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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1002/2012

23/8/2017

Not reportable

Not of interest to other judges

Revised.

In the matter between:

M M

PLAINTIFF

and

MINISTER OF POLICE

1ST DEFENDANT

WARRANT OFFICER COLLEN DIKGALE

2ND DEFENDANT

JUDGMENT

SIKHWARI AJ

- [1] On 22 February 2017 this court, Mokgohloa DJP, made a judgment on merits to the effect that defendants are liable for plaintiff's damages for two heads of damages; to *wit* unlawful detention and malicious prosecution. The matter then was set down for quantum.
- [2] The plaintiff testified as the only witness on merits. He testified that he was arrested on 24 July 2011 and was detained for 25 days until 19 August 2011 when he was released on warning. Proceedings against him were later withdrawn on 28 May 2012.
- [3] When he arrived at the police cells on the 24 July 2011 he was forced by other inmates to take off his clothes and remain naked as a method of baptising him. He was later told to go to take a bath. It was winter and the water was cold. The bathing place was next to a dirty toilet in the same room with no partitioning or curtain. After taking a bath he was ordered to join the other inmates in singing. He was assaulted twice by the inmates on the throat on the allegations that his voice was out of tune. The inmates threatened to cut open his throat if he does not

improve his singing tune. There were about 17-18 male inmates in one small cell. There was one boss who was in control of everything.

[4] The boss forced other inmates to bend and so that he could sexually penetrate them through the anus. The plaintiff was forced to hold the blanket with another inmate to create some sort of a curtain to cover the boss when he was having anal sex so that other inmates could not see the act. The plaintiff was told that he is too slim and as such he will not be raped. The boss was raping those male inmates who were bit stout or fat.

[5] In the evening the plaintiff was given one blanket which had some lice. Those lice were pricking him and disturbing his sleep. When the plaintiff was arrested on the 24 July 2011 he was in a good physical and emotional health but when he was there he sustained injuries on the throat due to beating of the first day. At one time his brother was refused to see him by the police officers. The community does not respect him any more due to allegations of murder for which he was arrested. People still look at him as if he is a murderer. He feels isolated in the eyes of the community.

[6] Under cross-examination, the plaintiff was asked one question about whether he applied for bail or not. He answered that he was released on warning, and attended court several times until he was told that the real people who committed the murder were found. Charges against him were then withdrawn.

- [7] Counsel for plaintiff addressed court and referred to several case law authorities which I need not repeat in this judgment. Counsel stated that the appropriate amount for damages due to the plaintiff which is fair and reasonable is the amount of R525 000.00 (five hundred and twenty five thousand rand) for unlawful detention. He relied on the case of *Woji v Minister of Police (92 / 2012) [2014] ZASCA 108 (20 August 2014)*. Plaintiff's counsel submitted further that a fair and reasonable amount for damages due to the plaintiff for unlawful prosecution is the amount of R120 000.00 (one hundred and twenty thousand rand). Counsel stated further that the court should look on all factors, cumulatively, and arrive at a fair and reasonable amount for both heads of damages herein.
- [8] Counsel for the defendants also referred the court to *Woji v Minister of Police* as well as other decisions and submitted that the fair and reasonable amount for damages for unlawful detention is the amount of R80 000.00 (eighty thousand rand). He distinguished *Woji* from the present case on the bases that *Woji* was raped whereas the plaintiff herein was not raped except that he only witnessed the rape of others; *Woji* lost sexual interests on his wife whereas there is no such evidence in respect of the plaintiff herein; *Woji* was detained for a lengthy period of 13 months whereas the plaintiff herein was detained for 25 days, etc. *Woji* was awarded R500 000.00 (five hundred thousand rand) for unlawful detention. I agree with the above distinguishable factors between the present case and *Woji*.
- [9] For malicious prosecution, counsel for the defendant submitted that a fair and reasonable amount for damages should be R20 000.00 (twenty thousand rand). He relied on the case of *Minister of Safety and Security v Schubatch (437/2013) [2014] ZASCA (216) (01 December 2014)* in which the Supreme Court of Appeal

has reduced a high court award of R120 000 to R10 000.00 for malicious prosecution damages.

[10] I have noted that in paragraph [23] of the *Schubatch* judgment, Zondi JA justified the decision of the SCA to reduce the award on the fact that “*the trial court erred in its assessment of damages by failing to take into account the fact that the respondent’s prosecution on charges relating to the other weapons was based on reasonable and probable cause and not malicious. In other words, the infringement of the respondent’s rights was not wrongful as his prosecution on those charges was based on reasonable grounds. The appellant would in any event have been arrested in respect of the charges for which there was probable cause, spent time in custody and faced prosecution. These facts were ignored by the court below*”.

[11] These factors which were outlined by Zondi JA, in my view, distinguish *Schubatch* matter from the present one. In this case plaintiff was never associated with any other murder case except the one he was wrongly detained for. Plaintiff could not have been detained for any other crime which carries a competent verdict to the murder crime which he was wrongly detained for. The plaintiff herein could not have been detained or accused or suspected of any other crime except the one he was ultimately told that the real perpetrators were found. Therefore, the jurisdictional facts which Zondi JA relied upon to reduce the amount for damages in the *Schubatch* case are not present in this case.

[12] In *Minister of Safety and Security v Tyulu* (327/08) [2009] ZASCA 55 (27 May 2009), Boshielo AJA (as he then was) stated in paragraph [25] that “... *although it*

is true that the detention was for a relatively short period, I am of the view that the length of time for which a person is detained after arrest is not the only factor to be considered in determining damages. All the surrounding circumstances deserve to be accorded proper consideration. It cannot be doubted that this arrest must have caused him serious shock with concomitant mental anguish and stress". I align myself with this reasoning in as far as this case is concerned.

- [13] In paragraph [26] of *Tyulu* judgment, *Boshielo AJA* went further to state that “*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 solatim 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 really 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)*”

- [14] I must state that I agree with the above method of assessment. Having considered all the surroundings circumstances, personal circumstances of the

plaintiff and the emotional state of mind he endured due to events in custody, I am of the view that a fair and reasonable amount of damages for unlawful detention is R300 000.00 (three hundred thousand rand) and for malicious prosecution is R100 000.00 (hundred thousand rand). I see no basis why costs should not follow the event.

[15] In the result, the following order is made:

1. That the first defendant is ordered to pay the sum of R300 000.00 (three hundred thousand rand) to the plaintiff as damages for unlawful detention.
2. That the first defendant is ordered to pay to the plaintiff the sum of R100 000.00 (one hundred thousand rand) as damages for malicious prosecution.
3. That the first defendant is ordered to pay interests on the sums of R300 000.00 and R100 000.00 respectively at the rate of 10.3% per annum, calculated from the date of judgment to the date of final payment.
4. That the first defendant pays the taxed or agreed costs of the plaintiff on party and party scale.

MS SIKHWARI, AJ
Acting Judge of the High Court,
Limpopo Division, Polokwane

APPEARANCES:

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|------------------------|------------------|
| 1. Plaintiff's counsel | : Adv KC Kekana |
| 2. Defendants' counsel | : Adv DM Kekana |
| 3. Date of hearing | : 15 August 2017 |
| 4. Date handed down | : 23 August 2017 |