

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO:4497/2017

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO THE JUDGES: YES / NO
(3) REVISED.

Signature

Date... 2024/11/14

In the matter between:

TEBOGO LUDWICK MALEKA

PLAINTIFF

And

MINISTER OF POLICE

1ST DEFENDANT

POLICE OFFICER MANABALALA

2ND DEFENDANT

JUDGMENT

MONENE AJ**INTRODUCTION**

[1] The plaintiff, a 33-year-old male educator, instituted action proceedings against the defendants for damages arising from his arrest and detention by the defendants on 28 October 2016 and his subsequent release from custody on 7 November 2016. I note that in the plaintiff's heads of argument the date of release from custody is indicated as 9 November 2016, but I shall go with the pleaded date, which is 7 November 2016.

[2] In broad strokes the plaintiff canvassed his claims in his particulars of claims as, first, unlawful arrest and detention, second, unlawful assault on two occasions and thirdly as "the laying of false charges" against him.

[3] Initially the defendants, the police minister and a police officer in the minister's employ, filed a joint standard plea which the police minister traditionally and routinely hoists in this kind of matters, to wit, denial of the unlawfulness of the arrest and the consequent detention and taking refuge under section 40(1)(b) of the Criminal Procedure Act 51 of 1977. However, all that fizzled out on 22 April 2024 when, before Naude-Odendaal J, the merits were settled 100 percent in favour of the plaintiff. The matter was later to serve before me on 19 June 2024 for determination of quantum.

[4] However when the matter was called, counsel for the defendants denied that the merits had been settled and indicated that he was briefed to proceed with trial on both liability and quantum. Counsel for the plaintiff argued that the defendants were aware of the order dispensing with liability as it was not only made in their presence but was served on them too. However, a copy of the Naude-Odendaal order was not on file nor did either of the parties have a copy thereof. I then stood the matter down until 21 June 2024 to determine whether liability was indeed no longer an issue or not stressing that I would have been prepared to proceed with quantum absent the court order on merits, if both parties were *ad idem* on the existence of that order.

[5] When the matter served before me on the next date it became clear on production of the liability(merits) order that the defendants were all the time aware of the order or, at the very least, ought to have been aware of it. I shall return to this aspect when dealing with costs *infra*.

[6] Counsel for the plaintiff conceded that the way the laying of false charges claim was worded was not a malicious prosecution claim. It is a claim scantily clad and completely incapable of being proven by anything placed before me let alone without oral evidence. Furthermore, its essence as worded in the particulars of claim, appears to me repetitive of the unlawful arrest and detention basis. It being so that this claim was not withdrawn and was argued in written submissions before me and regard being had to the fact that no evidence was led to quantify this curiosity of a claim, I have no

option but to offhand dismiss the quantum claim on it, that is, assuming that the merits settlement at 100 percent included it as part of the equation.

[7] What then remains to be determined is what general damages, if any, attach to the plaintiff's unlawful arrest and detention and assault claims on which merits have already been awarded to the plaintiff on a 100 percent basis.

GENERAL DAMAGES

Unlawful arrest and detention

[8] Regarding general damages as attaching to the unlawful arrest and detention claim, the plaintiff's counsel referred me to the following authorities to look at as guidelines in my determination of a damages award:

8.1 ***Mkwati v Minister of Police (ECM) unreported case no 2902/2013 decided on 23 January 2018*** an arrest of 5 days attracted an award of R560 000.00.

[8.2] ***Mphindwa v Minister of Police (952/2016) [2019] ZAECMHC 9(26 February 2019)*** where arrest and detention of 5 days resulted in an award of R480 000.00.

[8.3] On the strength of the above authorities, where unlike in *casu*, evidence was led to prove quantum, the plaintiff argued for general damages in the amount of R1 120 000.00.

[9] Counsel for the defendants relied on ***Rahim and 14 Others v Minister of Home Affairs 2015(4) SA 433(SCA) ("Rahim")*** where paltry amounts ranging from R3 000.00 to R25 000.00 for detention periods ranging from 4 days to 35 days. Owing to that he argued for compensation award of no more than R25 000.00.

[10] As regards the assault plaintiff referred me to the following authorities:

[10.1] ***Mgele v Minister of Police and Others (1257/2011) [2015] ZAECMHC 70 (Mgele)*** where a plaintiff who was assaulted from the whole night and left with sequelae of erectile dysfunction was in 2015 awarded R150 000.00 as general damages.

[10.2] ***Nyamanda v Minister of Police (2400/2009) [2022] ZAECGHC 49(6 September 2022) ("Nyamanda")*** where a fists, booted feet and pepper spray dousing assault by police on the plaintiff attracted a general damages award of R100 000.00.

[11] I was not favoured with any authority on comparative awards for assault by counsel for the defendants.

[12] The principles attendant to the determination of general damages in matters of unlawful arrest and detention and assault by police have over the years, in my view, crystallized as follows:

[12.1] The primary need to seriously and determinately uphold the constitutional rights to personal liberty and physical integrity.

[12.2] The secondary need to avoid perceptions of an extravagant distribution of wealth from a wrongly perceived horn of plenty, which is the public purse.

[13] In my view these principles are best captured by the Supreme Court of Appeal in ***Minister of Safety and Security v Tyulu 2009(5) SA 85(SCA)*** (“Tyulu”) at para 26 where the following was stated:

“When assessing 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 are 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 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 for 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.”

[14] Alive to the caution urged by the Supreme Court of Appeal in both ***Tyulu*** referred to immediately supra and in ***Minister of Safety and Security v Seymour (2006) SCA 67 RSA at para 17*** to the effect that reference to and unqualified reliance on previous awards is fraught with difficulties, I have nonetheless looked at the following awards if only for some guarded bench marking:

[14.1] In ***Tyulu*** itself an arrest and detention for 15 minutes attracted an award of R15 000.00 in 2009.

[14.2] In 2012 an arrest and detention for four and half hours secured a R50 000.00 solatium for the plaintiff in ***Minister of Safety and Security and Another v Johannes Francois Swart (194/11) (2012) ZASCA 16(22 March 2012)***.

[14.3] In ***Woji v Minister of Police (92/2012) [2014] ZASCA 108(11 September 2014)*** an unlawful detention period of a year and one month saw the plaintiff compensated for R500 000.00.

[14.4] The plaintiff in ***Minister of Safety and Security v Ndlovu (788/11)2012 ZASCA 189(30 November 2012)*** was in 2012 awarded a R175 000.00 solatium for unlawful arrest and detention for 8 days.

[15] In casu, the plaintiff was unlawfully arrested on 28 October 2016 and was only released from the consequent unlawful detention on 07 November 2016. He was thus in unlawful detention for 11 days.

[16] Beyond the natural consequences of detention which are deprivation of liberty and restricted access to amenities of life, there is no evidence before me of the conditions under which the plaintiff was detained, how exposed he was to degradation and humiliation and indignity; all of which are factors about which the authorities upon which I benchmark supra are based and evidence led. This point is not advantageous nor helpful to the plaintiff in the determination of solatium in this matter.

[17] All things being equal and from a study of the authorities referred to supra and others not necessarily mentioned in this judgement, it seems to me that, on an

unsteady average, our courts have generally determined a day of unlawful detention to be equivalent to the present-day value of R25 000.00 to R35 000.00.

[18] Regard being had to the dearth of evidence on whom exactly the plaintiff is, that is, except his age and occupation as a teacher, absence of evidence on how unpalatable the plaintiff's unlawful detention was, on who saw him detained, on how many people, if any, he was exposed to as an accused chained or not, on the conditions of the cells he was kept in, the kind of nutrition he was subjected to and generally how his reputation was negated by the arrest and detention, I am inclined to determine the plaintiff's solatium at the baseline of the spectrum I have indicated to, in my view, be the comparable daily approximate regarding unlawful detention. Approached from that angle the 11-day detention equates to R275 000.00.

[19] However on further reflection upon and due regard to the two principles attendant to the determination of a proper solatium I mentioned supra, I find that I must show, in my determination of an award, a heavy leaning in favour of the upholding of the right to liberty as against the need to protect the meagre public purse on which much more societal mouths depend. Indeed, as it is astutely stated in the Bapedi idiom of "Feta kgomo o tshware motho", human rights must always be found to be much weightier than commercial interests. In that regard I am inclined to reflect this court's serious and stern frown upon the conduct of the police in unlawfully arresting and

detaining people, by ordering a further R100 000.00 to the plaintiff's unlawful arrest and detention general damages solatium.

Unlawful assaults

[20] It was pleaded in the plaintiff's amended particulars that the plaintiff was assaulted with fists and open hands, kicked with booted feet all over the body and in particular on his genitalia, suffocated with a plastic bag by the police and further that all these forms of assault led to multiple resultant sequelae such as painful coughs, internal injuries and urination of blood. However, no evidence was led on all this. The mere presence of a J88 form in the court file, which although not even suggesting a medical case as grave as pleaded, does not, absent it being led into evidence orally or per uniform rule 38(2), amount to evidence before me.

[21] This leaves me with nothing beyond the indignity and generalized pain, discomfort and suffering visited upon the plaintiff to help determine general damages arising from the two assaults, which I take cumulatively, suffered by the plaintiff at the hands of the defendants.

[22] I take guarded counsel from both **Mgele** and **Nyamanda** to which I was referred by counsel for the plaintiff, Mr. Mbali and to whose professionalism in dealing with this matter I am grateful. Additional thereto I am guided within the **Tyulu** vigilance against slavishly following previous awards by Mfeyana J in the unreported matter of **M R v**

L Mokgethi N.O a decision of the North West Division of the High Court in Mafikeng decided on 16 February 2024 (“ M R”) where in a more serious assault and rape claim and, unlike in *casu*, evidence was led to prove quantum, the plaintiff was awarded R650 000.00 in general damages.

[23] Given the already lamented dearth of evidence to help determine general damages quantum, the primacy of the constitutional right to physical integrity and the guiding awards in ***Mgele***, ***Nyamanda*** and ***M R*** listed *supra* where, unlike in *casu*, evidence was led on the extent of the injuries to help determine general damages quantum, I can, regard being had to the principles outlined in ***Tyulu*** above, go no higher than R75 000. 00 as general damages for each of the two assault claims. This leaves me with an amount of R150 000.00 as compensation for the two assault claims.

COSTS

[24] I have in the introductory part of this judgement indicated how the defendants in this matter have misled this court on the question of whether the merits or liability in this matter had previously been settled or not.

[25] It became apparent to this court that when counsel for the defendants argued that the merits were still in dispute, he was aware or at least ought to have reasonably

been aware that they were indeed settled months earlier per court order. The result was a needless and avoidable argument and consequent postponement of the matter to another day.

[26] This court does not take kindly to how the defendants handled this issue and would be remiss if it does not exercise its discretion in favour of showing its stern frown upon the defendants with a punitive costs order, the subsequent profuse apologies tendered by counsel for the defendants, notwithstanding.

[27] It being so that costs should follow the event, I find that they should do so punitively on an attorney and client scale.

ORDER

[28] In the backdrop of all the foregoing, I make the following order:

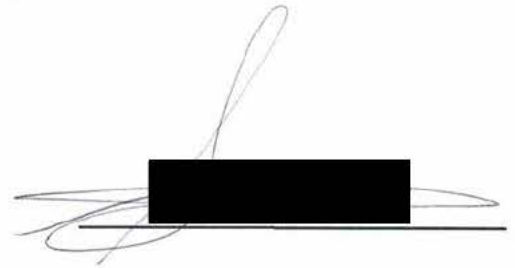
[28.1] The first defendant shall pay to the plaintiff an amount of

R 525 000.00(**FIVE HUNDRED AND TWENTY-FIVE THOUSAND RANDS ONLY**) comprised of R375 000.00 general damages for unlawful arrest and detention and R150 000.00 for unlawful assault.

[28.2] The amount in 24.1 above shall, within 180 days of this order, be paid by direct transfer into a trust account nominated by the plaintiff's attorneys of record which nomination shall be made to the defendant within 14 days of this order.

[28.3] The defendant shall pay the plaintiff's taxed or agreed to attorney and client costs on a high court scale which costs shall include the costs attendant to obtaining expert reports and the costs of counsel on scale B

[28.4] Should the defendant fail to pay the amount in 24.1 above within the 180 days and/or the agreed to or taxed costs within 30 days of agreement or taxation; the plaintiff shall be entitled to recover interest thereon on the prescribed rate of interest from the date of mora to date of final payment.



MALOSE S MONENE

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

Heard on : 21 June 2024

Judgment delivered on : 14 November 2024

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