

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 82307/2018

Date of hearing: 22 April 2024

Date delivered: 29 April 2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
29/4/24	[REDACTED]
DATE	SIGNATURE

In the matter of:

TSHILISANO NEFALE

Plaintiff

and

MINISTER OF POLICE

Respondent

JUDGMENT

SWANEPOEL J:

[1] This is a claim for damages arising from the alleged unlawful arrest and detention of the plaintiff on 30 May 2017. The plaintiff's case stands uncontested, and is the following: At approximately 18h00 on that day the plaintiff was walking in Sunnyside, Pretoria, having just delivered a laptop to a friend. The plaintiff is a Rastafarian, and wears the distinctive apparel typical to that religion. He was then an intern with the Department of International Affairs and Cooperation, and he was still dressed in his work clothing and his Rastafarian hat. As he approached an intersection a police vehicle with two occupants drove past. They greeted the plaintiff in a Rastafarian manner, and he returned the greeting. The police officers called the plaintiff to their vehicle (they called him 'Rasta'). As he approached them one of the police officers demanded marijuana and said that if the plaintiff did not give them marijuana, they would search him.

[2] At that point the police officers alighted from the vehicle. The plaintiff demanded to know why they were targeting him with such a request. He was told that it was because he was a 'Rasta'. The plaintiff had words with the police officers, who then grabbed him. The plaintiff resisted them. The police officers then called for backup, and a further four officers arrived on the scene. Together they picked the plaintiff up by the legs and arms and threw him into the police vehicle. The plaintiff was not told why he was being arrested, nor were his rights explained to him.

[3] The plaintiff was taken to the Sunnyside Police Station where he was placed in a cell. The police officers told the plaintiff that he was a 'Venda boy' who was full of witchcraft, and that he was trying to present himself as educated. His shoe laces and cell phone were taken from him. The cell was approximately 10 x 5 meters, and he shared it with more than five other persons.

[4] Between approximately 21h00 to 22h00 the investigating officer took the plaintiff out of the cell. He asked the plaintiff to provide a statement, which the plaintiff refused to do, writing only that he did not know why he was under arrest. He was returned to the cell. Sometime after midnight another police officer came to him. He searched the plaintiff without finding anything incriminating. When asked why the plaintiff was in custody, the police officer merely said that he didn't know, and that only

‘Lucky’ would know. Lucky turns out to be the arresting officer. He was present in court and was pointed out by the plaintiff. A few minutes later Lucky came to the cell and demanded that the plaintiff sign a ‘notice of rights’ form. The plaintiff refused to sign the document when he noticed that the time reflected thereon was 18h55, and not the correct time which was after midnight. When the plaintiff refused to sign the form, Lucky told the plaintiff that he was being disrespectful.

[5] The plaintiff did not receive any food at Sunnyside Police Station. The following day he was taken to court where his case was remanded to the following day for confirmation of his residential address. He was taken to the Kgosi Mampuru Correctional Facility.

[6] At Kgosi Mampuru the plaintiff was put in a cell with a large number of other prisoners. The new-comers to the cell were all assaulted, including the plaintiff, and he was only saved from further assault by an elderly man who took the plaintiff under his wing, protecting him through the night.

[7] The experience of being in a cell was clearly horrifying to the plaintiff. The plaintiff says that the toilets had no doors, and neither did the showers. There were people defecating in full view of the others in the cell. The prisoners were not given blankets, and they had to sleep on the floor unless they were able to pay R 30 to rent a blanket. There were men openly masturbating.

[8] The plaintiff is obviously still traumatized by his experience. When he recounted this version he was visibly upset and tearful. He says that he was very afraid that he would be raped or otherwise assaulted, and even the protection extended to him by the elderly man raised his hackles. He spent the night unable to sleep.

[9] The following morning the plaintiff was taken to court where he was granted bail. The plaintiff’s brother managed to pay the bail, and he also alerted the plaintiff’s supervisor of his arrest. The case dragged on for some 18 months before being withdrawn by the state.

[10] The plaintiff’s case was closed after his evidence was led. The defendant also chose to close its case without leading any evidence. The defendant elected not to address me on the merits, a (belated) wise

decision. The arrest was no longer in dispute, and the defendant had not satisfied the onus on it to prove that the arrest was lawful.

[11] That left the quantum aspect for consideration. The plaintiff was, at the time of his arrest, approximately 24 years of age. He had already attained an Honours degree and was studying towards his Master's degree in political science. As I have said above, he was engaged in an internship with Dirco. The plaintiff is clearly an intelligent, ambitious and sensitive individual. He says that he had always strived to be an upstanding citizen.

[12] The plaintiff was humiliated in public by the police officers who descended on him. One would have expected at least one of the six police officers who attended at the scene to have called a halt to what was obviously unlawful conduct, and it says much for the culture at this police station that none did. The arresting officer had no reason to target the plaintiff other than his religion, a fact conceded by defendant's counsel.

[13] Therefore, not only did the police officers infringe on the plaintiff's human rights to freedom and security and the right not to be arbitrarily deprived of his freedom, they also did so in a manner which infringed upon his right to human dignity. Their reason for doing so infringed on the plaintiff's right to religious freedom. The police officers fabricated an offence to justify the plaintiff's arrest. The plaintiff was then subjected to two nights in custody, with the second night in Kgosi Mampuru being especially horrifying.

[14] The trauma that the plaintiff suffered was palpable in court. The plaintiff was tearful, and on one occasion I adjourned court to give the plaintiff an opportunity to recover. The plaintiff is a sensitive person who would have felt the trauma of his incarceration even deeper than other more resilient persons might have. One must also consider the humiliation that the plaintiff would have felt by the disclosure to his supervisor of his arrest.

[15] The plaintiff claimed a global sum of R 500 000 for unlawful arrest, for deprivation of freedom, *contumelia*, emotional stress and psychological trauma, and embarrassment for being arrested in public. In argument the plaintiff's counsel submitted that R 180 000 would be an

appropriate award. The defendant contended that the sum of R 60 000.00 was appropriate.

[16] Both parties addressed me on authorities relating to quantum in these types of cases, but neither have submitted heads of argument, nor have I been provided with references to, or copies of these judgments. I am aware of the dictum in *Minister of Safety and Security v Tyulu*¹ where the Court (per Bosielo AJA) said that the purpose of damages for unlawful arrest is not to enrich a party, but to provide him or her with solatium for his or her injured feelings. The elements to consider when awarding damages are the plaintiff's personal circumstances, the manner of arrest, the duration of detention, the degree of humiliation to the plaintiff, and any other relevant factors.² It is helpful to consider awards made in comparable cases, without making a "*meticulous examination of awards made in other cases*".

[17] In *Diljan* (*supra*) the plaintiff was held in custody in unsavoury circumstances for a period comparable to this case. The Court awarded R 120 000 for unlawful arrest and detention. However, in that case the plaintiff had in fact committed a Schedule 1 offence and her arrest was held to be unlawful because the police officers had not exercised their discretion to bring the plaintiff before court in a manner other than by detention. In this case the plaintiff did not commit any offence, distinguishing this case from *Diljan*.

[18] In *Khedama v The Minister of Police*³ the plaintiff was arrested and held in custody for 12 days. The plaintiff was held in unsavoury circumstances, and was humiliated and traumatized by the experience. She was awarded R 100 000 for unlawful arrest, and R 80 000 per day for unlawful detention. The plaintiff was also awarded damages for defamation and general damages for suffering and psychological shock. In *Diljan* (*supra*), the Khedama award was criticized as being excessive.

[19] It appears to me that an award in the amount that the plaintiff contends for is appropriate. The amount argued for by the defendant is

¹ 2009 (5) SA 85 (SCA); [2009] ZASCA 55

² *Diljan v Minister of Police* [2022] ZASCA 103 (24 June 2022)

³ 2022 JDR 0128 (KZD)

totally inadequate, especially given the abominable conduct of the police officers.

[20] I must, furthermore, express my dismay at the manner in which the defendant prosecuted this case. The summons was issued in 2018, and it is very evident from the plea that little to no investigation or consideration went into its preparation. The defendant simply pleaded a bare denial of all of the averments in the particulars of claim, specifically denying the arrest.

[21] It is now six years later, and the bare denial in the plea still stands, notwithstanding that it is crystal clear that the plaintiff was in fact arrested by the police, who were acting within the course and scope of their employment. Before the trial commenced the plaintiff advised me that the arrest was not disputed, and that the onus therefore rested on the defendant to prove the lawfulness of the arrest. The defendant's counsel, however, insisted in chambers that the arrest was still in dispute (in the face of its own discovery of the arrest documents), only to concede that the plaintiff had in fact been arrested a few minutes later.

[22] In cross-examination of the plaintiff the defendant did not deny any aspect of his evidence. The high point of cross-examination (which was very cursory) was when the plaintiff was asked how big the cell was at Sunnyside, how many persons had occupied the cell, and whether he had been given food at Sunnyside and Kgosi Mampuru. Not a single material part of his evidence was disputed.

[23] After the plaintiff testified and closed its case, the defence also closed its case without calling any witnesses, even though the arresting officer was in court. This begs the question why, if the defence was at all times in agreement with the plaintiff about the facts, this matter was allowed to drag on for six years, and be taken to trial without any attempt whatsoever at settling the matter, or even simply curtailing the proceedings by making the appropriate admissions.

[24] Not only is the manner in which the matter was conducted by the defendant a waste of scarce and valuable resources of the State Attorney's office, but also of judicial resources.

[25] Finally, an aspect which is relevant to costs is the conduct of the police officers. Not one, but six officers descended on the plaintiff in public, dragging him into a police van by his arms and legs, in full view of the public. The police then manufactured an offence, detaining the plaintiff for almost three days. The only reason why the plaintiff was targeted was because of his distinctive religious regalia. The plaintiff was pounced upon by those persons who were in fact tasked with protecting him. Their conduct was a disgrace. I will direct the Registrar to forward this judgment to the Commissioner of Police and to the Minister of Justice.

[26] Consequently, I find that, given the polices' conduct, and the blatant infringement on the plaintiff's human rights, it would be appropriate to make a costs order on the High Court scale, so that the plaintiff would not be unduly out of pocket. Had I been asked to do so, I would have awarded punitive costs.

[27] I make the following order:

[27.1] The defendant shall pay the plaintiff the sum of R 180 000.

[27.2] The defendant shall pay interest on the aforesaid sum *ex tempore morae* from 14 November 2018 to date of payment.

[27.3] Defendant shall pay plaintiff's costs on the High Court party and party scale.

[27.4] The Registrar is directed to forward this judgment to the National Commissioner of Police and to the Minister of Justice.


SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR THE PLAINTIFF:

Adv. N Babalwa

ATTORNEY FOR THE PLAINTIFF:

Ernest Nemusimbori
Attorneys

COUNSEL FOR THE DEFENDANT:

Adv F Mhamba

ATTORNEY FOR DEFENDANT:

The State Attorney

DATE HEARD:

22 April 2024

DATE OF JUDGMENT:

29 April 2024