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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Case no: CIV APP MG 25/2023

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

In the matter between:

K[...] C[...] K[...]

APPELLANT

and

THE MINISTER OF POLICE

RESPONDENT

Coram: PETERSEN J et WESSELS AJ

Date Heard: 8 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **09 January 2025 at 10h00**.

ORDER

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following order:

 '(i) The defendant is ordered to pay the plaintiff the amount of R90 000.00 together with interest at the rate of 7.25% per annum *a tempore morae*.

 (ii) The defendant is ordered to pay the plaintiff's costs on the Magistrates Court scale.'
3. The defendant is ordered to pay the costs of the appeal on party and party Scale A.

JUDGMENT

Wessels AJ:

Introduction

- [1] This is an unopposed appeal against a judgment by the Ganyesa Magistrate's Court. The order appealed against is as follows:

“9.1. The Defendant is ordered to pay an amount of R45,000.00 in damages for the unlawful arrest and detention of the Plaintiff.

9.2. Defendants [sic] is ordered to pay interest on the amount of R45,000.00 at the rate of 7.25 % per annum from 17 January 2022 to date of full and final payment.

9.3 The Defendants [sic] are ordered to pay the Plaintiff the costs of suit on a scale as between party and party.”

Background

[2] The succinct facts of the matter before the court *a quo* was that the appellant was arrested without a warrant on allegations of illegal hunting on 13 October 2019 and detained at the Morokweng Police cells from 13 October 2019 up to 15 October 2019. In adducing evidence on *quantum*, the appellant testified that he was frightened when arrested. On arrival at the cells, he was threatened by other detainees. On the first night spent in the cells, according to the appellant, one of the inmates “*made me his wife*” denoting that he was sodomised. Thereafter, he was threatened with his life should he inform the authorities about the sodomisation.

[3] The conditions in the holding cells were not conducive, in that the toilets were blocked, which he could not use as a result; he did not have a mattress to sleep on and was only given one blanket for the purpose.

[4] The personal circumstances of the appellant are that he is a livestock farmer who farms with goats and sheep. He has three minor children who do not reside with him aged 10, 7 and 4 years.

[5] According to the appellant he lost his motor vehicle within three months of being detained, a claim that was not supported by the pleaded facts.

[6] On 15 January 2020, all criminal charges against the appellant were withdrawn.

The appeal

- [7] The legal representative of the appellant submitted in this Court, that the appellant is entitled to R180,000.00 in damages.
- [8] This Court need not concern itself with the merits of the matter, as they were conceded at trial in the court *a quo*. The evidence in the court *a quo* was focused on the determination of the *quantum* of the claim. Despite opposing the matter on the issue of *quantum*, the respondent did not call any witnesses to testify in mitigation.
- [9] Another factor to be considered insofar as the specific circumstances of the arrest and detention of the appellant are concerned is that it was agreed to be common cause in the court *a quo* that the arrest was unlawful. To this extent, the appellant's person has been invaded and his constitutional rights infringed upon.
- [10] While detained in the holding cells, the appellant was subjected to a harsh environment where he was denied the basic amenities of the use of ablution facilities and sleeping on a mattress.
- [11] A dominant factor relied on by the appellant which has the propensity to increase the quantum of the damages, is the issue of the appellant's alleged sodomisation. This issue requires careful and sensitive consideration against the facts pleaded by the appellant and the evidence adduced in support thereof.
- [12] The appellant failed to even tangentially plead the alleged sodomisation in his particulars of claim (*facta probanda*). To exacerbate the failure to plead the alleged sodomisation, the issue also featured rather cursorily in the appellant's evidence. Absent *facta probanda* on the alleged sodomisation, there can be no talk of *facta probantia* (that is evidence adduced to prove the *facta probanda*). It is inexplicable, bearing in mind that the alleged sodomisation had not been

pleaded in the particular of claim in the summons, that the legal representative for the respondent in the court *a quo* did not object to such evidence being tendered by the appellant. Such evidence, *sans* the pleading of the applicable *facta probanda*, held clear prejudice for the respondent as the appellant had a duty to plead the facts upon which he relied.

[13] An apt description of the duty that rests on the pleader in a summons is found in *Prinsloo v Woolbrokers Federation Ltd*¹ where the court remarked as follows:

“Now a pleader’s first duty is to allege the facts upon which he relies; his second duty is to set out the conclusions of law which, he claims, follow from the pleaded facts. Facts and conclusions of law must be kept separate. In my opinion the declaration and particulars do not observe this distinction.”

[14] The duty set out in *Prinsloo*² is found in Rule 18(4) of the Uniform Rules of Court and is instructive in the drawing of pleadings in general. The subrule reads as follows:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[15] In *Buchner and Another v Johannesburg Consolidated Investment Co Ltd*³, the Transvaal Provincial Division, a Full Bench as it was then known, discussed the practical application of Rule 18(4) on the structure and content of a summons as follows:

“The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws

¹*Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N) at 299 D-E

² *Ibid*, fn9

³ *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216 I-J

conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based."

(own emphasis)

- [16] This Court can do no better than to refer to the ultimate conclusion drawn on this point in a judgment of this Division by Petersen J in *Blos v Minister of Police*⁴:

"The principles enunciated in the authorities referred to above are clear and require no further elucidation save to consider their application to the peculiar circumstances to the present matter. Firstly, a party has a duty to allege in the pleadings the material facts upon which it relies. Secondly, it is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial."

(own emphasis)

- [17] The appellant's belated and cursory incantation of allegedly being sodomised in the absence of such facts being pleaded must be considered against the objective evidence, which militates against the probability of this serious allegation. The appellant failed to report the incident to a police official, and neither did he lay any criminal charges when he had an opportunity to do so. In passing, it merits noting that although the appellant testified that he went to a clinic after he was released from the holding cells, he failed to present any evidence in confirmation thereof.

- [18] The alleged sodomisation was not part of the appellant's pleaded case and should resultantly have no effect on the determination of the quantum. On the facts presented to the court *a quo* on this issue, this Court is not persuaded that

⁴ *Blos v Minister of Police* (114/2019) [2023] ZANWHC 126 (20 July 2023) at paragraph 22

the appellant satisfied the onus of proof in respect of the sodomisation itself, let alone the possible escalatory effect thereof on the *quantum* of the claim. To this extent, the alleged sodomisation cannot be considered in the calculation of damages.

[19] On a similar footing to the alleged sodomisation, the appellant failed to plead or prove that the alleged patrimonial damages suffered because of the loss of his motor vehicle were a direct result of his detention either.

Quantum

[20] The determination of the quantum of the damages suffered by the appellant entails the balancing of various interests. The rights of individual freedom lie at the heart of our constitutional dispensation. It is a well-established principle that a balance must be struck between enforcing constitutional rights and ensuring that the resulting award, accurately corresponds with the circumstances of the matter, while not resulting in an overcompensation of a claimant.

[21] In *Diljan v Minister of Police*⁵, the Supreme Court of Appeal (SCA) warned against the deviation from the principles mentioned above, in the determination of the *quantum* of damages in cases of wrongful arrest. The SCA remarked that although a balance should be struck between the award and the injury inflicted, it in the same breath cautioned that the Minister of Police should not be used as the proverbial “cash cow”.

[22] This view has its origins in the most pertinent judgment of the SCA on the issue, in *Minister of Safety and Security v Tyulu*⁶ where the following was said:

“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

⁵ *Diljan v Minister of Police* [2022] ZASCA 103 at paragraph 17

⁶ *Minister of Safety and Security v Tyulu* (327/2008) [2009] ZASCA 55 at paragraph 26. See also *Masiteng v Minister of Police* [2024] ZASCA 165

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 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.”

[23] In assessing the *quantum* of damages in such cases, the SCA in *Motladile v Minister of Police*⁷ re-affirms the specific considerations in the process of assessment as follows:

‘The assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff.’

⁷ *Motladile v Minister of Police* [2023] ZASCA 94 at paragraph 17

[24] In *Masiteng v Minister of Police*⁸, the appellant who was incarcerated for 42 hours, appealed against an award of damages in the amount of R30 000, having claimed R210 000 in the Magistrates Court. The SCA stated as follows:

‘[12] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court. In cases involving deprivation of liberty, the quantum of damages to be awarded is at the discretion of the trial court, to be exercised fairly, and generally calculated according to what is equitable and good, and on the merits of the case itself (ex aequo et bono). As a result, an appeal court should be slow to interfere, unless there are specific reasons to do so.

...

[14] Comparable cases and the awards made therein are nothing more than a useful guide to what courts have considered to be appropriate on the facts before them, but they have no higher value than that. Ultimately, each case must be determined on its own facts. In my view, the high court correctly endorsed this principle and did not interfere with the amount awarded by the regional court.

[15] Counsel for the applicant submitted (without it being specifically mentioned in the judgment) that, the social status and standing of the applicant seem to have been regarded as the overriding criteria in determining what was an appropriate compensation. It was an injustice to the intrinsic value of the applicant because he was a farm worker, and ‘poor people should not be compensated less simply because they are poor’.

[16] Counsel argued that the regional court materially misdirected itself, as it was influenced by the wrong principles and did not exercise its discretion judicially, by only awarding an amount of R30 000 to the applicant. It was contended that an amount of R100 000 would have been a fair amount under the circumstances. Furthermore, the court did not consider other comparable cases.

⁸ *Masiteng v Minister of Police* [2024] ZASCA 165

[17] Regarding exceptional circumstances, counsel for the applicant argued that this was a social injustice as the disparity in the amount is based on the applicant's social standing. It was argued that the high court erred in not adjusting the compensation awarded to the applicant and failing to apply all the relevant considerations.

[18] Applying the legal principles mentioned above, these submissions are without merit. The high court confirmed that the unlawful arrest and detention of the applicant infringed his personal rights of liberty, body integrity and human dignity. And that the primary purpose of an award is not to enrich a party but to offer him a solatium for his injured feelings.”

[25] An important cog in the process of determining the *quantum* of damages in cases such as the present is to consider the awards in recent comparable judgments. Recent judgments where awards have been made for unlawful arrest and detention include the Full Bench judgment of the Eastern Cape High Court, Grahamstown in *Minister of Police v Page*⁹, where the court awarded damages of R30 000 to the claimant who had been detained for one day. In the matter of *Shode v Minister of Police*¹⁰ the Full Bench of Eastern Cape High Court, Makhanda granted compensation in the amount of R40 000 to the claimant who had been detained for 22 hours. In *Diljan v Minister of Police*¹¹, the Supreme Court of Appeal awarded R120 000 to the claimant for arrest and detention of three days. In *Lenoke v Minister of Police*¹² the Full Bench of this Division granted R30 000 for an unlawful detention that lasted three hours. In *Motladile*, the claimant who spent four days and nights in detention, was awarded damages of R200 000.

⁹ Minister of Police v Page [2021] ZAECGHC 22

¹⁰ Shode v Minister of Police [2022] ZAECMKHC 11

¹¹ Diljan v Minister of Police [2022] ZASCA 103

¹² Lenoke v Minister of Police [2024] ZANWHC 277

[26] In the final analysis, as the SCA re-iterated in *Masiteng*, with reference to *Neethling v Du Preez and Others*; *Neethling v Weekly Mail and Others*¹³, as applied by the Constitutional Court in *Dikoko v Mokhatla*¹⁴:

“In cases involving deprivation of liberty, the quantum of damages to be awarded is at the discretion of the trial court, to be exercised fairly, and generally calculated according to what is equitable and good, and on the merits of the case itself (ex aequo et bono).”

Conclusion

[27] It is against the aforesaid principles, that the award of damages, relevant to the peculiar facts of this matter must be considered. The appellant was detained for three (3) days before he was released, when the charges were withdrawn against him. The award of R45 000 by the court *a quo* does not accord with the salient principles and this Court is at large to interfere.

[28] Having regard to the fact that the only issues of relevance in the court *a quo* from the evidence of the appellant were that he could not use the ablution facilities, and was a farmer, without quantifying any impact on his incarceration on his farming activities, and that he was detained for three (3) days, on a careful consideration of all these factors, an award of R90 000 would be just and equitable.

Costs

[29] Although the appeal was not opposed, the appellant was substantially successful with his appeal and there exists no reason to deviate from the normal rule that costs should follow the result.

Order

¹³ *Neethling v Du Preez and Others*; *Neethling v Weekly Mail and Others* [1994] ZASCA 133; 1995 (1) SA 292 (A); [1995] 1 All SA 441 (A) at 301G-H

¹⁴ *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) paragraph 94

[30] Resultantly the following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following order:

'(i) The defendant is ordered to pay the plaintiff the amount of R90 000.00 together with interest at the rate of 7.25% per annum *a tempore morae*.

(ii) The defendant is ordered to pay the plaintiff's costs on the Magistrates Court scale.'
3. The defendant is ordered to pay the costs of the appeal on party and party Scale A.

M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

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For the Respondent : No appearance