

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, PORT ELIZABETH)**

CASE NO: 3177/13

**Heard on: 1 December 2015
Delivered on: 17 March 2016**

In the matter between:

GILLIAN MFUENGI

Plaintiff

v

MINISTER OF HOME AFFAIRS

First Defendant

MINISTER OF CORRECTIONAL SERVICES

Second Defendant

JUDGMENT

MAKAULA J:

[1] The plaintiff issued summons against the defendants claiming damages in the amount of R350 000.00 arising from his unlawful arrest and detention at the instance of the officials of the first defendant.

[2] The action against the second defendant was withdrawn at the commencement of the proceedings.

[3] Mr Gajjar, for the first defendant, closed the case of the first defendant without leading evidence. He submitted that he had no instructions to concede the unlawfulness of the arrest.

A. The facts:

[4] The plaintiff testified that he came to South Africa in June 1994 on a temporal visa permit for medical reasons and to seek political asylum. He got married on 26 May 1996 to a South African woman who unfortunately passed away in 2010 while serving his sentence. No children were born out of the marriage. However, he has a boy child born out of wedlock. He attained South African permanent resident status in 1999. He testified that he was sentenced to four years imprisonment for fraud. He was released on parole on 13 August 2012, only to be arrested by the officials of the first defendant on allegations that he was an illegal foreigner the same day. He informed them that he was a South African citizen still inside prison premises. However, his plea fell on deaf ears. He was detained at Medium A Section at St Albans Prison until 27 August 2012.

[5] The plaintiff testified that his arrest affected him physically, emotionally and morally. He testified further that he could not honour a promise to his son that he would meet him on 13 August 2012 upon his release.

[6] Mfundo Mabangula testified that he is an attorney working for the Refugee Rights Centre attached to the Nelson Mandela Metropolitan University (*Institute for Law in Action*). On receipt of instructions about the plaintiff, he wrote several letters to the first defendant in an attempt to secure the plaintiff's release which ultimately occurred on 27 August 2012.

B. Argument:

[7] Mr Dyer, for the plaintiff, submitted that the conduct of the first defendant revealed total disregard of the rights and interests of the plaintiff in that (a) they should have first properly investigated the status of the plaintiff before arresting him, and (b) in spite of numerous e-mails sent to the first defendant, it detained the plaintiff for 14 days conducting investigations which should have been done before arresting the plaintiff.

[8] Relying on previous awards, Mr Dyer submitted that an amount between R200 000.00 and R230 000.00 would suffice to compensate the damages plaintiff suffered.

[9] Mr Gajjar submitted that other than what the plaintiff testified to, there is no sufficient information, like the conditions the plaintiff leaved under at St Albans prison, to justify the amount sought in damages. The paucity of information would inevitably leave this court to speculate about the circumstances which would justify the amount claimed, so he submitted.

C. Lawfulness of the arrest and detention:

[10] Deprivation of personal liberty is prima facie unlawful. The onus to prove the lawfulness of the arrest vested on the defendant. Langa CJ in *Zealand*¹ said the following:

“It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.... [I]t must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.”² (Footnotes omitted.)

[11] The first defendant has not discharged the onus of proving the lawfulness of the arrest. Therefore, the first defendant is liable for the unlawful arrest and detention of the plaintiff.

D. Quantum:

[12] In cases of this nature, the award of damages is dependent upon the discretion of the court and is calculated *ex acquo et bono*. Factors which are normally taken into consideration 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 (*e.g. solitary confinement or humiliating nature*) of the deprivation of liberty, the status, age, health and disability of the plaintiff,

¹ *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

² *Ibid* at para [25].

awards of previous 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 etc.³

[13] The plaintiff at the time of his arrest was on parole having been released from prison on the day of his arrest. He had been serving a four year sentence for fraud. I am not privy to his parole conditions. The parole conditions would have been of assistance in assessing the impact the unlawful arrest and detention would have had to the plaintiff.

[14] It is further not clear under what conditions the plaintiff was detained at Medium A in St Albans. The evidence does not indicate whether the plaintiff was detained in a manner and place (*in Medium A section*) determined by the Director General of the first defendant as envisaged by Section 34(1) of the Immigration Act.⁴ That evidence would be crucial to determine whether the plaintiff was detained with general prison population or other illegal foreign nationals as the defendant thought of the plaintiff. To me, that would matter when determining quantum. I say so mindful that conditions generally in prison are not conducive to the wellbeing of anyone who is not supposed to be incarcerated like the plaintiff. It would have been of great assistance to have heard about the conditions the plaintiff stayed under during the 14 days he spent in prison.

³ Visser & Potgieter, *Law of Damages*, JUTA Cape Town 2012 3ed at 545-568 and the authorities cited therein.

⁴ 13 of 2002; see *Minister of Home Affairs vs Rahim and Others* [2016] ZACC 3 decided on 18 February 2016.

[15] The plaintiff, as stated above, testified that his arrest and detention affected him physically, emotionally and morally. However, the plaintiff did not tender evidence on how he was so affected. The evidence of the plaintiff lacks details which would otherwise assist in the assessment of the amount of damages to be awarded.

[16] Deprivation of liberty and freedom should not be treated lightly in circumstances like these. In *Olgar v Minister of Safety and Security*⁵, Jones J had the following to say:

“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.”⁶

[17] As alluded to, Mr Dyer referred me to a number of decisions in respect of previous awards. The awards varied between R200 000.00 and R230 000.00 for plaintiffs who had been unlawfully arrested and detained for 10 to 21 days. I have considered those matters. It is now trite that previous decision can be a useful guide in determining an appropriate award for damages. The following statement by Bosielo AJA, as he then was, in *Minister of Safety & Security v Tyulu*, is apposite.⁷

⁵ *Olgar v The Minister of Safety and Security* 2008 JDR 1582 (E).

⁶ *Ibid* at para [16].

⁷ 2009 (5) SA 85(SCA).

“[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) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26-29).”⁸

[18] Having had regard to the principles enunciated above, I consider that an amount of R10 000.00 shall be appropriate.⁹

[19] Consequently, I make the following order:

- 1. The arrest and detention of the plaintiff is declared to have been unlawful;**
- 2. The first defendant is ordered to pay the sum of R10 000.00 (ten thousand rand) to the plaintiff as damages;**
- 3. The first defendant is ordered to pay the plaintiff’s costs.**

⁸ *Ibid* at 93D-F.

⁹ *Rahim v Minister of Home Affairs* 2015 (4) SA 433 (SCA) at para [27].

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances:

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