

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MAKHANDA)**

CASE NO: 1923/2018

In the matter between:

XOLISILE KHUBALO

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

NORMAN J:

- [1] Plaintiff sued the defendant for damages allegedly resulting from wrongful and unlawful arrest, malicious prosecution and *contumelia*. He claimed R200 000.00 for wrongful and unlawful arrest; R200 000.00 for malicious prosecution and R50 000.00 for *contumelia* plus costs of suit. Mr Basson appeared for the plaintiff and Mr Mili for the defendant. Both parties agreed that it was not necessary to separate issues of liability and *quantum* and the trial proceeded on that basis. They also agreed that the defendant bore the onus to justify the arrest and detention whilst plaintiff had a duty to begin and bore the onus to prove malicious prosecution.

Pleadings

- [2] In paragraph 5, of the particulars of claim, plaintiff alleged: That he was wrongfully, unlawfully and intentionally arrested without a warrant and wrongfully detained. The members of the South African Police Service maliciously set the law in motion against him by laying false charges of possession of drugs. The police acted without exercising a discretion to

arrest in a fair and balanced manner or failed to exercise their discretion properly. They acted without reasonable and probable cause and with *animo injuriandi*. The prosecution failed when charges were withdrawn. He alleged that he suffered damages as claimed in the first paragraph of this judgment.

- [3] Defendant, in his defence, pleaded that plaintiff was arrested without a warrant in terms of section 40 (1) (h) of the Criminal Procedure Act 51 of 1977 (“the CPA”). He was detained until his first appearance. He was charged with an offence of using, being in possession of and dealing in drugs in terms of section 4 (b) and 5 (b) of the Drugs and Drug Trafficking Act 140 of 1992 (“the Drugs Act”). The plaintiff was found in unlawful possession of 324 litres of self- brewed beer and one dagga plant. The decision not to prosecute the plaintiff was made by the prosecutor in terms of the CPA and National Prosecuting Authorities Act 32 of 1998. Defendant denied that plaintiff suffered any damages. In response to a request for further particulars the defendant confirmed that plaintiff was also charged with being in unlawful possession of 324litres of self -brewed beer. In this regard the defendant alleged a contravention of section 56 (1)(a) to (d) of the Eastern Cape Liquor Act 10 of 2003(“the EC Liquor Act”).

Issues for determination

- [4] Parties identified issues for determination as: The lawfulness of the plaintiff’s arrest and detention, whether or not plaintiff was maliciously prosecuted, whether he suffered any damages and issues relating to costs.

Plaintiff’s evidence

- [5] On 22 November 2017 at about 08h00 the members of the police service arrived at house no.2[...] [...], N[...] Street, Joza Location, Makhanda. Plaintiff was informed about the police presence as he was sleeping in another house that he rents, house no. 229 B. He was wearing his night shorts. He brushed his teeth and walked through a passage, across the street into house no. 2[...]. As he was approaching, he saw four police vans parked outside house no.2[...] [...]. He found police kicking the door of the storeroom. He saw Lt. Colonel Pika taking a video of what was happening. Plaintiff confronted him.

He asked someone to bring his cell phone and decided to take a video of the police actions, but Lt. Colonel Pika slapped his hand and the cellphone fell on the ground. The police took out about 80 litres of home brewed beer that he referred to as “*iqhilika*”. The police threw all of it away on the basis that it was unlawful to brew it. There was an altercation between him and Lt. Colonel Pika who threatened to take the cleverness out of him.

[6] Lt. Colonel Pika picked a dagga tree or plant which was growing next to the fence on the neighbour’s side. It was about a metre away between the door that was kicked in and the fence. Lt. Colonel Pika asked the plaintiff what that was. Plaintiff told him it was a dagga plant. Lt. Colonel Pika said that gave him reason to arrest plaintiff. Plaintiff told him that it was not in his yard. Lt. Colonel Pika instructed another police officer to handcuff plaintiff and put him in the van. Plaintiff refused to go into the van wearing only his night shorts. Lt. Colonel Pika held him by the elastic waistband of his night shorts and tried to push him towards the van. At that point his private parts were exposed to the people who were there. He felt humiliated and hurt. Another police officer offered to escort him to the house to put on his clothes. Lt. Colonel Pika agreed.

[7] Thereafter he was taken to the police station. He was charged with brewing a prohibited concoction “umshovalale”, being in possession of dagga, resisting arrest and *crimen injuria*. He was later detained in the police cells. He found eight (8) other detainees in the cell. The cell smelt of urine, the toilet was blocked and the blankets smelt of dirty feet. He was made to sleep on a mattress that was about 5 centimetres thick.

[8] Lt. Colonel Pika decided that plaintiff was not to be taken to court with the other arrested persons the following day. He was taken to another cell. Lt. Colonel Pika came to that cell and asked the three prisoners that were there to identify themselves. They each identified themselves as members of the 24, 26 and 28 gangs, respectively. Lt. Colonel Pika wanted to know from the plaintiff whether he could see where he was. He regarded that as a threat. He was only taken to court around lunch time. Upon arrival at court the

magistrate said to him he must leave using the same door he used to enter the court room. That was the only time he went to court. He was released from the police cells around 15h00. He was given a piece of paper that was entered as part of Exhibit "A". The document is on a letterhead of the Magistrate's Court, Grahamstown. It is signed by the clerk of the court certifying that plaintiff appeared in court on 23 November 2017 and the case was "Not Placed". It recorded, briefly that *"the case was not enrolled because of small quantity of dagga plant: own use; there was no crimen iniuria and that on illegal brewing of beer, samples thereof had to be sent to the laboratory for testing; and that the resisting of arrest charge will depend on the outcome of the laboratory tests."* The relevance of this document shall become apparent when the issue of malicious prosecution is dealt with later in this judgment.

- [9] Under cross- examination plaintiff admitted that it was not the first time for Lt. Colonel Pika to come to his place. It was put to him that Lt. Colonel Pika had been there before and had warned plaintiff not to sell *"umshovalale"*, a prohibited concoction according to the defendant. Plaintiff denied that he was selling a prohibited concoction and was adamant that what he was brewing and selling was *"iqhilika"*. It was also put to him that he used profanities at Lt. Colonel Pika. He denied that he swore at Lt. Colonel Pika or used vulgar language as alleged. It was also put to him that he was arrested because of the dagga plant and not in relation to the concoction. He denied that. He stated that he heard from the radio that dagga, for own use, was lawful. He denied that he told Lt. Colonel Pika that he was not selling but smoking dagga. The plaintiff closed his case.

Defendant's case

- [10] Lt. Colonel Pika testified. On the date of the hearing his rank was that of a Colonel having been promoted in 2019. I shall hereinafter address him as Colonel. He confirmed that he had been to the plaintiff's house on a previous occasion. On the day in question, they were conducting raids in places that were selling *"umshovalale"*. They had information that at the plaintiff's place dagga and mandrax were being sold. Upon arrival they found many people who were consuming *umshovalale*. They got resistance from the plaintiff who

was shouting and insulting them. They intended to arrest and release him immediately using the SAP 496 option. Plaintiff fought with them refusing to get into the van, kicked him on the chest and was kicking the door of the van. They took out about 324 litres of *umshovalale* from the storeroom.

[11] They took the ingredients and poured those into the concoction which was 324 litres and threw it away. As he was walking in the yard he saw a dagga plant. He picked it and asked the plaintiff about it. Plaintiff swore at him and did not give him an explanation. He was informed of his constitutional rights and placed under arrest. Plaintiff resisted arrest. He swore at him using vulgar language. This happened in the presence of many people, about 150 people. He allowed plaintiff to go and put on a hoodie as he requested. He was taken to the police station where he was charged and taken to the cells. He could not recall whether plaintiff was handcuffed. Thereafter he was taken to court with other arrested persons in the morning and was released by court. He denied that plaintiff was taken to court alone during lunch time or that he was abused or threatened by being taken to the alleged gang members. He denied that he threatened to take cleverness out of the plaintiff. He further denied that the cell where plaintiff was detained smelt of urine. He testified that there are several stacked up mattresses in the cell. He denied that the blankets were not clean. He stated that that police station was newly built and it was clean. He denied that he manhandled the plaintiff as alleged.

[12] Under cross – examination he was adamant that “*umshovalale*” was a prohibited concoction which caused those that consumed it to lose consciousness with saliva coming out of their mouths, and he referred to that condition as “*ukunkonka*”. He stated that the concoction “was killing our people”. When asked about the ingredients of “*umshovalale*” he stated that there was a certain sugar that was being used. He further stated that possession of dagga was prohibited. He was referred to a judgment from the Western Cape Division in the matter of ***Prince v Minister of Justice and Constitutional Development and Others; Rubin v National Director of***

Public Prosecutions and Others; Acton and Others v National Director of Public Prosecutions and Others¹. He testified that he was aware of the judgment. When that judgment came out, he stated, the defendant sought and obtained an opinion to the effect that the police were to continue to arrest and detain suspects until the Constitutional Court pronounced on the matter.

- [13] He was adamant that the dagga plant was in the yard that was rented by the plaintiff. The plaintiff's version was put to him that he had goats in his yard that would have devoured the plant if it was in his yard. He had no response to that version. He was taken through the relevant entries in the occurrence book that indicated that the plaintiff's release on SAP 496 was scratched off. This, according to plaintiff's counsel was evidence that he acted with malice in detaining plaintiff. He disputed the entries on the basis that there were no initials next to the deletions, in his view, that proved that the entries were forged. He alleged some corrupt or collusive conduct between some police officials and certain attorneys. When asked by court the reason he did not send the concoction samples to the laboratory for testing, his response was that he did not deem that necessary because he could see what *umshovalale* was doing to people. He made an example that if he finds a drunk person he does not need to test the alcohol that the person consumed. Defendant closed his case.

Submissions by the parties

- [14] Mr Basson submitted comprehensive heads of argument, at least 64 pages, in addressing the issues for determination. He submitted that the arrest and detention by the defendant was malicious. Plaintiff was treated badly and was abused by Colonel Pika. His constitutional rights were infringed, in particular his rights to integrity and dignity were violated. His personal liberty was restrained without justification. The police could have released him under a summons or a SAP 495 form instead of detaining him. The police actions were unlawful. The court should prefer the plaintiff's version to that of Colonel

¹ ***Prince v Minister of Justice and Constitutional Development and Others; Rubin v National Director of Public Prosecutions and Others; Acton and Others v National Director of Public Prosecutions and Others*** [2017] 2 All SA 864 (WCC).

Pika as the plaintiff's version is corroborated by the objective facts contained in the extracts from the Occurrence Book. The fact that plaintiff was going to be released under the SAP 495 form but that was scratched out is consistent with the plaintiff's version that he was detained maliciously.

[15] He conceded that the detention of the plaintiff was for 30 hours and not two days as pleaded. He relied on, *inter alia*, ***Zealand v Minister for Justice and Constitutional Development and Another***², for the contention that any deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. He submitted that the defendant failed to discharge the onus that there was justification for the interference with plaintiff's liberty³. Plaintiff was maliciously prosecuted by Colonel Pika because the charges were withdrawn by the public prosecutor on 13 December 2017. He submitted that the defendant must be found liable to compensate the plaintiff for damages suffered. In so far as quantum is concerned he relied on ***Minister of Safety and Security v Tyulu***⁴ for the contention that in the assessment of damages for unlawful arrest and detention the correct approach is to have regard to all the facts of the particular case and to determine quantum of damages on such facts.

[16] Mr Mili, on the other hand, submitted that plaintiff had failed to discharge the onus on a balance of probabilities, to prove the unlawful arrest, detention, and *contumelia*. There were no facts pleaded by the plaintiff in the particulars of claim relating to the reason for the arrest. He relied on the decision by Lowe J in ***Siyabonga Matebese v Minister of Police***⁵ for the contention that the plaintiff in this case failed to discharge the onus resting on him and the claims were dismissed with costs. He further argued that the police had reasonable and probable cause to arrest the plaintiff since a dagga plant was found in his

² ***Zealand v Minister for Justice and Constitutional Development and Another*** 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008(4) SA 458 (CC).

³ ***Mahlangu and Another v Minister of Police*** 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) at para 32.

⁴ ***Minister of Safety and Security v Tyulu*** 2009 (2) SACR 282 (SCA); [2009] 4 ALL SA 38 (SCA) at para 26

⁵ ***Siyabonga Matebese v Minister of Police***, Case No. 2224/ 2017, delivered on 18 June 2019, Eastern Cape Division, Port Elizabeth.

yard. On the issue of *quantum* he relied on the decision of the Full Court of this Division in **Minister of Police v Loyiso Mahleza**⁶, where an award in the sum of R600 000.00 for damages arising from unlawful arrest and detention was set aside on appeal and replaced with an award of R50 000.00 as compensation for arrest and detention for approximately five hours.

Discussion

Was the arrest and detention unlawful?

- [17] As aforementioned the defendant admitted the arrest and detention. He bore the onus to justify the plaintiff's arrest. He would discharge the onus if he proved that Colonel Pika entertained a suspicion, based on reasonable grounds that the plaintiff was brewing a prohibited concoction and had thus committed an offence in terms of the EC Liquor Act, or had committed an offence as envisaged in section 5 (a) or (b) of the Drugs Act, that of being in possession of the dagga plant or dealing in dagga as pleaded. In **Minister of Safety and Security v Sekhoto and Another**⁷, the Supreme Court of Appeal found that the duty to justify arrest does not change even if the arresting officer arrests or purports to arrest a person on the strength of a warrant.
- [18] He charged plaintiff with brewing or selling beer or a concoction. Plaintiff does not rely on this charge for his claim. Mr Basson had submitted that this charge was irrelevant. This charge was dealt with in the defendant's plea and in a reply to a request for further particulars as a contravention of section 56 (1) (a), (b), (c) and (d) of the EC Liquor Act. Colonel Pika also relied on this charge in evidence in justifying the raid of the plaintiff's house. It is for that reason that something must be said about it. The raid of the plaintiff's premises was planned by the members of the defendant. On the version of Colonel Pika he had been to the plaintiff's house prior to the day in question. He was concerned about people being made to consume *umshovalale* as it

⁶ **Minister of Police v Loyiso Mahleza** (CA 106/2020) [2021] ZAECHGHC 83 (14 September 2021)

⁷ **Minister of Safety and Security v Sekhoto and Another** 2011 (1) SACR 315 SCA at paras 28 – 36. See also **Gigaba v Minister of Police and Others** [3469/2020] 2021 ZAGPHC 55, 2013 All SA 495 (GP) (11 February 2012) at para 58 – 61 D, **Malebe Thema and Another v Minister of Safety and Security and Others** 2021 (2) SACR 233 (GP) at para 10,16-19 and 23.

was killing them. There were about 150 people who were at the plaintiff's place. When asked under cross-examination:

“Q. You did not have a search warrant?”

A. We did not do a search. We saw the dagga and we confiscated it. We were not there to search. We went there to confiscate umshovalale.”

[19] I am not aware of any law that permits the conduct contended for in that response by Colonel Pika where the police would simply go into a person's property, warrantless and without seeking permission from the owner and confiscate what they deem to be illegal. It is not sanctioned by the provisions of section 40 of the CPA that is relied upon by the defendant. It is certainly not permitted in terms of the Constitution and in particular, sections 9, 10 and 14 thereof.

[20] That evidence contradicted his version when he testified in chief that they were raiding places selling *umshovalale*. It is apparent from his evidence that he never sought permission to enter the plaintiff's premises and confiscate what he called “*umshovalale*”. That conduct was unlawful. His testimony contradicted to a large extent the version that was put to the plaintiff. Those contradictions are material in that although it was put to plaintiff that he was not arrested for brewing the concoction, there was a charge preferred against the plaintiff and was based on unlawful brewing of “*umshovalale*”. Colonel Pika sought to dispute recordals made in the Occurrence Book by suggesting that they were forged by police officers working with certain lawyers and that he was going to investigate that. The claim was instituted on 25 June 2018. The defendant delivered his plea on 1 February 2019. There was ample time for him to investigate because not only was he an officer that led the raid he was the complainant. He claimed forgery when he was confronted with entries in the Occurrence Book indicating that plaintiff was going to be released on the SAP 495 form. His testimony in this regard contradicted what he himself had volunteered that they were going to release plaintiff immediately on the

SAP 495 form. His testimony of forgery was clearly false. He was making up his answers whenever he was confronted with objective facts. His testimony that all of *umshovalale* was destroyed differed from the version put to the plaintiff that *umshovalale* was taken to the police station and was entered into the SAP13 register. On his version the entry in the SAP 13 was made when *umshovalale* had already been destroyed. He testified that because of the strong smell of *umshovalale* it could not be taken to the police station.

[21] Section 56 (1) of the EC Liquor Act provides:

“56.(1) No person may have in his or her possession or custody or under his or her control , consume or sell, supply or give to any person-

- (a) any concoction manufactured by the fermentation of treacle, sugar or other substances and known as isishimiyana, hopana, qediviki, skokiian, uhali, or Barberton, but excluding indigenous qhilika;*
- (b) any concoction which, though called by another name is similar or substantially similar to any of the concoctions referred to in paragraph (a);*
- (c) any concoction manufactured by the fermentation of any substance the consumption of which would, in the opinion of the MEC in consultation with the Minister responsible for health, be prejudicial to the health and well- being of the population of the Republic and specified by him or her by a notice in the Gazette; or*
- (d) any drink manufactured by the distillation of any concoction referred to in paragraph (a),(b),or (c).*

(2) *The MEC may, in consultation with the Minister responsible for health, at any time by a like notice withdraw or amend any notice issued under subsection (1) (c)."*

[22] Plaintiff maintained that he was selling *iqhilika* and not *umshovalale*. The indigenous *iqhilika* is excluded from prohibited concoctions or drinks. The prosecutor directed that samples of the concoction found at the plaintiff's place should be sent to the laboratory for testing. Colonel Pika did not deem that necessary. Colonel Pika conceded that he is not a chemist. He, accordingly, does not possess the scientific expertise to identify a concoction without the benefit of laboratory results. His insistence that there was no need to do the tests was unreasonable and obstructive, in my view. *Umshovalale* is not listed amongst the prohibited substances. Colonel Pika did not suggest that *umshovalale* is similar or substantially similar to the concoctions listed in section 56 (1) (a). If he had reasonable and probable cause to believe that *umshovalale* was killing people, his defiance of the advice from the prosecutor to have the concoction tested is inconsistent with that belief. A prudent police officer would have gone ahead with the testing process for the well - being of the community. It is only through that scientific process that the MEC in consultation with the Minister of Health may take appropriate steps as provided for in the EC Liquor Act. I accordingly reject the version of Colonel Pika that the concoction that was thrown away was a prohibited concoction and not *iqhilika*. The arrest of the plaintiff in relation thereto was accordingly unlawful.

[23] An officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40 (1) (b) of the CPA. Those are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion;(iii) the suspicion must be that the arrested person committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds. *"If the prerequisites are satisfied a discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify the exercising of his*

*discretion on those facts. The facts may include investigation of the exculpatory explanation provided by the accused person*⁸.

- [24] On Colonel Pika's version he knew that the plaintiff was the occupant of the house. He went there to 'raid' the place for *umshovalale* and drugs. He did not ask for permission to enter the premises. Seeking permission or consent was even more essential where he went there having received information that there were prohibited substances that were being sold at the place. On his version it appears that he did not ask the plaintiff anything about the alleged unlawful concoction. They simply took out of the storeroom and threw it away. He walked about the yard and found a dagga plant. He stated that the dagga plant was in the plaintiff's yard. He simply asked one question, "What is this?", as soon as he got the response that it was dagga he effected the arrest.
- [25] His evidence in relation to the discovery of the dagga plant is contradictory. In his evidence in chief he stated that plaintiff did not answer when he confronted him with the dagga plant but simply swore at him. In his statement filed in the docket and in what was put to the plaintiff he stated that plaintiff responded that he was not selling dagga but was smoking it. He did not change his evidence even after he had been afforded an opportunity, as he requested, to refresh his memory by reading his statement. I find that Colonel Pika was a poor witness that performed badly under cross-examination. It is apparent from his evidence that he was intent on arresting and detaining the plaintiff. That attitude is consistent with the evidence of the plaintiff that he was wanted to take the cleverness out of him. I accordingly reject his evidence where it is at variance with that of the plaintiff. I accept the plaintiff's evidence. He did not embellish his evidence and his recollection of the events is supported by what the police recorded in their Occurrence Book.
- [26] Colonel Pika failed to investigate the plaintiff's contention that the dagga plant was in the neighbour's side of the fence. He effected the arrest in

⁸ *Minister of Police v Dhali*, (CA 327/2017) ZAECHC16 (26 February 2019) at para 13.

circumstances where he failed to investigate the defence of the plaintiff or to exercise his discretion to arrest and detain carefully. The fact that the prosecutor refused to place the matter on the roll because, amongst others, there was “*small quantity of dagga (plant)*”, does not support his evidence that the dagga plant was big and could not be weighed. His version in this regard falls to be rejected.

[27] In so far as the arrest for resisting arrest and *crimen iniuria* is concerned, the prosecution made it apparent that the resisting arrest charge was dependent on the outcome of the sample tests. He or she declined to pursue the charge of *crimen iniuria*.

[28] Section 12 (1) of the Constitution provides:

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

(a) not to be deprived of freedom a beautifully without just cause

(b) not to be detained without trial

(c) to be free from all forms of violence from either public or private sources

(d) not to be tortured in anyway and

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

[29] Theron J in **De Klerk v Minister of Police**⁹, dealt with specific requirements when one is dealing with a claim under the *actio iniuriarum* for unlawful arrest and detention. They are:

- a) *the plaintiff must establish that his liberty has been interfered with,*
- b) *the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only to show that the defendant acted intentionally in depriving his liberty and not that the defendant knew that it was wrong to do so,*
- c) *the deprivation of liberty must be wrongful, with the onus on the defendant to show why it is not, and*
- d) *the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.”* Rabie CJ in **Minister of Law and Order v Hurley**¹⁰, found that an arrest constitutes an interference with the liberty of the individual concerned.

[30] Having considered all the evidence in its totality the court is satisfied that the plaintiff discharged the onus on a balance of probabilities and has proved that the arrest and detention were wrongful. The plaintiff had walked across to house 2[...] [...] where the police were, wearing only his night shorts. It was how he was manhandled by Colonel Pika that his private parts were exposed to the members of the community. The conduct of Colonel Pika in this regard was unlawful and wrongful. Plaintiff succeeded in proving humiliation and degradation that impaired his honour as a free citizen.

[31] In so far as malicious prosecution is concerned plaintiff failed to discharge the onus resting on him for these reasons:

⁹ **De Klerk v Minister of Police** (CCT 95 /18) [2019] ZACC 32, 2019 (12) BCLR 1425 (CC), 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019).

¹⁰ **Minister of Law and Order v Hurley** 1986 (3) SA 568 at 589 EM – F.

- (a) The prosecution had the presence of mind not to enrol the case. The prosecutor made it clear that the charges levelled by the police against plaintiff had no merit and had endorsed the docket accordingly.
- (b) On the plaintiff's version he appeared in court only once and nothing was said by the prosecutor in court but the Magistrate told him to use the same door he used to leave the court room.
- (c) It is apparent from all the evidence that the prosecution did not associate itself with the police actions instead exercised its independent discretion in ensuring that plaintiff was not subjected to unnecessary prosecution¹¹.
- (d) I have no doubt that if plaintiff believed that the prosecutor acted maliciously, he would have cited the National Director of Public Prosecutions as a party in these proceedings. The claim based on malicious prosecution must accordingly fail.

[32] For all the above reasons, I accordingly find that the defendant failed to discharge the onus resting on him to justify both the arrest and detention. I am satisfied that the arrest and detention was malicious and without reasonable cause. It follows that the defendant is liable to compensate plaintiff for all proven damages.

Quantum of damages

[33] In the determination of an award for damages for unlawful arrest and detention, a court is seized with a discretion to find what is fair and reasonable to all parties, taking due cognisance of public policy. In **Hulley v Cox**¹², the Appellate Division stated that:

¹¹ **S v Lubaxa** 2001 (2) SACR 703 (SCA) at para 19.

¹² **Hulley v Cox** 1923 AD 234 at 246,

“We cannot allow our sympathy for the claimant in this very distressing case to influence our judgment.”

- [34] The court must balance interest of both parties. In compensating plaintiff it must not pour out largesse from the horn of plenty at the defendant's expense, as the court cautioned in ***Pitt v Economic Insurance Co Ltd***¹³.
- [35] When defining the purpose of an award of damages, the Constitutional Court, in ***Mahlangu and Another v Minister of Police***¹⁴, held that damages are awarded to deter and prevent future infringements of fundamental rights by the organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place.
- [36] Both parties referred the court to various authorities. Mr Basson further relied on various cases with awards that were unfortunately not based on detention for 30 hours but ranged between 4 to 9 days. He, for instance, relied on ***Xakambana v Minister of Police***¹⁵. This case is distinguishable from the facts in *Xakambana*, where the plaintiff was arrested and detained for two days and was subjected to anal rape. He further submitted that the court should award the damages as claimed in relation to malicious prosecution and relied on, *inter alia*, ***Patel v National Director of Public Prosecutions and Others***¹⁶, where an award for R900 000.00 was made for malicious prosecution. The facts of this case differ materially from the facts in the *Patel* case. First, in *Patel* the claim was for malicious prosecution and was directed that all the prosecutorial authorities such as the National Director of Public Prosecutions. Second, unlike in this case, in *Patel*, the prosecutors took a decision to prosecute the plaintiff who was a Judge President of the KwaZulu Natal Division. He was made to appear in the criminal court and the matter

¹³ ***Pitt v Economic Insurance Co Ltd*** 1957 (3) SA 284 (D) at 287 E- F Holmes J.

¹⁴ ***Mahlangu and Another v Minister of Police*** (CCT 88/20) [2021] ZACC 10, 2021 (7) BCLR 698 (CC), 2021 (2) SACR 595 (CC) (14 May 2021).

¹⁵ ***Xakambana v Minister of Police*** 2021 JOL 49407 (ECM).

¹⁶ ***Patel v National Director of Public Prosecutions and Others*** 2018 (2) SACR 420 (KZD).

was highly publicised. It is for that reason therefore that to make an award similar to the one in *Patel's* case would be inappropriate.

[37] In *Motsai v Minister of Police*¹⁷ the court awarded an amount of R50 000 for one night. Having considered the facts and circumstances of this case including the recent awards made in this Division in comparable cases, I accordingly find an award in the amount of R80 000.00 would be appropriate for unlawful arrest and detention for 30 hours and R20 000.00 for *contumelia*. In respect of malicious prosecution, the claim is dismissed.

[38] The court finds no basis to depart from the normal rule that the successful party is entitled to costs. Although the claim for malicious prosecution has been dismissed plaintiff achieved substantial success in this action and should be entitled to the costs of the action. Mr Basson sought an order for costs on an attorney and client scale. I disagree because there are no circumstances that warrant imposition of a punitive cost order.

ORDER

[39] **In the result the following Order is made:**

39.1 Defendant is liable to compensate plaintiff for damages suffered and is ordered to pay to plaintiff a sum of R100 000.00 (One Hundred Thousand Rand) as and for damages arising from unlawful arrest, detention and *contumelia*.

39.2 Interest on the aforesaid amount at the prescribed rate from the date of this judgment until date of final payment.

39.3. Defendant is ordered to pay plaintiff's costs of suit.

T.V. NORMAN
JUDGE OF THE HIGH COURT

¹⁷ *Motsai v Minister of Police* (A1174/2006) [2010] ZAGPPHC 14 (4 March 2010).

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Matter heard on : 12 February 2024, 13 February 2024, 14 February 2024,

16 February 2024 & 27 February 2024

Judgment Delivered on: 26 March 2024