



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

[Not Reportable]

CASE NO: 1201/2016

Heard on: 23/08/2022

Delivered on: 27/09/2022

In the matter between:

MBUYISELO NGONO

Plaintiff

And

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

NHLANGULELA DJP

[1] In this matter, the parties have agreed that the defendant is liable to compensate the plaintiff for arresting and detaining him unlawfully between 04 June 2013 to 07 June 2013. There is a dispute with regard to the detention of the plaintiff between 07 June 2013 to 19 September 2013. For a just decision to be made, the parties submitted a statement of agreed material facts which is framed in the following terms:

1. The plaintiff was detained on 04 June 2013.

2. He appeared in court in person on 07 June 2013, where the court remanded for his formal bail application, because it was opposed by the State.
3. The plaintiff appeared in court on 13 June 2013. The bail application did not proceed. The matter was remanded further for witness statement and DNA test results.
4. On 15 July 2013 he appeared in court again but the bail application did not proceed. He was detained further for further investigation and DNA results.
5. On 20 August 2013, the plaintiff appeared before the magistrate, and he was ordered to remain in detention for police investigations and regional court date.
6. On 19 September 2013, the plaintiff was caused to appear before the district magistrate. On this occasion it transpired that the blood kit and DNA exhibits; with blood having been drawn from him on 18 September 2013. On this day, the matter was struck off the roll at the instance of the prosecution”.
7. Therefore, the detention was for a period from 04 June 2013 to 19 September 2013.

[2] On the one hand, *Mr Mgxaji*, for the plaintiff, advanced the following submissions:

- (a) The arrest and detention of the plaintiff was unlawful;
- (b) For the detention of the plaintiff from the day of arrest on 04 June 2013, until 19 September 2013, the defendant should be liable to compensate the plaintiff in damages amounting to at least R500 000,00.

[3] On the other hand, *Mr Ndabeni*, for the defendant, submitted that the payment of damages by the defendant should be limited to the period starting on 04 June 2013 and ending on 07 June 2013 because such detention was unlawful.

[4] In other words, whereas *Mr Mgxaji* contends that the damages should be assessed on the basis of unlawful arrest and detention for 105 days, *Mr Ndabeni* contends that the assessment should be limited to 3 days.

[5] The reason given for limiting the amount of damages to 3 days was given by *Mr Ndabeni* as being that the prosecutor and / or magistrate were responsible for the post remand detention from 07 June 2013 to 19 September 2013. In other words, the members of the SAPS had nothing to do with the continued detention of the plaintiff beyond the first appearance of the plaintiff before the magistrate on 07 June 2013.

[6] The facts admitted in this case, based on the agreed statement of material facts demonstrate that the plaintiff, aged 36, was arrested by the members of the SAPS on a suspicion that he had raped a 63 years old woman in a village situated in the district of Centane. The detention that followed endured until 19 September 2013. The events that occurred between 04 June 2013 and 19 September 2013 were the first appearance of the plaintiff before the magistrate on 07 June 2012 when the hearing of bail application was postponed for not less than five times by reason that the Investigating Office (I/O) wanted more time to complete the investigation, which persisted without any meaningful ending in sight. As long as the I/O expressed appetite for continued investigation coupled with the postponement of the bail hearing, the remanding of the plaintiff in the police custody persisted.

[7] The record of proceedings before the magistrate, admitted by the parties, reveal that at not a single occasion of the court remands were the prosecutor and the court the reason for continued detention of the plaintiff. The so-called police investigation would have entailed a search for state witnesses to testify against the plaintiff and the collection of a DNA test results. It came as a complete surprise to note from the court record that

plaintiff's blood sample was extracted from him only on 18 September 2013, just one day before the day when the court ultimately decided to strike the matter off the roll on 19 September 2013.

[8] The facts found proved are that the DNA results were never brought to court, and written police statements of witnesses were never obtained. The inevitable conclusion to be drawn from these facts is that the applications for a remand made to the magistrate served merely to keep the plaintiff in custody in violation of his constitutionally protected rights to human dignity and not to be deprived of freedom arbitrarily as provided for in ss 10 and 12 of the Constitution, 1996. Both the magistrate and the prosecutor were obviously misled by the I/O into believing that necessary investigation was being pursued by the I/O.

[9] I find that the submission advanced on behalf of the defendant that the magistrate and the prosecutor were responsible for the unlawful detention of the plaintiff from 07 June 2013 to 19 September 2013 is baseless. Further support for this finding derives from the very fact that the magistrate and the DPP were never joined in these proceedings to answer the call that they were responsible for keeping the plaintiff in police custody for a continuous period of 102 days. Therefore, the defendant bear sole responsibility for the arrest and detention of the plaintiff for 105 days.

[10] The findings that I have made in the preceding paragraph are supported by the judicial statements made in *De Klerk v Minister of Police* 2020 (1) SACR (CC) at paras 62 and 63. The statements read as follows:

“[62] The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand*, a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public-policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts — there is no general rule that can be applied dogmatically in order to determine liability”. (The underlining is mine).

[11] As already stated, on the facts of this case the I/O, not the magistrate or prosecutor, caused the unlawful detention of the plaintiff from 04 June 2013 to 19 September 2013. And the conduct of the I/O was the proximate cause of the remands and detention that followed.

[12] Consequently, the defendant is fully liable for the delictual damage that was caused to the plaintiff.

[13] In this case the appropriate award of damages for unlawful arrest and detention of the plaintiff for 105 days falls on the issue of general damages. The proper approach adopted by the courts in the assessment of general damages is discussed in the case of *Johanna Janse Van Rensburg v The Minister of Safety And Security Of The Government Of the Republic Of South Africa*; ECG Case No. 2344/09 dated 17 March 2011 at page 2, para. [2]:

“The damages suffered by the plaintiff are not easy to compute because they are non-patrimonial in nature. I can do no better than to quote a passage from the case of the *Provincial Commissioner, Eastern Cape and 2 Others v Cameron Geduld* Case No. CA458/03 dated 27 November 2003 (ECD) (unreported) in which the correct approach to the assessment of *quantum* in a case such as the present was set out. There Plasket J said the following at para. [3]:

The correct approach to the assessment of damages has been summarized by Erasmus J in a recent judgment, *Ntshingana v Minister of Safety and Security and Another* [ECD 14 October 2003 (Case No. 1639/01) unreported, para. [28] as follows:

‘The satisfaction in damages to which plaintiff is entitled falls to be considered on the basis of the extent of the violation of his personality (*corpus, fama and dignitas*). As no fixed or sliding scale exists for the computation of such damages, the Court is required to make an estimate *ex aequo et bono*. The authors of *Visser and Potgieter’s Law of Damages* 2nd ed, 475 have extracted from our case law factors which can play a role in the exercise:

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 (eg solitary confinement) of the deprivation of liberty; the status, standing, age and health of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the action *injuriarum* also has a punitive function.’

Neethling’s Law of Personality op cit, 130-1 adds the following factors:

‘The circumstances surrounding the deprivation of liberty; its duration; and the presence or absence of an apology or satisfactory explanation. Naturally, satisfaction is increased if additional personality interests such as dignity and good name are involved.’”

[14] According to the pleadings, the plaintiff seeks an award of general damages in the sum of R600 000,00. In argument, it was submitted on behalf of the plaintiff that the unlawful conduct of the I/O deprived the liberty of the plaintiff in the ways that were traumatic, degrading, discomforting and, as it were, it inflicted psychological harm upon the plaintiff due to being kept in an unpleasant awaiting trial prison cell for 105 days. However, the cases that the Court was referred to are not very similar to the present matter in that the range of detention periods under consideration therein was limited to 3 days. Counsel for the defendant referred to the case of *MX v Minister of Police* (1329/2016) ZAECMHC, where a sum of R340 000,00 was awarded on the basis of detention for approximately 3 days coupled with ill treatment during arrest visited

upon the claimant. Both counsel suggested an award of damages in the region of R450 000,00 to R500 000,00, which suggestion I understood to be premised on the appreciation that the plaintiff's detention for a period of 105 days was egregious, and the previously decided cases comparable to the present matter on the facts are very few and far in between. As stated in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325, the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The comparisons made between similar cases must be fair rather than mechanistic – *De Jongh v Du Pisani* [2004] 2 All SA 565 (SCA) at 682I. Nevertheless, in the exercise of its judicial discretion this court must have regard to the peculiar facts of the case presented to it – *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 172. At the same time, the court should give recognition to the plaintiff's constitutional rights as provided in ss 10 and 12 of the Constitution, including the fact that the standards of living are high. In the hope that the award of damages to be made will not over-compensate the plaintiff, I consider a sum of R500 000,00 to be an appropriate amount of damages to be paid by the defendant.

[15] In the result the following order is made:

- 1. The defendant is held liable to compensate the plaintiff for wrongful arrest and detention, including *contumelia* in the sum of R500 000,00 (five hundred thousand rand).**
- 2. The defendant to pay the costs of suit.**

Z M NHLANGULELA

**DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA**

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