

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>07/03/2018</i>	

CASE NO: 628/2014

In the matter between:

KOEN CHRISTIAAN FERDINAND**PLAINTIFF**

and

THE MINISTER OF POLICE**DEFENDANT**

JUDGMENT

MAKGOBA JP

- [1] This is an action for damages consequent to an unlawful arrest and detention. The Plaintiff instituted the action against the Defendant claiming damages arising out of his arrest and detention by members of the South African Police Service, acting within the course and scope of their employment with the Defendant. The arrest of the Plaintiff occurred in Polokwane on the 8 August 2012.
- [2] The merits and quantum of damages in this case were separated in terms of Rule 33 (4) of the Uniform Rules of Court. On the 20 April 2015 I gave judgment in favour of the Plaintiff on the merits and the issue of quantum was postponed *sine die*. The trial on quantum resumed on 5 February 2018 and was concluded on 6 February 2018. The present judgment is in respect of the quantum of damages only.
- [3] The Plaintiff instituted the action for damages in two heads:
- 3.1. General damages for unlawful arrest and detention, which encompass impairment of dignitas and fama, psychological trauma, emotional shock and contumelia; deprivation of personal liberty or freedom of movement.
 - 3.2. Loss of income.

- [4] The Defendant, through his legal representative conceded that the Plaintiff had suffered general damages and suggested that a global amount of R 200 000.00 would be appropriate to compensate the Plaintiff. However, regarding damages for loss of income, Defendant contended that the Plaintiff had not suffered any damages in any amount or at all.

Factual Background

- [5] The Plaintiff was a practicing attorney in Polokwane for almost 16 years when he was arrested on 8 August 2012 by certain police officials. The Plaintiff obtained his LLB degree in 1994 at the University of Pretoria and thereafter attended a six months full-time law school for candidates that wish to qualify as attorneys. He commenced employment as a candidate attorney on 1 July 1995 and this training period was completed at the end of June 1996 whereafter he was admitted as an attorney.
- [6] The Plaintiff started to practise as an attorney and a partner in a law firm as from July 1996 until the end of the year 2004 in Polokwane. He established his own firm at the beginning of 2005 and continued to practise as such up until the date of the incident, that is 8 August 2012.

- [7] The Plaintiff had a certain client, one Peggy Mokoena ("Mokoena") who was doing business as a cash loan operator and she employed Plaintiff to draft Acknowledgement of Debt documents which Mokoena's clients had to sign in the normal course of business activities. These business activities of Mokoena caught the attention of the South African Police Service for one reason or another, and criminal investigations into her activities followed. The Plaintiff was also appointed as the attorney of Mokoena representing her on these criminal proceedings.
- [8] On the morning of 8 August 2012 the Plaintiff was working at his offices when he received a telephone call from Mokoena indicating to him that members of the South African Police Service were present at her home and were busy searching the premises of her home, and she requested Plaintiff's assistance. The Plaintiff immediately went to the home of Mokoena and upon his arrival, there were a number of high-ranking police officials at the premises, and all, but one, were women. Upon his arrival, and inside the house, he confronted the most senior officer and requested to see a copy of the search warrant in terms of which the officers were authorised to search the premises of Mokoena. The officer indicated to him that she would talk to him at a later stage and requested him to leave the house. He did so.

- [9] While standing outside the house, the officer approached the Plaintiff and indicated to him that she was arresting him and immediately handcuffed his hands behind his back. This happened at 15h00. When the Plaintiff enquired as to the reason for his arrest, she indicated to him that it would be communicated to him at a later stage.
- [10] The Plaintiff was thereafter driven to the Polokwane police station, but en route to the Polokwane police station the driver of the vehicle was apparently instructed to take the Plaintiff to the Botlokwa police station, a police station which is situated about 40 km outside Polokwane, on the way to the town Makhado (Louis Trichardt). The motorcade transporting him and other arrestees was driven at an excessive high-speed with flashing blue lights. The Plaintiff testified that he had the impression that the drivers of the motorcade intended to drive in a very demonstrative manner in order to draw maximum attention. He also testifies that he feared for his life as the driver drove recklessly. He felt humiliated and afraid, as being an attorney he heard lots of stories by clients on what may transpire in the police cells. He has never been in such a situation and growing up in a protected family environment, he never had any formal training (military or otherwise) to protect himself or any training on how to deal with such a potential situation. He had no idea, save for the stories of clients he represented, of what to expect.

- [11] Upon arrival at the police station, the Plaintiff was met by his attorney, Mr Andries Rheeder, who told him that he was being charged for fraud and that, for that reason, that the granting of bail could only be considered by a Court of law and not by the investigating officer investigating the case. Mr Rheeder handed a R 100.00 note to the Plaintiff, indicating to him that he should hand this over to inmates in the cells in order to ensure that he is not intimidated or otherwise harmed in the cells.
- [12] The Plaintiff concealed the money on his body and once inside the cell discovered that he was being locked up with nine inmates. On detention in the cell, the other inmates threateningly demanded money and the Plaintiff handed over the R 100.00 to them. They were not satisfied at that stage that the Plaintiff handed over all money and demanded to search the Plaintiff. The Plaintiff undressed and only remained clothed in underpants. One inmates satisfied himself that he had no further money on his person by drawing away his underpants and looking inside his underpants. He was humiliated and afraid. The Plaintiff described the appalling conditions in the cell. He had to sleep in front of the toilet and wash place, which were a bucket, and every time a cellmate needed to use the facility they had to climb over him to such an extent that he could not sleep at all.

[13] On the following date, 9 August 2012, which was an official holiday, Women's Day, the Plaintiff was summoned to the charge office where a certain police officer finalised certain administrative tasks, regarding Plaintiff's arrest. During this discussion, a police official, for the first time, told the Plaintiff that he was charged with fraud but could not give any further information to the Plaintiff. On the following day, Friday, 10 August 2012, the Plaintiff was once again transported, at high speed in the same demonstrative and reckless manner, with flashing blue lights, from the Botlokwa police station to the Polokwane Magistrate's Court to be charged and for the purpose to bring a bail application. When the Plaintiff eventually appeared, the Court was full of his colleagues who shunned him and he again felt humiliated and disgraced, the Magistrate that was presiding over the case, postponed the case to Monday, 13 August 2012, citing his unwillingness to possibly have to make an adverse finding against an attorney regularly appearing before him, after which he recused himself from the proceedings.

[14] The Plaintiff was returned to the Botlokwa police station immediately, once again transported, at high speed in the same demonstrative and reckless manner, with flashing blue lights and remained incarcerated for the rest of the weekend. The Plaintiff was once again taken to the Polokwane Magistrate's Court on Monday, 13 August 2012, again transported, at high speed in the same demonstrative and reckless manner, with flashing blue lights for a bail

application, and bail of R 10 000.00 was eventually granted to him. The Plaintiff appeared on several occasions afterwards in Court but eventually the charges were withdrawn against him on 5 July 2013.

[15] The events were published on nine occasions in different newspapers, some of the newspapers with a local distribution in Polokwane but newspapers, viz, Beeld and Sowetan, are newspapers with a national footprint. Apart from this, all the newspapers also published online on the internet and are accessible from anywhere in the world. These newspapers were published between 8 August 2012 up until 10 July 2013.

[16] The Plaintiff was identified by name and photo on several occasions in the newspaper reports which were handed in as evidence during the trial. It was further stated in the media statement that the lawyer of Mokoena lured a farmer into a fraudulent business deal.

[17] There was a further publication of the Plaintiff in a circular "Legalbrief Today" which is a circular circulated countrywide amongst members of the legal profession and the following is stated in the second paragraph of the publication:

"Former chair of the National Freedom Party in Limpopo, Mulala Mokoena has appeared in Polokwane Magistrate's Court alongside her lawyer Chris Koen and business partner Johan Lambrecht. They are accused of defrauding several people of thousands of rands."

The general approach in the assessment of damages for unlawful arrest and detention.

- [18] In this matter the Plaintiff suffered an arbitrary deprivation of personal liberty and was humiliated and traumatised by virtue of his unlawful arrest and detention. He has furthermore suffered patrimonial loss in the form of loss of income as a practising attorney whose practice was closed down as a direct result of this arrest and detention as well as the wide publication thereof in the public domain.
- [19] In deprivation of liberty the amount of damages is in the discretion of the Court. 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 of the deprivation of liberty; the status; standing; age; health and disability of the Plaintiff; the extent of the publicity given to the deprivation of the liberty; the presence or absence of an apology or satisfactory explanation of the events by the Defendant; and awards in previous comparable cases.

- [20] Section 35(2)(e) of the Constitution of the Republic of South Africa provides that everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity. Therefore other factors that play a role are 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.
- [21] The above stated factors have been extracted from various case law and set out by the authors of **Visser & Potgieter Law of Damages Third Edition on pages 545 – 548.**
- [22] The purpose of an award of damages in the context of a matter such as the present is a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress. In **Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP)** it was held that the right to liberty is an individual's most cherished right, and one of the fundamental values giving inspiration to an ethos

premised on the freedom, dignity, honour, and security. That its unlawful invasion therefore struck at the very fundamental of such ethos.

[23] The Supreme Court of Appeal held as follows in **Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) paragraph 26 at 93 D – E:**

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

[24] In **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)**

Nugent JA 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.”

At page 326 paragraph 20 the learned Judge went on to express the view that when assessing damages for unlawful arrest and detention Courts are not extravagant in compensating the loss as there are many legitimate calls on the public purse to ensure that other rights that are no less important also receive protection.

[25] I do not understand the Supreme Court of Appeal to be suggesting that heavier amounts for damages should not be awarded in deserving cases, neither do I see it as encouraging infringement of human rights. The Courts will always be guided by the facts of each case and not taking its eyes off the purport and object of the protection of such rights as enshrined in the Constitution. In *casu*, I shall be guided by the particular facts and circumstances of the case in determining the appropriate amount of damages.

[26] Claassen J held as follows in **Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino 2000 (4) SA 68 (WLD) at 86 D:**

“Deprivation of one’s liberty is always a serious matter. The contention is reflected in fact that our Constitution has entrenched the freedom and security of the person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

“(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial ”

It is important to note that in the aforementioned case, as in the present case we are also dealing with the violation of important constitutional rights, including the Plaintiff’s rights to human dignity, freedom and security of the person, freedom of movement and to conditions of detention that are consistent with human dignity.

[27] Where a right is said to be so important that it has been afforded constitutional protection, any damages to be awarded should reflect that importance. In considering quantum, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society, which should be jealously guarded at all times and there is a duty on the Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual.

See: **Thandani v Minister of Law and Order 1991 (1) SA 701 (ECD) at 707 A.**

The present case displays a reckless disregard of the rights of the Plaintiff by members of the South African Police Service.

Damages for unlawful arrest and detention

[28] The Plaintiff in the present case was detained without a shred of justification and detained in what was very humiliating, fearful and degrading circumstances entailing that he had to strip virtually naked to undergo a body search by other inmates in the cell, without being able to defend himself. Quite apart from the normal common law rights to personal freedom, liberty, dignity and reputation, a number of constitutional rights as outlined above were infringed. The Plaintiff did absolutely nothing wrong. He was arrested while performing his professional duties as an attorney. The conduct of the police in effecting the arrest of the Plaintiff in those circumstances amounts to interference with not only the Plaintiff's rights but also the public's right to legal representation.

[29] It is significant to note that the unlawful arrest and detention of the Plaintiff and subsequent publicity thereof has resulted in a number of personal *sequelae*, some of which are the following:

- 29.1. A practicing attorney is wholly dependent on his good name and reputation in society to draw and retain clients. The Plaintiff testified, uncontested, that within a month after the publication of the arrest in various news media, he had to close down his lucrative legal practice and that he had to look for employment and eventually had to relocate to Mosselbay from where he had to rebuild his life.
- 29.2. News of his arrest and detention quickly spread to Mosselbay when he had to appear in the debtor's Court (Section 65 proceedings) in Mosselbay to answer to creditors' claims in his practice in Polokwane when he had to close down following the events. He had to explain in detail why he was in financial ruin in open Court in front of new colleagues.
- 29.3. The Plaintiff is entitled to an award that would restore his good name and reputation in society, especially given the fact that the arrest and detention was outrageous and with no apparent justification.
- [30] It is for all the above reasons that I am of the view that Plaintiff is entitled to a profound and substantial award as general damages for unlawful arrest and detention. Counsel for the Defendant is of the view that an amount of R 200 000.00 is appropriate. I differ slightly with Counsel in this regard. In my view a fair and reasonable amount is R 250 000.00.

Damages for loss of income

- [31] The Plaintiff testified that he had to close down his legal practice as a direct result of this arrest and detention and the wide publication thereof in the public domain. The Plaintiff had to relocate to Mosselbay in an effort to rebuild his reputation and professional career. At Mosselbay he could not build a successful own legal practice. He worked under Heyns Attorneys for only five months and quit the legal practice when he realised that he could not easily recover from his loss of dignity and reputation. He is presently employed as a legal advisor at a firm of debt counselors earning a salary of R 30 000.00 per month.
- [32] A practicing attorney is wholly dependent on his good name and reputation in society to draw and retain clients. The Plaintiff lost clients and closed down his practice in Polokwane. At a new place in Mosselbay it could not be easy for Plaintiff to build new clientele hence he ceased practicing law as an attorney and opted to accept another employment at a firm of debt counselors at a reduced income.
- [33] The Plaintiff presented evidence of three experts, Nicolene Kotze, an industrial psychologist, Zelda Buitendag, a clinical psychologist and Gerard Jacobson, an actuary, in order to proof his loss of income. On the other hand the Defendant also presented evidence of three experts, an industrial

psychologist, clinical psychologist and an actuary to counter the expert evidence of the Plaintiff.

[34] The two clinical psychologist Zelda Buitendag for the Plaintiff and Tebogo Kgole for the Defendant concur in their joint minutes that:

- 1) The Plaintiff's self-confidence is low and his public image is tarnished.
- 2) He suffers from moderate chronic Post Traumatic Stress Disorder (PTSD).
- 3) The incident affected the Plaintiff's financial, social and professional stance in society.
- 4) They recommend that the Plaintiff gets intervention and treatment from a Clinical Psychologist (19 sessions at cost of +/- R 1200.00 per session) and Psychiatrist (at R 1800.00 per session) to assist him in recovering from the psychological difficulties that he experiences.

[35] The industrial psychologist, Nicolene Kotze for the Plaintiff and Lance Marais for the Defendant agree that the Plaintiff would have been able to continue in his self-employed capacity as a practicing attorney but for the incident of arrest and detention. They agree further that the Plaintiff would have been able to continue working until age 65-70 as there is no indicated retirement age for self-employed individuals.

- [36] Nicolene Kotze opines that self-employed people determine their income by actively marketing their services, networking and hard work. She is of the view that the Plaintiff could very well have expanded his practice even further and could then have earned up to R 50 000.00 per month. This is more or less on par with the salaries for an attorney with more than 18 years of service, as indicated by Robert Koch (Quantum Yearbook 2016). As such the expert is of the view that from the income of R 30 000.00 the Plaintiff earned at the time of his arrest and detention in August 2012, he could likely have increased his income to earn approximately R 50 000.00 per month by 2016 (20 years since he has being admitted as an attorney). Same would then have increased with annual inflationary increases.
- [37] Nicolene Kotze, the industrial psychologist, explains in detail that for purposes of the calculation of damages, that it can safely be assumed that the Plaintiff earned an amount of R 30 000.00 per month as at date of arrest. She gave a full explanation of that on pages 10 to 13 of her report. Both the industrial psychologist as well as the clinical psychologist, namely Zelda Buitendag, testified that the Plaintiff still suffers from post-traumatic stress syndrome which will have an adverse impact on the performance of the Plaintiff in future, curtailing the income earning potential of the Plaintiff.

[38] Of further significance the industrial psychologist, Nicolene Kotze indicated that due to tarnished reputation and his age, i.e 47 years, as well as that he now resides in a different town where he does not know as much people as back in Polokwane, he will struggle to start his own practice again. The psychologist, Lance Marais for the Defendant agrees with Nicolene Kotze that the Plaintiff will in all probabilities remain in his current employ or similar employment as legal advisor, earning on par with his current salary of R 30 000.00 per month, with no added benefits, plus annual inflationary increases.

[39] Mr Lance Marais opined in his report that:

“The claimant has probably retained his pre-incident employability, as well as earning potential”

On the basis of this statement, the actuary employed by the Defendant to calculate the loss of income, Mr Gert du Doit, assumed no loss of income. Mr Marais later conceded to the Court, that there might be a loss of income and as a result of his misunderstandings, did not base his report on the correct facts. I reject Mr Marais' version in so far as same differs with that of Nicolene Kotze. The latter's report and evidence is accepted as the basis on which the Plaintiff's loss of income should be calculated.

[40] Mr Gerard Jacobson, the actuary, calculated the loss of the Plaintiff on the basis of the abovementioned assumptions to be R 3 815 151.00 being in respect of the total gross past and future loss of income. The contingency deductions have not been applied.

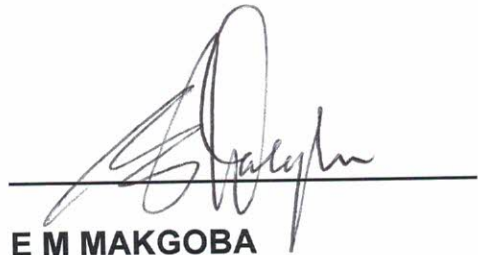
[41] The amount or percentage of the contingency deductions is essentially subjective and is in the discretion of the Court. It is so that an individual who is self-employed is responsible for his own earnings. Factors such as personality, market forces, economic climate, service levels, commitment, state of health of the individual and profitability of the business are some factors that would influence the individuals' drawings or earnings. It cannot be said that the attorneys' profession is always a booming practice. In the circumstances I have decided to apply a much higher percentage of contingency deductions. I shall apply 10 % for past loss and 20 % for future loss, in total 30 % deduction.

[42] In the premises the amount of damages for loss of income is as follows:

Total gross loss	R 3 815 151.00
Less 30 % contingency deduction	R 1 144 545.30
Nett loss	R 2 670 605.70

[43] I accordingly grant judgment in favour of the Plaintiff in the following amounts:

- (1) Payment of R 250 000.00 for general damages.
- (2) Payment of the sum of R 2 670 605.70 for loss of income.
- (3) Interest on the above amounts at the rate 9 % per annum from date of judgment to date of payment.
- (4) Costs of the action.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on : **5, 6 & 21 February 2018**

Judgment Delivered : **7 March 2018**

For Plaintiff : **Adv. G J Diamond**

Instructed by : **Diamond Hamman & Associates**
Polokwane

For Defendant : **Adv. S Mathabatha**

Instructed by : **State Attorney**
Polokwane