



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7472/2013

In the matter between:

PATRICK BUTHELEZI

Plaintiff

and

MINISTER OF POLICE

First Defendant

MINISTER OF JUSTICE

Second Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Third Defendant

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL Fourth Defendant

ORDER

1. The First and Third Defendants, jointly and severally, the one paying the other to be absolved, are directed to pay, for the unlawful detention of the Plaintiff for the period 22nd November 2011 until 14th December 2012 as damages an amount of R 1 668 592,00, made up as follows:

1.1	General Damages	R 1 600 000.00
1.2	Past Loss of Income	R 8 592.00
1.3	Special Damages – Legal Fees and cost of transcripts	R 60 000.00

2. The First and Third Defendants, jointly and severally, the one paying the other to be absolved, are directed to pay interest on the above amount at the prescribed rate from a date 14 days after date of judgment to date of payment.
3. The First and Third Defendants, jointly and severally, jointly and severally, are directed to pay the plaintiff's costs of trial such costs to include the costs attendant on the compilation of the expert reports of Specialist Psychologist, Dr Chohan as well as the costs of the actuarial report by Mr Hellig.

JUDGMENT

Chetty J:

[1] This is a quantum trial following an action for damages by the plaintiff against the defendants arising from his arrest and detention on a charge of rape of a nine-year-old learner at the school at which he was teaching. The plaintiff was arrested on 21 November 2011 after family members of the learner confronted him at the school, in the presence of the school management and other educators. As a result, the plaintiff, after consulting with his attorney, handed himself over to the police, who detained him until his bail application on 29 November 2011. In light of the seriousness of the charges against the plaintiff, a formal bail application was held, after which the plaintiff was refused bail on the grounds that he was unable to show exceptional circumstances justifying his release on bail. It is common cause that he remained incarcerated until his eventual acquittal at the conclusion of a criminal trial on 14 December 2012.

[2] Following his acquittal, the plaintiff instituted an action against the defendants arising from the conduct of the investigating officer and the prosecutor. This court handed down judgment on liability on 30 July 2019 in which it held that the plaintiff's detention from 22 November 2011 until 14 December 2012 was unlawful and that the first and third defendants were jointly and severally liable to compensate the plaintiff for such damages as were agreed or proven. It further ordered the first and third defendants to be liable for the plaintiff's cost of suit.

[3] It bears noting that in finding for the plaintiff on the merits of the action, the court concluded that the investigating officer had failed to bring certain information to the attention of the prosecutor and the court, which information, if it had been disclosed, would have revealed the State's case in a far weaker light than it had been made out. In respect of the prosecutor's role, the court noted the following in paragraphs 61-62 of its judgment:

'[61] It is not in dispute that the defendants bear the onus to prove that the detention of the plaintiff was lawful. Both the investigating officer and the prosecutor at the bail application testified that they were bound by a duty to act fairly and lawfully to the plaintiff and to respect his rights, including that of liberty. It was submitted in argument by the plaintiff's counsel that contrary to such duty, both the investigating officer and the prosecutor failed to disclose to the presiding magistrate hearing the bail application of the contents of Ms Mkhize's statement; that the first report by the complainant to her aunt was inadmissible because of the existence of the knowledge that the implication of the plaintiff only arose after the complainant was threatened with a beating; that the investigating officer failed to carry out certain investigations including the interviewing of the children in the complainant's class and that the complainant gave conflicting explanations to her aunts as to why she was crying.

[62] In light of this, it was submitted by Mr *Singh* that had the magistrate been in possession of all of these facts, she probably would have granted the plaintiff bail. In fact, in response to a question posed by the Court to the prosecutor at the conclusion of her evidence, Ms Perumal conceded that with hindsight and knowledge of all of the facts which emerged at the trial, the affidavit of Ms Mkhize should have been brought to the attention of the magistrate together with the revelation that the child had been beaten or threatened with a beating before implicating the plaintiff. In her words, she perhaps may have "inadvertently" misled the court.'

[4] While the court found that the prosecutor may have been negligent, her conduct in the matter paled to that of the investigating officer. In this regard the court said the following in paragraph 68 of its judgment regarding the investigating officer:

'In my view, he withheld evidence which would have been crucial for the court hearing the bail application to assess the strength of the State's case. His explanations for these omissions, in light of his public law duty, are simply unconvincing. I am of the view that he was probably driven to oppose bail because of public sentiment over the serious nature of the allegations. The plaintiff was sacrificed to satisfy the need to make an early arrest and keep the offender behind bars, despite the paucity of evidence against him even at the time of the bail application.'

[5] Mr *Singh*, who appeared on behalf of the plaintiff, submitted that in determining the quantum of damages to be awarded to the plaintiff regard should be had to the conduct of the prosecutor and the investigating officer. It is not in dispute that the plaintiff was unlawfully detained for a period of 388 days in total, during which time he appeared in the District Court on eight occasions and on 14 occasions in the Regional Court, until his acquittal. As appears from what is set out below, the matter received much publicity in the print media.

[6] Prior to the commencement of the quantum trial, the representatives of the parties were in agreement that the plaintiff sustained past loss of income of R8 592,00 and special damages of R60,000, the latter amount comprised primarily of legal fees incurred by the plaintiff in challenging the criminal charges brought against him. The only issue that remained before me was a determination of what would constitute a reasonable and fair amount in respect of general damages.

[7] By agreement of the parties and the court, and in light of the fact that the first day of trial was lost due to the defendants' counsel not having proper instructions, the plaintiff handed in as an exhibit a written statement which formed part of the plaintiff's bundle of documents to be used in the trial. Counsel for the defendants, Ms *Khuzwayo SC*, had no objection to the document being handed in, and furthermore admitted its contents. In summary, the statement sets out in graphic detail the experiences which the plaintiff encountered during his incarceration. The plaintiff testified briefly on certain aspects of his incarceration, including the hierarchy which he encountered amongst the prisoners at Westville Prison. He provided details of the manner in which new inmates were forced to 'buy' their safety from abuse by supplying other senior inmates with cigarettes and airtime. In addition, the plaintiff was forced to pay R600.00 in order to receive a clean bed, bed sheets and a sponge to wash himself. He also paid for the rental of a television for the benefit of all the inmates in the cell. The gang culture was evident in the hierarchy of the prisoners, and during his period of incarceration he witnessed stabbings and sexual assaults of inmates. He testified that an article which appeared in the *Isol ezwe* newspaper found its way to his cell and was read aloud by one of the inmates, which gave details of the plaintiff's case but did not mention him by name. The fact that the

complainant was a nine-year-old learner angered the inmates, who referred to the perpetrator as a 'madman and a dog' who should be stabbed for raping a young girl. The plaintiff was panic stricken as to what would happen to him if news reached the inmates that he was indeed the accused in the rape trial. He testified that he eventually confided in an inmate and told him that he was the accused referred to in the article, but professed his innocence throughout. Fortunately for the plaintiff, he suffered no repercussions as a result of the article.

[8] The plaintiff testified that after his release from prison he was examined by a clinical psychologist, Dr Chohan, whose report was handed in by consent, with the contents thereof being admitted by the defendants. Dr Chohan concluded that during the period of his detention, the plaintiff experienced feelings of fear, horror and shame and had his life threatened after his release. He continued to have flashbacks of events that occurred during his detention at Westville Prison, leading to him becoming hyper vigilant and developing sleep disturbances. According to Dr Chohan the plaintiff should have been diagnosed as suffering from post-traumatic stress disorder (PTSD). The plaintiff was also diagnosed as suffering from depression by Dr Agambaram, after which he was placed on sick leave for a few days. In April 2013 the plaintiff was admitted to Entabeni Hospital for treatment for his depression for a period of ten days.

[9] After his release, he was barely able to sleep and repeatedly cried, with recurring flashbacks of the unsanitary conditions in his cell as well as the assaults on fellow inmates. He testified that these depressive episodes have since abated with treatment. He now attempts to avoid confrontation or stressful situations. He related an experience of him having to admonish certain parents who were selling sweets on school property. When he did so, the parents refused to obey his instructions, and responded by bringing up the charges that had been laid against him. In this way, the ordeal of having been charged for a heinous crime of having raped a learner has not entirely left him. As Mr *Singh* submitted, the plaintiff is in large measure 'scarred for life'. He is unable to forget the experience of his detention and people in the community have not forgotten the accusation against him, notwithstanding his acquittal.

[10] Mr Buthelezi testified of the effect that his incarceration had on his personal life. He was constantly afraid of being sexually violated and contracting a sexually transmitted disease. While at Westville Prison he was visited by his fiancée. Prior to his arrest, he had paid *labola* and intended getting married to her. However, the stress of his incarceration took its toll on their relationship which ended while he was still in prison. After his release from prison in December 2012, the plaintiff subsequently formed a relationship and got married on 21 December 2018. He and his wife have three children, aged 7, 6 and 3 years' old. In addition, he also cares for his two nephews, as a result of the death of his brother in 2001. Prior to his arrest and incarceration, the plaintiff was a member of the South African Democratic Teachers Union (SADTU). After his release he continued being a member of SADTU but with his subsequent promotion to the rank of deputy principal at Isidingo Primary School, he ceased being a member. It bears noting that after this release, he returned to his teaching career at the same school at which he was stationed at the time of his arrest. In 2018, he was appointed deputy principal and also was assigned the position of Acting Principal for a short period in June 2019. Since his release he has been involved in community affairs and has been appointed as the treasurer of the Little Flower Educare Centre focusing on the education needs of young children.

[11] Reflecting on his period of incarceration and the events leading thereto, the plaintiff testified that he bears no ill feeling towards the complainant and has forgiven her for the allegations levelled against him. This statement also emerges in one of the media articles which featured the plaintiff. He testified of the publicity that occurred during the course of his trial and thereafter, which seriously affected him. However, under cross-examination, he conceded that not all the publicity in the media was negative, and that some articles did mention that he received support during the course of his trial from members of his union, as well as from some of the teaching staff at his school and his family.

[12] The plaintiff's evidence remained substantially intact under cross-examination, with the thrust of the questions posed to him suggesting that even if he had been released on bail initially, this would not have necessarily silenced the media from reporting on his ongoing rape trial. He also conceded that there was no evidence to suggest that the defendants engineered any of the articles in the media or were

responsible for providing the media with information that featured in the articles. It was however not disputed that the rape case against the plaintiff received considerable publicity in the press and was also discussed in the community in which the plaintiff lived. This concluded the evidence on behalf of the plaintiff. The defendants elected not to call any witnesses and accordingly closed their case.

[13] In assessing what would constitute a reasonable amount of damages to be awarded to the plaintiff for the 388 days he spent incarcerated, the starting point as stated in *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC), para 24 is that '[t]he Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause'. It would appear from the plaintiff's evidence that even though he was an awaiting trial prisoner, he was placed in a cell with other inmates who were serving periods of imprisonment. This in turn exposed the plaintiff to the gang culture prevalent in prisons, as well as various acts of violence.

[14] As to the factors to be taken into account in determining an appropriate award for the deprivation of liberty and the attendant consequences that arise from an unlawful incarceration, in *Ferdinand v The Minister Of Police* (628/2014) [2018] ZALMPPHC 58 (7 March 2018) Makgoba JP analysed the existing case law and stated the following in paragraph 19:

'In deprivation of liberty the amount of damages is in the discretion of the Court. Factors which 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 of the deprivation of liberty; the status; standing; age; health and disability of the Plaintiff; the extent of the publicity given to deprivation of the liberty; the presence or absence of an apology or satisfactory explanation of the events by the Defendant; and awards in previous comparable cases.'

[15] In the present matter, this court has already recorded the seemingly improper motive which the investigating officer had in opposing the bail application of the plaintiff leading to the plaintiff remaining in custody until his acquittal. Added to this, was the investigating officer's failure to disclose certain crucial information to the court, which prejudiced the release on bail of the plaintiff. The plaintiff, after resuming

his career as an educator quickly made up for his time in incarceration and was promoted after a few years to the position of deputy principal. One can only speculate whether he would have assumed this higher position earlier had not been for his unlawful detention.

[16] The plaintiff testified at some length of the adverse publicity which accompanied his appearances in court. Equally important is the strain which the incarceration had on his personal relationship, ultimately leading to its breakdown. It has been held that in cases of unlawful detention, the awards take care of the *contumelia*, the embarrassment, deprivation of liberty and the mental agony of the arrest and detention. In some instances, the arrest and detention can bring about the disruption of an accused's business, professional practice, employment or career, although in the present case, as referred to earlier, the plaintiff has been successful in resurrecting his teaching career and earning a promotion despite the setback of his incarceration.

[17] In *Phungula v Minister of Police* (AR 342/2017) [2018] ZAKZPHC 21 (8 June 2018) bail was posted for the accused by his mother, who was the complainant in a theft charge against her son, but the accused was only released from detention just less than a month later. Gorven J in considering an appropriate award for damages, said the following in paragraph 20:

'The principles are clear. An award must "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." Comparable awards cannot be looked to as more than a basic guide since facts differ from case to case. An award is "no more than a crude *solatium* for the deprivation of [liberty]" and courts are not extravagant in arriving at such awards. All relevant facts must be taken into account, not only the length of the deprivation of liberty.' (footnotes omitted)

The court took into account that Mr Phungula was unlawfully detained for just less than a month and it appeared that he was a member of a prison gang and admitted to having been involved in criminal behaviour prior to his incarceration. By way of contrast, the plaintiff in the present matter had only previously been arrested for public violence following a union demonstration and he was released after spending a few hours in jail. He has no other record of being incarcerated.

[18] Counsel for the plaintiff referred me to *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) and *Minister of Home Affairs v Rahim and Others* 2016 (3) SA 218 (CC). These cases, in addition to *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA); *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA); *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C) and *Minister of Safety and Security v Scott and Another* 2014 (6) SA 1 (SCA) all vary in their factual background relating to the period of detention, the standing of the plaintiffs, their professions and the circumstances of their arrest. The latter aspect was particularly relevant in *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) where a magistrate was arrested and detained for about 15 minutes on account of being drunk in public. The court found that an improper motive led to his arrest, and took into account his standing in the community in awarding him R15 000 as damages.

[19] The uncontested evidence of the plaintiff in the present case is that his arrest and trial received widespread publicity in the community and the media. He testified that although he was eventually acquitted on all charges, members of the community still recall (on occasion) the allegations against him. The stigma of having been arrested and tried for the rape of a minor remains as a permanent stain on the plaintiff's character, with his acquittal seemingly relegated to insignificance.

[20] In *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) 534H-535A, Potgieter JA said the following in relation to general damages '[i]t 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 these *sequelae* of his injuries.'

Counsel for the plaintiff submitted that having regard to the circumstances relating to the plaintiff's detention for 388 days, an amount of R3,5 million would be fair and reasonable as compensation. Ms *Khuzwayo* for the defendants submitted that an amount of R1,2 to R1,4 million would be reasonable. I should point out that in his amended particulars of claim, the plaintiff claimed an amount of R5 million in compensation. There was nothing in the particulars or in argument before me that gave an indication as to how the amount of compensation claimed, was arrived at. It is precisely this sort of pleading that caused Seegobin J in *Latha and Another v*

Minister of Police and Others 2019 (1) SACR 328 (KZP) to say the following in paragraph 13:

‘ . . . it is fast becoming a notorious fact that claims for personal injuries are being pitched at such exorbitant levels, thus making it extremely difficult for courts to make a proper determination. This relates not only to claims of the kind under consideration herein but also to claims against the Road Accident Fund, as well those arising out of medical negligence in public hospitals. The notion seems to be that since the state is held liable the claims should be as high as possible. In my view, much of the blame for this must be laid at the doors of the claimants' legal representatives and the experts employed. The difficulty posed in such matters is that it creates unrealistic expectations in the minds of the claimants concerned. The further difficulty with such an approach, in my view, is that it loses sight of the fact that such damages are not there to enrich but to serve as some form of solatium to an injured person for the pain and loss suffered. The following words of Holmes J in the matter of *Pitt v Economic Insurance Co Ltd* ring as true today as they did in 1957:

"I have only to add 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 not pour out largesse from the horn of plenty at the defendant's expense."

[21] All of the cases referred to earlier differ in their factual matrix from that of the present case, however, as stated in *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 536A-B, these cases:

‘ . . . 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.’

[22] In assessing what is fair and reasonable as compensation for having been unlawfully incarcerated for 388 days, the starting point is that no person should be deprived of their liberty without just cause. It is a foundational value of our constitutional system. Where this is underpinned by improper motive, in this case by the police involved in the investigation of the matter, the claim of the plaintiff assumes an even greater significance. It is not disputed that the plaintiff's

incarceration had a direct bearing on the breakdown of his relationship with his fiancée. I have had regard to the list of cases provided to me by the plaintiff's attorney which have been extracted from the Quantum Year Book. It is impossible to discern any formula which is applied in arriving at a 'flat daily rate' in respect of the amount of compensation to be awarded. Indeed, it would be highly irregular if such a formula were to result, as each case is dependent on its unique facts (*Mkwati v Minister of Police* (2902/2013) [2018] ZAECHC 2 (23 January 2018)). In this case I have taken into account that although the plaintiff was exposed for a prolonged period to the horror of having been unlawfully incarcerated in our prison system, fortunately, he came out of the ordeal without any physical scarring. I have no doubt, as stated earlier, that the mental anguish and trauma he suffered will endure for the remainder of his life, or at least for a significant period of time. In *Latha and Another v Minister of Police and Others* 2019 (1) SACR 328 (KZP) Seegobin J awarded compensation of R3,6 million to each of the defendants following their unlawful incarceration for a period of just under seven years. The court made the following observation in paragraph 8:

'While I consider that the Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom, in my view, courts should be careful not to overemphasise the right in order to punish a guilty party unduly. A delicate balance must be struck between the rights of an aggrieved party on the one hand and the guilty party on the other, in order to arrive at an assessment which is fair and reasonable in the circumstances.'

[23] In light of the length of the plaintiff's incarceration, his status as a qualified educator, the exposure that was given to his arrest and conviction and the humiliation suffered by him, all of which are not disputed by the defendants, I am of the view that an award of R1,6 million for general damages constitutes fair and reasonable compensation of the ordeal suffered by the plaintiff.

[24] In the result, I make the following orders:

4. The First and Third Defendants, jointly and severally, the one paying the other to be absolved, are directed to pay, for the unlawful detention of the Plaintiff for

the period 22nd November 2011 until 14th December 2012 as damages an amount of R 1 668 592,00, made up as follows:

1.1	General Damages	R 1 600 000.00
1.2	Past Loss of Income	R 8 592.00
1.3	Special Damages – Legal Fees and cost of transcripts	R 60 000.00

5. The First and Third Defendants, jointly and severally, the one paying the other to be absolved, are directed to pay interest on the above amount at the prescribed rate from a date 14 days after date of judgment to date of payment.

6. The First and Third Defendants, jointly and severally, jointly and severally, are directed to pay the plaintiff's costs of trial such costs to include the costs attendant on the compilation of the expert reports of Specialist Psychologist, Dr Chohan as well as the costs of the actuarial report by Mr Hellig.



M R CHETTY

Appearances:

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For the Defendant: Ms N Z Kuzwayo SC
 Instructed by: State Attorney Durban

Date of reserved: 9 & 10 June 2021

Date of delivery: 2 August 2021