

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 3057/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED:

SIGNATURE:

DATE: 2023-06-28

In the matter between:

KENNETH MDLULI

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 28 June 2023.

JUDGMENT

PHAHLAMOHLAKA A.J

INTRODUCTION

[1] This is a claim for damages by the plaintiff, Kenneth Mdluli, which he suffered as a result of an unlawful arrest and detention. The claim is against the defendant in his official capacity as the Minister of Police. The relief is couched as follows:

(a) Judgment against the defendant for payment of the amount of R 400 000.00 (four hundred thousand rand).

(b) Interest at the rate of 9% from date of service of summons.

(c) Costs of Action on attorney and client scale.

(d) Further and/or alternative relief.

FACTUAL BACKGROUND

[2] In the Particulars of Claim, the plaintiff alleges that on the night of 16 September 2016, he was arrested by sergeant Tsakani Sithole who was on duty, acting within the course and scope of her duties as a police officer in the employ of the Minister of Police, pursuant to a warrant of arrest that was authorised by the Protea magistrates court. The plaintiff is now suing the Minister of Police for damages suffered as a result of the arrest which the plaintiff avers was unlawful.

[3] It was contended on behalf of the defendant that sergeant Sithole was authorised by a warrant of arrest which was properly executed to arrest the plaintiff, detain him and bring him before a court of law. At the outset I was informed by counsel for both parties that they are *ad idem* that the arrest and subsequent detention took place and therefore the only issue between the parties became only the unlawfulness or otherwise of the arrest. Following from that, the quantum of damages. The parties further agreed that because the defendant alleges that the arrest was lawful, the defendant bore the duty to begin.

EVIDENCE BY THE DEFENDANT

[4] The defendant called one witness, Sergeant Tsakani Sithole, who testified as follows:

4.1 She is a Sergeant in the employ of the South African Police Services(SAPS), stationed at Moroka Police Station. She joined the police service on 11 July 2005 and in 2016 she was still a Constable.

4.2 Prior to 6 September 2016 she knew the plaintiff, Kenneth Mdluli, because she had previously arrested him '*on the same case*'.

4.3 After his initial arrest and subsequent appearance at the Protea magistrates court plaintiff failed to come to court on 1 September 2016 and as result a warrant was authorised for his arrest by the magistrate. Sergeant Sithole arrested the plaintiff again on the strength of that warrant of arrest on 6 September 2016. According to the SAP-14 register the plaintiff was arrested at 23h00 for assault GBH and detained at 23h40. Sergeant Sithole knew the plaintiff because she had arrested him before.

4.4 Sithole further testified that the warrant of arrest she was executing was signed by a magistrate and therefore she had to execute it because it came with a command to arrest the plaintiff.

[5] Under cross examination Sithole was referred to the discrepancies that appeared on the warrant of arrest which she had executed. She was referred to paragraph C on the warrant of arrest which had the caption that reads as follows:

" the plaintiff was admitted to bail on condition he was supposed to appear on 01 February 2016"

[6] When she was confronted with this discrepancy and it was put to her that she did not apply her mind before arresting the plaintiff, Sithole answered by saying '*people can make mistakes, maybe the person who wrote that thinks it is a 9 and not a 2*'. She was saying this in response to a discrepancy that is so apparent on the warrant in relation to the date on which the warrant was authorised. What appears on the warrant is the date of the 1st of February 2016 as the date on which the plaintiff failed to appear which led to the magistrate authorising a warrant for his arrest.

[7] It was further put to Sithole that she did not explain the constitutional rights to the plaintiff upon his arrest to which Sithole responded by saying the plaintiff was arrested before and therefore it was not necessary to explain his rights again. Sithole further said that at that time her commanders had given instructions that it was not necessary to read the rights to persons who were arrested on the strength of a warrant but later this was corrected.

EVIDENCE BY THE PLAINTIFF

[8] To rebut the case for the Minister, the plaintiff, Kenneth Mdluli, testified that he was born on 1 November 1968 and in 2016 he was married and had three adult children. He got separated with his wife at about August 2016 after he was arrested. He was arrested at around July or August 2016 and thereafter he was released on bail with the condition that he had to come back to court on 1 September 2016. He attended court 2 at Protea magistrates court on 1 September 2016 and the matter was transferred to court 4 and subsequently postponed to 6 September 2016 for him to appear in court 4. On 6 September 2016 he appeared in court 4 and the matter was postponed to 11 October 2016. At all material times he was attending court as he was out on bail.

[9] In his particulars of claim which he confirmed during his testimony, the plaintiff testified that on the evening of 6 September 2016 at about between 21h00 and 22h00 his brother came to inform him that members of the South African Police Services were looking for him. By then he was residing at his parental house at Molapo Extension. The

police came in and informed him they were looking for him. They told him they were in possession of a warrant of arrest because he failed to appear in court. He explained to the police officers that he was at court at all the dates to which his matter was postponed. The members of SAPS never told him at which date he failed to attend court. He even showed them a note that he got from court indicating on which date he was supposed to be back at court. The police said the court would not lie and then they placed him under arrest telling him that they were arresting him because he failed to appear in court. He told the police *that “even today I was in court and the matter was postponed to 11 October 2016”*. However the police told him they were placing him under arrest because they were in possession of a warrant for his arrest. He was never shown any warrant.

[10] The plaintiff was then driven to Moroka Police Station where upon arrival he was taken out of the police motor vehicle, placed in a waiting room and thereafter taken to a holding cell. When he was taken into the holding cell police never said anything to him. He was never informed of his rights as a detainee. He further testified that the holding cell in which he was held was filthy, the toilets were not in a working condition, one could smell a stench as one enters that cell, there were some lies crawling on the walls, the toilet was not flushing, the door of the toilet was not closing and the blankets were smelling badly. They were only five detainees in that cell but it was everybody for himself. He could not sleep the whole night because he was thinking a lot and the place was not conducive for one to sleep.

[11] The next morning at approximately 4:00 a.m, him and other inmates were awoken by the police officers and they were ordered to stand against the wall where they were searched. He wanted to bath but there was no soap. As a result he only wiped his face. Later that morning he was taken out of the holding cell to a passage and given food. Thereafter he was taken by a police car to Protea magistrates court where he was made to appear before a magistrate. The magistrate before whom he appeared exclaimed “ *Kenneth, what are you doing here*”. The plaintiff responded that he was arrested on the strength of a warrant of arrest. The magistrate then perused his papers

and later he said “*I made a mistake*”. The magistrate then asked the plaintiff “*are you happy you are going home*” to which the plaintiff responded by saying “*no* “. Thereafter the plaintiff was released.

[12] The plaintiff further testified that before his arrest and detention his health was fine, but after the arrest his health was never the same. He suffered from stress, had a high rate of heartbeat and he could no longer focus or concentrate. The plaintiff was cross examined and the essence of the defendant’s version is that the police officers were executing a warrant of arrest irrespective of the defects that may appear on that warrant of arrest. It was also put to the plaintiff that he suffered from ill health even before the arrest to which the plaintiff conceded but said it worsened after the arrest.

COMMON CAUSE FACTS

[13] The following aspects are either common cause or not in dispute:

13.1 The plaintiff is Kenneth Mdluli and he was arrested by sergeant Sithole on 6 November 2016 and released on 7 September 2016 after he appeared in court at Protea magistrates court.

13.2 When sergeant Sithole arrested the plaintiff she was acting within the course and scope of her employment with the respondent.

13.3 The plaintiff was arrested pursuant to a warrant of arrest.

THE ISSUE(S) FOR DETERMINATION

[14] The issue for determination by this court is therefore, whether the arrest was unlawful as pleaded by the plaintiff.

THE LAW

[15] The defendant concedes the arrest but argues that it was a lawful arrest as the police officers were executing a warrant that was issued by the magistrate. The onus to prove that the arrest was lawful therefore rests on the defendant.

[16] The arrest can only be lawful if it is constitutional and it was not effected arbitrarily by the arresting officer. It must be borne in mind that an arrest is a deprivation of liberty of a person and therefore any arrest must be a measure of a last resort to bring a person before a court of law.

[17] Section 12 of the Constitution¹ (the Constitution) provides as follows:

“ 12(1) Everyone has the right to freedom and security of a person, which includes the right-

(a) Not to be deprived the right to freedom arbitrarily and without just cause;

(b)”

[18] Section 35 of the Constitution provides as follows:

“35(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) To remain silent;

(b) To be informed promptly-

¹ 108 of 1996

(i) *Of the right to remain silent; and*

(ii) *Of the consequences of not remaining silent;....”*

(2) *Everyone who is detained, including every sentenced prisoner, has the right-*

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;....”

[19] Section 67A of the Criminal Procedure Act² (the CPA) deals with persons who fail to appear after being released on bail, and it provides as follows:

“(1) If an accused person who is released on bail-

(a) Fails to appear at the place and on the date and at the time-

(i) Appointed for his trial; or

(ii) To which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) Fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending shall declare the bail provisionally cancelled

² Act 51/1977

and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused...”

EVALUATION

[20] From the uncontested evidence of the plaintiff it is abundantly clear that the plaintiff was at court on all the dates and at the times appointed for his trial. His evidence was uncontested to a greater degree. The defendant could not put it to the plaintiff that he failed to attend court as ordered, and therefore there was a silent admission that the plaintiff was arrested as a result of a warrant of arrest that was authorised by mistake.

[21] Counsel for the defendant referred me to section 50(1) of the CPA, in an attempt to justify the arrest of the plaintiff in the execution of a warrant of arrest which was defective. The section provides, *inter alia*, as follows:

“ (1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other other place which is expressly mentioned in the warrant....”

[22] Counsel for the defendant further argued that section 43(2) of the CPA compels a peace officer to effect an arrest on the person described in the warrant of arrest and to bring same before a lower court according to the provisions of section 50 of the CPA. With reference to those sections Counsel argued that the warrant of arrest against the plaintiff was valid and enforceable on 6 September 2016 when the plaintiff was arrested.

[23] I am of the view that counsel for the defendant has not given a proper interpretation and meaning of the said sections. The arrest of any person must be in accordance with the constitution and the law and therefore an arrest and detention that does not accord with the constitution is arbitrary and thus unlawful.

[24] Counsel for the defendant correctly referred to the Supreme Court of Appeal judgement of **Minister of Safety and Security v Sekotho**³ in support of her submission, but the Sekhoto judgement does not exonerate the defendant at all. In paragraph 44 of the judgment Harms DP says the following:

“44. While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the inquiry to be made by the peace officer is not how best to bring the suspect to trial: the inquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime- and those listed in Schedule 1 are serious, not only because the Legislator thought so-a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest.”

[25] **Sekhoto** clearly gives the arrestor the discretion to apply his/her mind before arresting the suspect, albeit in the execution of a warrant of arrest.

[26] *In casu* sergeant Sithole insisted that because she was in possession of a warrant of arrest authorised by a magistrate she had to arrest the plaintiff at all costs. Clearly she was wrong to think that she was forced by the warrant to arrest even though the warrant itself was defective.

³ 2011(1) SACR 315 (SCA); [2011] 2 ALL SA 157 (SCA); 2011 (5)MSA 367 (SCA); [2010] ZASCA 141; 131/10 (19 November 2010)

[27] Sergeant Sithole did not impress me as a witness. It is apparent that she did not see that the warrant she was executing was defective. I am satisfied that the plaintiff informed her that he had been in court during the day but because she was armed with a warrant of arrest she would not listen to a word uttered by the plaintiff.

[28] I am satisfied that the plaintiff was arrested with a defective warrant of arrest which provided that he failed to appear in court in February 2016 when that was not the case. Further, it could not be contested that during his appearance after he was arrested with that defective warrant of arrest the magistrate commented that a mistake was done in authorising that warrant of arrest.

[29] Consequently I find that the plaintiff was able to prove on the balance of probabilities that:

29.1 He was arrested by sergeant Sithole on the night of 6 September 2016 and released on 7 September 2016 by the magistrate.

29.2 When sergeant Sithole arrested the plaintiff she did so within the course and scope of her employment.

29.3 The warrant of arrest which was used to arrest the plaintiff was defective.

29.4 According to the warrant of arrest that was used to arrest the plaintiff the plaintiff failed to attend court after he was warned to to so.

29.5 The plaintiff has never failed to attend court at any stage.

29.6 After the arrest the plaintiff was held overnight at a police station and he was released by the magistrate the following day without being charged or without any inquiry being held for his failure to appear in court.

[30] The defendant contended that the arrest was not unlawful. However the evidence that was presented by the defendant proves that the arrest was indeed unlawful. Sergeant Sithole conceded that she did not even read the plaintiff his constitutional rights when she effected the arrest because, according to her and the advice she got from her superiors, it was not necessary to do so because the plaintiff had been arrested before and therefore he knew his rights. This was a wrong approach because the plaintiff had not been arrested for failing to attend court before, and even if he was, the constitution is very clear that every arrested person has those rights irrespective of whether he was arrested for the first time or not.

[31] I am of the view that sergeant Sithole was grossly negligent for arresting the plaintiff despite the plaintiff informing her that he never failed to attend court at any stage whatsoever. I find that sergeant Sithole was influenced by her knowledge of the plaintiff's case of domestic violence and therefore she failed to be objective when she went to arrest the plaintiff on 6 September 2016. Had she been objective and applied her mind properly sergeant Sithole would have realised that the plaintiff never failed to attend court. She could also have realised that the warrant she was in possession of was defective and thus could not be executed.

[32] In the result I find that the defendant has not successfully discharged its onus of proving that the arrest of the plaintiff was not unlawful. Conversely I am satisfied that the arrest of the plaintiff was unlawful. In the circumstances the plaintiff's claim should succeed.

QUANTUM

[33] When the plaintiff issued summons he was claiming an amount of **R 650 000.00** but in the amended particulars of claim the plaintiff, especially paragraph 11 thereof, prays as follows:

"11. WHEREFORE Plaintiff claims against the Defendant for:

11.1 Payment in the amount of R400,000.00

11.2 Interest at the rate of 9% from date of service of summons.

11.3 Costs of Action on attorney and client scale.

11.4 Further and/or alternative relief.

[34] In his heads of argument, counsel for the plaintiff concludes by submitting as follows⁴:

*“ It is submitted that the plaintiff’s arrest and detention was unlawful and he should be awarded damages in the sum of **R120.000.00**, with high court scale of costs and interest at the prescribed rate from date of judgment to payment.”*

[35] The submission by the plaintiff’s counsel is an admission and a clear indication that if the plaintiff is successful he is only entitled to compensation of at least R 120 000.00 which is an amount within the jurisdiction of the Regional court. Counsel for the plaintiff never attempted to justify the amount of **R 650 000.00** that the plaintiff was claiming in his particulars of claim when summons was issued or the **R 400 000.00** in the amended particulars of claim. The plaintiff has not told the court why did he prosecute this action in the High Court rather than in the Regional court.

[36] In trying to justify the amount of damages that I must award, Counsel for the plaintiff referred me to a plethora of previously decided cases. However, the principle should be found in the Supreme Court of Appeal judgment of **Minister of Safety and Security v Tyulu**⁵, also referred to by both the plaintiff and the defendant’s counsel, where Bosielo AJA said the following:

⁴ PARAGRAPH 65 OF THE PLAINTIFF’S HEADS OF ARGUMENT

⁵ [2009] ZASCA 55 at Paragraph 26

“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.”

[37] The plaintiff has successfully proved he was unlawfully arrested and detained in a holding cell overnight. He testified that the cell was filthy with toilets that were not functioning. He further testified that he could not sleep because the place was not conducive for one to sleep and there was stench as the toilet was not flushing. He said that he was detained with four others and everybody was minding their own business. He further testified that his health deteriorated after the arrest but under cross examination he conceded that he suffered from ill health even before the arrest.

[38] I have already said earlier that Counsel for the plaintiff submitted that I should award damages in the amount of **R 120 000.00**. On the other hand Counsel for the defendant submitted that an amount of **R 50 000.00** is fair and reasonable in the circumstances.

[39] Among others, Counsel for the Plaintiff referred me to **Louw v Minister of Safety and Security and Another**⁶, **Olivier v Minister of Safety and Security and Another**⁷ as well as **Van Resnsburg v City of Johannesburg**⁸. In **Louw** the Plaintiffs were detained for 20 hours and they were awarded R 75 000.00 each. In **Olivier** the plaintiffs were detained for six hours and they were awarded each R 50 000.00, current value R 100 000.00. In **Van Rensburg** a 74 year old plaintiff who was detained for six hours was awarded R75 000.00 (current value R 100 000.00). The amounts of compensation

⁶ 2006(2) SA SACR 178 T

⁷ 2009(3) SA 434 (W)

⁸ 2009(2) SA 101 (W)

awarded in the above matters indicate that the plaintiff concedes that the amount of compensation this court may award is an amount of not more than R 120 000.00.

[40] On the other hand Counsel for the defendant submitted in her heads of argument that a fair and reasonable amount of compensation in the circumstances of this case should be an amount of between R30 000 and R 50 000. Counsel for the defendant referred me to the two decided cases in this regard, namely **Mvu v Mminister of Safety and Security & Another**⁹ and **Seria v Minister of Safety and Security & Others**¹⁰ to justify her submission. However, counsel for the defendant omitted to take into account the current value of the amounts that were awarded in both the cases. In Mvu an amount of R 30 000 was awarded in 2009 and therefore the current value is about R 61 500. In the matter of Seria an amount of R 50 000 was awarded to the plaintiff in 2004 with the current value being about R 121 500. In my view this is a concession by the defendant that a fair and reasonable amount of compensation in this case should be in the region of R 120 000.

[41] Having considered the submissions by both counsel as well as case law and, of course the rate of inflation I am of the view that an amount of R 120 000 is a fair and reasonable amount for the damages suffered by the plaintiff in this case.

COSTS

[42] It is a well established triad that costs follow the cause. I am also alive to the fact that the award of costs is within the discretion of the presiding officer. However the elephant in the room in this case is the scale of costs. Counsel for the plaintiff argued that although there was a concession that the amount to be awarded falls within the jurisdiction of the Regional court, I should award costs on a High Court scale. Counsel for the plaintiff did not say much with regard to why the action was prosecuted in the

⁹ (07/20296) [2009] ZAGPJHC 5

¹⁰ (7357/2004) [2004] ZAWCHC 26

High Court despite it being not complicated and when the duration of the plaintiff's incarceration was only for less than twelve hours.

[43] The Regional Courts in South Africa were conferred with monetary jurisdiction of up to R 400 000 in civil matters so that all actions where plaintiff's claims exceed the jurisdiction of the magistrates court should be adjudicated in a less expensive manner. The High courts' rolls are so voluminous and therefore the courts should register their disdain against the plaintiffs who choose the High court as a forum without any justification.

[44] Counsel for the plaintiff says the following in the heads of argument¹¹ in an endeavour to justify costs on a High Court scale:

“ 63. Despite the fact that the plaintiff submits for damages of R 120 000 which falls within the jurisdiction of the regional court it is submitted that the costs should be granted at the high court scale. The dominating jurisdiction is that this matter relates to the infringement of the Plaintiff's constitutional rights and furthermore the inhumane and degrading manner in which the Plaintiff was treated.” Surely any arrest is a deprivation of an arrestee's constitutional right not to be arbitrarily deprived of one's freedom. In my view this aspect alone cannot be a justification to prosecute an action in the High court even if the plaintiff is aware that he will not be able to prove damages in the amount exceeding that of the Regional Court.

[45] I was also referred to decided cases where the plaintiff was awarded damages that are within the jurisdiction of the magistrates court with costs on the High court scale. In **Mathe v The Minister of Police**¹², Opperman J remarked as follows:

“ 81. In this matter the parties expressly agreed at pre-trial conference that the matter should not be referred to another court.

¹¹ CASELINES 013-78(PAGE 36 PARAGRAPH 63 PLAINTIFF'S HEADS OF ARGUMENT)

¹² (33740/14) [2017]ZAGPJHCN 133; 2017(2) SACR 211(GJ)

82. *I am persuaded that High Court costs should be granted. This judgment is not intended to be authority for the proposition that no matter what quantum is achieved in an action, if wrongful arrest and detention is at issue, one is always allowed to sue out of the High Court. This decision is based on the facts of this case.*" Having regard to all the cases referred to by the Plaintiff's counsel it is clear that they are distinguishable to this case.

[46] Counsel for the defendant argued that I should award costs in the magistrates court scale. She also referred me to a number of cases to justify her submission. I am persuaded by the submission by Counsel for the defendant that I should award costs in the magistrates court scale. In my view this is not a complex matter and therefore there is no justification for High Court costs.

ORDER

[47] In the result I make the following order:

- (a) Judgment is granted against the defendant for payment of the amount of **R120 000.00** (One hundred and twenty thousand);
- (b) Interest thereon at the rate of 11.75% per annum from the date of this judgment until date of payment.
- (c) The defendant is ordered to pay the costs of suit on the appropriate regional court scale.

KGANKI PHAHLAMOHLEKA
ACTING JUDGE OF THE HIGH COURT

JUDGMENT RESERVED ON: 11 MAY 2023

DELIVERED ON: 28 JUNE 2023

COUNSEL FOR PLAINTIFF: ADV JMV MALEMA

INSTRUCTED BY: MADELAINE GOWRIE ATTORNEYS

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