

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 5657/2011

2015
24 APRIL 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

ALFRED DOLAMO

Plaintiff

and

MINISTER OF SAFETY & SECURITY

Defendant

J U D G M E N T

MAKGOKA, J:

[1] This judgment concerns only the assessment of damages flowing from the wrongful arrest and the subsequent detention of the plaintiff. The defendant (the Minister) has admitted vicarious liability for the wrongful arrest of the plaintiff by a police officer. In the docket, it was recorded that the plaintiff was arrested for ‘trespassing with intent.’(sic). The plaintiff was subsequently detained for 4 days, after which he was released without any charges being preferred against him.

[2] No evidence was led in the matter. Instead, the parties agreed to place certain common cause facts before the Court as factual background to the arrest and the detention. Those facts appear from three statements- of the plaintiff, of the instigator of the arrest and of the arresting officer. I set out briefly the contents of each of those statements below.

[3] The plaintiff's version of the events leading to his arrest is set out in his warning statement taken down a day after his arrest. He stated that on 19 August 2010 at approximately 16h00 he was walking from his place of employment in Silverton, near Pretoria. He had to wait for a lady friend who also worked nearby. It was in a residential area. While waiting, a white male person approached him and asked him where he came from and what he was doing there. He explained to the man that he was from his place of employment, and he was waiting for someone. The man told him he was lying, and called the police. The police officers arrived and arrested him, after which he was detained at the Silverton Police Station. He later appeared in the Pretoria Magistrate Court on 23 August 2010, where the prosecutor declined to prosecute him.

[4] The apparent instigator of the arrest, a Mr Van Copenhagen, made the following statement:

'That on 19 August 2010 at approximately 16h00 Insp Pienaar contacted me and told me that my daughter Jacqueline contacted (the police) over the community radio for help. Jacqueline told me that an unknown black male with white clothing was in front of the second gate of our yard and she didn't know why he was there. No one had permission to enter without our permission and without pressing the call button in front of the first gate. That is all I have to declare.'

[5] In his statement, the arresting officer, Warrant Officer Hendrick Johannes Muller stated:

'On 19 August 2010 at approximately at 16h00 I was on duty and in uniform. I was with the Silver community. We got a distressed call on the community radio of a

young girl Jacqueline that an unknown black male is standing in front of the back gate and looking inside the yard. I immediately, also with the community, drove to Joseph Bosman Street 550, Silverton. Johan Botha got there first and saw the suspect coming out of the residence and spoke to him. I spoke to him at corner Fountain and Joseph Bosman Street where I started to ask the suspect what he was doing in front of the gate. He answered sarcastically: 'Why, was there a crime committed.' I asked him again and told me there was no crime committed and he wants to go. I tried a few times for him to give me a proper answer but didn't want to cooperate. I immediately arrested him for trespassing with the intent and read him his rights. That is all I have to declare.'

[6] This is the information on which the plaintiff's *quantum* to be paid by the defendant has to be determined. The proper approach to assessment of damages in matters such as the present includes the evaluation of the personal circumstances of the plaintiff (which includes his standing in the community and level of education), the circumstances around the arrest, as well as the nature and duration of the detention. See *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 935B-F.

[7] With regard to the personal circumstances of the plaintiff, there is not much before me as the plaintiff did not testify. All I know of him is that he was 36 years old, and that he was employed as a domestic worker. Similarly, there is no information as to the conditions under which the plaintiff was detained. Although these are relevant considerations in arriving at a fair and just amount of damages, the paucity of information under these headings is no bar to making an award. As stated by Stratford J in *Hersman v Shapiro & Co* 1926 TPD 367 at 379:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damages has been suffered, the Court is bound to award damages.'

See also *Southern Association v Bailey* 1984(1) SA 98 (A) at 114A; *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) at 451B-C.

[8] It is against this backdrop that I turn now to consider an appropriate amount of compensation for the plaintiff on the information available. Although this is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases, which afford a useful guide in this regard. The process of comparison is not a meticulous examination of awards, and should not interfere upon the court's general discretion: *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535B-536A and *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) paras 17 and 18. The purpose is to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress: *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26 where it was emphasised that the primary purpose was 'not to enrich the claimant but to offer him or her some much-needed *solatium* for his or her injured feelings.'

[9] The plaintiff was detained for 4 days – from 19 until 23 August 2010. As to the circumstances of the plaintiff's arrest, the nature of the information used to arrest displays total disregard for his personal liberty. On the information before him, there was simply no basis for Muller to suspect that the plaintiff had committed any offence whatsoever, let alone one referred to in s 40(1)(b) of the Criminal Procedure Act 51 of 1977 - which would have entitled him to arrest the plaintiff without a warrant. The plaintiff was arrested on the flimsiest of excuses – for standing in the street next to a house. It is instructive that the plea filed on behalf of the Minister, contained a bare denial of the unlawfulness of the arrest, without reliance being placed on s 40(1)(b),

as is normally the case in matters such as this. The Minister, commendably in my view, did not persist with his defence on the liability, because there was certainly no basis for doing so.

[10] Mr *Zietsman*, counsel for the plaintiff, referred to the following cases: *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA); *Khanyile v Minister of Police* (33478/2011) [2013] ZAGPJHC 234 (5 August 2013); *Murrell and another v Minister of Safety and Security* (24152/2008) [2010] ZAGPPHC 16 (22 February 2010); *Braam Beukes v The Minister of Safety and Security* (unreported case number A676/2011 (North Gauteng High Court, Pretoria, 13 December 2013); *Lamula & 3 others v The Minister of Police* (unreported case number 310/2012, South Gauteng High Court, Johannesburg, 16 April 2013). On the other hand, Mr Modukanele, attorney for the Minister, also referred to *Seymour* (above); *Tyulu* (above); *Mvu v Minister of Safety and Security and another* 2009 (6) SA 82 (GSJ); *Hoco v Mtekwana* 2011 (6K6) QOD 18 (ECP).

[11] I have also considered the case of *Gellman v Minister of Safety and Security* 2008 (1) SACR 466 (W), which is comparable to the present case with regard to the duration of the detention. Mr Gellman, an attorney and a businessman, was unlawfully arrested and paraded in handcuffs in front of his employees. He was later detained for over 48 hours, during which he was held in a police cell, where he was seen by a number of his fellow attorneys, and was also deprived of access to his heart medication. He was awarded R80 000 in damages.

[12] In *Seymour*, a 63 year old small scale farmer who suffered from high-blood pressure was unlawfully arrested and detained for five days. He fell ill the morning following the detention, experiencing chest pains.

On appeal, the Supreme Court of Appeal (SCA) reduced the amount of R500 000 awarded by the High Court, to R90 000. In arriving at the amount of damages, the SCA restated the general principles applicable in assessment of general damages and considered past awards as well as the devaluation of currency.

[13] Of the cases mentioned, I find the facts in *Gellman* to be, in broadest terms, closely similar to the present case. Having said that, there are important distinguishing factors between the two cases. First, Gellman was a practising attorney and businessman. It is trite that one's social standing is a factor to be considered as part of the personal circumstances in assessing damages in matters of this nature. The plaintiff in the present matter was a domestic worker. Second, and flowing from the first, Gellman was arrested in the presence of his employees, whereas the plaintiff was alone when arrested. Third, Gellman was seen by some of his fellow attorneys while held in a police cell, whereas there is no evidence that beyond his arrest, the plaintiff was seen by anyone known to him.

[14] In the present case, however, it must be borne in mind that I have found that the police officer had acted maliciously, with an ulterior motive, and without any intention of bringing the plaintiff to justice. In *Masisi v Minister of Safety and Security* 2011 (2) SACR 262 (GNP), it was found that the arresting police officers had acted maliciously. This court made the following observations at para18:

'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 strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly. In *Solomon v Visser and Another* 1972 (2) SA 327 (C), at 345C–E, it was remarked that where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any

humiliation and indignity which result. To this I add that, where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice’.

[15] Having regard to the circumstances of the arrest, and in particular that malice has been established; the duration of the detention; the very limited personal circumstances of the plaintiff; the lack of information as to the conditions under which the plaintiff was detained and the effect of the detention on him; the awards made in previous comparable cases; the gradual devaluation of the currency, I deem R100 000 to be a just and fair amount of damages for the plaintiff.

[16] There remains the issue of costs. Pursuant to the findings in paras [10] and [15] above - that the plaintiff was clearly arrested for a purpose ulterior to a legitimate one of bringing him to justice – I do not intend to order the Minister to pay the costs, at least at this stage. The arrest of any person with an ulterior motive is malicious, and amounts to blatant abuse of power. There is a discernable increase in such instances before this court. Where that is established to be the case, I see no reason why the arresting officer should not be ordered to pay the costs from their own pocket. In the present case, I take a *prima facie* view that Warrant Officer Muller should be ordered to pay the costs of the action. However, it is only fair that before such order is made, the officer concerned should be given an opportunity to state the reasons why such an order should not be made.

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

1. The defendant is ordered to pay the plaintiff an amount of R100 000;
2. Interest on the amount at 15.5% *per annum* from date of judgment to date of final payment;
3. The issue of costs is postponed *sine die*;

4. The State Attorney is ordered to immediately cause a copy of this judgment to be served by the Sherriff on Warrant Officer Johannes Hendrick Muller;
5. Warrant Officer Johannes Hendrick Muller is given 20 days from the date of service upon him of this judgment, in writing, to furnish reasons why he should not be held personally liable for the costs of the action;



TM Makgoka
Judge of the High Court

APPEARANCES

For the plaintiff Adv. Z. Zietsman

Instructed by: Loubser Van Der Walt, Pretoria

For the defendant Mr S.A Modukanele

Instructed by: State Attorney, Pretoria