



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

CASE NUMBER: 569355/ 16

12 / 09 / 2019

DATE

SIGNATURE

In the matter between:

MOKITI EVENY

PLAINTIFF

AND

MINISTER OF POLICE

1ST DEFENDANT

AMOS SIZWE HLATSHWAYO

2ND DEFENDANT

JUDGMENT

MAVUNDLA. J.

[1] The plaintiff a 29-year-old adult male claimed from the defendants damages he suffered as the result of his unlawful arrest, assault on 6 June 2015 and detention for 3½ before he appeared in court and then detained for another period of 21 days before he was released. He claimed the following:

1.1	unlawful arrest, detention and further detention	R1 275 000. 00
1.2	assault	R500 000. 00
1.3	future medical expenses	R150 000. 00
1.4	emotional shock and psychological stress and trauma	R200 000. 00
4.5	past loss of income	R 21 000. 00
4.6	future loss of income	R200 000. 00
4.7	general damages	<u>R600 000. 00</u>
	Total	<u>R 2 946 000. 00</u>

[2] The question of liability was disposed of in the unopposed motion roll before Kubushi J who granted the following order:

- "1 The 1st defendant is ordered to pay to the plaintiff the proven or agreed damages in respect of the claim for unlawful arrest only;
2. Merits and quantum are separate, and quantum is postponed *sine die*; and
3. Costs of this application."

[3] The plaintiff subsequently brought an application for default judgment on the quantum.

[4] The plaintiff testified before Kubushi J in his default application. The Court founds as follows:

“[8] Although the evidence of the plaintiff indicated that he was assaulted by the police this, however, was not his case on the papers. He did not make a case for assault in his particulars of claim and he did not apply for the amendment of the particulars of claim to include a claim for assault. As such this claim even though proven cannot be entertained.

[9] It is not clear from the evidence led by the plaintiff what actually happened when he appeared in court on Tuesday, that is, whether he was remanded in custody because bail was not set or whether he could not pay bail. It is not clear whether between 9 June 2015 when he first appeared in court and 15 June 2015 when he was released he made any other appearance in court. But defendant cannot be held liable for any of the time spent in detention after the first appearance. The said period cannot be regarded as unlawful since he was detained in terms of an order of court which made the detention lawful. If it was the plaintiff's case that this period was unlawful as well, he should have brought a claim against the National Director of Public Prosecutions and / or the magistrate who appeared over the matter.”

[5] Regard being had to findings by Kubushi J, this court can therefore not entertain the plaintiff's case in respect of the alleged assault.

[6] The plaintiff's counsel in his heads of argument stated that the claim for loss of earnings is abandoned. Plaintiff persists with his general damages claim and future medical expenses for psychological counselling in respect of his

unlawful arrest. In this regard it was pointed out that the plaintiff filed a report from a clinical psychologist Mark Southwood. It is opined in this report that:

6.1 Mr Mokiti has an elevated level of anxiety at present. This implies that placed into certain situation he would be more prone to being worried about the outcome. While it is not clear when the onset of this might have been it is certainly something that could relate to what he has experienced.

6.2 Mr Mokiti may benefit from some counselling to deal with what he went through especially in relation to his stress and anxiety. The therapy of between 10 to 20 sessions is recommended.

[7] I find the clinical report of no value at all. The report is not definitive as to the source of the plaintiff's anxiety. It cannot therefore be determined with precision that the source is from his arrest and detention. Neither can it be determined what the recommended sessions for therapy would costs. In the circumstances, I find that the plaintiff has failed to prove his claim for future medical expenses and emotional shock and psychological stress and trauma.

[8] The Supreme Court of Appeal held as follows in *Minister of Safety and Security v Tyulu*:¹

¹In the assessment of damages for unlawful arrest and detention, it is important to bear

¹ Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) paragraph 26 at 930-F.

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) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26-29).'

Factors that can play a role in the assessment of damages

- [9] The authors of Visser & Potgieter *Law of Damages* have extracted from South African case law the following factors which can play a role in the assessment of damages:²

'In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bona*. Factors which can play a role are 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 (e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the

² Visser & Potgieter *Law of Damages* Third Edition, pages 545-548. This list of factors has been referred to with approval in *Ntshingana v Minister of Safety and Security* (unreported judgment dated 14 October 2003 under Eastern Cape Division case number 2001/1639) and *Phasha v Minister of Police* (unreported judgment by Epstein AJ dated 23 November 2012 under South Gauteng High Court case number 2011/25524).

publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the *actio iniuriarum* also has a punitive function.”

[10] In respect of the alleged assault, plaintiff testified before Kubushi J that: “One soldier tripped him and he fell and one of the police members kicked him with booted feet. They ordered him to lie down and ordered his co-worker and brother to come out of the motor vehicle. they searched the motor vehicle and then ordered him to go. He informed them that he was going to lay a charge of assault against the policeman who kicked him. One of them said he talks too much and they assaulted him further.”

[11] In the report of Southwood it is stated, inter alia;”

11.1 “It does not appear to have suffered any neurological damage...”

11.2 ‘Eveny, was taken from his vehicle and police started beating him with their open hands and fists. When he asked why their cars were searched he was told not to ask so many questions and he was beaten some more.”

[12] There are inconsistencies in the version of the plaintiff before Kubuṣhi J and what he told Southwood, the clinical psychologist.

12.1 before Kubushi J: the police members kicked him with booted feet

12.2 to Southwood: police started beating him with their open hands and fists

12.3 before Kubushi J: One of them said he talks too much and they assaulted him further.”

12.4 to Southwood: he was told not to ask so many questions and he was beaten some more.”

Save for being beaten further or some more, the versions do not tally. Besides, it is not clear what the extent and gravity of the assault was. One would have expected the plaintiff to have been much open before Kubushi J and Southwood with regard to the alleged further assault meted to him. It needs to be borne in mind that the *onus* of proving assault and the nature thereof lies with the plaintiff. In my view he has not acquitted himself in this regard and as such his claim for the alleged assault must fail, and I find as such.

[13] With regard to the alleged future loss of income, the clinical psychologist opined that: the plaintiff: “... does not appear to have suffered any neurological damage...” That being the position, I am unable to find on what basis is this claim of future loss of earnings is predicated. I therefore find that this claim too must fail.

[14] Of the plaintiff’s capita claims only two are remaining:

14.1 unlawful arrest, detention and further detention (15) R1 275 000. 00

14.2 general damages R600 000. 00

14.3 It needs noting that the plaintiff was arrested on 6 June 2015 Saturday round about 9:50. Kubushusi J has correctly found that the plaintiff’s

subsequent detention after he appeared in court was not unlawful and the defendant cannot be held liable in that regard. In my view, in all probabilities the plaintiff must have appeared in court on 8 Monday, within the 48 hours of arrest and would have been further remanded in custody. I therefore find that the plaintiff was at the most unlawfully detained for two and a half days, from Saturday until Monday.

[15] According to the Kubushi J judgment, the plaintiff: "slept on a mat on the floor shared with other five inmates. As he came last in the cell he had to sleep on the floor and it was very cold. He did not bath all the time he was there. There was no water. They were brought cold water in a bucket for drinking. The toilet was out of order and they had to use water from the bucket to flush it."

[16] In *Minister of Safety and Security vs Seymore*³, Nugent J A stated at paragraph 17:

'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.'

[17] In *Mandleni v Minister of Police*⁴, Hellens AJ observed as follows in para [13]:

"In *Masisi v Minister of Safety and Security 2011 (2) SACR 262* Makgoka J very wisely in my view described the purpose of an award of general damages in the context of a matter such as the present as a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and

³ 2006 (6) SA 320 (SCA)

⁴ an unreported judgement of this division dated 24 April 2017 by Hellens AJ under case number 37539/14

distress. The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore struck at the very fundament of such ethos. Those with authority to curtail that right had to do so with the greatest of circumspection, and sparingly. Where members of the Police transgressed in that regard, the victim of the abuse was entitled to be compensated in full measure for any humiliation and dignity which resulted. To this may be added that where an arrest was malicious, the Plaintiff was entitled to a higher amount of damages than would be awarded, absent malice.'

- [18] In awarding compensation, the Court must strive to balance the interest of both the claimant as well as the defendant and as stated in *Pitt v Economic Insurance Co Ltd*⁵ cited with approval by the Constitutional Court in *De Jongh v Du Pisanie NO*⁶, the Court held: "(T)he Court must take care to see that its award is fair to both sides---it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."
- [19] In the matter of *Minister of Safety and Security v Seymour*⁷ where the arrestee was unlawfully arrested and detained for 5 days, the Supreme Court of Appeal reduced the award of R500 000 to R90 000. The last mentioned amount must have appreciated by now.
- [20] In the matter of *De Klerk v Minister of Police*⁸ an award of R300 000. 00 was considered to be appropriate for a wrongful and detention for 8 (eight) days, which in my view, approximate an amount of R37, 500. 00 per day. *In casu* for 2.5 days the amount would approximate an amount of R93,700. 00.

⁵ 1957 (3) SA 284 (D) at 287E-F.

⁶ 2005 (5) SA 457 CC at 475E.

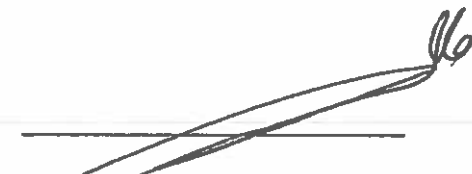
⁷ 2006 (6) SAS 320 (SCA).

⁸ 2018 (2) SACR 28 (SCA).

Accepting that the said amount would have appreciated in value by now, I am of the view that an amount of R150 000. 00 in the circumstances of this case would be a fair and reasonable *solatium* for the plaintiff.

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

1. That the defendant is ordered to pay the plaintiff an amount of R150 000. 00 (ONE HUNDRED AND FIFTY THOUSAND RAND) together with interest thereon from date of this order, calculated at the applicable rate per annum to date of payment;
2. That the defendant is ordered to pay the plaintiff's 100% costs to date on party and party scale as taxed or agreed.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 12 / 08 / /2019

PLAINTIFF'S ADV : ADV. MC.H. BARDENHORST

INSTRUCTED BY : MASHISHI ATTORNEYS