

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO.: 1329/2016

Date of hearing: 10 December 2020

Date delivered : 12 January 2021

In the matter between:

MNIKELO XAKAMBANA

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

MAJIKI J:

[1] This matter is for determination of quantum of damages. Initially, the defendant had resisted the plaintiff's claim for unlawful arrest, detention and assault. He had pleaded that the plaintiff was lawfully arrested without warrant of arrest, in terms of section 40 (1)(b) of the Criminal Procedure Act (CPA) because he was suspected of having committed rape. After the death of the late Constable Msiwa, the defendant's key witness, the defendant conceded liability for unlawful arrest and detention. The plaintiff abandoned his claim for assault. The defendant's liability is a vicarious one, as the person liable for wrongful

acts or omissions by the members of the South African Police Service (SAPS) during the course and within the scope of his employment with the defendant.

[2] On Saturday 27 July 2013, the plaintiff, a 27 year old unmarried male was arrested by two members of SAPS. He was told that he was suspected of having committed an offence of rape. In his particulars of claim he averred that he appeared in court on 28 July 2013, however, during the hearing it transpired that he appeared on Monday 29 July 2013. The defendant was prepared to compensate the plaintiff for his damages until the said date. The plaintiff did not accept the said offer. He said wanted to be compensated until 11 February 2014 when he was eventually released on bail. On 3 October 2014 his matter was struck off the roll of criminal trials.

[3] Only the plaintiff testified during the hearing of the matter. He said upon the police arrival at his home in a white van, they called out his surname, grabbed him with his belt, hit him with the butt of the gun and handcuffed him. He started to bleed as they took him to the van, saying he had raped. They put books on his penis. They drove fast causing him to bump from side to side. They stopped at Caltex garage towards central police station. All the time the books were still left on top of his penis. They eventually took him to central police station. One of them told a lady who was at the front office that he had raped. That lady insulted him saying he had AIDS and was a rapist who raped children. Handcuffs were only removed when he was taken to the cells.

[4] On his first night he never slept, he was insulted by fellow inmates for being a rapist. That caused him to be stripped of blankets and sodomised. He was sodomised by different inmates of no less than five at a time, taking turns. He was bleeding throughout. The cell and the blankets were dirty, there were lice, the window panes were also broken and the water was leaking. It was

cold. His food was also taken by inmates. They were more than 30 in the cell, the cell was full. The toilet was within their view and close to them. He experienced a lot of pain in his abdomen and suffered swollen kidneys. He suffered fecal incontinence for sometime. He would realise after he had soiled his pants that he passed a bowel.

[5] He was assaulted by fellow prisoners in the holding cells at court saying he was a rapist. He was thereafter taken to Wellington prison where he was also sodomised throughout his stay there until he was released. All the episodes would happen in full view of other inmates. No one intervened. He did report his being sodomised to one lady correctional service warder who did nothing about the report. He never told anyone else about his ordeal, not even the magistrate. He never received counselling, his relative promised to arrange it for him but that has not yet materialised.

[6] On his first appearance the magistrate asked if he needed a legal representative provided by the state, to which he answered in the affirmative. The matter was postponed for that reason. He obtained legal aid representation, but eventually secured bail when his family had engaged his current legal representative, on private instructions. At the second appearance the legal aid representative advised him that he would not be admitted to bail because he was charged of rape. The attorney stated that the matter should just proceed to trial when the magistrate asked about his admission to bail.

[7] He felt very bad about being labelled a rapist and being sodomised. People still do not accept him in his community. He went up to standard two at school. He lives on odd jobs of chopping wood and building. People are no longer keen on engaging him. He also lost trust in fellow men because of his experience in prison. Women reject him because they say he is a rapist.

[8] Mr Mtokwana, counsel for the plaintiff submitted that when the liability for the detention was conceded by the defendant, it was in respect of the entire period until his release. In the particulars of claim it was averred that on 27 July 2013, at central police station, the central police members of SAPS wrongfully and unlawfully detained the plaintiff, without any just cause. The plaintiff was detained from 27 July 2013, he appeared in court on 29 July 2013, facing a charge of rape and was granted bail in February 2014.

[9] From the foregoing, it can hardly be said the plaintiff pleaded that the extended detention was at the instance of the police. In evidence it transpired that the pleaded detention at the central police station by members from central police station ended on 29 July 2013. After he came back from court he was detained at Wellington prison. Evidence established that he was remanded in custody in order to obtain legal representation.

[10] The defendant in its plea had denied that the detention was wrongful and unlawful, he averred that the plaintiff was arrested for a schedule 6 offence, he therefore would not readily be admitted to bail. When the concession of the liability was made, it was not specified as to whether it related to the entire period or the period prior the first court appearance.

[11] Mr Melane, counsel for the defendant on the other hand submitted that after the first appearance the plaintiff was detained at the instance of the court. The plaintiff was brought to court by the police within 48 hours of his arrest in compliance with sections 50(1)(c) (ii) of the CPA and 25 (1)(d) of the Constitution of the Republic of South Africa, Act 108 of 1996. He was not released on bail because he was facing a schedule 6 offence, the rape of a 6 year old child.

[12] The issue therefore is whether in the determination of quantum, the plaintiff is entitled to compensation by the defendant for the entire period of detention or the unlawful arrest by the police ceased when the magistrate ordered further detention, after the first appearance. Therefore, the order rendered that further detention lawful.

[13] Section 60 (1)(a) of the CPA provides that where an accused is charged with an offence referred to in schedule 6, the court shall order that the accused be detained in custody until he is dealt with in accordance with the law, unless the accused, having been given an opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.

[14] According to his evidence, at the first appearance, the plaintiff was remanded in custody in order to secure legal representation. On the second appearance, despite the magistrate enquiring about the plaintiff's admission to bail, his legal aid representative was not keen on making the bail application. He was of the view that the plaintiff would not be successful and be admitted to bail because of the nature of the charge he faced. The representative considered it best to just proceed with the trial. Thereafter, there were several remands until the legal representative instructed by his family secured his release on bail.

[15] I have had regard to the discussion about the issue of lawfulness of detention after the first appearance in **De Klerk v Minister of Police** 2020 (1) SACR 1 (CC) at paragraph 38 to 45. The facts as adduced by the plaintiff both in his particulars of claim and in oral evidence are scanty relating to his continued detention after each of his court appearances. However, I have

reason to accept that, even when the magistrate raised the issue of bail, the legal representative did not take the opportunity and apply that the plaintiff be admitted to bail. Nowhere, is it averred that the police officers who arrested the plaintiff had anything to do with the plaintiff's further remands in custody.

[16] In my view, in the circumstances of this case, the defendant cannot be held liable for the plaintiff's further detention. His further detention was at the instance of the order of court, after there had not been an attempt to have him admitted to bail in terms of section 69(II)(a) of the CPA.

[17] The quantum of the plaintiff's detention therefore relates to the period from 27 July 2013 to 29 July 2013 when he first appeared in court. Mr Melane submitted that the court should not consider the treatment the plaintiff was subjected to by his fellow inmates, including sodomy. He submitted that such was not pleaded in the plaintiff's particulars of claim.

[18] I am unable to agree with Mr Melane in that regard. The plaintiff pleaded the unlawful detention at central police station from 27 July 2013 until he appeared in court. He however, erroneously made reference to 28 July 2013 instead of 29 July 2013, in the particulars of claim. The manner the arrest was affected and the conditions during detention form part of his pleaded case under unlawful arrest and unlawful detention. It is in oral evidence that he explained the specific experiences. In **Rahim and 14 Others v Minister of Home Affairs** (4) SA 433 (SCA) at paragraph 27 it was stated:

‘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 a 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 liability the amount of satisfaction is calculated by the court *ex aequo et bono*. *Inter alia* the following factors are relevant:

- ‘27.1 circumstances under which the deprivation of liability took place;
- 27.2 the conduct of the defendants; and
- 27.3 the nature and duration of deprivation ...’

[19] In **Olga v Minister of Safety and Security** 2008 JDRJ582E paragraph 6 (ECD case number 608/207) Jones J remarked:

‘In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim and the nature, extent and degree affront to his dignity and his sense of worth, These considerations should be tempered with restraint and proper regard to the value of money to avoid the motion of an extravagant distribution of wealth from what Holmes J called the “horn of plenty” at the expense of the defendant’.

[20] The plaintiff claimed a total sum of R450 000.00 for each head of his damages, unlawful arrest and unlawful detention. With regard to assessment of damages in **Minister of Safety v Tyulu** 2009 (5) SA 85 (SCA) paragraph 26 the court stated:

‘In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed *solatium* for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make

for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (**Minister of Safety and Security v Seymour** 2006 (6) SA 320 (SCA) 325 para 17; **Rudolph & others v Minister of Safety and Security & others** (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).’

[21] With regard to arrest the plaintiff stated that he was grabbed, handcuffed and told he had raped. He was bleeding from the assault and books were put on his penis whilst the vehicle was driven in an inconsiderable manner, causing him to bump from side to side. He was shouted by a police woman at the police station saying he was a rapist who raped children and had AIDS. The false allegation of rape caused him to be raped anally throughout his stay at central police station. He attended court with soiled pants from the rapes. The cell conditions were horrible. He lost customers as a result of the allegations. He lost trust in fellow men and women do not like him.

[22] The court could not get assistance of a medical or psychological opinion to be able to assess the damage caused by the experience the plaintiff had in prison. However, he was clearly still very troubled when he testified about experience, he broke down more than once during his testimony.

[23] In the assessment of damages, previous awards are usually helpful in order to arrive at a fair compensation. In **Minister of Safety and Security v Seymour** (295/05) [2006] ZASCA 71; [2006] SCA 67 (RSA) [2007] 1 All SA 558 (SCA) (30 May 2006) Nugent JA cautioned:

‘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 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’.

[24] The defendant after submitting a list of previous awards suggested that a sum of R30 000.00 a day would be a fair award in the circumstances of this case. The Constitutional Court in August 2019 in **De Klerk v Minister of Police** awarded a sum of R300 000.00 for eight (8) days. After the complainant had withdrawn the charge. In **Mgele v Minister of Police and Others** 1257/2011 [2015] ZAEPMC 70 (6 October 2015) in respect of detention for four (4) days in cold, smelly cells where the plaintiff was bitten by lice, he was awarded R150 000.00. The court was of the view that high amount of damages was justified. The police had stolen food from the plaintiff and consumed his milk in his presence. He was tortured, over and above the conditions in the cells.

[25] In the circumstances of this case, I am of the view that a globular amount in the sum of R340 000.00 is fair and reasonable taking into the account the ill-treatment during arrest and the humiliation the plaintiff suffered throughout the period of detention.

In the result,

1. The defendant is hereby ordered to pay the plaintiff a sum of R340 000.00 as damages for wrongful arrest and detention.

2. The defendant shall pay interest at the legal rate on the said amount from fourteen (14) days from the date of judgment to the date of payment.
3. The defendant is hereby ordered to pay costs of cation.
4. The defendant shall pay interest at the legal rate from fourteen (14) days from the date of taxation to the date of payment.



B. MAJIKI

JUDGE OF THE HIGH COURT

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