

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

CASE NO. 2902/2013

In the matter between:

ONELE MKWATI

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

MBENENGE JP:

[1] At inception this action was for recovery of damages for unlawful arrest and detention, and for malicious prosecution against the Minister of Police (then cited as the first defendant) and the National Director of Public Prosecutions (the NDPP, then cited as the second defendant).

[2] It was alleged that the plaintiff had been involved in the commission of robbery with aggravating circumstances. Upon his arrest, on 29 April 2013, so it was further alleged, the plaintiff was detained and released on 30 May 2013, whereafter, (on 28 October 2013), the charges he had been facing were withdrawn.

[3] In the course of time, liability was conceded, with the result that on 26 October 2017 the second defendant consented to an order for payment of R30 000. 00 as and for damages for malicious prosecution.

[4] The issue that remains for me to determine is that of the *quantum* of damages for unlawful arrest and detention, in respect of which the *lis* is between the plaintiff and the Minister of Police (the defendant).¹

[5] In pursuit of the claim, the plaintiff testified that on 29 April 2013 whilst walking from a school meeting he was arrested and put in the back of a canopied police van with his arms handcuffed from the back. The van was driven in a rough manner,² causing the plaintiff to lose balance and, from time to time, to be thrown around and sometimes hit himself against the van's body panel. When he wanted to know why he had been arrested, the police said they were looking for his brother, who was eventually apprehended and also put in the back of the van.

[6] The handcuffs were only removed from the plaintiff upon arrival at Ngqeleni Police Station. He was detained in a filthy cell and subjected to torture by cell inmates³ he found already there. The blanket he was supplied with was dusty. At times the blanket would be snatched from him, and he would end up leaning against the wall for the duration of the night for warmth. The mattresses they were supplied with were also filthy. The cell toilet which was within view and proximate was blocked, causing an unbearable stench. Because of the stench that pervaded the cell, he lost appetite and hardly ate. It occurred that an inmate would relieve himself whilst meals were being partaken of. The cell was not sufficiently ventilated, despite the fact that the inmates would smoke dagga and tobacco. At no point were the cells ever cleaned. When being supplied with food (morvite porridge in a plastic container), the police official concerned would simply open the cell door and throw the food on the floor without even entering the cell. At the time of his arrest and detention the plaintiff had been doing standard 8. He could not attend school for the duration of the detention.

[7] It emerged during cross-examination that the plaintiff was incarcerated at Ngqeleni Police Station for five days, whereafter he was transferred to Wellington

¹ Hence the process heading mentions one defendant.

² The ride was characterised by fast driving and random hard braking.

³ He was made to spin on soapy, slippery surface, whilst being slapped, kicked and forced to smoke tobacco by the inmates.

Correctional Centre, Mthatha to await his trial, upon his first appearance in court. No testimony was given of the conditions that prevailed at Wellington Correctional Centre, hence the plaintiff was released after spending another eighteen days.

[8] Captain Qezu testified on behalf of the defendant. He is Station Commissioner at Ngqeleni Police Station. He saw the plaintiff at some stage whilst he had been visiting the cell. As far as he was concerned the blankets were clean; fresh blankets would be supplied at intervals of two months. There had been no shortage of blankets. The cell toilets were not blocked. Had that happened, the prisoners would have been moved to another cell whose toilet was in a working condition. Captain Qezu denied that the awaiting trial inmates smoked in the cells, adding that smoking is prohibited. He also said there were constant police visitations to the cells.

[9] From what has been said above, the version of Captain Qezu and that of the plaintiff concerning the circumstances in which the plaintiff was detained are mutually destructive.

[10] In *National Employees' General Insurance v Jagers*⁴ it was held:

“It seems to me, with respect, that in any civil case, ...where there are two mutually destructive stories, [the party who bears the onus] can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”

[11] Captain Qezu admitted under cross-examination that he had been sitting in court when the plaintiff was testifying in chief and being cross-examined. This would, in and by itself, have had the effect of detracting from the value of his testimony. In any event, at all the relevant twists and turns of his cross-examination Captain Qezu

⁴ 1984 (4) SA 437 (E)

floundered. He was hard put to explain why the salient features of the defendant's case were not put to the plaintiff.⁵

[12] Captain Qezu's assertion that there were regular police visitations to the cell was not backed up by any document such as, for example, the occurrence book for the period in question. Nor was reference made to any document in support of the assertion that blankets were tidied at intervals of two months by the "SCN unit". None of the persons alleged to have supplied fresh blankets or swept the cell was called to testify. The assertion that the person who supplied the food to the inmates merely threw the plate on the floor without entering the cell could have been gainsaid by the calling of one of the officials who fed the inmates during the period in question, which was not done.

[13] At this juncture, we should remind ourselves of the following remarks by the Constitutional Court in *President of the RSA v South African Rugby football Union*⁶:

"The institution of cross-examination not only constitutes a right, it also imposes certain obligation. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."

[14] In light of the foregoing, it is safe for me to reject the version of the defendant in so far as it is not consistent with that of the plaintiff regarding the circumstances that beset the plaintiff's detention. I find no fault with the demeanour of the plaintiff. He appeared to me to be honest, reliable and credible as a witness.

[15] My summation of the factual background is therefore as follows: The plaintiff was arrested whilst walking from a school meeting. He was put in the back of a police van which was driven in a manner that tossed him, causing him, to hit his head against the van's body panel. At Ngqeleni Police cells where he was incarcerated for five

⁵ Namely, that the toilet was not blocked; that inmates smoked dagga and tobacco, and smoking was prohibited; that the toilet was not in view and in close proximity of the inmates even when partaking of their meals; that the cells were not filthy and smelly; that fresh blankets were supplied every two months

⁶ 2000 (1) SA 1 (CC) at para [61]

days, the cell was dirty and smelly, principally because of the proximity of a blocked toilet. The plaintiff also suffered at the hands of cell inmates who ill-treated him, including forcing him to smoke dagga. The cell was not properly ventilated. Food was thrown at cell inmates from outside the cell, as if animals in a cage were being fed.

[16] Let me now turn to consider an appropriate and fair award of the damages to which the plaintiff is entitled.

[17] Courts have been warned to be wary of the primary purpose in the assessment of damages for unlawful arrest and detention which is not to enrich the aggrieved party but to offer him or her some much needed *solatium* for his or her injured feelings, but at the same time to be astute in ensuring that the awards they make 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.⁷

[18] It is also incumbent on me to give heed to the principle recently enunciated by the Supreme Court of Appeal that the amount of the award is not susceptible of precise calculation; it is arrived at in the exercise of a broad discretion.⁸ In *Phillip v Minister of Police and Another*⁹ it was observed, in relation whether the court should calculate the award on a daily tariff or a single all-inclusive award, that the nature of the compensation and the inherent variables applicable in each case would be minimised by trying to place an average daily tariff on such a determination. The court went on to state that “[t]he fact that each case must be considered on its own merits militates against a so-called average flat rate per day” and that “a single all-inclusive award would appropriately address and express all the factors to be considered.”

⁷ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93 d-f

⁸ *Minister of Safety and Security v Augustine* C811/2016) [2017] ZASCA 59 (24 May 2017); 2017 (2) SACR 332 (SCA)

⁹ Unreported decision of the then Limpopo High Court under case numbers 457 and 676/2012 by Lamminga AJ

[19] The circumstances surrounding the plaintiff's arrest, especially *en route* to the police station were quite an ordeal. The detention at Ngqeleni Police Station, under squalid circumstances, was inhumane and degrading in the extreme. The subsequent detention at the Wellington Correctional Centre does not seem to have been beset by the woes that prevailed at Ngqeleni, as indeed the plaintiff said nothing anent thereto in his testimony. However, even during that lengthy period, the plaintiff was deprived of his liberty, and separated from friends and family.

[20] Having regard to all the above as also previous awards, including those made in *Mtola v Minister of Police*¹⁰ and *Nel v Minister of Police*,¹¹ a fair and reasonable award in the circumstances of this case is R560 000. 00.

[21] There is no reason why costs should not follow the result.

[22] The order that I make is the following:

- (a) *The defendants shall pay the plaintiff damages in the sum of R560 000. 00 consequent upon the plaintiff's arrest and detention.*
- (b) *The defendant shall pay interest on the amount referred to in (a) above at the prescribed legal rate with effect from today to date of payment.*
- (c) *The defendant shall pay the plaintiff's costs of the action, such costs to bear interest from a date 14 days of the Taxing Master's allocatur to date of payment.*

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

¹⁰ Case No. CA 23/2016 by Smith J (concurrent in by Mbenenge ADJP (as he then was) *et* Brooks J) delivered on 30 June 2017

¹¹ Case No. CA 62/2017 by Mbenenge JP (concurrent in by Mageza AJ) delivered on 23 January 2018.

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Instructed by : The State Attorney
MTHATHA

Date heard : 24 October, and 04 to 05 December
2017

Date Judgment delivered : 23 January 2018