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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - MTHATHA)**

CASE NO: 295/2024

In the matter between:

DYAMLUTI GOQWENI

APPLICANT

And

MINISTER OF POLICE

RESPONDENT

JUDGMENT

Nkele AJ:

INTRODUCTION:

- [1] The plaintiff instituted action proceedings against the defendant for unlawful arrest and detention, as well as malicious prosecution in the amount of R 825 000.00. An appearance to defend was entered on the 11th of September 2024 and a plea subsequently filed on the 21st of November 2024. Upon realising that the plea is a bare denial, the plaintiff approached the court by way of an application to have it set aside as irregular.

- [2] On the 11th of March 2025 the court set aside the defendant's plea as irregular and non-compliant with the provisions of Rules 18(4) and (18(5) of the Uniforms Rules of Court. In the same Court order the defendant was granted leave to amend the plea within 30 (thirty) days.
- [3] Despite the court order directing the defendant to amend the plea within 30 (thirty) days from the date of the order, the defendant failed to so amend the plea and as a result the plaintiff set the matter down for default judgment on the 17th of September 2025 and the defendant was notified accordingly.

PLAINTIFF'S EVIDENCE

- [4] The plaintiff testified that on the 17th of August 2023 he was preparing for a traditional ceremony and was in a forest to get things needed for that ceremony, when he was telephoned by a policeman who advised him that he is in his homestead, waiting for him. That was about 15h00 in afternoon. When he enquired as to what they want the policeman replied that they want him and he then advised them to wait for him.
- [5] On his arrival he saw a white double cab bakkie (van) parked next to his homestead and he went straight to it and greeted the three police who were inside it. There was one policewoman and two young men. He thereafter asked them what the problem was, and they told him that they have come to arrest him for having raped A[...], who was her stepdaughter. The plaintiff testified that he was very surprised to hear this and even asked them when did that happen because A[...] left the homestead about seven years ago when she was ten years old and had never seen her since then. The police never answered him.
- [6] Thereafter, plaintiff further testified, he advised the police that he was to start a traditional ceremony that very same afternoon and for that reason he requested that he be allowed to proceed with it and thereafter present himself the following Monday. The police refused to yield to that request and ordered himself to be ready to go with them. He then called her sister to hear for

herself what was happening who, after hearing that her brother was about to be arrested, cried and left.

- [7] He then went to the young men who were near the kraal and gave them the permission to proceed with the ceremony even in his absence. Thereafter he got inside his house to prepare himself to be arrested. While still inside the house the police came to fetch him, advising him that it was getting late. At that time there were people in his homestead, other than the young men who were near kraal, who had come to help with the preparations for the ceremony. So, the arrest happened in full view of everyone present at his homestead. The police took him to the Willowvale police Station where he was detained until he appeared in court on the 23rd of August 2023.

THE CONDITION OF THE CELLS AND THE PERIOD OF DETENTION

- [8] According to the plaintiff's testimony, the condition at the holding cells was horrifying, to say the least. He further testified the blankets were very dirty and infested with lice which were going up and down his body, such that he had to continuously scratch himself non-stop. The food composed of half-cooked porridge and a cold weak tea.
- [9] He was detained from the 17th to the 23rd of August 2023. Effectively he spent a period of four days under arrest and detention of the defendant's members. On the 23rd of August 2023 he was handcuffed and taken to court when he was kept in the holding cells. When his turn came to be called to appear in court, what happened was that a policeman told him that *'his ancestors have told him to go home'*. He therefore went out to meet his family members who became emotional when they saw his condition. He too lost control of himself and shed some tears.

THE GOVERNING LEGAL PRINCIPLES AND THE EVALUATION OF EVIDENCE

[10] It is trite that a person may only be arrested and detained without a warrant authorising the arrest only if there is a reasonable suspicion that he committed an offence referred to in Schedule 1 and in other very limited circumstances which are prescribed in section 40 of the Criminal Procedure Act (**“the Act”**)¹.

[11] In terms of section 40(1)(b) of the Act a peace officer may without a warrant arrest any person –whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody. It is not every suspicion that will suffice to justify a person’s arrest and detention. The suspicion must be reasonable and the test for such reasonableness is objective.² A lucid explanation of the reasonableness test where an arrest has been effected on the basis of suspicion was made in *Mabona and Another v Minister of Law and Order and Others* where the court held that:

*“The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion”.*³

[12] As Rusi J stated in *M.J v Minister of Police* the decision to arrest entails the exercise of discretion and it is only after the jurisdictional facts for an arrest that a discretion arises and even in that instance the peace officer is not obliged to arrest. The discretion to arrest must be exercised after taking into account all the prevailing circumstances into consideration.⁴ Quite recently, the apex court had this to say about the reasonableness of an arrest without a warrant *“The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not*

¹Act no. 51 of 1977

² *M.J v Minister of Police and Another* (1191/2022) [2025] ZAECHC 17 (11 March 2025).

³ 1988 (2) SA 654 (SE) at 658G-H.

⁴ para 51 of the judgment.

to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person”.⁵

[13] It also a well-entrenched principle of our law that an arrest or detention is prima facie unlawful. This was explained in *Zealand v Minister of Justice & Constitutional Development* as follows “*This is not something new in our law. It has been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification*”.⁶

[14] The evidence of the plaintiff, gleaned in its entirety, in my view demonstrates that the arrest as well as the detention was effected without a warrant. As the authorities clearly state an arrest and detention effected in such a fashion was, prima facie, an unlawful deprivation of their liberty. In such circumstances, once the plaintiff alleges that the arrest and detention was effected without a warrant, the onus shifts to the defendant to prove the lawfulness of the arrest and the resultant detention. As the opposition was explained by the Constitutional Court “*It follows that in a claim based on the interference with the constitutional right not to be deprived of one’s liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established the deprivation is unlawful and the defendant bears the onus to prove that there was a justification for interference*”.⁷

[15] As there was no plea filed, the matter was set down for default judgment. So, there was no version put up by the defendant to justify the arrest and detention of the plaintiff. In fact, the defendant was given that opportunity and never utilised it by filing a plea. This so because it was afforded an opportunity to file the plea within 30 days and even the notice of set down for default judgment was served upon its attorneys of record. The defendant was,

⁵ Groves NO v Minister of Police [2023] ZACC 36; 2024(1) SACR 286 (CC)B para 52.

⁶ 2008(4) SA 458 (CC) para 25.

⁷ JE Mahlangu and Another v Minister of Police 2021 ZACC 10 para 32.

therefore, well aware that the matter has been set down for default judgment. The effect of it all is that the defendant was nowhere to be found for purposes of discharging the onus that rests with him, that of justifying the arrest without a warrant. That therefore leaves me with no other option, in the present factual matrix, but to come to the inevitable conclusion that both the arrest and the consequent detention of the plaintiff was an unlawful deprivation of their liberty which was totally unjustified.

[16] As far as malicious prosecution is concerned, it is trite such a claim, for to be valid and acceptable, the plaintiff has to prove the impairment of his good name, physical liberty and feelings of dignity. In *Rudolph v Minister of Safety and Security* it was stated that “...The ‘malice’ must be that of the person responsible for initiating the prosecution against the appellants. In this case the appellants were formally charged –with contravening the Gatherings Act- on Saturday 19 July 2003 by members of the SAPS at the Pretoria Moot Police Station. It would appear that this the stage at which the proceedings were instituted. Although Captain Bekker’s statement was made only on 18 August 2003, it is safe to assume that the member of SAPS who charged the appellants did so on the basis of information furnished to him or her by the arresting officer, viz that there were only eight persons (four adults and four children) gathered at the scene of the supposed ‘illegal gathering’. By no stretch of the imagination could this ‘demonstration’ be regarded as a ‘gathering’ within the meaning of the Gatherings Act”.⁸

[17] At para 20 of the judgment the court continued as follows “In this case there can be no question that the person who charged the appellants was aware of the fact that, by so doing, would in all probability be ‘injured’ and their dignity (comprehending also their good name and privacy) in all probability negatively affected. Knowing that the ‘gathering’ in question comprised only of eight persons, the police member concerned must at the very least have foreseen the possibility no offence in terms of the Gatherings Act had been committed and that, in charging the appellants with a contravention of that Act, he or she

⁸ 2009 (5) SA 94 at para [19].

*was acting wrongfully. He or she nevertheless continued to so act, reckless as to the possible consequences of his or her conduct. In our view, he or she thus acted animus injuriandi. That being so, the appellants proved the requirements of malicious prosecution and their claim in this regard should have succeeded”.*⁹

- [18] On the basis of the abundant authority in our law I find that the police personnel who arrested the plaintiff are members of the SAPS who are solely responsible for setting the process of law in motion when he arrested and detained the plaintiff on the 17th of August 2023. They acted not only wrongfully but also recklessly as to the possible consequences of his conduct. I am quite certain that when they arrested and detained the plaintiff, they either did not have sufficient information at their disposal necessary to formulate a reasonable suspicion or they failed to properly consider all the relevant facts before deciding whether to arrest or not. The defendant therefore cannot, in my view, escape the consequences of their actions. In the circumstances I find that the plaintiff's claim for malicious prosecution should also succeed.

QUANTUM IN RE UNLAWFUL ARREST AND DETENTION CLAIM

- [19] It has been proven, on a balance of probabilities, that the plaintiff's arrest and detention was indeed an unlawful and unjustifiable deprivation of his liberty. What now remains is to consider an appropriate compensation for the unwarranted invasion and deprivation of his liberty. It is common cause that the plaintiff's arrest and detention lasted approximately for four days, that is from 17 to 20 August 2023. The plaintiff was a respected member of the community, an elderly man in his seventies and a traditional healer. I now turn to consider the authorities that will serve as a guide to a proper compensation relating to an unlawful arrest and detention.

⁹ also, *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 All SA 375 (SCA) para 5.

- [20] It is trite that in the exercise of judicial balance the courts have been cautioned not to pour out largesse from the horn of plenty at the defendant's expense. In *Mahlangu and Another v Minister of Police*¹⁰ it was held that damages are awarded to deter and prevent future infringements of fundamental rights by the organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place. Similarly, in the *Supreme Court of Appeal in Minister of Safety & Security v Tyulu*¹¹ remarked 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 inflicted injury*”.
- [21] According to Reddy J in *Khorae v Minister of Police* the correct approach is to have regard to all the facts of the case and to determine the quantum of damages according to the exigencies of the case. It is therefore a salutary practice in our judicial culture that previous awards in a claim for damages should only serve as a guide and should not be followed lavishly.¹²
- [22] Against the backdrop of these trite principles enunciated in the case law, I am now required to determine an appropriate compensation in the light of the salient facts that have already been narrated above. In the *Khorae* case the North West High Court recently awarded an amount of **R 220 000.00** for an unlawful arrest and detention that lasted for eight days. The difference is that the circumstances were more serious than in the present case, in particular that the plaintiff was deprived of his chronic medical treatment, as he was asthmatic. That means the court awarded an amount of **R 27 500.00** for each day of unlawful detention.

¹⁰ CCT 88/20 [2021] ZACC 10, 2021 (7) BCLR 698 (CC), 2021 (2) SACR 595 (CC).

¹¹ 2009 (5) SA 85 (SCA) at para [26].

¹² 2025 (9K6) QOB 1(NWM) para 7, *Minister of Safety & Security v Seymour* 295/05 [2006] ZASCA. 71, [2006] SCA 67 (RSA)B; [2007] 1 All SA 558 (SCA).

[23] In this matter the appropriate solatia, after consideration of all the facts, in my considered view, would be an amount **R 35 000.00** per day for each of the plaintiff was in custody. That means the total award for the plaintiff in respect of the number of days he has been unlawfully arrested and detained would be a sum of **R 140 000.00**.

QUANTUM IN RE MALICIOUS PROSECUTION CLAIM

[24] The facts relating to the claim for malicious prosecution have already been narrated, which are the same as those of the arrest and detention claim, as well as the legal principles related thereto. Indeed, as already adumbrated, the police personnel's decision to set the law in motion had no reasonable basis. There was no reasonable basis for even entertaining a suspicion that an offence had been committed in the factual circumstances of this case. Their decision to arrest and detain therefore fails the reasonableness test. For that reason, the defendant cannot escape being held responsible for their unreasonable decision, albeit vicariously, of setting the law in motion when there was no reasonable basis to do so.

[25] In *Nakana v Classens and Others (137/2024) [2025] 52 (7May 2025)* the Supreme Court of Appeal over turned an award of **R 250 000.00** made by the court a quo for damages in respect of malicious prosecution and substituted it with an amount of **R 80 000.00**. Having considered all the relevant facts in the present case I am of the view that an amount **R 120 000.00** is appropriate compensation for the malicious prosecution of the plaintiff.

[26] In the circumstances I make the following order:

- (a) That the defendant is ordered to pay the plaintiffs a sum of R 140 000,00 for unlawful arrest and detention.
- (b) That the defendant is ordered to pay the plaintiff a sum of R120 000.00 for malicious prosecution.
- (c) The defendant is ordered to pay costs of suit.

T.A. NKELE

ACTING JUDGE OF THE HIGH COURT

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Matter heard on : **17 September 2025**

Judgment delivered on : **23 October 2025**

