



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

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2021-06-11

DATE

Mabuse

SIGNATURE

CASE NUMBER: 81714/16

DATE: 11 June 2021

MARCHANT MIGUEL MUMFORD

Plaintiff

V

THE MINISTER OF POLICE

Defendant

JUDGMENT

MABUSE J

- [1] This is a claim by the Plaintiff against the Defendant for payment of money. The Plaintiff is a major male person who resides at Unit 4, 22 Central Road, Sunrella Agricultural Holdings, Gauteng. The Defendant, who is cited in this matter in his official capacity, is the Minister of Police of Watchuis Building, Pretorius Street, Pretoria.
- [2] The Plaintiff's cause of action arose on 17 May 2016 and continued until 28 May 2016. It arose from the following circumstances:

- 2.1 on or about 17 May 2017 at Muldersdrift, the Plaintiff was arrested by members of the South African Police Services (SAPS), who were at all material times acting within their course and scope of employment with the Defendant. Although the Plaintiff claims that he was arrested unlawfully, his claim is not based on unlawful arrest;
- 2.2 after his arrest he was taken to Krugersdorp police cells where he was detained. The Defendant admits the detention of the Plaintiff at Krugersdorp Police Station. This still is not the Plaintiff's claim;
- 2.3 while he was detained at Krugersdorp police cells, this is the Plaintiff's case, he was detained in inhuman conditions in contravention of his constitutional rights as enshrined in s 35(2)(e) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). According to him, there were toilet facilities at the said police cells, but the toilet had no door and could not be used because the toilet pot was full of human faeces. It is for this reason that the Plaintiff claims that he was detained in inhuman conditions. This claim constitutes claim 1 of his particulars of claim (poc);
- 2.4 while the Defendant admits that the Plaintiff was detained at Krugersdorp police station, he is silent on the allegations that the Plaintiff was held in inhuman conditions. He neither denies nor admits the allegations;
- 2.5 in terms of Rule 22(3) of the Uniform Rules of Court *"every allegation of fact in the combined summons, or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted"*;
- 2.6 so, based on the said Rule 22(2), it is now deemed that the Defendant has admitted the Plaintiff's allegation that whilst he was in detention at Krugersdorp police cells there were toilet facilities that could not be used; that the toilet pot was full of human faeces and that the toilet had no door;
- 2.7 the evidence of the Plaintiff with regards to the toilet facilities was not challenged during cross-examination.

- [3] The Plaintiff was conveyed in the police van from Krugersdorp police cells to Nelspruit Police Station where he arrived after dark. At Nelspruit Police Station he was again detained in the police detention cells for the whole night.
- [4] Similarly, in the cells of this police station there were toilet facilities. But the toilet next to which he slept the whole night was full of human faeces and smelling. If one of the inmates had to use the toilet facility, the others had to look away. This is the Plaintiff's evidence. It is the Plaintiff's case that these conditions were inhuman.
- [5] Again these allegations were not disputed by the Defendant nor was the Plaintiff's evidence about these conditions at Nelspruit police cells challenged. So, these averments are deemed, in terms of the said Rule 22(3), to have been admitted by the Defendant. In my view, the Plaintiff has made out a good case for the relief that he seeks in respect of claim 1.

CLAIM 2

- [6] The allegations in respect of claim 2 were that on or about 17 May 2016 and at Muldersdrift the Plaintiff was assaulted by the police officers in the following manner:
- 6.1 he was handcuffed, extremely tight and violently at his wrists and lifted in the air by the handcuffs which resulted into injuries to his wrist;
- 6.2 he was violently pushed against a motor vehicle.
- [7] The Plaintiff's second claim did not enjoy the support of his evidence. In his testimony the Plaintiff testified that:
- "They first handcuffed me and thereafter threw me into the back of the motor vehicle."* No mention is made that he was handcuffed tightly and violently at his wrists; no mention is made that he was lifted into the air by his handcuffs and finally, no mention is made that because of being lifted into the air by the handcuffs he sustained any injuries. Finally, he never testified that he was pushed against the motor vehicle.

- [8] During cross-examination he told the Court that he did not go to the doctor because he was in detention. He told the Court furthermore that when he was released on 20 May 2016 the injuries had disappeared.
- [9] Neither of the witnesses who testified in his case supported his case. In the premises his second claim cannot succeed.

CLAIMS 3 AND 4

- [10] The allegations in respect of claim 3 were that:
- 10.1 on or about 20 May 2016 the Plaintiff had to incur legal costs to have legal representation at the Nelspruit Magistrates Court;
 - 10.2 in respect of claim 4 it was alleged by the Plaintiff in his poc that after the Plaintiff was released from police custody in Nelspruit, he had to incur travelling expenses to travel back from Nelspruit to Sunrella Agricultural Holdings, Gauteng;
 - 10.3 in terms of our law, the claims for legal fees and travelling expenses must be properly vouched. There must be documentary proof of money or expenses incurred by the Plaintiff. These claims cannot succeed because the Plaintiff has failed to substantiate them. He has failed to submit proof that he has paid the legal fees of R101,000.00 he is claiming in respect of the legal fees. He has also failed to submit documentary proof that he paid R10,000.00 in respect of his travelling expenses from Nelspruit to Sunrella AH, Gauteng.
- [11] Claims 3 and 4 of the Plaintiff are predicated on the *lex aquilia*, whose purpose is to admit the recovery of pecuniary loss. The purpose of the aquilian action, such as the ones that the Plaintiff has put up in claims 3 and 4, is to recover compensation for the pecuniary loss sustained, *in casu*, by the Plaintiff. There are three essentials of liability that the Plaintiff must establish to be successful with an aquilian claim. Firstly, he must prove a wrongful act; secondly, he must show pecuniary loss resulted to him, and thirdly, he must show fault on the part of the Defendant. In respect of claims 3 and 4 the Plaintiff has failed to prove that

any pecuniary loss resulted to him. To succeed with the aquilian action the Plaintiff must prove that the act complained of caused him pecuniary loss. See in this regard **Union Government v Warneke 1911 AD 657**. I find support in the words of Lord de Villiers CJ when he said the following in **Union Government v Warneke at page 662**:

“Whatever may have been the practice under the Roman Law, it is clear that under the Dutch law the practice was to confine the damages claimable by the Aquilian law action to cases in which calculable pecuniary loss has been sustained. Such loss must be explicitly and specifically proved. Such loss must be explicitly and specifically proved....”

As I indicated somewhere supra, a claim for damages under the aquilian action must be properly vouched. Documentary substantiation in respect of the patrimonial loss is necessary.

[12] Claim 1 is based on s 35(2)(e) of the Constitution, which states that:

“Everyone who is detained, including every sentenced prisoner has the right –

(e) to conditions of detention that are consistent with human dignity”

It is of paramount importance to treat detainees with respect and dignity and to detain them in humane conditions. It must be recalled that when a person is detained at a police station, he comes there without any equipment with which to clean the police cells, let alone the toilet. The duty is therefore on those who have control over the premises to ensure the cleanliness of the police cells, including the toilet, so that when people are detained in there the toilet pots are clean. It is below one's dignity to be incarcerated in inhumane conditions such as those conditions described by the Plaintiff in this matter.

[13] The following apiece by Justice O'Regan in **Dawood, Shalambi & Thomas v Minister of Home Affairs 2000 (3) SA 936 CC at 961 paragraph [35]** demonstrates the centrality of dignity as protected by the Constitution:

“Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in

interpreting rights such as a right to equality, the right not to be punished in a cruel, inhuman, or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitation's analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

Finally, in his writing, *Human Dignity As The Normative Concept* (1983) 77 *American Journal of International Law* 848, 849 Schacter wrote that:

"Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others. Dignity, on this account, sets the floor below which ethical – and legal – behaviour may not fall."

- [14] This claim is based on *actio iniuriarum*. The interest of personality protected by the action *iniuriarum* are those interests:

"Which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation."

Therefore, to succeed with his *actio iniuriarum*, the Plaintiff must show that the act complained of constitutes an impairment of his person, his dignity, or his reputation. In my view, putting a man next to a toilet pot full of human faeces is a violation of his constitutional right as enshrined in s 35(2)(e) of the Constitution. This meditation is not consistent with human dignity. The real purpose of the *actio iniuriarum* is not so much to obtain compensation for harm done as it is to establish some right contained in, for instance, the Constitution, the protection of dignity and reputation. In such a case, if the Plaintiff successfully establishes his right, he is entitled to nominal damages, although he proves no loss. To succeed with his claim, the Plaintiff does not have to prove any loss or *damnum*. The leading case is **Edwards v Hide 1903 TS 381** at 387, in which Solomon J said the following:

“There are, however, many cases where, though in form the action is one for damages, it is really brought to substantiate and establish some right, and if the plaintiff succeeds in establishing his right, though he proves no damages, he has substantially succeeded in his action, and the Court is therefore, bound to give judgment in his favour for nominal damages.”

[15] According to the writers, Neethling, Potgieter, Visser (Edited and Translated by JC Knobel) in the Law of Delict page 223:

“Theoretically a non-patrimonial loss is, unlike patrimonial loss, determined by means of the comparative method.”

Therefore, the comparative method used in the patrimonial loss to determine the damages, is a necessary comparative method used in the determination of damages in a non-patrimonial lawsuit. A comparative test may be defined as follows:

“According to the sum-formula doctrine damage consists in the negative difference between the relevant person's current patrimonial position (after the event complained of) and his hypothetical patrimonial position that would have been the current position if the event had not taken place. It therefore entails a comparison of an actual current patrimonial sum with a hypothetical current patrimonial sum with a hypothetical current patrimonial sum- and hence the name: sum formula doctrine.” **See Union Government (Minister of Railways and Harbours) v Warneke.**

The afore going method for the determination of non-patrimonial damages was followed by the Supreme Court of Appeal in **Transnet Limited v Sechaba Photoscan Pty Ltd 2005 (1) SA 299 SCA par. [15]** when the Court had the following to say:

“It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. Essentially, that method, in my view, determines the difference, or, literally, the interesse. The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there be no delict. That surely says

enough to define the measure. There appears to be no practical value in observing the distinction between positive and negative interesse in determining the delictual damages.”

To simplify the formula or the comparative method of determining the damages one must:

14.1 first determine the damages after the delict has been committed;

14.2 secondly determine the hypothetical position had the delict not occurred.

They then subtract 14.1 – 14.2 and the difference is the amount of damages to be awarded.

- [16] The preferable method, diverting from *Transnet Ltd v Sechaba supra*, is encapsulated and simplified as follows by the Appellate Division in **Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2) SA 146 [A.A]** as follows:

“The difference between the patrimonial position of the prejudiced person before wrongful act and thereafter ...

Damage is the unfavourable difference caused by the wrongful act.” [translation]

- [17] In my view, there exists no material difference between the two methods. They are the same. What was the position before the delict must be compared with what is the position after the delict. The difference is the actual loss.

- [18] A claim for damages arising from the violation of a right embedded in the Constitution is now recognised. See in this regard **RK & Others v Minister of Basic Education and Others Case No. 754/2018 and 1051/2018** by the Supreme Court of Appeal. Section 38 (a) of the Constitution states that:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a Court are:

(a) *anyone acting in their own interest;”*

[19] The next point I wish to turn my attention to is the amount of damages to be awarded to the Plaintiff. In determining the amount, I will take guidance from *RK & Others*, the case cited in the preceding paragraph. I have not been referred to any authority on the quantification of damages based on the violation of the constitutional right. An award of damages arising from the violation of the constitutional right is determined in the same way as it is done in any civil litigation. No special award of damages is made simply because the matter is based on the violation of a right embedded in the Constitution. The *boni mores* that underpinned decisions prior to 1994 were quite different from those currently radiating through our society and an award that does not give expression to contemporary values would be unacceptable. It is not suggested that wholesale changes ought to be made to current practices; what is suggested, however, is that an additional consideration must now be effected into the quantum decision; whether a constitutional right or values relevant to the case, and whether it should affect the size of the award. Too large an award might have a chilling effect on the exercise of fundamental rights like freedom of speech; but on the other hand, too small an award might not adequately express the society's abhorrence for infringements of a particular nature; or infringements of core values like dignity and equality for example, discrimination. The Courts have also not lost sight of the fact that a delictual award may in some instances be the appropriate constitutional remedy for a particular type of case and that such awards might serve more than a narrow dual purpose.

[20] It is normal to rely on past awards as guidance in the determination of an amount to be awarded. What the Court must consider in the award of damages is the effect that being put next to a toilet pot full of faeces has had on the Plaintiff. Extraordinarily little information was placed before me in that regard. In his evidence in chief there was no evidence at all how a pot full of human faeces affected him. The evidence that is elicited in cross-examination was unhelpful in that regard. The plaintiff tendered no evidence at all in this regard. Counsel for the Plaintiff made no reference to the effect of being in the presence of human faeces in

his closing argument. He referred the Court to no authority or judgment on quantum. Instead, he made it clear that he left the issue of quantum in the hands of the Court. The conclusion I have arrived at is that no evidence has been placed before me or based on which this Court can determine the amount to be awarded to the Plaintiff. In *RK & Others v Minister of Basic Education and Others supra*, the awards made by the Court in that matter were made based on several factors that the Court had fully set out. Those factors are not the only kind of factors that a Court seized with a similar matter can consider. The factors set out in that judgment are not exhaustive. Every case depends on its own merits. The Court has in that case set out the relevant factors on basis of which it determined the amount of damages that were awarded to the applicants. In addition, it referred to other relevant judgments, for instance **Hing & Others v Road Accident Fund, 2014 (3) SA 350 WCC para [24]**, where the Court considered grief and sorrow or the death of anyone and the close relationship between the deceased and those he left behind.

[21] The Court also referred to *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) in which constitutional damages were awarded in respect of financial loss which would otherwise have not been recovered in terms of common law. In *Kate*, the SCA granted constitutional damages equivalent to the interest which would have been payable on the money which had been unlawfully withheld. There had been a serious delay in processing the application for a disability grant.

[22] I have had regard to the unreported judgment of **Minister of Safety and Security v Kevin Jafta Case Number CK310/2014** by Pickering J of the Eastern Cape Division,

Grahamstown. This was an appeal against the judgment and order of a magistrate. The magistrate had made an order against the appellant, the Minister of Safety and Security, to pay the Respondent R80,000.00 for having unlawfully detained the Respondent more than 88 hours without bringing him to Court. Although the Court of Appeal was unhappy about “the manner in which the magistrate came to his conclusion, it was, in my view, in the circumstances of that case where the Plaintiff was unlawfully detained in filthy cell for two days, the award of R80,000.00 made by the magistrate, although made on the incorrect basis, is fortuitously appropriate to cover the circumstances of the matter ...”

[23] In the said judgment Pickering J had regard to the number of cases dealing with quantum of damages, such as **KG Hendricks v the Minister of Safety and Security, an unreported ECD Case Number CA and R51/2015** and **Sibiya v the Minister of Safety and Security [2008] ZAK 44; [2008] 4 ALLSA 570** which cases contain useful summary of awards in similar such cases.

[24] Awards made in similar cases may serve as useful guidance. It must however be remembered that each case must be determined on its own merits. This Court must have in mind the warning sounded by Nugent J in **Minister of Safety and Security v Seymour 2006(6) SA 320 (SCA)** at p. 325 par [17], where he said:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and a few cases are directly comparable. They are a useful guide to what other Courts have considered to be appropriate, but they have no higher value than that.”

Now in this matter in which the Plaintiff tendered no evidence as to the effect of being detained in circumstances described in his evidence, the Court can consider the number of days during which he had to endure the conditions. He was detained from 17 – 19 May 2016 in a police station at Krugersdorp Police Station. On 19 May 2016 he was transported to another police station in Nelspruit. He was kept one night in the police cells of the said police station still under inhumane conditions. In all he was detained in inhumane conditions for three nights. In my view, the plaintiff ought to be handsomely compensated for his ordeal.

[25] In **Christopher Koekemoer v Minister of Police** unreported case number 9326/2015

Molefe J awarded the Plaintiff the sum of R30 000.00 as general damages for his unlawful arrest on 12 August 2014, subsequent detention, and the resultant withdrawal of his charges on 29 September 2014. After his arrest on 12 August 2014, the Plaintiff was detained for a period and released at the same day at 17h30. The Judge reasoned that:

"[16] When assessing damages in such matters such as the present, the evaluation of personal circumstances of the Plaintiff, the circumstances around the arrest and the nature and duration is (sic) taken into account. The testimony of the Plaintiff about his personal experience, the conditions that prevailed in the police cells and what effect the arrest had on him is (sic) also taken into account. The age of the Plaintiff is also taken into account."

[26] Referring to **The Minister of Safety and Security v Tyulu** 2009 (5) SA 85 SCA at para 26

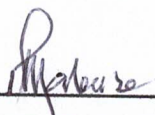
she stated that:

"The purpose of an award of general damages is to compensate the claimant for deprivation of personal liberty of freedom as well as the mental anguish. The primary purpose is not so much to enrich the claimant as it is to offer him or her some solatium for his injured feelings."

[27] I have pointed out that the Plaintiff in this matter has not instituted any claim for unlawful arrest and detention. This is one distinguishing feature from the judgment of Koekemoer. The other distinguishing feature is the conditions of detention. Mr Koekemoer was detained for a short period in humane conditions.

[28] In my view, the sum of R120,000.00 is an appropriate award in the circumstances of this case. I therefore make the following order:

1. The Plaintiff's claim against the Defendant is hereby granted.
2. The Defendant is hereby ordered to pay the Plaintiff the sum of R120,000.00 (One Hundred and Twenty Thousand rand), plus costs of the action, on a Magistrate Court Scale.


PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

Adv E Lebeko

Instructed by:

Coetsee Attorneys

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JUDGMENT

Counsel for the Defendant:

Adv M Rantho

Instructed by:

The State Attorney

Date on the trial roll before Mabuse J:

8-10 February 2021

Date of the judgment:

11 June 2021