

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

Case No: 1257/2011

In the matter between:

VUYISA MGELE

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

POLICE OFFICER GETYEZA

Second Defendant

POLICE OFFICER MALANGENI

Third Defendant

JUDGMENT

STRETCH J:

[1] On 2 June 2011 the plaintiff issued summons against the defendants claiming R600 000 (six hundred thousand rand) in damages quantified as follows:

- | | |
|---|----------|
| a. Wrongful arrest | R150 000 |
| b. Wrongful detention | R150 000 |
| c. Torture, humiliation, degradation and contumelia | R150 000 |
| d. Pain and suffering | R150 000 |

[2] The defendants delivered a notice of intention to defend but failed to plead to the claim despite having been given notice in terms of rule 26 of the uniform rules of this Court. In the result, they became *ipso facto* barred from pleading.

[3] The plaintiff accordingly set the action down (supported by a damages affidavit) for default judgment in compliance with the provisions of subrules 2(a) and 4 of rule 31. Indeed, this action has been enrolled for default judgment on no less than three occasions:

- a. On the first occasion, being 13 December 2012, this Court issued an order granting the defendant/defendants (who were duly represented by counsel on that day) the opportunity to bring a substantive application for the upliftment of the bar and to deliver draft pleas. This indulgence appears to have fallen on deaf ears.
- b. On the second occasion, being 7 May 2014 (18 months later), the defendants were again represented, this time by an attorney. On that occasion this Court ordered that the matter be removed from the roll with the “defendant” to pay costs on a party and party scale.
- c. On the third occasion, being 18 June 2015, the matter came before me. In the interests of justice and finality, I refused to grant any further indulgences or to countenance any further delays and heard the plaintiff’s evidence as provided for in rule 31(2)(a). It goes without saying that the defendants are at liberty to invoke the provisions of rule 31(2)(b) should they be dissatisfied with the order I am about to make.

The claim

[4] According to the particulars of the plaintiff’s claim the police arrested and assaulted him at his home in the area of Ntsundwane on 18 November 2010.

They were not in possession of a warrant of arrest. In particular, the third defendant attempted to suffocate him with a refuse bag. The police also confiscated R4 000, 00 in cash as well as a number of cartons of milk. Thereafter he was detained for four days. He sustained various injuries all over his body. According to a medical report, he presented with multiple bruises and whip marks on his forearms, his right shoulder and his penile shaft.

The affidavits

[5] In his affidavits in support of default judgment, the plaintiff states that the second and third defendants were amongst the police who assaulted him. He lists the injuries which he sustained (which are confirmed by hospital records) which resulted in him suffering from backache, pain in the area of his waist, a haematoma, genital pain, multiple bruises, weal marks across his right shoulder and a laceration and bruising of the shaft of his penis, resulting in erectile dysfunction.

[6] He was detained for a period of four days without a court appearance.

The evidence

[7] The plaintiff (who was 23 years old with a grade nine education at the time of the assault) elaborated further when he testified. He described how at least ten uniformed policemen in about seven marked police vehicles arrived at his home at about 22h00 on 18 November 2010. They demanded firearms which the plaintiff did not have and which they did not find despite a diligent search.

[8] They produced neither a search warrant nor a warrant of arrest. They handcuffed him and removed and confiscated R4 000, 00 from under his pillow.

This was money which his father who lived in Gauteng had sent to him and his five unemployed siblings. They never saw this money again. His assailants helped themselves to 16 cartons of long life milk which they consumed then and there. They assaulted him throughout the night with sticks, sprayed pepper spray in his eyes and attempted to suffocate him with a plastic bag. This took place in the presence of his younger brother, who was also assaulted and detained by the police. By the time they were taken away in one of the police vehicles it was already daylight. Many people witnessed their forced removal.

[9] He was detained in police cells for four days. He described the cells as cold with cement floors, smelly latrines and infested with lice. He was bitten by the lice.

[10] The assault to his genitalia resulted in him experiencing difficulty urinating which was not relieved by medical intervention. He still (five years later) suffers from back pain and pain in the area of his waist, particularly when the weather is inclement. At the time that he deposed to his affidavits in 2012 he was suffering from erectile dysfunction. In the plaintiff's words, his "manhood is not as strong as before." He was not given any reasons for his arrest and detention. When he was released he was simply instructed to go home as he had been "found not guilty". He did not enquire after the money which the police had taken for fear of being beaten up again.

[11] At the time he had been doing odd jobs as a plasterer earning minimal wages.

Damages

[12] The matter was adjourned for the appellant's counsel to submit heads of argument on the question of an appropriate damages award, which heads were

submitted on 8 July 2015, but for some inexplicable reason only made their way into the court file some six weeks later.

[13] Having heard the plaintiff's story and his description of the savage and unacceptable conduct of people who are meant to protect civilians, it is incumbent upon me to decide whether the claim for damages in the sum of R600 000, 00 is justified.

[14] Whilst each case should be considered on its own merits it is a useful tool to have regard to comparable matters in assessing damages. I mention a few:

- a. *Ndlovu v Minister of Safety and Security* (Eastern Cape High Court, Grahamstown: case no. 1203/2010)

Corbett and Honey vol VII K6-38 (original service, 2014)

Date of judgment: 12 August 2011:

In this matter the plaintiff, a Zimbabwean citizen, was unlawfully arrested at his residence on suspicion of the possession of stolen property which had been found in his house. He was incarcerated for two days in police cells under difficult circumstances despite having a fixed address. After his first appearance he was remanded for a further seven days for a formal bail application on the basis of unsubstantiated, incorrect and insufficient information. The charges against him were subsequently withdrawn. Mageza AJ awarded R230 000,00 in damages (R55 000,00 for unlawful arrest and detention in police cells and R175 000,00 for unlawful detention in prison for seven days). This award, upgraded to today's value, amounts to R285 890, 00.

- b. *Van der Laarse v Minister of Police and Another*
(North Gauteng High Court, Pretoria: case no: 31378/2012)

Corbett and Honey vol VII K6-107 (service 1, 2015)

Date of judgment: 18 October 2013:

The plaintiff was arrested without a warrant at Beit Bridge border post whereafter he was detained for four days in a hopelessly overcrowded container under filthy conditions. He was arrested by the second defendant who acted as if he was power drunk and in a disgraceful display to all those who witnessed these events. After four days he was released on bail. All charges against him were later withdrawn. Ebersohn AJ awarded general damages of R280 000,00 (which upgraded comes to R313 880,00) with *mora* interest calculated from the date of the issue of summons to date of payment. The learned judge also directed the registrar to forward the pleadings and all judgments in the matter to the Independent Police Investigative Directorate for their attention and urgent action against the second defendant (one Captain Sekelele) with the request that they report back to the court within 12 months with respect to what steps had been taken against him.

c. *Bantu v The Minister of Police and Another*

(South Gauteng High Court, Johannesburg: case no: 13609/2013)

Corbett and Honey vol VII K6-120 (service 1, 2015)

Date of judgment: 21 November 2014:

The plaintiff, a 30 year old male security officer, was ordered off a train after an enquiry as to why the train had been delayed. He was accused of having been forward and clever. He refused to leave the train as he was in possession of a valid ticket. He was grabbed by the collar and hit in the face with a fist and open hands. He was pushed down and his testicles were squeezed in full view of his wife and other passengers. Thereafter he was forcibly removed from the train and detained in a holding cell for 90 minutes. He was later handcuffed and bundled into a police van which drove at high speed, caused him

to be tossed around in the bin of the vehicle. At the police station he was detained in a small cell with several other people in filthy conditions for 48 hours whereafter he was taken to court. A concocted charge of interfering with the duties of police officials, was withdrawn by the prosecution. Makume J awarded compensation of R260 000,00 (which upgraded comes to R275 860,00) made up of R180 000,00 for unlawful arrest and detention, and R80 000,00 for assault.

[15] In *Minister of Safety and Security v M Tyulu* 2009 (5) SA 85 (SCA) Bosielo JA said the following at paragraph [26] of the judgment:

‘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 on such facts’.

[16] In *Masisi v Minister of Security and Another* 2011 (2) SACR 262 (GNP) at 267 paragraph [18] Makgoka J held as follows:

‘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.’

[17] In my view the facts of the matter before me cry out for a high amount of damages, particularly in view of the following aggravating features:

- a. The police stole money and food from the plaintiff and his unemployed siblings. They consumed the milk which they stole from him in his presence.
- b. They assaulted him savagely and severely in the presence of his brother from 22h00 until dawn of the following day.
- c. The assaults have resulted in the plaintiff still suffering from bodily pain today. He suffered from erectile dysfunction for some time after the assault and still feels stripped of his manhood.
- d. He was handcuffed and bundled into a police van in the presence of his sibling and in full view of the members of his community, by at least ten uniformed policemen who left his home in a cavalcade of at least seven marked police vehicles.
- e. In the circumstances he was treated as if he was an extremely dangerous criminal.
- f. He was detained at length under appalling conditions.
- g. The police blatantly ignored the plaintiff’s non-derogable rights set forth in section 35 of this country’s Constitution.
- h. Their conduct was malicious.

[18] Before making a final award with respect to compensation, it is necessary for me to deal with the position of the second and the third defendants. As I have said, the plaintiff’s version is that his home was invaded by many policemen, and that he was also assaulted by many. The only reason he was

able to single out the second and the third defendants was because he was able to read their name tags, and because it was the third defendant who had tried to suffocate him. It is trite law that the first defendant is liable for wrongful and unlawful acts committed by members of the police during the course and scope of their duties. There is nothing before me to suggest that this case is any different. It also seems to be the view which was ultimately adopted by the plaintiff's legal representatives and by the judges who made previous orders in this matter.

[19] Having regard to the foregoing I am of the view that an award of damages in the sum of R400 000,00 is appropriate, made up as follows:

- | | |
|---|-------------|
| a. Unlawful arrest: | R100 000,00 |
| b. Unlawful detention | R150 000,00 |
| c. Assault, contumelia and pain and suffering | R150 000,00 |

[20] I accordingly make the following order:

- a. The first defendant is directed to pay to the plaintiff the sum of R400 000, 00 (four hundred thousand rand) together with interest thereon determined according to the current *mora* interest rate calculated from the date of judgment to the date of payment.
- b. The first defendant is directed to pay the plaintiff's costs of suit.
- c. The registrar of this court is directed to forward a copy of this judgment to the National Director of Public Prosecutions and to the Independent Police Investigative Directorate for their attention, together with a request that they report back to this Court within 12 months regarding any action taken or contemplated in connection with this matter.

I.T. STRETCH
JUDGE OF THE HIGH COURT

6 October 2015

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