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**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO: 11909/04

DATE: 8 DECEMBER 2009

NOT REPORTABLE

In the matter between

A M MASANABO

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGEMENT

1

The plaintiff sued the defendant out of this division in an action based on the following facts, as pleaded:

1.1 that on 10 November 2002 the plaintiff was arrested by two uniformed members of the SAPS at Pretoria;

1.2 that the arrest was effected without a warrant.

1.3 that the plaintiff was detained at Pretoria by members of the SAPS from Saturday afternoon 10 November 2002 until Sunday afternoon 11 November 2002;

1.4 that in effecting the arrest, the members of the SAPS acted maliciously and/or wrongfully and/or unlawfully,

1.5 that the plaintiff suffered damages in the sum of R170 262.50 made up as follows

1.5.1 general damages in the sum of R120 000.00;

1.5.2 estimated damages for loss of earnings as a taxi driver in the sum of R262.50:

1.5.3 damages for contumelia in the sum of R50 000.00

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2.1 To this suit, the defendant filed a plea and a special plea, the latter of which pertained to the non-compliance with section 3(2)(a) of Act 40 of 2002. At the hearing. Mr Motepe abandoned the special plea and therefore no more shall be said about it

2.2 The plea filed by the defendant contains an admission regarding the arrest but the defendant pleaded that the plaintiff was arrested on a “reasonable suspicion that he was in possession of a stolen motor vehicle and consequently [was] a suspect”

2.3 All further contumelia and damages are denied

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3.1 At the hearing. Mr Geach acting on behalf of the plaintiff, moved for an amendment of par 9.2 of the particulars of claim to add the following:

"....plus R500 for the loss of the hire of the bakkie."

Thus the total amount of damages claimed is the sum of R170 762.50.

3.2 No objection was made to the amendment and it was granted and the pleadings thus accordingly amended.

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As both merits and quantum are in dispute. I was handed a document marked Exhibit C, which sets out facts that are common cause and facts that are in dispute. This document reads as follows:

'FACTS THAT ARE COMMON CAUSE

1. The identity of the parties.
2. That the Plaintiff was arrested and detained on 10 November 2002 and thereafter released.
3. Vicarious liability of the Defendant.
4. The arrest was without a warrant.

FACTS THAT ARE IN DISPUTE

1. That Plaintiff was unlawfully, maliciously arrested and detained.
2. That Plaintiff suffered any damages
3. That Plaintiff was a taxi driver
4. That Plaintiff gave full and adequate particulars of the owner
5. That the members of the SAPS ignored the owner of the vehicle
6. That members of the SAPS initially agreed to accompany the Plaintiff to tire owner but for no apparent reason subsequently changed their minds.
7. That Plaintiff was kept without toilet facilities and bedding.'

It bears mentioning that Mr Geach abandoned the malicious arrest part of the case during his closing argument.

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The following persons testified

- 5.1 the Plaintiff himself.
- 5.2 Mr Ntuh on behalf of Plaintiff being the owner of the vehicle in question;
- 5.3 Insp Jenny Lee Kemp for Defendant.

5.4 Insp Leonie Grobler for Defendant;

5.5 Insp Nqoko for Defendant;

THE PLAINTIFF

6.1 The plaintiff testified that he is [.....] years old and that he had parked his uncles bakkie. a brown Ford Cortina at a garage in Club View and was resting (actually sleeping) in the bakkie. He was awoken to knocking at the window of the bakkie and saw that there were uniformed police officers with a Flying Squad car. They asked him to get out of his vehicle and there was a white lady who kept shouting here is the car. "*It is my father's car*" He had never seen this lady prior to that night. She kept telling the officers that it was a colour of the vehicle belonging to her father.

6.2 The police asked him to open the bonnet of the vehicle and they inspected it whilst talking on their radio and then they told the plaintiff that they were taking him to the Wierdabrug Police Station where they arrived at approximately 23h00.

6.3 The woman who accused plaintiff of being in possession of her father's vehicle said that she was cold and asked if she could fetch something to wear and she left and returned with a jacket.

6.4 All the time the plaintiff kept telling the police officers that the owner of the vehicle was available and could be reached They asked him whether he knew where the owner lived and he told them who the owner was and where he lived. Although they would take him to find the owner this in fact never transpired and the plaintiff was informed that he would be charged for being in possession of a

suspected stolen vehicle Although the plaintiff informed them who the owner was and that he would take them to the owner he was ignored and he testified that he was read his rights. removed of his possession and locked in a cell which consisted of a wall with bars He described it as "more of a cage than a room". There was a 2litre container with urine in it and it stank, there was no toilet and no bedding.

6.5 Although the plaintiff asked for something to put on as it was cold, they didn't. Although he was told they would give him a blanket they didn't do that either After the change of shifts, he was taken to a cell and shown a bed and blankets and toilet facilities He was brought tea and bread eventually given the opportunity to make a telephone call and he telephoned someone to fetch his Uncle Ntuli. In the early morning he was taken to the charge office where he found his uncle Ntuli who had brought the ownership documents of the vehicle to show the police as the plaintiff had requested him to Although Mr Ntuli showed the policemen the documents and asked the police to release the plaintiff, the plaintiff testified that they took him back to his cell He was called again at approximately 09h00 on the Sunday being the day after his arrest

6.6 It then transpired that although there were further enquiries made to the plaintiff by other SAPS officers, he was still not released and he was seen by other people who usually use his taxi services

6.7 Eventually the plaintiff was released at approximately 16h00 He was informed that the bakkie had been inspected and nothing untoward found and he could return the following day to fetch the bakkie The bakkie was eventually returned to the plaintiff two days later.

6.8 No criminal charges were ever pressed and nothing came of the matter.

7.1 The plaintiff further testified that he is a taxi driver and head of the Marshalls at his taxi rank. He is a deputy chairperson of the disciplinary section of the Tshwane/Marabastad Taxi Association. He was incarcerated with 2 other people he knew; whilst he was in custody he was seen by the Chairman of his Association and by Mr Ntuli.

7.2 He stated that he felt emotionally abused and he felt very bad as he is the person who usually keeps discipline at the rank and he wondered now people would now regard him also because he wore his ZCC badge. He was concerned how this would affect him at work and at Church.

7.3 After his release he was subjected to people's questions about his arrest and he was

made to feel bad. What compounded matters is that his accuser at the police station was allowed to get herself something warm to wear but he was not afforded the same courtesy. He stated that he felt *"humiliated and insulted"*

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8.1 Insofar as his income is concerned he makes his living transporting people and goods

8.2 Regarding the bakkie he testified that he had borrowed it to remove a Zozo house from Knoppteslaagte to Olievenhoutbos and he would receive R500 for doing this. He would have done this the Saturday and still gone back to his taxi business after he'd completed the job. However, because of his arrest, he was unable to do this job. He also lost out on his usual taxi work as he was unable to go back to work on the Sunday after his release.

8.3 The plaintiff testified that on a Sunday he does approximately 5 trips and

earns R3-50 per passenger. This means that there would have been approximately 75 passengers in total.

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9.1 Cross examination did not take the plaintiffs case much further, nor did it make any dent in the plaintiff's credibility as a witness.

9.2 It was put to him that Insp Kemp would testify that the plaintiff was arrested at approximately 3.30a and that he was released at approximately 13h00 the following day. but the plaintiff denied this.

9.3 The fact that the plaintiff could not give Mr Ntuli's exact physical address but knew it from sight is neither here nor there as the point is that he was never taken there and Mr Ntuli in any event did produce the vehicle's documents when plaintiff asked him to do so.

9.4 One aspect that the cross did clear up is that the plaintiff would have expended approximately R100 - R150 petrol in his transport of the Zozo hut and his profit would thus be between R350 – R400.

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The next witness for the plaintiff was Mr Johannes Ntuli who testified that:

10.1 he is the plaintiff's uncle and the owner of a Ford Cortina bakkie which he had lent to the plaintiff.

10.2 He heard of the plaintiffs arrest from his friend on the Sunday and he went to the police station at approximately 09h00 and took his proof of ownership papers with him to the Wierda Brug Station.

10.3 He left the police station at approximately 13h00 and only got his bakkie back a few days later.

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Cross examination showed that Mr Ntuli went to fetch the plaintiff after his release, in the afternoon and the plaintiff dosed his case.

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The defendant's first witness was Insp Jenny Lee Kemp who was the arresting officer at the time She testified that:

12.1 she was at tne Wierdabrug Police Station when a lady arrived and said that during approximately 1999 or 2000 her Ford Cortina had been stolen and while she was driving that night, she had seen it parked at a Shell Garage. She said there were certain identifying marks on the vehicle such as the switches her father had installed, a towbar a bump on the vehicle and the doorhandle that opened and closed in a strange way.

12.2 Insp Kemp also testified that the vehicle was stated to have an automatic transmission but the bakkie was manual.

12.3 She stated that she woke the plaintiff up as he was sleeping in the vehicle and he explained that the vehicle belonged to a friend of his and he was asked to accompany them to the station. Mrs Viljoen (the complainant) was also asked to point out the identifying marks on the vehicle at that time.

12.4 They arrived at the station at approximately 01h00. The plaintiff was with them when they investigated the vehicle and he could not give us the address of the bakkies owner so he was read his rights at approximately 03h30 and was

put in a holding cell and when the paperwork was completed an hour later he was taken to the proper cells. Her shift ended at 07h00 but she left Wierdabrug at about 05h00 and has no idea what happened to the plaintiff after she signed the occurrence book and handed the plaintiff over.

12.5 Insp Kemp admitted that there were certain discrepancies between the vehicle stolen and the vehicle in the plaintiff's possession. She also stated that although the plaintiff told her who the owner of the vehicle was he could not give her an address or telephone number of the owner and she denied that the plaintiff told her he could take her to the owner's house. She admitted that her own suspicions were based upon Mrs Viljoen's report.

12.6 During cross examination much was made by Mr Geach of times that appeared on the documents contained in Bundle D and the time of arrest and the time of release. This is relevant to the issue of how many hours the plaintiff spent in detention and I will return to this issue later under the discussion of quantum.

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The next witness was Insp Leonie Grower. Unfortunately, Insp Grobler had undergone a brain operation which has affected her long term memory and she had independent recollection of the facts and could only testify as to what she saw in the bundles before court and the procedures she usually follows when an arrest is made.

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Insp Ngoko was the last witness to testify for defendant. He is an Inspector with the Vehicle Theft Unit and he was called in to do the inspection on the Ford Cortina. He testified that he had found that the vehicle had not been interfered

with and he signed the statement found at D12.

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AD MERITS

From the outset I must state that I found all the witnesses to be credible and I must also state that in my opinion, this matter does not turn on credibility, but on the objective facts of this matter. What is clear is that the arresting officers did not have a warrant. That being so the arrest must then be done in terms of the provisions of s40 of the Criminal Procedure Act.

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It is also so that the onus of proving that the arrest and detention are not unlawful or wrongful rests on the defendant, (see **Union Government v Bolstridge** 1929 AD 240 **Brand v Minister of Justice** 1959 (4) SA 712 (A) at 714, **Bentley and another v McPherson** 1999 (3) SA 854 (E) AT 857)

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17.1 During his argument, Mr Geach stated that:

17.1.1 the plaintiff and his uncle corroborated each other in all material respects;

17.1.2 the documents contained in Bundle D are contradictory and cannot be relied upon; 17.1.3 the police's version is improbable in material respects

17.2 He submitted that even on the defendant's version, the plaintiff was

arrested merely upon the say-so of the complainant and no rudimentary enquiries were made. Instead of impounding the bakkie and letting the plaintiff go he was arrested and even when the owner arrived with proof of ownership, he was ignored.

17.3 He submitted that, as stated in *Louw v Minister of Safety & Security* 2006 (2) SACR 178 (T) arrest should be the last resort and he stated that there was no doubt that the arrest and subsequent detention were unlawful

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Mr Motepe on behalf of the defendant, submitted that on the facts, the plaintiff was asleep at a garage at 01h00, the complainant had pointed out certain identifying marks on the vehicle, and that Insp Kemp had not immediately arrested the plaintiff but that she was brought under the impression that the vehicle was stolen. As I understand his submissions he states that the police at all times acted reasonably in terms of the Act.

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I cannot agree with Mr Motepe's submissions. At the very least, if the police were under the impression that the vehicle was stolen then they could have impounded the vehicle. Where it is clear that the plaintiff offered a reasonable explanation for his whereabouts, tendered to take them to the owner and where the owner indeed arrived the following day to show proof of ownership, objectively speaking there could be absolutely no reason to have either arrested or held the plaintiff. In my opinion, and perhaps whilst having the best of intentions the police acted hastily in arresting the plaintiff and I thus find in favour of the plaintiff on the merits.

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AD QUANTUM

It is clear that the plaintiff is entitled to damages the question being the quantum thereof. Mr Geach submitted that an amount of R80 000.00 is reasonable bearing in mind that:

20.1 the plaintiff was in custody from approximately 03h30 on the evening of his arrest until approximately 16h00 the following day;

20.2 the plaintiff was held under unpleasant circumstances in the holding cell before being transferred to the cells proper at about 07h00 when the shift changed and was not offered a blanket or warm clothing despite his requests and despite the fact that the complainant was allowed to fetch warmer clothing because she was cold.

20.3 the police were *"extremely unsympathetic with the plaintiff and Mr Ntuli and unduly brusque"*

20.4 the plaintiff is a man of some standing in his community and his incarceration received wide publicity.

20.5 he suffered a loss of earnings and an amount of R662.50 would be appropriate:

20.5.1 R500 00 in respect of the job lost for transporting the Zozo from which an

amount of R100 should be deducted for transport leaving an amount of R400.00

20.5.2 the amount of R262.50 for the 5 trips of passengers he lost out on

calculated at 75 passengers x R3-50 per person

20.6 an amount of R50 000.00 in respect of contumelia.

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Mr Motepe submitted that:

21.1 the amount claimed for damages is excessive when regard is had to the present

authorities and the time spent in detention which was at maximum a period of 12 hours;

21.2 insofar as the loss of earning is concerned, the plaintiff was released at 13h00 on the

Sunday and at most had he gone back to work after his release, he would have forfeited 1 load of passengers.

21.3 the amount of R400.00 is reasonable for the loss of the income from the transport of the Zozo;

21.4 an amount of R50 000, 00 for damages, Including contumelia is warranted as the plaintiff was in custody for no more than 12 hours, he was treated well after he was moved to the cells proper.

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Before I move on to the issue of the determination of quantum there is one

aspect which bears mentioning here and that is the one outlined in paragraph 17.1.2 supra. I agree with Mr Geach that the documents contained in Bundle B are somewhat contradictory and that as a result they are rather unreliable. Just one such example is the time of the Plaintiffs release which the police record puts at approximately 13h00 and the evidence of the Plaintiff and his unde put at 16h00 Although this issue is not germane to the issue of the merits. it ts germane to the issue of quantum and will be treated accordingly.

Each case must be regarded on its own merits and at best, the authorities give us no more than a general guideline as to damages in matters of this nature To give but a few examples

23.1 In the matter of **Louw and another v Minister of Safety and Security and others**¹ _Berllesmann J awarded the Plaintiff an amount of R75 000.00 in damages after the plaintiffs were incarcerated for approximately 20 hours in circumstances which were humiliating, an invasion of their dignity and emotionally damaging.

23.2 In **Serla v Minister of Safety and Security and others**² an amount of R50 000.00 was awarded after the Plaintiff was arrested and detained in terms of a warrant issued in terms of the Domestic Violence Act³ for some 20 hours.

23.3 In **Bentley and another v McPherson**⁴ the Plaintiff was awarded R15 000,00 after

¹ ___2006 (2) SACR 178 (T)

² ___2005 (5) SA 130 (C)

³ No 166 of 1998

⁴ ___(1999) 2 All SA 89 (EC)

spending some 9 % hours in detention

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Insofar as quantum is concerned I therefore come to the following conclusion

24.1 as to loss of earnings:

24.1.1 I disagree with Mr Motepe's submissions stated in paragraph 21.1 supra and find in favour of the Plaintiff in this regard.

24.1.2 I take note of the concession made by Mr Motepe as contained in paragraph 21.3.

24.1.3 I therefore find that the amount to be awarded to the Plaintiff in respect of his loss of earnings is the amount of R662,50.

24.2 I find that the Plaintiff was incarcerated for a period of 17 ½ hours and the appropriate

amount of damages to award including those in respect for *conlumelia*, is the amount of R70 000.00.

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COSTS

24.1 Mr Geach submitted that the plaintiff is entitled to costs on a High Court scale as it was proper for this matter to have been brought in this court. He therefore asks for an order that the defendant be ordered to pay the plaintiffs

costs of suit on the High Court scale.

25.2 Mr Motepe submitted that the plaintiff could never have thought that his damages could reasonably amount to R100 000.00 or more in light of the relevant authorities. He submitted that this court has a discretion as regards the issue of costs as well as the scale on which costs may be granted, but that the discretion must be exercised judicially.

25.3 I agree with Mr Motepe. In light of the facts of this matter, it could not be reasonably contemplated that the amount of damages to which the plaintiff would be entitled would exceed the sum of R100 000,00 and this matter is not so unduly weighty that it warrants, on its facts or the law the attention of a High Court which would justify the scale of the award to be those of the High Court.

THE ORDER

I therefore make the following order:

1. The plaintiff succeeds on the merits.
2. The plaintiff is awarded the sum of R 70 000 00 damages, including contumelia.
3. The plaintiff is awarded the amount of R662 50 for loss of income.
4. The defendant is ordered to pay the costs of the action on a party and party scale which costs are awarded on the Magistrate s Court scale.

B NEUKIRCHER (AJ)