

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 3934/2021P

In the matter between:

M[...] S[...] Z[...]

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

SECOND DEFENDANT

ORDER

In the premises it is ordered that:

1. The first defendant is ordered to pay the plaintiff the amount of R800 000.00 together with interest at the rate of 7% a tempore morae.
 2. The defendant is ordered to pay the plaintiff's costs on scale B.
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JUDGMENT

Mathenjwa J

[1] On 11 June 2021 the plaintiff issued summons against the Minister of Police and the National Director of Public Prosecutions, claiming damages for unlawful arrest, detention and malicious prosecution. The defendants opposed the action.

[2] In his particulars of claim the plaintiff alleges that on 26 March 2020 he was wrongfully and unlawfully arrested by Ezakheni members of the South African Police Services while he was at his home at Ezakheni, Ladysmith on alleged charges of rape. The arrest was effected without a warrant.

[3] The plaintiff was charged, and appeared at Ezakheni Magistrates' Court on 30 March 2020. He applied for bail, which was refused by the magistrate. The plaintiff was thereafter incarcerated at Ladysmith Correctional Facilities, until he was released on 18 May 2020, when the prosecutor withdrew the charges against him.

[4] The defendants filed a plea. In their plea they contended that the plaintiff failed to serve a notice of his intention to institute proceedings to the defendants in terms of section 3 of Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, therefore, the action should be dismissed. The plaintiff had filed an application for condonation for the late issue of the notice, which was not opposed by the defendants. The defendants do not deny that the plaintiff was arrested by members of South African Police Services without a warrant, and the rest of their plea is a bare denial.

[5] It is instructive that on 24 October 2024 this court issued an order to strike out the respondents' defence on the basis that they failed to comply with a court order dated 18 July 2024. On 3 March 2024 the plaintiff had already served the notice of set down on the defendants informing them that the matter was set down for hearing on 5 December 2025, however the defendants failed to appear in court. The matter came before me on both liability and quantum.

[6] The plaintiff, an adult male person of 26 years, testified that on 26 March 2020 he was arrested and detained at Ezakheni Police Station holding cells. After his appearance in court on 30 March 2020 he was further detained at Maharaj Prison until he was released when the prosecutor withdrew the charges against him on 18 May 2020. According to the plaintiff, while he was detained at Ezakheni Police Station holding cells the toilet in the cell was not flushing because there was no water. There were three prisoners in the cell when he first arrived at Maharaj Prison,

but as more inmates arrived, the cell became overcrowded. There were no beds in the prison cell, so he slept on a blanket on the floor.

[7] The mother of a young girl accused the plaintiff of raping her, leading to the plaintiff's arrest. At the time of his arrest he disputed that he raped the child, but did not inform the arresting officers that he was not able to perform sexual intercourse nor commit rape due to his physical condition.

[8] On Monday, 30 March 2020, the father of the plaintiff attended at the court premises where the plaintiff was appearing at Ezakheni, but he was not allowed to enter into the court house due to the COVID-19 pandemic restrictions, which were in force at the time. However, he managed to talk to the investigating officer, Sergeant Madondo, and informed her that the plaintiff was kidnapped and his genitals emasculated at Morocco in Soweto in 2013. The incident regarding the abduction and emasculation of the plaintiff's genitals was reported at Morocco Police Station, where a J88 report, which was completed by a medical doctor, was issued. That report, which was discovered in the pleadings before court, clearly depicts that the plaintiff's genitals was emasculated.

[9] It is trite that arrest without a warrant is *prima facie* wrongful.¹ When the police wrongfully arrest and detain a person, they may be liable for the post-hearing detention of that person.² Consequently, the failure by the first defendant to testify and justify the lawfulness of the arrest and further detention of the plaintiff left this court with little choice but to find that the arrest and detention was wrongful and unlawful.

[10] Section 40(1)(b) of the Criminal Procedure Act states that:

‘A peace officer may without warrant arrest any person—

...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1’.

¹ *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) at 589E-F.

² *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).

For the arresting officer to form a reasonable suspicion that a person has committed an offence he or she must do an investigation of the facts at his or her disposal, and based on objective information at his or her disposal take a decision whether the suspicion is reasonable before he or she puts a person under arrest and detention.³

[11] It is clear from the evidence before court that the arresting officer did not investigate the allegations and evaluate the facts at her disposal before putting the plaintiff under arrest and detained him. It is common cause that the plaintiff was detained at Ezakheni Police Station holding cells and later Maharaj Prison for a period of 54 days. The investigating officer who was well informed that it was not possible for the plaintiff to have committed the crime, did not even inform the prosecutor of the evidence presented to her by the plaintiff's father, which showed that it was not possible for the plaintiff to have committed that offence.

[12] Regarding the second defendant's alleged malicious prosecution, I am unable to see any justification in the evidence presented to the court for this court to conclude that it was liable for malicious prosecution. The reason for this is that the plaintiff was never prosecuted ; rather, the prosecutor dropped the complaint against him after learning of his physical state and concluding that he was incapable of committing the alleged act.

[13] It is trite that the assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise, but the court must have regard to various factors including but not limited to the number of days that a plaintiff had spent in detention; the circumstances under which the arrest and detention occurred; the presence or absence of improper motive or malice on the part of the defendant; the conduct of the defendant; the nature of the deprivation; the status and standing of the plaintiff; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in comparable cases and what would be fair and reasonable compensation to award.⁴

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814D-E; *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (T).

⁴ *Motladile v Minister of Police* [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) para 23.

[14] In *Minister of Safety and Security v Tyulu* the Supreme Court of Appeal held as follows:⁵

‘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.’

In 2022 in *Lifa v Minister of Police and others*⁶ the court awarded an amount of R600 00 (six hundred thousand rands) to a plaintiff who was in detention for 90 days. In 2023, *Motladile v Minister of Police*⁷ the Supreme Court of Appeal awarded the amount of R2000 000 (two hundred thousand rands) to the plaintiff who had been in detention for 5 days, and in 2024 in the matter of *Sokhela v Minister of Police and others*⁸ the court awarded an award of R990 000 (nine hundred and ninety thousand rand) to the plaintiff who had been in detention for 33 days.

[15] The plaintiff is an adult unemployed person of 26 years of age. It is common cause that the plaintiff was in detention for 54 days. Apart from the dysfunctional ablution and his sleeping on the blankets on the floor, the plaintiff testified that he acquainted himself with the conditions in detention after he met with other inmates. However, despite the scarcity of information about the plaintiff’s experience in detention it is not in dispute that South African prisons are severely over crowded causing inhumane conditions to detained individuals.

[16] The investigating officer’s careless use of her arrest authority; failure to confirm whether the plaintiff was capable of committing the offence and provide documentary evidence regarding the plaintiff’s physical condition to the prosecutor resulted in the plaintiff’s arrest and detention, deprivation of the plaintiff’s liberty and him being held in intolerable prison conditions.

⁵ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA) para 26.

⁶ *Lifa v Minister of Police and others* [2023] (1) All SA 132 (GJ).

⁷ *Motladile v Minister of Police* [2023] ZASCA 94; 2023 (2) SACR 274 (SCA).

⁸ *Sokhela v Minister of Police and others* [2024] ZAGPJHC 1281.

[17] I consider that the plaintiff had committed no crime, yet he received neither an apology nor a satisfactory explanation for his arrest and detention from the first defendant following his release from unlawful custody. Instead the first defendant did not even appear in court to explain the circumstances under which the plaintiff was arrested and detained. Having taken all of the foregoing factors into account, it is my opinion that a suitable amount for general damages to be paid by the first defendant to the plaintiff is the sum of R800 000.00 (eight hundred thousand rands). Given the egregious violation of the plaintiff's rights when the first defendant exercised its arrest and detention power, the defendant ought to pay the costs to the plaintiff on scale B.

Order

[18] In the premises it is ordered that:

1. The first defendant is ordered to pay the plaintiff the amount of R800 000.00 together with interest at the rate of 7% a tempore morae.
2. The defendant is ordered to pay the plaintiff's costs on scale B.

Mathenjwa J

Appearances

Applicant's counsel: Mr C Zitsman

Instructed by: Loubser Van Wyk Inc.
Brooklyn

Respondent's counsel: No appearance

Date of hearing: 3 February 2025

Date of judgment: 13 February 2025

