

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES

24/01/2024

SIGNATURE

DATE

CASE NO: 2630/2021

In the matter between:

MOSHE THOBELA

Plaintiff

and

MINISTER OF POLICE

Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 24 January 2024 at 10:00.

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The Plaintiff ("Thobela"), a thirty-two-year old male person, sues the Defendant ("the Minister") for damages emanating from his alleged unlawful arrest, detention and assault on 17 December 2018 at approximately 23:00 by members of the South African Police Services ("SAPS") stationed at various South African Police Stations. The arrest is said to have happened at or near Alexandria Trust in the District of Bushbuckridge, Mpumalanga Province. The Minister is sued in his capacity as the executive head of SAPS.

[2] Despite the issuing of founding papers, service thereof and delivery of other subsequent processes, the action was not defended and the Minister was not represented in Court on the date of trial. Thobela was arrested on 17 December 2018, detained at Calcutta Police Station and released on 19 December 2019. The date of release of Thobela stated in the particulars of claim appears to be incorrect because his evidence in Court was that he was released on 19 December 2018 and that the period of arrest over those two nights covered approximately thirty-five hours. Moreover, Dr Makukule confirmed that he examined Thobela on 19 December 2018 and not 2019.

[3] Thobela was allegedly woken up late at night arrested, detained and assaulted by members of SAPS for being a suspect in robbery. In consequence of the assault, Thobela sustained the following injuries:

3.1 Left ear,

3.2 Left knee;

3.3 Left side of the head;

3.4 Chest; and

3.5 abdomen.

[4] The Minister has neither contested the merits nor the quantum. In view of the Minister's lack of response, I am bound to accept that Thobela was wrongfully arrested, detained and assaulted in the manner described by him. I am further compelled to accept that the actions of the members of SAPS were intentional and legally inexcusable. The actions of the members of the SAPS led to the injuries described above. The only issues that this Court is required to determine are therefore causation and patrimonial loss. In other words, two of the four elements of delictual liability are already present. These are, the wrongful act and fault, either in the form of negligence or intention.

EVIDENCE

[5] In support of the claimed amount, two witnesses were called. The first was Thobela himself followed by Dr Makukule who examined him following the assault. To start then with the evidence of Thobela. He testified that he was thirty-two-years old, married with one minor child and that he resides in Alexandria, in the District of Bushbuckridge, Province of Mpumalanga with his wife and child. He stated that he was awoken by loud bangs coming from the windows of his bedroom.

[6] He slightly opened the curtain and noticed that there were about seven members of the SAPS who demanded that he open the door. He told them that he would not do so unless they furnished him with a search warrant. This seemed to infuriate them as they told him that they would proceed to open without his permission. They broke down the burglars and forcefully pushed open the door to his bedroom. They instructed him to come

out, which he did. He was directed to a dusty ground where he was instructed to lie down. When he refused, he surprisingly found himself on the ground anyway.

[7] He could not tell how he was brought down but thought that he was kicked on the legs. Once on the floor, the Police assaulted him further by jumping on his back with their boots, repeatedly kicked him on his ribs and abdomen. He screamed and cried. They lifted him from the ground, and told to go back to his bedroom and to keep quiet as he was making noise. The Police then demanded to know from him what he was doing at Spar Ximungwe earlier that day. He answered that he went to buy envelopes on behalf of his mother-in-law and food for himself.

[8] They rejected his explanation and demanded to know who he was with when he went to Spar Ximungwe where he and his friends robbed a cash-on-transit vehicle. They slapped him on the face with open hands. They then took an empty plastic, covered his head and face, and tied it around his neck. They continued to slap his face with open hands and fists on his head and ribs. They took-off the plastic and again repeated the question concerning the robbery at Spa Ximungwe. He denied any knowledge of the robbery as a result of which they covered his head in a plastic and resumed the beatings.

[9] They ultimately relented and told him that they were arresting him. They guided him to a grey double cap Ford Ranger in which he was conveyed to Marite Satellite Police Station. Discovering that Marite did not have holding cells, they conveyed him to Calcutta Police Station where the Police at that station attended to admission administrative procedures before incarcerating him over night. He said that Police officers visited him in the Police cell at about 21:00. They asked the same questions that were put to him by the group of Police Officers that arrested him the previous night.

[10] He told them that he was not part of what had happened at Spar Ximungwe. They left him but warned that they would return the following day to assault and to establish what the truth was. They did not come back in the morning instead, he was informed that he would be released and that they were waiting for some officer to sign his release

warrant. He was eventually set free at about 10:00 on 19 December 2018 without any charges levelled at him and without appearing in Court. On his release, he went to see Dr Makukule for medical examination. He explained to him that he felt pains on his left ear, chest, ribs and left knee.

[11] Dr Makukule is the Medical General Practitioner who examined Thobela after his release from custody on 19 December 2018. His qualifications were not challenged. He confirmed that he examined Thobela and that he prepared a medical certificate to which he appended his signature. Thobela told him that he was apprehended, assaulted and detained. His medical examination of Thobela revealed:

11.1 A swollen left head;

11.2 A swollen left ear;

11.3 A tender chest suggesting that it was moderately painful;

11.4 Tenderness on the left and right sides of the abdomen;

11.5 That Thobela's urine showed protein without any trace of blood cells confirming that the injuries were moderate.

[12] These injuries, he said, were consistent with those that could have been sustained as a result of assault. The injuries were serious but not as severe as they could have been. Thobela did not obtain further medical treatment from any other medical institution other than that from Dr Makukule.

ISSUES

[13] The issue to be decided is whether or not the jurisdictional preconditions mentioned below have been satisfied in particular, whether or not a reasonable suspicion

to arrest was present. It will be adequate to dismiss the claim if this Court finds that one of those jurisdictional prerequisites were not met. However, it will not be the end of the enquiry if the Court finds that all of the conditions were fulfilled. The next question that will still require determination will be to establish whether the Police Officers exercised their discretion to arrest rationally having regard to the circumstances.

[14] Insofar as quantum is concerned, Thobela must demonstrate that he has made out a case that the injuries that he suffered directly contributed to the loss that he now seeks to recover from the Minister. If that causal link cannot be established, there cannot be liability on the side of the Minister and the claim will stand to be dismissed. Assuming that there exists a causal link between the injuries and his loss, Thobela will also have to satisfy this Court that the injuries are commensurate with the amount that he is claiming.

LEGAL FRAMEWORK

[15] Section 12(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996 stipulates that everyone has the right to freedom and security of the person, which includes the right:

- “(a) *not to be deprived of freedom arbitrarily or without just cause;*
- (b) *not to be detained without trial;*
- (c) *...;*
- (d) *...;*
- (e) *...”*

[16] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) provides that a peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1. The jurisdictional factors for a Section 40(1)(b) of the CPA defence were, in *Duncan v Minister of Law*¹, held to be as follows:

¹ 1986 (2) SA 805 (A) at 818G

- 16.1 The arrestor must be a peace officer;
- 16.2 The arrestor must entertain a reasonable suspicion;
- 16.3 The suspicion must be that the arrestee committed an offence referred to in schedule 1;
- 16.4 The suspicion must be based on reasonable grounds.

[17] Insofar as quantum is concerned, Thobela has referred this Court to two cases, *Fisa v Minister of Police*² and *Phefadu v Minister of Police*³, which, he contended are analogous with the case under consideration. I will look at these two cases more closely below. Whatever the argument is with the amount awarded in these two cases, the statement at Paragraph 17 of *Minister of Safety and Security v Seymore*⁴ is significant. The Court held as follows:

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."

[18] The above stated, certain general principles concerning awards in these matters have crystallised and it is significant that I describe them before proceeding with the assessment itself. In *Sondlo v Minister of Police*⁵ it was held that: *"where the coffers of the state to which citizens of the country make a contribution are to be the source for payment of damages, some restraint is called for when awarding damages."*

² (1263/2012) [2016] ZAECELLC 1 (26 April 2016)

³ (65249/2012) [2017] ZAPGPPHC 583 (12 September 2017)

⁴ 2006(6) SA 320 (SCA)

⁵ (14842/11) 2012 ZAPGJPHC 140(21 August 2012) at paragraph 10

[19] In similar terms, the Court in *Olgar v The Minister of Safety and Security*⁶, the Court stated:

"In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant."

[20] In *Rahim and 14 others v The Minister of Home Affairs*⁷, it was held:

"[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the Court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the Court ex aequo et bono. Inter alia the following factors are relevant:

- (a) Circumstances under which the deprivation of liberty took place;*
- (b) The conduct of the defendants; and*
- (c) The nature and duration of the deprivation.*

Having regard to the limited information available and taking into account the factors referred to it appears to me to be just to award globular amounts that vary in relation to the time each of the appellants spent in detention."

ANALYSIS

⁶ 2008 JDRJ582 (E) at para 16

⁷ 2015 (7K6) QOD 191 (SCA), at para 27

[21] An arresting officer must demonstrate that his reasonable suspicion to apprehend the suspect can be supported by objective evidence. Failure to establish such objective evidence, the suspicion cannot be justified and the arrest will be unlawful. The question is therefore, have all the four jurisdictional factors for the section 40(1)(b) defence been satisfied in this case? The Court find itself in an unenviable position where it has to decide without any contribution from the Minister. In the absence of evidence from the Minister, the Court will assume in favour of Thobela that the officers were peace officers and that the offence that he was suspected to have committed is a Schedule 1 offence.

[22] Again, the lack of evidence from the Minister makes it impossible to ascertain whether on the facts of this case Thobela has successfully demonstrated that the officers lacked a reasonable suspicion at the time of arrest - Thobela was part of a gang that robbed the Spar Ximungwe and that the suspicion was based on reasonable grounds. Even if all these jurisdictional facts were to be marked off as having been complied with, this Court would remain reticent whether or not the Police Officers exercised a proper or rational discretion to arrest him.

[23] Assuming that all these jurisdictional factors were complied with, the main obstacle for the Minister is, did the officers exercise their discretion to arrest rationally? Admittedly, it is clear from the evidence of Thobela that he was interviewed and questions put to him about a robbery at Spar Ximungwe. This Court does not have any clue why Thobela was suspected of having been part of that gang. Thus, a decision that they acted reasonably arresting him cannot be readily made.

[24] In any event, the purpose of arresting and confining a suspect is ordinarily to secure attendance at Court, to ensure that he does not temper with State witnesses or destroy potential evidence. From the evidence of Thobela, the Court is unable to discern whether any of these troubled the mind of the officers when they resolved to arrest and detain him for thirty-five hours. There is no evidence that Thobela was a flight risk and besides, the officers obviously had his address. Why they could not ask him questions

and warned him to come to the Police Station leaves this Court baffled. Everything considered, it is the finding of this Court that the officers were too eager to make an arrest where circumstances demanded more circumspection.

[25] Turning to quantum, the statement in the matter of *Seymore supra* is significant insofar as the use of previous decisions are concerned but it must be stated that each case must be assessed on its own facts. In consequence of lack of evidence from the Minister, this Court is prepared to assume in favour of Thobela that there exists a direct correlation between the injuries sustained and the loss suffered. This renders the consideration of causation gratuitous.

[26] In the matter of *Phefadu supra*, the Court awarded a globular figure of **R350 000.00**. Over and above the arrest and detention, stated the Court, the Plaintiff was severely assaulted by members of the Police and suffered an injury to his left eye; severe bruising to the left eye; severe bruising, abrasions and lacerations to the face, a ligamentous injury to the left arm and shoulder; bruising and muscular injuries to the left arm and shoulder; a deep laceration to the left shoulder, a concussive type head injury and emotional shock and trauma.

[27] In the matter of *Fisa supra*, the Court awarded a globular amount of **R300 000.00** for general damages where the Plaintiff was detained for approximately 6 hours during which it was found that he was severely assaulted. The general medical practitioner who first examined the Plaintiff in that case confirmed that the Plaintiff had complained of a headache and pains in his arms. During her examination of the Plaintiff, she noted bruises and swelling of his arms and haematomas on the back of his head.

[28] A Clinical Psychologist told the Court that the plaintiff would require 15 sessions of relationship, family and sexual counselling at the rate of **R920** per session. The Clinical Psychologist stated that the Plaintiff's prognosis could be regarded as poor. The Clinical Psychologists of the respective parties then compiled a joint minute wherein they agreed that the Plaintiff had initially developed acute stress disorder followed by post-traumatic

stress disorder with depressed mood. They also agreed that his condition has become chronic and he will require 15 to 20 session at **R920** per session.

[29] Dr Magagula, the Defendant's Psychiatrist, diagnosed the Plaintiff with major depressive disorder and chronic post-traumatic stress disorder. She was of the opinion that he suffered from distress triggered by exposure to cues, which remind him of the trauma, namely nightmares, insomnia, intense fear and the fear of being left alone in public places where he is likely to encounter Police officers. He further suffers from low self-esteem, sexual problems, daytime drowsiness and poor attention and concentration. She recommended both Pharmacological and Psychological treatment.

[30] I need to reiterate that it is important to bear in mind that each case is to be treated differently as previously decided cases may or may not be helpful. That is not to say that decided cases are to be disregarded but still they are not to be followed dogmatically. Thus, it is manifest from both the cases of *Fisa* and *Phefadu supra* that although the Plaintiffs in both matters were confined and assaulted for a shorter period when compared to the matter in *casu*, the injuries sustained and their *sequelae* were graver.

[31] While in both cases experts attested to the seriousness of the injuries suffered, in *casu* there are no particulars of the after effects of the injuries. I am consequently obliged to assume that Thobela's injuries were moderate, as testified by Dr Makukule who completed the J88 wherein he describes his finding of his examination of Thobela. It appears that future medical treatment is not foreseen as it is not even claimed. Equally there is no evidence that he has lost income or that he will in future as a result of the injuries that he sustained.

[32] Everything said, the award to be made will take into account that the Court does not take kindly to the violation of a person's right to liberty. While that is so, this Court is somewhat hindered in its determination of the amount to award to Thobela as a result of lack of evidence. Thobela did not adduce any evidence of the conditions under which he was held during the thirty-five-hour period. This Court cannot assume that the conditions

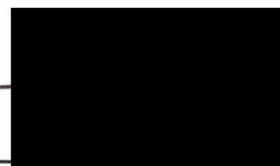
were bad or favourable. Furthermore, no evidence was presented stating how Thobela felt as a result of the unlawful arrest.

[33] That said, Thobela was arrested and assaulted in full view of his mother and sisters. The conduct of the officers of jumping on his back with their boots and kicking him on the ribs, head and abdomen was undeniably appalling. The duration for which he was kept was unjustifiably protracted having regard to what they needed to establish.

[34] Thobela has claimed an amount of **R850 000.00** for arrest, detention and assault. The cases to which he has referred this Court do not compare favourably with this case. Admittedly, he was kept in custody for longer but that did not translate into severe injuries as was the case in *Fisa* and *Phefadu supra*. Everything considered, it is the view of this Court that an amount of **R200 000.00** will adequately address his deprivation of liberty and the fact that he was assaulted.

[35] In the result, I make the following order:

1. The Minister is ordered to pay an amount of **R200 000.00** to Thobela for the unlawful arrest, detention and assault;
2. The Minister is liable for the Costs of Thobela.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

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Instructed by:

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Instructed by:

Date of Judgment:

24 January 2024