

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 25300/2014

Date:

DELETE WHICHEVER IS NOT APPLICABLE

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

28/2/17
DATE

[Signature]
SIGNATURE

In the matter between:

SELLO MOSES LEBELO

PLAINTIFF

Vs

MINISTER OF POLICE

DEFENDANT

JUDGMENT

TOLMAY, J:

- [1] The arrest and detention of the Plaintiff at the hands of officers of the SAPS has already been found by the Court to have been unlawful. It is not in issue that the Defendant is liable for the consequential damages suffered by the Plaintiff. It is now common cause that the Plaintiff was unlawfully arrested on 29 May 2013. The Plaintiff was detained thereafter until 6 September 2013 (15 weeks or 101 days). The Plaintiff seeks general damages for such unlawful arrest and detention.
- [2] The Defendant sought to limit the period of detention for which it is liable to a period from the arrest until the day that bail was set which the Defendant claimed was 15 days. It seems however to be 16 days calculated from 29 May 2013 to 13 June 2013.
- [3] Despite the granting of bail, the Plaintiff was unable to pay the amount and as a result remained in custody until 6 September 2013. This period amounted to 15 weeks or 101 days, as previously stated.
- [4] The Plaintiff initially claimed a total amount of R550 000-00 as damages, at the trial an amendment was sought to increase the amount claimed. The amendment was initially opposed, but Counsel, after consultation with his attorney, left it in the Court's hands. The amendment was granted. Mr Geach (SC) in his heads of argument conceded that an amount of R950 000-00 would be fair, despite the amendment sought, which far exceeded this amount. Defendant was

of the view that an amount of ± R40 000-00 would be fair compensation.

[5] It is important to note some of the facts that the Court, hearing the merits found. In my view these facts should be considered when determining an appropriate award. In this regard note should be taken of the following which was found by the Court.

[6] Rabie J¹ said the following:

[19] *In order to establish whether Constable Moloto could have entertained a reasonable suspicion that the plaintiff had committed the crime of theft, it is necessary to analyse the information he had at his disposal prior to the arrest of the plaintiff.*

[20] *The information he obtained from the statement of the complainant was that she had been told by two alleged eyewitnesses, namely Mr Ramatsetse and Mr Swart, that two male persons opened the boot of her car; took out a silver laptop; threatened the two eyewitnesses, and walked away. According to the eyewitnesses the thieves were a certain Jazzman and a certain Molefe Botha.*

¹ The unreported judgment in S M Lebelo vs The Minister of Police, Case 25300/2017 delivered on 2 February 2018

[21] However, according to the written statements of the two eyewitnesses taken down by Constable Moloto, quite a different version was given. According to their statements it was only Jazzman who opened the boot of the vehicle. There was no mention of a second person opening the vehicle or even in the proximity of the vehicle. Furthermore it was clear that Jazzman then moved away from the vehicle towards the South. At that point the laptop was not visible as it was inside a bag carried by Jazzman. Then, at some point, a person known as Molefe followed Jazzman, according to one of the eyewitnesses, or joined Jazzman, according to the other eyewitness.

[22] There were thus significant differences in the versions of the eyewitnesses given to Constable Moloto and to the complainant, Mrs Maluleke, respectively. Furthermore and in any event, on none of the versions, the person known to the eyewitnesses as Molefe, had, on the face of it, anything to do with the theft of the laptop. Nothing was said or reported to have been said, by the eyewitnesses, that could implicate the person known as Molefe with the theft committed by Jazzman.

[23] Furthermore, there was no evidence whatsoever to suggest that the person known as Molefe was in fact the plaintiff. According to Constable Moloto his informer had mentioned the name "Ghost" as the person who had committed some or other crime at that particular corner."

- [7] These facts in my view illustrate that there was no doubt that no lawful basis for the arrest of the Plaintiff existed. The facts found by the Court in my view, illustrate an abuse by the Defendant of its powers, with no concern for the rights of the Plaintiff.
- [8] Before this Court Plaintiff testified that he was born on 13 August 1981. He is not married but has three children, aged 12, 7 and 6 years respectively. When he was arrested he was not employed. He had no money at all. He testified that no enquiries were ever made to determine whether he could afford the R1 000-00 bail set. When he could not pay he was told that he had "to go down", meaning that his detention would continue. He also testified that his father was unemployed and his mother was a domestic worker and supported 6 dependants. No one in his family could assist him with the bail money, and as a result he remained in custody until 6 September 2013. No charges were ever brought against the Plaintiff.
- [9] He testified that the conditions in jail were bad. Some inmates tried to sodomise him and he feared for his life. He tried to report this to a warden, but was hit with a baton on the back by the warden. He said he feared for his life from both inmates and wardens. Although nobody physically prevented him from reporting this, he felt that it was not safe to do so.

- [10] He testified that once, when he was trying to call his mother, he was threatened by another inmate with a broken bottle attached to a piece of cloth. He said that he was throttled. Apparently his attacker insisted that Plaintiff should pay him to stay safe. All he had was airtime that his father brought him, he was forced to hand this over to his attackers
- [11] He said he suffered from tuberculosis before he was incarcerated and his health deteriorated while he was in jail. Someone fortunately brought his out-patient TB card and after presenting it, he was treated for tuberculosis at the clinic.
- [12] It was clear from the evidence that the Plaintiff suffered a great deal during his incarceration and felt helpless and fearful. It is also apparent that he did not have the financial resources or ability to get the necessary assistance to ensure that his rights were protected.
- [13] The first issue to be determined was whether the period of incarceration should be calculated based on the period from date of arrest until the date that bail was set.
- [14] Counsel for the Plaintiff argued that it is clear that the granting of bail, even in the rather modest amount, was illusory, due to Plaintiff's impecuniosity and his financial inability to pay bail. Granting bail in an amount that was beyond Plaintiff's means and resources, effectively

nullified the granting thereof.² In my view, the Defendant's liability cannot simply cease on the date that bail was set. Furthermore, the state could and should have considered consenting to release on a warning. Especially in the light of the absence of reliable evidence against the Plaintiff. The Plaintiff's detention persisted until 6 September 2013 and the Plaintiff should accordingly be compensated for the whole of the period that he was incarcerated.

[15] For purposes of quantum it may therefore be accepted as being common cause that the Plaintiff was unlawfully arrested on 29 May 2013 and unlawfully detained from 29 May 2013 until 6 September 2013.

[16] It is trite that the determination of general damages falls within the discretion of the Court.³ In the process of determination one may consider the amounts awarded in other cases, but ultimately each case will be determined on its own facts.

[17] In **Areff v Minister van Polisie**⁴ a 41-year-old businessman who was arrested and detained for about two hours was awarded R1 000.00. (Present value R 47 000.00)⁵.

² S v MOHAMED 1977 (2) SA 531 (A) at 544H;

³ Minister of Safety & Security v Seymour 2006(6) SA 320 SCA par 11

⁴ 1977(2) SA 900 (A) KOCH, QUANTUM YEARBOOK 2019 p6: present value R 47 000.00)

⁵ KOCH, QUANTUM YEARBOOK 2019 P 6

[18] In **Minister of Safety and Security v Scott and Another**⁶ a professional hunter awaiting the arrival of hunters from America, was arrested just after 23h00 and transported to the police station where he was advised he was being arrested for being in possession of a firearm, while under the influence of alcohol, after a typical brawl in a bar. He spent the night in a police cell and was released the following morning when the charges against him were withdrawn. An appropriate award was held to be the sum of R30 000. (Present value R47 000)⁷.

[19] In **Van Rensburg v City of Johannesburg**⁸ the 74-year-old plaintiff was awarded R 75 000.00 for damages for his wrongful detention in a police cell for an afternoon consequent upon his lawful arrest at a roadblock for failure to appear at court on several traffic violations. (Present value R 150 000.00)⁹.

[20] In **Olivier v Minister of Safety and Security**¹⁰ the detention was of relatively short duration, comprising some five or six hours in all, and the plaintiff a senior police officer was not placed in a cell or handcuffed. The unlawful arrest however took place in full view of colleagues. The plaintiff's office and home were searched, latter in

⁶ 2014 (6) SA 1 (SCA)

⁷ KOCH, QUANTUM YEARBOOK 2019 p36

⁸ 2009 (2) SA 101 (W)

⁹ KOCH, QUANTUM YEARBOOK 2019 p41

¹⁰ 2008(2) SACR (W) p 387

presence of his wife and children and he had to appear in court three times as an accused. A sum of R50 000 was held to be fair to all parties. (Present value R 90 000.00)¹¹.

[21] A Police Inspector based in Umthatha, but on work-related business in Gauteng, was unlawfully kept in wrongful detention (although his arrest for malicious damage to property had been lawful) and incarcerated in the police cells with 'suspected rapists and robbers' from 22h00 until the next morning. An amount of R30 000 was awarded. (Present day value, R50 000-00)¹².

[22] A Magistrate, was wrongfully arrested for being drunk in public and detained. He was detained for a few hours only. The following considerations were deemed relevant, the age of the respondent, the circumstances of his arrest and its nature and short duration, his social and professional standing, and the fact that he was arrested for an improper motive. An amount of R15 000 in damages in present day value was awarded. (Present day value R30 000-00)¹³.

[23] In **Minister of Safety and Security v Seymour**¹⁴ a 63-year-old plaintiff was unlawfully arrested and detained for five days. Only one

¹¹ KOCH, QUANTUM YEARBOOK 2019 p26

¹² MVU v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009 (6) SA 82 (GSJ); KOCH, QUANTUM YEARBOOK 2019 p24: present value R 50 000.00)

¹³ MINISTER OF SAFETY AND SECURITY v TYULU 2009 (5) SA 85 (SCA); KOCH, QUANTUM YEARBOOK 2019 p40: present value R 30 000.00);

¹⁴ 2006 (6) SA 320 (SCA)

day was really spent in prison, the remainder of the time he was hospitalised. He had suffered no degradation beyond that inherent in being arrested and detained was awarded R90 000 on appeal, the SCA referred to awards made in other matters as follows:

*"The following awards also provide some indication of how other courts have viewed incursions upon personal liberty (they are by no means exhaustive of the cases that have confronted the issue). In **Solomon v Visser and Another**, [1972 (2) SA 327 (C)] a 48-year-old businessman who was detained for seven days, first in a police cell and then in a prison, was awarded R4 000 (R136 000). In **Areff v Minister van Polisie**, [supra], this court awarded a 41- year-old businessman who was arrested and detained for about two hours R1 000 [R47 000]. In **Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino**, [supra] a businessman who was unlawfully detained for about three hours was awarded R12 000 [R 33 200]. In **MANASE v MINISTER OF SAFETY AND SECURITY AND ANOTHER** [2003 (1) SA 567 (Ck)], in which a 65-year-old businessman was unlawfully detained for 49 days, incarcerated at times with criminals, the sum of R90 000 [present value R224 000: KOCH QUANTUM YEARBOOK 2019 p17] was awarded. In **Seria v Minister of Safety and Security and Others** [2005 (5) SA 130 (C)], a professional man who was arrested and detained in a police cell for about 24 hours, for a time with a drug addict, was awarded R50 000 (R52 000)."*

- [24] In **Naidoo v Minister of Police**¹⁵ the appellant had attended at the Lenasia South Police Station to lay a charge of assault against her former husband who, during a scuffle between them, had severely assaulted the appellant and pushed her, causing her to fall to the

¹⁵ 20431/2014) [2015] ZASCA 152 (2 October 2015)

kitchen floor, hitting her head against a door. She suffered a concussion and was admitted to hospital, treated overnight and discharged the next day. On 14 April 2010 she went to report the assault and laid a criminal charge of domestic violence. At the station, she received no assistance. *"What followed thereafter was a dreadful series of traumatic, humiliating, de-humanizing and flagrant violations of the appellant's right to dignity, freedom, security of her person and bodily integrity. Instead of being assisted, she was arrested, ostensibly pursuant to a charge of assault laid against her by Naidoo at the instigation of an Inspector Molefe, and detained overnight. The next day, when she was being taken to the Vereeniging Magistrates' Court, she was assaulted by a police officer who threw her into the rear of a police van. She suffered physical injury comprising soft tissue injuries in the right arm and right leg with severe swelling. In court, the charges against her were withdrawn by the prosecutor".* The SCA awarded damages in the amount of R70 000 for unlawful arrest and detention.

[25] A perusal of the authorities reveals that in all these instances the incarceration was for shorter periods of time. In this instance, however the accused was incarcerated for 101 days.

[26] The protection of personal liberty has a long history in common law and of course is now entrenched in our law by the guaranteed right of everyone in section 12(1)(a) of the Constitution to freedom and security of the person, including the right not to be deprived of freedom

arbitrarily or without just cause.¹⁶ From Roman-law times the right of liberty and freedom of a free man was recognised as being a right that must be protected.¹⁷ The human rights enshrined in our Constitution are all-important. The police necessarily have extensive powers and the Courts must be astute to stand resolute against any abuse thereof. The courts should protect the right to freedom.¹⁸

[27] I considered the duration of the incarceration, as well as the facts that led to initial arrest, and the trauma that the Plaintiff obviously suffered while incarcerated.

[28] I am of the view that our Court's should be careful not to value the dignity and right of freedom of a poor, unemployed and uneducated person less than those who are more fortunate. If Courts truly value the equality and dignity of human beings they will be seen not only to acknowledge the suffering of vulnerable members of society, but will also proceed to protect the rights and dignity of vulnerable individuals. One must keep in mind that those who do not have the necessary resources, very often also do not have the knowledge and ability to fend for themselves. They are often vulnerable and left at the mercy of a system that very often does not provide the necessary support to enable them to fight for their rights. Therefore the fact that someone does not have any significant social standing, should in my view, not lead to the award of a lesser amount. If anything, as in this case, if a

¹⁶ MINISTER OF HOME AFFAIRS v RAHIM AND OTHERS 2016 (3) SA 218 (CC) par [27] at 228

¹⁷ COETZEE v NATIONAL COMMISSIONER OF POLICE AND OTHERS 2011 (2) SA 227 (GNP) par [52] at 243

¹⁸ SEYMOUR v MINISTER OF SAFETY AND SECURITY 2006 (5) SA 495 (W) par [13] at 500

person's suffering has been exacerbated, because of a lack of resources, one must consider this aspect in determining an appropriate award. Obviously each case should be determined on its own facts.

[29] Although damages should not be aimed at enriching a litigant, but to offer *solatium*¹⁹, one should be careful not to value the loss of dignity and freedom as trivial. Taking into consideration all the facts, I am of the view that an amount of R500 000-00 is reasonable and fair.

[30] In the light of all the facts I am of the view that an amount of R500 000-00 is appropriate.

[31] I make the following order:

1. The Defendant is to pay an amount of R500 000-00 to the Plaintiff for damages.
2. The Defendant is to pay the costs of the Plaintiff, which costs shall include the costs of two counsel.



R G TOLMAY

JUDGE OF THE HIGH COURT

¹⁹ Minister of Safety & Security v Tyulu [2009] 4 All SA 38 (SCA)

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DATE OF JUDGMENT: 28 FEBRUARY 2019

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