge on which to sleep on the concrete floor. The blankets with which they were issued were dirty, and in one instance were stained with blood. Only one pillow was made available to them. There was a toilet situated in the cell which was extremely dirty and the stench from this toilet filled the cell

with a distinctly unpleasant odour. During the night the plaintiffs were unable to gain access to any water, because the only source of water was situated outside the cell, to which they had access prior to their being locked up. The police did not provide them with any food from the time of their arrest until approximately 11h00 on Sunday morning, that is the following day. They testified that they received food from their attorney when he visited them at about 09h00 on the Sunday morning. The police gave them a cup of tea and dry bread at about 11h00 on Sunday. There is some ambiguity in the evidence about the provision of food, in that the plaintiffs' attorney seemed to suggest at one stage in his evidence that he had also provided the plaintiffs with food on the Saturday evening. Whatever the case, it is common cause at least that the police provided food to the plaintiffs for the first time about 18 hours after they had been arrested. During the night they were held at the Silverton police station two other detainees were put into the cell with them. While detained at the magistrate's court in Pretoria they were held together with about 40 to 50 people. They all testified that they were extremely fearful in that situation because many of those who were detained with them appeared to be hardened criminals. Whether that is in fact so is difficult to say. Though it is perhaps reasonable to surmise that certainly some of their fellow detainees at the court cells would have been experienced criminals and accordingly their subjective fears were understandable in the

circumstances. No food was provided to them at all by the police on Monday 13 October 2008.

14. In terms of section 35(2)(e) of the Constitution everyone who is detained has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. Furthermore, section 12(1)(e) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. The failure to provide awaiting trial prisoners with clean blankets, appropriate bedding and hygienic toilet facilities is unquestionably a denial of their rights to dignity as protected by the Constitution. There can be no justification for holding prisoners in the conditions in which the plaintiffs were held. All that is required to ensure that detainees have appropriate bedding and hygienic ablution and toilet facilities is proper management. The demand for additional resources would be minimal. The conduct of the defendant, through its servants, who omitted to provide the appropriate means of dignity, is an unjustifiable infringement of the rights of the plaintiffs as detainees to adequate accommodation and nutrition.

15. The infringement of the plaintiffs' constitutional rights to dignity was not the only infringement. Mr de Klerk, the plaintiffs' attorney, tried unsuccessfully to secure the release of the plaintiffs from detention. Once he received instructions, he contacted the investigating officer and arranged with him to meet at the Silverton police station at 10h00 on Sunday morning, 12 October 2008, with a view to having the plaintiffs released from detention on their own recognisances or on police bail. The investigating officer did not keep the appointment. When Mr de Klerk attempted to contact him on his cell phone, as he had been able to do the previous evening, the investigating officer had switched his cell phone off. Mr de Klerk testified that before leaving the police station, frustrated in his efforts, he gave his business card to the police officers on duty and requested the investigating officer to contact him.
16. Not long after Mr de Klerk had left the Silverton police station without securing the release of the plaintiffs, the investigating officer arrived at the police cells, and despite the plaintiffs having informed him that they wished to consult with and have their lawyer in attendance, the investigating officer took statements from the plaintiffs in the absence of their attorney at 12h55, 13h55 and 14h31 respectively. These statements were admitted into evidence as exhibits B13, B22 and B32. The conduct of the investigating officer resulted in the detention of the plaintiffs being prolonged and the frustration of the possibility of an earlier release on bail.

The investigating officer, knowing full well that Mr de Klerk was the plaintiffs' attorney, after not honouring an arrangement with him, and no doubt aware that he had earlier been present, went ahead and interviewed the plaintiffs in violation of their constitutional rights.

17. In terms of section 35(1)(f) of the Constitution everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Section 35(2)(b) of the Constitution provides that anyone who is detained has the right to choose, and to consult with, a legal practitioner, and to be informed of this right promptly. This provision should be read in conjunction with section 35(1) which provides that everyone who is arrested for allegedly committing an offence has the right to remain silent and not to be compelled to make a statement that could be used in evidence against him. Legitimate inferences may be drawn from the limited evidence that the investigating officer paid little heed to the underlying rationale of these rights and was not concerned that he might infringe them. While normally the police have 48 hours to bring an accused before court, where the evidence is notably insubstantial, and the offence not serious, the obligation on the authorities is to at least weigh rationally and judiciously the possibility of releasing an accused person on police bail or their own recognisances. In terms of section 59A of the Criminal Procedure Act 51 of 1977 an authorised prosecutor may, in

respect of the offences referred to in schedule 7 of the Act, and in consultation with the police official charged with the investigation, authorise the release of an accused on bail. Theft of an amount of less than R20 000 is a schedule 7 offence. The idea behind this section is that in less serious offences the police should deprive accused persons of their liberty only as a last resort. Accordingly, the investigating officer acting in consultation with an authorised prosecutor could indeed have released the plaintiffs at an earlier stage. At the very least he had a duty to entertain any representations by the plaintiffs' attorney in that regard. By failing to honour his arrangement to meet with the plaintiffs' attorney, and his unconstitutional interrogation of the plaintiffs, the investigating officer was in breach of his duty and thus further infringed the rights to dignity of the plaintiffs.

18. As I indicated earlier, the sole issue for determination is the amount to be awarded for general damages for the injuries suffered by the plaintiffs arising out of their loss of freedom and the impairment of their dignity. The courts have given ample direction on the correct approach to be followed. In *Protea Assurance Co Ltd vs Lamb* 1971 (1) SA 530 (A) at 534H - 535A, Potgieter JA made the following observation regarding 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."

In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325B, Nugent JA added the following important rider as a guiding principle in the exercise of the discretion. He said:

"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."

Dealing specifically with damages for unlawful arrest and detention, Nugent JA continued (at 326E) as follows:

"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 discernable 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 on the public purse to ensure that other rights that are no less important also receive protection."

19. In reaching my conclusion on an appropriate amount to be awarded in this instance, I have had regard to the following cases: *Minister of Safety and Security v Seymour* (supra); *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T); *Gellman v Minister of Safety*

and Security 2008 (1) SACR 446 (W); *Olivier v Minister of Safety and Security and Another* 2008 (2) SACR 387 (W); *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E); *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA); and *Thandane v Minister of Law and Order* 1991 (1) SA 702 (E). These judgments confirm what Nugent JA said in *Seymour*, namely that the awards reflect no discernable pattern and indicate that our courts are not extravagant in compensating the loss occasioned by unlawful arrest and detention. The factors that usually have some bearing are: the age of the plaintiff, whether or not the arrest was for an improper motive; whether the plaintiff was manhandled or arrested in a humiliating, degrading or public manner; the duration of the detention; and whether the plaintiff was compromised in his dignity further by reason of him occupying an important office or position.

20. It is obvious from the evidence that all of the plaintiffs suffered humiliation by reason of the arrest in front of the first plaintiff's grandchild and subsequently at their places of employment when they had to account for their absence. The plaintiffs are in reasonable good health and it cannot be said that the detention, despite the appalling conditions, compromised their health or physical well-being in any way. No doubt, the humiliation and appalling conditions of the detention did have a negative emotional impact that may possibly endure. Nevertheless I have the impression that the plaintiffs are men of the world and will not be too deleteriously affected

at a psychological level. What is however an important consideration in the present matter is that they were held in conditions and subjected to a period of detention and interrogation that unjustifiably infringed their constitutional rights. Counsel for the defendant has urged me to keep in consideration though that the plaintiffs were granted an opportunity to make phone calls to their family members and attorney, were detained in the same cell and not subjected to any physical or positive mistreatment beyond the omissions to which I have already referred. The probabilities are also that the SAPS might not have provided food because food had been made available from other sources. I am not sure that the latter point sufficiently excuses the conduct of the police. Whether food is brought in from the outside or not, arrested persons have a right to be provided with nutrition during their period of detention and the evidence, as I understand it, indicates that they were not offered food until 18 hours after they had been detained, and then only dry bread and tea.

21. Looking at the *quantum* awarded in previous recent decisions, the best that can be said is that the amounts awarded range from between R12 000 and R90 000. I am unable to find any case in which an amount as much as R225 000, as sought by each plaintiff, has ever been awarded.

22. Bearing all these circumstances in mind, in my view an appropriate award of general damages in this case would be the sum of R70 000 for each plaintiff.
23. The plaintiffs' claims against the defendant are for unliquidated damages. Mr Prinsloo SC, who appeared for the plaintiffs, requested me to make an order in respect of interest effective from the date of the service of summons until the date of payment. In terms of the Prescribed Rate of Interest Act 55 of 1975 it is permissible to recover *mora* interest on amounts awarded by a court which, but for such award, were unliquidated. Once judgment is granted such interest shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier - section 2A(2)(a). The word "demand" is defined in the Act to mean a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the *quantum* thereof. Mr Prinsloo submitted that it was possible for the defendant in this case to reasonably assess the *quantum* once summons was issued. I agree. Accordingly, I shall order interest to run as requested.
23. In the premises, I issue the following orders:

- i) The defendant is ordered to pay each plaintiff the amount of R71 226,38, together with interest on such amount at the rate of 15.5% per annum a *tempore morae* from the date of service of summons to the date of payment.
- ii) The defendant is ordered to pay the plaintiff's costs.



JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 4, 7 and 8 June 2010
For the Applicant: Adv JJS Prinsloo SC, Johannesburg
Instructed By: De Klerk & Marais Inc. Pretoria
For the Respondent: Adv TB Hutamo, Pretoria
Instructed By: State Attorney, Pretoria