



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2021/26368

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: _____
09/09/24	

In the matter between: -

TUMELO MTSHALI

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

GEORGIADES AJ:

[1] This is a claim for delictual damages for unlawful arrest and detention which

arises from the unlawful arrest of the plaintiff by members of the South African Police Service on 31 December 2020.

- [2] The plaintiff was arrested and detained at Kagiso police station on charges of possession of an unlicensed firearm and live ammunition. He was released on 3 January 2021, without appearing in court.
- [3] The defendant conceded the merits of the claim in favour of the plaintiff. Therefore, the only issue is that of quantum.
- [4] The plaintiff was born on the 20th of May 1989 and was 31 years of age at the time of his arrest and detention. He was arrested at approximately 20:00 on 31 December 2020 and was released on 3 January 2021 at about 13:45. It is common cause that he was detained at Kagiso police station.
- [5] At the trial, the plaintiff was the only witness. He testified that he was arrested at a private home in the West Rand and furthermore that there was no evidence linking him to the allegation that he was in possession of a firearm and/or live ammunition.
- [6] He testified that upon his arrest, as he as about to enter the police van, he requested to be allowed to relieve himself. The police refused. As a result, he urinated in the police van.
- [7] The plaintiff testified further that he was held in a police cell with ten other people. The police cell was smelly; had no hot water; there was a single toilet in the cell and the persons in the cell would have to use the toilet in

the presence of each other. He was forced to sleep on a mattress that was not comfortable and was given a smelly blanket. He was served tea and plain bread, pap and cabbage. The plaintiff could not sleep due to the conditions of the mattress and the blanket.

[8] It appears that his detention had all the trappings of a typical unlawful arrest and detention that finds its way onto this Court's trial roll on a weekly basis. These have become commonplace. The plaintiff was held in detention for a period of approximately three days and did not appear in court, nor does it appear that he was charged with any offence.

[9] The plaintiff testified further that he is single and has no children. He was residing at Soweto at the time and was arrested after he attended a funeral at Kagiso. He holds a diploma as an aircraft mechanic. He was unemployed at the time. It was the first time that he was arrested.

[10] The defendant conceded the issue of liability on the eve of the trial. It was agreed that the trial would only proceed on the issue of quantum.

[11] The defendant led no evidence. The defendant did not put any version to the plaintiff in cross-examination. The detention was without justification; and the plaintiff was deprived of his freedom; his treatment was degrading and inhumane and clearly infringed his constitutional rights to freedom and dignity.

[12] I proceed now to deal with the issue of damages. In doing so, I refer to decided case law both in the Supreme Court of Appeal and the Constitutional Court. I take heed of the warning by those Courts not to

award the plaintiff an excessive amount of damages.

- [13] I begin with the oft quoted case of *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA), where the SCAQ held as follows: -

*"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 for damages for this kind of iniuria 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 of damages on such facts."*

- [14] It was held by the SCA in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA), 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 a few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they may have no higher value than that: -

"The process of comparison [should] not take the form of a

meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration." (*Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A)).

- [15] In *Diljan v Minister of Police* [2022] ZASCA 103 (24 June 2022), it was held that: -

"A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim.

Amounts in monetary claims in the particulars of claim should not be 'thumb sucked' without due regard to the facts and circumstances of each case. Practitioners ought to know the reasonable measure of previous awards which serve as a barometer in quantifying their client's claim even at the stage of the issue of summons."

- [16] It is within the prism of these cases that the amount of damages ought to be assessed. Noteworthy, the plaintiff claimed damages in the summons in

the amount of R420 000.00. At the close of the plaintiff's case, his counsel submitted that the plaintiff be granted damages in the sum of R350 000.00 for his unlawful arrest and detention.

[17] In *Seymour*, above, a 63-year old man had been unlawfully arrested and imprisoned by the State for a period of five days. He had had free access to his family and a doctor throughout his detention. He had suffered no degradation beyond that which is inherent in being arrested and detained, and after 24 hours he had spent the remainder of his detention in a hospital bed. In 2006, the SCA awarded him R90 000.00, thereby reducing the award of R500 000.00 made by this division.

[18] In *Tyulu*, above, a 48-year old magistrate who had served for 12 years was arrested while walking in the early hours of the morning. The police alleged that he was drunk and that he matched the description of a person who had fled the scene of a motor vehicle accident in the vicinity. He was first arrested for being drunk in public and then later, at the charge office and after having been identified by the witness, arrested a second time for drunken driving. The arrestee admitted to consuming six beers, his blood alcohol level was tested to have been substantially more than the legal driving limit and he was moderately under the influence when examined shortly after the arrest. He was detained for a few hours and released the next day. In 2009, the SCA awarded R15 000.00, reducing the award from R280 000.00 made by the High Court.

[19] In *Diljan*, above, a lady suspected of having committed the offence of malicious damage to property was arrested on a Friday afternoon and

detained until Monday. She was kept in appalling circumstances. The condition of the police cell in which she was detained was filthy with no hot water. The blankets were dirty and smelly. The toilet was blocked. She was not provided with toilet paper and she was not allowed visitors. She could not eat bread and peanut butter that was the only food provided to her. She was deprived of visitation rights by her family and that resulted in her not receiving medication for her heart condition. She was deprived of her liberty for three days. In 2022, the SCA awarded her R120 000.00.

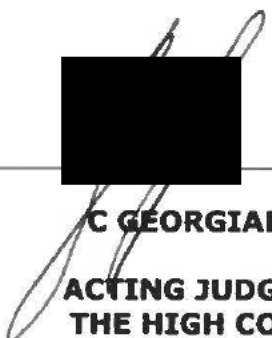
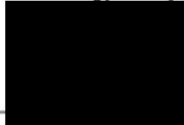
[20] It is my view that the plaintiff should also be awarded a sum of R120 000.00. Although the above cases warn of slavishly following comparable cases, I find that the two cases, that of *Diljan* and the case at hand are closely related on the facts to warrant a similar award. *Diljan* is a useful guide and the award in that case is an appropriate amount in the circumstances. This amount is a discretionary amount based on the facts and circumstances of the case at hand. It is arrived at by balancing the rights of the individual to his personal freedom, of which he was arbitrarily deprived in this case, with that of not lavishly enriching the plaintiff. The amount is a solatium for his injury.

[21] Regarding costs, the defendant's counsel urged that they be granted on a Magistrate's Court scale. I see no justification for this. The plaintiff was entitled to bring his case in the High Court.

ORDER

[22] In the circumstances I make the following order: -

1. The defendant is ordered to make payment to the plaintiff in the sum of R120 000.00.
2. The defendant is ordered to pay interest on the amount of R120 000.00 referred to in 1 above at the legal prescribed rate of interest of 11.75% per annum from 8 August 2024 to date of payment.
3. The defendant is ordered to pay the plaintiff's costs, including the costs of counsel.

C GEORGIADES
ACTING JUDGE OF
THE HIGH COURT
GAUTENG DIVISION,
JOHANNESBURG

Date of Hearing: 25 January 2024

Judgment Delivered: 8 August 2024

APPEARANCES: -**On behalf of plaintiff:**

Adv J M V Malema

Instructed By:Logan Naidoo Attorney
Johannesburg**On behalf of defendant:**

Adv S L Salela

Instructed By:The State Attorney
Johannesburg