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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not
reportable

Case no: 2753/2021

In the matter between:

TUMELO DAVID MOSALA

Plaintiff

and

MINISTER OF POLICE

Defendant

Coram: PR Cronjé, AJ

Heard: 23 August 2024

Delivered: 03 September 2024

Summary: Unlawful arrest and detention – plaintiff unarmed and naked at arrest – malice - girlfriend pregnant – lack of privacy in police and correctional services holding cells – lack of sheets and blankets – lack of medical care - child born when in custody

ORDER

1. The Defendant shall pay the Plaintiff R1 000 000.00 (one million rand) for general damages.

2. Defendant pays the Plaintiff's costs, counsel's fees to be taxed on scale B.

JUDGMENT

Cronjé AJ

Introduction

[1] The plaintiff instituted action against the defendant for his unlawful arrest on 15 September 2020 and his subsequent detention. On 14 February 2024, Reinders J ordered that the merits and quantum be separated as the defendant conceded merits and liability. The defendant was ordered to pay the plaintiff's taxed party-and-party cost to date of that order. Only the quantum of the plaintiff's claim remains to be determined.

[2] The plaintiff pleaded that as a result of his unlawful arrest, alternatively apprehension and the unlawful detention by members of the defendant, he suffered damages in the amount of R5 million based on the deprivation of his liberty, the injury to his person, being humiliated and traumatised, his right of security and safety being injured, injury to his reputation, being subjected to adverse circumstances, being detained in a police cell for two days and for approximately seven months in the Grootvlei Correctional Services facility (Grootvlei), loss of income for a period of more than seven months, and being offended by acts of the members of the defendant.

[3] The amounts reflected in the heads of damage are as follows:

- (i) Unlawful arrest – R500 000.00;
- (ii) Unlawful detention – R4 000 000.00;
- (iii) Pain and suffering – R300 000.00;
- (iv) Humiliation, discomfort, degradation and contumely – R140 000.00;
- (v) Loss of earnings – R60 000.00.

[4] Only the Plaintiff testified. The Defendant did not call witnesses and closed its case.

Evidence of the Plaintiff

[5] He is 39 years old and was born on [...] F[...] 1985. He has a Grade 10

qualification, is unmarried but has two children: a son of three years (born 1[...] J[...] 2021) and a one-year old daughter (born 1[...] M[...] 2023). His son stays with him while his daughter stays with her mother. At the date of his arrest, he was self-employed, making a living by selling vegetables door-to-door. If business went well, he earned R450.00 on a good day and about R2 700.00 over a fortnight. He ordinarily stayed with one Lerato, his son's mother, at the time when he was arrested. At that stage, she was five months pregnant and gave birth to his son whilst he was in custody.

[6] When the police arrived at his flat, he was upstairs in his room whilst Lerato made breakfast for them. He heard her screaming, and she sounded frightened. He was naked and went downstairs, where he saw the police officers carrying firearms. He was informed that they were there to arrest him. He did not know what type of firearms they had, but one of them had a big/long gun. The other two carried firearms on their waists. The firearms were pointed at him, and they shouted that he must go down on the floor, to which he complied. The arrest took place not long after he was discharged from the hospital as he had an open fracture to his leg. At the date of his evidence, the wound has not yet healed, and he still has to receive physiotherapy.

[7] When he enquired the reason for his arrest, various reasons were mentioned, *inter alia*, that there was footage of a robbery that was committed at a certain shop. He told them that it was impossible for him to have been involved in the robbery and showed them the operation he had on his right leg. All three police officers could see the injury and could notice that he was unable to walk properly as he had a limp. He suggested they approach Pelonomi Hospital to see when he was admitted and discharged. Naturally, he was heartbroken and upset when they did not heed his request. He was handcuffed and led to the vehicle. Lerato was crying when he was handcuffed. When taken outside his flat, he saw people at the carwash but could not state whether they observed him. On the way to the vehicle, one Sharon and members of a group saw him and the police moving towards the exit. He assumed that they were looking at them, but he could not state how many people watched; he estimated it could be about seven or eight persons. He was well-known in that particular part of Brandwag as it is where he normally makes his door-to-door deliveries; even small boys from a gang knew him well, as he used to chase them away.

[8] At the police station, he was informed that he had many criminal cases against him and was then detained in a cell. The cell was room-like, with a toilet and shower. The toilet was shielded by a wall approximately 800mm tall; if standing at a certain point, people could see the person sitting on the toilet. According to him, the shower was not covered for privacy, which was unnecessary in any event as the cell had intermittent running water, which, when available, was cold. When he arrived, five to six other detainees were also in the cell. These factors made showering highly impractical. He could not sleep well in the cell and knew Lerato was alone. He was kept at the police station for two days before he was taken to court. After appearing in Court, he was taken to Grootvlei where he was detained there for seven months until 29 April 2021.

[9] In the admission cell at Grootvlei, many persons were brought from various police stations and all were required to share the only available toilet and shower. He was taken to the clinic the following day and placed in another holding cell with, what he estimated to be, about forty other persons. This cell had two basins, one toilet, one shower and only eight beds. The rest of the detainees had to sleep on mattresses on the floor. This necessitated additional sheets or blankets as the sponges on which they slept were very thin. These sheets and blankets were the personal property of the detainees and doubled up for curtains when they went to the toilet or had to shower.

[10] The fact that he was arrested and detained did not go down well with him, and at a point, there was also a fight with gangsters. He left Lerato pregnant in the flat, which made him well unwell.

[11] At Grootvlei, he requested a check-up on his leg injury and was informed that he had to obtain a special letter showing that he needed treatment. This, naturally, had to come from outside Grootvlei. He stated that he had mentioned before he was detained that he needed aggressive physiotherapy, which he never received, and Grootvlei did not call Pelonomi Hospital.

[12] When his son was born, he was still detained, which made him feel sad. He was upset when he was arrested in front of Lerato, and he tried to comfort her, stating that everything would be okay and that she must not despair. He was ashamed, knowing that people were watching and that he was leaving someone behind.

Cross-examination

[13] During cross-examination, he was questioned about the age of his child and admitted that he made an incorrect calculation.

[14] When he went downstairs when the police arrived, he could not use both legs, on account of his injury, and jumped on one leg. Furthermore, he admitted that he had been arrested before, but could not recall how often. He confirmed that he sold vegetables, and before his arrest, he once did a piece-job at a One Stop filling station as a petrol attendant. When confronted with his allegation in his particulars of claim that he was doing piece-jobs at the time of his arrest and earning an amount of R4 000.00 per month, he stated that he did not lie as he did piece-jobs and was self-employed. He left it to the Court to decide which version was correct. He explained that when he consulted with his attorney, he was asked whether he was working or employed on piece jobs. The only explanation he proffered was that there must have been a misunderstanding, as both statements were correct.

[15] The police officers who came to arrest him were not in uniform, and he did not know what was happening at the time. He believes that persons in the vicinity knew that the persons were police officers, even though they did not wear uniforms or came with an unmarked vehicle, as under normal circumstances, ordinary people do not carry big guns like that. Despite his statements, he could not provide proof that he was well-known in the area.

[16] When he was subsequently detained upon his arrival at the police station, he only used the toilet at the police station to urinate, which was in working condition. When confronted with his version that there was no running water in the cell, he stated that he meant that there was only cold water.

[17] He told the wardens at Grootvlei that he needed aggressive physiotherapy. There was a clinic and a hospital at Grootvlei. The procedure at the clinic was merely to check on whether the detainees had TB and HIV or needed any other treatment. He complained, and if he received the required attention, he would have been able to bend his leg. A detainee can visit the clinic on Wednesdays, and he attended it regarding his leg but was told that there were no facilities to give him the required

treatment. He can now bend his leg 45 degrees due to assistance from the inmates but it would be fruitless to go to Pelonomi Hospital after his release as he was supposed to receive physiotherapy four weeks after the removal of the stitches. Up to the date of the trial, he has never undergone any form of physiotherapy.

[18] The Defendant did not call witnesses and closed its case.

Loss of income

[19] As a point of departure, I am not satisfied that Plaintiff's evidence concerning his employment and the quantum thereof has been credibly proven. As such, no compensation will be granted in this regard.

Arguments for the Plaintiff

[20] Mr Nkhahle refers to *Minister of Safety and Security v Tyulu*¹ where it was held:

'[26] In 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 them some much-needed *solatium* for their 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 of 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 of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) 325 para 17; *Rudolph & others v Minister of Safety and Security & others* (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).'

[21] In *Masisi v Minister of Safety and Security*² (*Masisi*) it was held that:

'[18] The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to

¹ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA).

² *Masisi v Minister of Safety and Security* [2010] ZAGPPHC 280; 2011 (2) SACR 262 (GNP).

curtail that right must do so with the greatest circumspection and sparingly. In *Solomon v Visser and Another* 1972 (2) SA 327 (C) at 345A it was remarked that where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which result. To this I add that where an arrest is malicious, the plaintiff is entitled to a higher amount of damages than would be awarded, absent malice.

[19] In the present case, the arrest in itself was undoubtedly and decidedly malicious, the execution thereof despicable and humiliating. I take into account the short duration of the detention - just over 4 hours; the fact that the plaintiff did not suffer any further indignity of being handcuffed or fingerprinted, and that the publicity of the arrest was very limited. Having regard to the above factors, the complementary personal circumstances of the plaintiff, the awards made in previous comparable cases, as well the deterioration in the value of the currency over the years, I deem R65 000 to be an appropriate amount.'

[22] He argues that the Defendant's officers were malicious in that they saw the injury he had on account of the operation, and notwithstanding requesting them to establish for themselves whether this was correct, it was ignored. They expressed brutal aggression by pointing at him with firearms when he was naked and unarmed. *Masisi supra* rings familiar.

[23] In *Lifa v Minister of Police and Others*,³ the plaintiff was incarcerated for three months and six days, claiming R30,000.00 for each day spent in custody. The court found that being arrested is a highly traumatic event in itself. However, he was not subjected to torture nor detained in front of his peers or any other members of the community. In the result, he was awarded compensation of R600 000.00.

[24] In *Jongile v Minister of Police*,⁴ the plaintiff was awarded R1 050 000.00 for six (6) months' detention. In *De Klerk v Minister of Police*,⁵ the plaintiff was awarded R300 000.00 for approximately seven (7) days of incarceration.

³ *Lifa v Minister of Police and Others* [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ).

⁴ *Jongile v Minister of Police*, unreported case in North-West Division of the High Court, case number: 1172/2018.

⁵ *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC).

[25] In *Rathebe v Minister of Police and Another*⁶ Naidoo J found that no evidence was placed before the court of any serious physical or medical *sequelae* to the plaintiff due to his arrest and detention. It was accepted that he was traumatised by his arrest and subsequent incarceration and his freedom was severely curtailed. He suffered emotional distress and suffered severe humiliation and degradation. The plaintiff was awarded R300 000.00 for unlawful arrest and detention for less than a month.

[26] The submission is made that this court should order compensation between R2 500 000.00 to R3 000 000.00.

Arguments for the Defendant

[27] Mr Manye relies on *Brits v Minister of Police & Another*⁷ (*Brits*) where it was held that:

‘[33] . . . Although awards of damages made in previous decisions may serve as a guide in considering an appropriate amount of damages for the injury resulting from unlawful arrest and detention, such awards are not to be followed slavishly, for every case must be determined on its facts. It must be borne in mind that the primary purpose of an award of damages for unlawful arrest and detention is not to enrich the aggrieved party but to offer him or her some solatium for their injured feelings.’ (Footnote omitted.)

[28] In *Pitt v Economic Insurance Co Ltd*⁸ the court stated that:

‘I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant’s expenses.’⁹

[29] He argues that the Plaintiff was a sole witness who had previously encountered the law. Furthermore, he makes the argument that the Plaintiff does not have a mild personality or good repute in society, and it cannot be said that, notwithstanding the unfortunate unlawful arrest and detention, it truly dented his dignity and humiliated him.

⁶ *Rathebe v Minister of Police and Another* [2024] ZAFSHC 69.

⁷ *Brits v Minister of Police & Another* [2021] ZASCA 161.

⁸ *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N).

⁹ *Ibid* at 287E-F.

[30] In *Manyoni v Minister of Police and Another*¹⁰ (*Manyoni*), R 744 000.00 was awarded for approximately eight months of detention while in *Nontsele v Minister of Police and Another*¹¹ (*Nontsele*), the plaintiff was kept in detention for 467 days on a false charge of rape and was awarded R1 600 000.00.

[31] He argues that there were no unusual features under which the Plaintiff was arrested and detained. It cannot be said that his experience was harrowing, as he admitted he has had several past brushes with the law. Furthermore, the Plaintiff never testified to any harassment, assault, or deprivation of food while he was detained and only during cross-examination did he state that the inmates assisted him with physiotherapy. Also, the detention was not of such a nature that the cell was unfit for occupation. Such being the case, he submits that an amount between R800 000.00 and R900 000.00 would be fair.

Overview of case law

[32] In *July v Minister of Police*,¹² the plaintiff was detained in a very unclean cell with 30 other inmates. There was no privacy, as inmates would relieve themselves while others ate on account of there being only one toilet that was to be shared among the 30 inmates. They would all take turns to clean the toilet. On his arrival, the other inmates threatened and bullied him. About the food they were given, the plaintiff testified that the food was bad, and the pap they were given to eat was not edible. He did not eat the pap at first, but as time passed, he did, as he had no other option. At the time of his arrest, his girlfriend was pregnant. He later learnt that she had a miscarriage, which made him sad as he could do nothing to help her. When he returned home after his release, she left as she was alone while members of the community mocked him and stigmatised him for being a murderer, singing songs they composed about his arrest. The court found a wanton disregard for the importance of personal liberty entrenched in the Constitution and awarded R1 050 000.00.

[33] The court in *Brits* referred to *Kammies v Minister of Police and Another*,¹³ the plaintiff was detained for three days and awarded damages of R70,000. In *Rahim and*

¹⁰ *Manyoni v Minister of Police and Another* [2023] ZAGPJHC 1185.

¹¹ *Nontsele v Minister of Police and Another* [2021] ZAECMHC 29.

¹² *July v Minister of Police* [2024] ZANWHC 99.

¹³ *Kammies v Minister of Police and Another* [2017] ZAECPEHC 25.

Others v Minister of Home Affairs,¹⁴ the court noted that it awarded damages ranging from R3 000 for four days of unlawful detention and R20 000 for 30 days to R25 000 for 35 days of unlawful detention.

[34] In *Mahlangu and Another v Minister of Police*,¹⁵ the Constitutional Court awarded damages of R550 000.00 and R500 000.00 to two plaintiffs. They were unlawfully detained for eight months and ten days. The court took into consideration that several police officers tortured Mr Mahlangu before he made the confession that led to the deprivation of his liberty. The circumstances under which Mr Mahlangu and Mr Mtsweni were detained were unpleasant. They were placed in solitary confinement for two months to protect them from attack and taunting by fellow detainees who believed that they had killed their relatives. The court found that no amount of compensation can undo the humiliation and human rights violations suffered by the applicants.

[35] In *Manyoni*, the plaintiff was 38 years of age at the time of his arrest. He was an ex-convict trying to redeem himself when he was arrested. The defendants were of the view that the plaintiff should be awarded a lower amount of compensation since he had served time in prison before. During his unlawful detention, he endured overcrowding, violence, a dirty environment, poor ablution, and a lower food ratio and was limited in his interaction with people dear to him. He had to share limited mattresses and blankets with other inmates. He encountered the power of prison gangs and less protection from prison warders. An amount of R 744 000.00 was awarded for approximately eight months of detention.

[36] In *Nontsele*, the plaintiff was kept in police cells throughout his detention, designed for short transitional stays. It was freezing in the winter, and he sat on a cement bench and slept on the cement floor. Food was scarce, and inmates fought over it. It was particularly difficult for him as the problem in his leg caused his movement to be slow. Even when he received his ration, it was not timely and posed challenges as far as the taking of his medication was concerned. He shared a communal cell with smokers whilst he was a non-smoker. Also, he could not see outside the prison walls. He suffered additional hurt because, upon his release,

¹⁴ *Rahim and Others v Minister of Home Affairs* [2015] 3 All SA (SCA).

¹⁵ *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC).

members of the community called him a rapist. He also lost his lover. He had to contend with being unwell during his incarceration. He was granted R1 600 000.00.

[37] In *Olivier v Minister of Safety and Security and Another*¹⁶ The plaintiff was a superintendent at the Heidelberg police station. He was in uniform and on duty at the time of his arrest. He was arrested in full view of his colleagues and detained at the police station. His office and home were searched, the latter in the presence of his wife and children. He asked to be released on bail, but his request was refused. He was awarded R50 000.00.

Discussion

[38] Every case should be determined on its own facts. Arguments were presented regarding the arbitrary and malicious way the officials conducted themselves. I considered it.

[39] Police officials are expected to treat persons suspected of crime with dignity. The plaintiff was vulnerable (naked) when he proceeded downstairs, in his own home, where the police officers were waiting. He was unarmed when he was instructed to lie down; all three officers pointed their firearms at him. His request that his whereabouts on the alleged robbery day be verified at the hospital fell on deaf ears. His pregnant girlfriend was frightened, and this undoubtedly impacted his psychological state. He could not be present when his son was born. He was then taken to a holding cell for two days. The case law is replete with references to the unacceptable conditions in holding cells, especially concerning the lack of privacy.

[40] He was then detained at Grootvlei for approximately seven (7) months. There, he was given a sponge mattress that could have provided more comfort, but without any sheets or blankets. The lack of privacy continued, and those fortunate enough could shield themselves when using the shower. I accept that he requested assistance with physiotherapy for his injured leg.

[41] In contrast with many other cases, he was fortunate to have been provided acceptable food. He was not raped, assaulted or tortured.

¹⁶ *Olivier v Minister of Safety and Security and Another* [2008] ZAGPHC 50; 2008 (2) SACR 387 (W).

[42] Our Constitution places a high premium on all persons' physical and psychological integrity. He suffered infringements on both.

Quantum

[43] Considering the facts of the matter, the impact on the Plaintiff, the principles applicable to compensation for claims of this nature, and the case law, I believe that an amount of R1 000 000.00 (one million rand) will be fair.

Costs

[44] There is no reason why costs should not follow the result, and I believe that the costs of Plaintiff's counsel on scale B would be appropriate.

ORDER:

[45] In the result, the following order is made:

1. The Defendant shall pay the Plaintiff R1 000 000.00 (one million rand) for general damages.
2. Defendant pays the Plaintiff's costs, counsel's fees to be taxed on scale B.

CRONJÉ, AJ

Appearances:

For the Plaintiff:

Adv R J Nkhahle

Instructed by:

Kambi Attorneys
Bloemfontein

For the Defendant:

Adv L Manye

Instructed by:

Office of the State Attorney
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