

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]

CASE NO: CA 17/2021

Heard on: 18/02/2022

Delivered on: 03/05/2022

In the matter between:

MBUYISELO SHODE

Appellant

(Respondent in the cross-appeal)

and

MINISTER OF POLICE

Respondent

(Appellant in the cross-appeal)

JUDGMENT

NHLANGULELA DJP

[1] On 05 March 2021 the magistrate of Grahamstown (now Makhanda) made the following order:

- (a) Payment of the amount of R10 000,00 (TEN THOUSAND RAND), to be paid within 30 (thirty) days of payment;
- (b) Interest on the judgment amount from date of service of summons at the rate of 7.25% per annum;
- (c) Costs of the action on party and party scale.

[2] Aggrieved by that order, the appellant (the plaintiff in the Magistrates' Court) noted an appeal on the grounds that the award in the sum of R10 000,00 is inadequate; and that the interest was fixed at 7.25%, instead of 10%. In a nutshell the appellant seeks an increased financial award.

[3] On the other hand, the respondent on appeal (the defendant in the Magistrates' Court) noted a cross-appeal on the issue of liability on the ground that the magistrate misdirected himself in the manner in which he evaluated the evidence which, had he evaluated it properly, he would have found that the appellant failed to discharge the *onus* of proof that he was entitled to the payment of R10 000,00 or at all. In so far as the cross-appeal is directed to the issue of the merits of the appellant's claim against the respondent, it will be proper to deal with the cross-appeal first; the issue for determination being whether the evaluation of the evidence on which payment of damages was ordered is correct. To that end, it bears mentioning at this early stage that the proper approach on appeal based on facts was stated long ago to be that the factual findings made by the trial court are presumed to be correct. In this regard, Pickering J in *Sizani v S*, Case No: CA 272/2009 dated 02 November 2011 (unreported) at page 8 states that:

"The learned trial Judge's findings as to credibility and demeanour were assailed on appeal. It is trite that a Court of appeal is not at liberty to depart from the trial Court's findings of fact and credibility unless they are vitiated by irregularity or unless examination of the evidence reveals that those findings are patently wrong. Those findings are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See for instance Rex v Dhlumayo 1948 (2) SA 677 (A) at 705; S v Hadebe 1997 (2) SACR 641 (SCA) at 645; S v Francis 1991 (1) SACR 198 (A) at 204C – F; S v Skoti unreported Eastern Cape High Court, Grahamstown, Full Bench Appeal case no CA77/09 and S v Leve 2011 (1) SACR 87(E) at para 8."

[4] Two oral witnesses testified before the magistrate. Those were the appellant and Ms Ntomboxolo Ndzima, the Constable in the SAPS.

[5] The appellant's version is that on 10 May 2018 he and one Ms Siphokazi Kom, his girl-friend at the time, appeared before the Domestic Violence Court (the DVC) pursuant to a complaint made by Ms Kom that he had committed acts of violence against her. At the end of those proceedings a protection order was issued by the magistrate that he must desist from assaulting, swearing at, threatening or communicating with Ms Kom. According to the appellant he complied with the protection order without fail. However, on 12 June 2018 he was arrested by Ms Ndzima. Pursuant thereto, he was detained in a police cell and taken to the Magistrates's Court on the following day to face a criminal charge of breaching the protection order. During that appearance in court he was merely remanded to appear in court again on a date when the criminal proceedings were terminated. Thereafter, he instituted civil proceedings against the respondent claiming payment of R200 000,00 for unlawful arrest and detention, including insult (*contumelia*).

[6] The appellant testified that during his arrest on 12 June 2018 he was informed only at the time of detention into Joza Police Station cells that the reasons for arrest was that he had breached the protection order. But when that happened he was not asked to make a statement denying the new complaint that Ms Kom had made against him. Instead, the appellant was told that he would make his statement at court during trial. But at court the opportunity to refute the complaint of Ms Kom was never presented to him. It is the present civil trial that gave him the opportunity to narrate his version.

[7] The appellant told the court below that on 09 June 2018, the day on which he allegedly breached the protection order, he left his parental home (No. [...] "P", Street), Tanti Location, Grahamstown, to pass "O" and "N" Streets until he reaches his destination at Aiken Street which is situated at the same Location. When he got to "N" Street he saw Ms Kom with his new boy-friend. He nevertheless continued on his journey without uttering a word to Ms Kom until he reached Aiken Street, where he spent approximately three hours. On his return home he met Ms Kom's mother standing

next to the gate of her house at “O” Street who hurled insults at him without any provocation. The insults entailed a concern, orally expressed, that since Ms Kom had a new boy-friend the appellant must not interfere with her for fear that his violent acts that had led to the protection order being made in May 2018 might be repeated. The appellant told the court that the insults of Ms Kom’s mother included an assertion that appellant’s mother was a witch. Nonetheless, the appellant kept his composure. The appellant reported the incident to his mother when he finally got home. The appellant denied the allegation of Ms Kom put to him under cross examination that he had committed further violent acts on 09 June 2018 in breach of the protection order.

[8] Ms Ndzima testified that on 09 June 2018, and at about 19h00, she received a docket that contained a sworn statement of Ms Kom which was to the effect that on 09 June 2018 whilst she was with her boy-friend at No. 36 “N” Street the appellant arrived and shouted at her saying that he was going to beat her up. In response, the owner of the house ordered Ms Kom to leave his house, with the result that the appellant got an opportunity to yet again issue threats that: “I am going to beat you now. You can lay a complaint or [cause me to be arrested] because I know [that] you do have a protection order against me.” Further, the appellant grabbed her, but she succeeded to free herself from that restriction and run away back home. Based on the sworn statement of Ms Kom and the protection order that were contained in the docket, during the night of 09 June 2018 and on 10 and 11 June 2018 Ms Ndzima proceeded to the house of the appellant to arrest him, but she did not find the appellant there. It would appear that Ms Ndzima’s attempts to arrest the appellant on 09, 10 and 11 June 2018 were thwarted by absences of the appellant from home.

[9] When Ms Ndzima was subjected to cross examination it appeared that she was happy to effect arrest without a warrant authorizing her to do so; and she was happy to effect arrest because Ms Kom had opened a case against the appellant. In addition, at the time of arrest Ms Kom had expressed fear to remain in the company of the appellant.

[10] In paragraph 15 of his judgment the magistrate stated the legal position correctly when he said:

“The governing sections of the Act which are pertinent to a decision on whether the arrest may have been unlawful is found at s 8 (4)(b) read with s 8 (5) of the [Domestic Violence Act 116 of 1998 aa] Act, which read:

8. ***Warrant of Arrest upon issuing of a protection order***

(4) (a) A complainant may hand a warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.

(b) If it appears to the member concerned that, subject to sub-section (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).

(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which-

...

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account –

(a) the risk to the safety, health or wellbeing of the complainant;

(b) the seriousness of the conduct comprising an alleged breach of the protection order; and

(c) the length of time since the alleged breach occurred.”

[11] In evaluating the conflicting versions of the two witnesses who testified the magistrate applied the tools that are provided in the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 SCA at para 5. He was correct in making factual findings on the credibility of the witnesses, their reliability and in assessing the probabilities of the conflicting versions adduced by the two witnesses.

[12] The finding that Ms Ndzima effected the arrest and detention without a warrant is correct. That finding paved the way for the determination of the case on the fulfilment or otherwise of the jurisdictional factors that emerge from the provisions of s 8 (4)(b) and s 8 (5) of the DVA.

[13] On the facts the magistrate made further critical findings of which I list hereinunder for the purposes of convenience:

(1) Ms Ndzima acted on the contents of unverified sworn statement of Ms Kom that the appellant had violated the protection order.

(2) Ms Ndzima was on board using a private vehicle, not a police van, when she arrested the appellant near Matebese shop.

(3) Ms Ndzima did not inform the appellant about the charge that was laid against him.

(4) The appellant was not given an opportunity to submit a police statement.

(5) The reason for the arrest and detention of the appellant was simply that Ms Kom had laid a complaint, as well as that Ms Kom appeared to Ms Ndzima at the time of arrest to be fearful that the appellant would assault Ms Kom.

(6) The arrest of the appellant took place after three days from the date on which the complaint was laid.

(7) Although the appellant was the first to testify and denied categorically that he spoke to Ms Kom and threatened to commit violence on her person on 09 June 2018, it was not put to him under cross-examination that:

(i) Ms Kom had exhibited fear that the appellant was about to assault her.

(ii) The appellant was facing a criminal charge for contravening the protection order.

(iii) The appellant was not subjected to unpalatable conditions of the prison cell in which he had been detained.

(iv) Ms Ndzima explained the constitutional rights of the appellant at the time of arrest.

[14] On the basis of the findings as aforementioned, the magistrate accepted the version of the appellant; and in express language rejected the version of Ms Ndzima.

[15] Further, on the accepted version of the facts as stated by the appellant when he testified, the magistrate concluded that Ms Ndzima did not have reasonable grounds to suspect that Ms Kom suffered or would at any future time suffer imminent harm within the meaning of the provisions of s 8 (4)(b) read with s 8 (5) of the DVA, which are interpreted in *Barnard v Minister of Police and Another* (CA286/18) [2019] ZAECHGHC 58; [2019] 3 All SA 481 (ECG); 2019 (2) SACR 362 (ECG) (31 May 2019); and in *Khanyile v Minister of Safety and Security and Another* (7079/08) [2012] ZAKSDHC 12;

2012 (2) SACR 238 (KZD) (27 January 2012) at para 28 to mean that the arrestor ought to consider, *inter alia*, the long duration of time since the alleged breach and make investigation on the necessity of the arrest by interviewing all the witnesses including the suspect.

[16] In this case the magistrate found, correctly so, that Ms Ndzima failed to exercise discretion whether, or not, to arrest the appellant, as she had not investigated the matter as necessitated by the fact that the arrest was effected on a date following three days since the alleged act of violence was committed. He found that Ms Ndzima based her decision to effect the arrest almost exclusively on the unverified statement, emotional state of Ms Kom and on the mere say so that: "I went there to arrest, because if a case has been opened against you I will arrest you." It was held by the magistrate that Ms Ndzima could have at the very least, issued summons for the appellant to appear in court rather than arrest him on the basis that Ms Kom was scarred by the appellant upon meeting him at the time of arrest on the road near Matebese shop.

[17] This court cannot fault the findings of law and fact that were made by the magistrate. The magistrate was alive to the fact that the facts of this case did not satisfy the definition of the term: "imminent harm" as adumbrated in the case of *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C) at 146B in the following terms:

"The phrase 'imminent harm' finds expression in the Canadian Criminal Code. The Ontario Court of Appeal in *R v Adams* described the concept as follows:

'(I)t is the danger of harm of a certain degree of immediacy that activates the protection... that is to harm which is impending, threateningly ready to overtake or coming on shortly.'

It is safe to say therefore that 'imminent harm' is harm which is about to happen, if not certain to happen."

[18] The submission made by *Mr Ntlokwana*, counsel for the appellant, was that the evidence in this case shows that Ms Kom's allegations in her sworn statement are not truthful. In so far as this court accepts that the rejection of Ms Ndzima's version by the magistrate was proper, the sworn statement cannot be true.

[19] On the foregoing, the cross-appeal falls to be dismissed.

[20] I now turn to the appeal on *quantum*. Both parties agreed that interest at the rate of 10% was applicable at the time when the magistrate delivered the judgment on 05 March 2021. I agree. To that extent, the magistrate *erred* in fixing the rate of interest at 7,25% per annum. However, the question whether the award of general damages in the sum of R10 000,00 is appropriate calls for a closer assessment in this appeal. The grounds of appeal against the *quantum* is that the magistrate would have awarded damages in a sum of money that is more than R10 000,00 had he taken into account that the appellant endured hardship in the prison cell due to smelly blankets and sponge mattress provided to him; appellant was deprived of delivering bricks at his workplace due to arrest and detention on 13 June 2018; and that the high esteem that he enjoyed from the members of his church was lowered.

[21] It was submitted on behalf of the respondent that the award is reasonable. The case of *Rahim and Others v Minister of Home Affairs* [2015] 3 All SA 425 (SCA) at para 27 was referred to the court. The passage referred to reads as follows:

"The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. *Inter alia* the following factors are relevant:

- (a) circumstances under which the deprivation of liberty took place;
- (b) the conduct of the defendants; and
- (c) the nature and duration of the deprivation.”

[22] The pleaded case of the appellant on the issue of *quantum* is a starting point. The appellant’s cause of action is unlawful arrest and detention, including *contumelia* associated therewith. The appellant was arrested on 12 June 2018 at about 15h00 and kept into police custody until 13 June 2018 at about 13h00 when the magistrate released him on warning. So, the arrest and detention in the hands of the police endured for approximately 22 hours. But the magistrate calculated damages on 17 hours. This is an error. The smelly blankets and sponge mattress coupled with sub-standard hygiene suffered by the appellant was not taken into account by the magistrate. In my opinion, he misconstrued the judgment of *Mofokeng, supra*, which he used when assessing damage. However, the magistrate was not obliged to take into account the loss suffered due to a job that the plaintiff would not do on 12 June 2018 and defamation that he allegedly suffered in the eyes of members of his church. The reason is that the appellant’s claim is for non-patrimonial loss, a type of damage that was pleaded by the appellant. A claim founded on defamation was also not pleaded. Neither was evidence led that the appellant was a church-goer. The finding of the magistrate that the appellant did not suffer any ill effects from his arrest is not grounded on the principles that are stated in the case of *Mofokeng v Minister of Police; C/N: 2014/A3084 (GJ)* dated 17 February 2015 at para 13, which read:

“It would therefore be incorrect to conclude that a party will only be entitled to a nominal award if he or she does not eloquently and vividly describe the effects of the arrest and detention. Moreover, the court is entitled to assume that, barring any evidence to the contrary, a Plaintiff will suffer a loss of self-worth, will perceive that others have a lower estimation of him, that he will suffer embarrassment, is likely to lose a degree of self-confidence and will experience vulnerability, humiliation and a feeling of being impotent as a consequence of a wrongful arrest and detention.”

[23] In any event, it does appear in the judgment of the magistrate that the unpleaded damages based on patrimonial loss and defamation were rejected. The magistrate was correct in doing so. In all, the grounds for interference on appeal have been established as the magistrate did commit misdirection in the manner in which he fixed the *quantum* in respect of the duration of time that the appellant spent in the custody of the police and the application of the incorrect interest rate of 7.25%.

[24] I have observed that the magistrate misconstrued the meaning of the judgments in the cases that he relied upon in considering the amount of damages for wrongful arrest and detention, and *contumelia*. Those cases are: *Goliath v Minister of Police* [2017] ZAECHGHC 119 (14 November 2017) and *Barnard v Minister of Police and Another* 2019 (2) SACR 362 (ECG). In those cases, the courts awarded an amount which is far more than R10 000,00 for a period of 22 hours spent in police custody; the invasion of constitutional rights not to be arrested and detained unreasonably; and the embarrassment caused by the inhuman manner in which the appellant was treated at the time of arrest whilst he was detained in a filthy police cell and during his first appearance in court. Consequently, I am in agreement with the submissions advanced on behalf of the appellant that the appeal on *quantum* should succeed to the extent that an appropriate amount of damages may be fixed by this Court.

[25] In my opinion, a sum of R40 000,00 is an appropriate amount of damages to be awarded in favour of the appellant. That amount of damages does accord with the principle that was established in the case of *Rahim and Others v Minister of Home Affairs, supra*; it is fair and reasonable; it is not over-compensation; and it accords with the established bench marks of comparable awards made in previously decided cases.

[26] The appellant has achieved success for which the costs must be awarded in his favour.

[27] In the result, the following order shall issue:

1. The appeal succeeds.

2. The judgment of the magistrate is set aside, and is substituted with the following new order:

2.1 The respondent to pay R40 000,00 as and for damages in respect of wrongful arrest and detention; including *contumelia*.

3. The respondent to pay the costs incurred both in the Magistrates' Court and in this Court.

Z. M. NHLANGULELA

DEPTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA

I agree:

N.M. MVUMBI

ACTING JUDGE OF THE HIGH COURT

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