



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

Circulate to Magistrates / Circulate to Regional Magistrates

Case no: CIV APP RC 08/25

In the matter between:

**THANDIWE MTATI
APPELLANT**

APPELLANT

and

**THE MINISTER OF POLICE
PARTY**

FIRST RESPONDENT

Coram: Masike AJ et Wessels AJ

Heard: 31 October 2025

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 17 March 2026.

Summary: Unlawful arrest and detention – Quantum of damages – Discretion of trial court – Appellate interference – Substandard detention conditions (dirty cells, broken toilets, lack of bedding) – Whether such conditions constitute ‘special circumstances’ or have become baseline factors in assessment – Held that prevalence of such conditions in unlawful detention cases means they do not automatically warrant a premium – Award of R40,000 for 48-hour detention by young female plaintiff with aggravating features (naked confrontation, mixed detention with males, lack of food) not so low as to warrant interference – Appeal against quantum dismissed.

Costs – Heads of argument – Recoverability – Practice Directive 6.11 of Regional Court Practice Directives permits filing of heads ‘where necessary’ but does not require them in default judgment matters – Costs of heads of argument not automatically recoverable – Determination of necessity a matter for court's discretion and ultimately taxing master – Magistrate's omission to specifically award heads of argument costs not a material misdirection where general costs order granted – Appeal against costs dismissed.

Appeal – Record on appeal – Appellant bears burden to place complete record before appeal court – Absence of transcript or note of proceedings prevents speculation about what occurred.

JUDGMENT

Wessels AJ

Introduction

[1] This is an appeal against part of the judgment and order of the Regional Court for the Regional Division of the North West, held at Klerksdorp. The court a quo granted default judgment in favour of the appellant against the respondent for unlawful arrest and detention. The magistrate awarded the appellant R40 000.00 in damages, together with interest and costs. The appellant appeals against the quantum of the damages award, which she contends is too low, and against the refusal to award the costs of drafting her heads of argument. The respondent did not participate in the appeal.

Facts

[2] The facts of the matter largely emanate from the appellant's affidavit filed in support of her claim, as the respondent did not file a plea on the ground that it was barred. The appellant's evidence is thus largely uncontested.

[3] On Saturday 16 March 2024, the appellant, by then a 22-year-old woman, was at a friend's house in Kanana, Klerksdorp. She was naked and lying on a bed when two male police officers entered the room without warning. She was embarrassed and shocked. She was ordered to get dressed. The police then searched the house and found cannabis. The appellant denied any knowledge of the cannabis, but her protestations were ignored. The police officers informed her that it was their instruction to arrest her and that she must give her version in court. She was arrested without a warrant at approximately 17h00.

[4] She was first taken to Kanana Police Station, where she was detained for four to five hours in a room with approximately six other male detainees. She was the only female and feared for her safety. She was then transferred to the Leeudoringstad holding cells.

[5] The cell at Leeudoringstad was approximately 8x5 metres and was dirty. It had a bad smell emanating from a non-working toilet. The shower was dirty, covered with spiders, spider webs, and flies. The appellant was not provided with a blanket or a mattress and was forced to sleep on the cement floor. The cell was full of insects and mosquitoes.

[6] The appellant was not provided with any food on Saturday night. On Sunday 17 March 2024, she was offered porridge with milk, which she could not eat because she is allergic to milk. She received no food on the Monday until her release. She was not allowed to call her family to bring her warm clothes or toiletries.

[7] The appellant was detained from the evening of Saturday 16 March 2024, until Monday 18 March 2024, at approximately 16h00 and was released without ever appearing in court.

[8] The appellant states in the evidence, adduced on affidavit, that the experience had a lasting impact on her. She is not the same person as she was before the arrest. She has frequent dreams about the experience. Any bad smell triggers flashbacks and she struggles to manage her emotions, becoming easily emotional, irritated, and frustrated.

The judgment of the court a quo

[9] In her judgment on quantum, the Magistrate correctly restated the trite principles governing the assessment of damages for unlawful arrest and detention, citing *Minister of Safety and Security v Tyulu*¹ for the proposition that the primary purpose is to offer a solatium for injured feelings, not to enrich the aggrieved party.

[10] The Magistrate considered the facts of the case, noting the appellant's young age, the humiliation of being confronted while naked, the poor conditions of the cell, and the lack of food. She referred to several previous comparable judgments regarding the facts and the quantum awarded in those cases. She concluded that the facts and circumstances of this case were distinguishable from the case law cited by the appellant and that an amount of R40 000.00 would be 'fair and just'.

[11] Regarding costs, the magistrate ordered that the 'Defendant is to pay costs of action on a party and party scale, which costs include the necessary preparation and travelling costs.'

[12] The magistrate did not award the costs of drafting the heads of argument, despite a specific prayer for these costs in the appellant's written submissions.

Issues to be decided on appeal

[13] The appellant's notice of appeal raises the primary issues for this Court's determination:

¹ *Minister of Safety and Security v Tyulu* (327/2008) [2009] ZASCA 55; 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) (27 May 2009).

(a) Whether the learned magistrate erred in awarding the sum of R40 000.00, thereby failing to take into account all relevant factors and adopting a mechanical approach to the quantification of damages.

(b) Whether the learned magistrate erred in omitting or refusing to grant the appellant the costs of drafting the heads of argument.

Applicable legal principles: The assessment of quantum

[14] The assessment of damages for unlawful arrest and detention is a matter of discretion for the trial court. In *Tyulu*², the Supreme Court of Appeal stated:

‘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.’

[15] In *Minister of Safety and Security v Seymour*³, the Supreme Court of Appeal (‘SCA’) cautioned that it is challenging to assess general damages by comparing them with past cases because the facts of each case must be considered as a whole, and few are truly alike. While previous awards can help indicate what quantum courts have found suitable, they do not carry greater authority than serving as guidance. In *Protea Assurance v Lamb*⁴, the SCA held that the process of comparison is not a meticulous examination of

² *Op cit* fn 1 para 26.

³ *Minister of Safety and Security v Seymour* (295/05) [2006] ZASCA 71; [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA) (30 May 2006) para 17.

⁴ *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535B-536A.

awards and should not fetter a court's general discretion. Previous awards are useful guides but have no higher value than that.

[16] The proper approach to the assessment of damages in matters such as the present includes the evaluation of the personal circumstances of the plaintiff, the circumstances around the arrest, as well as the nature and duration of the detention⁵.

[17] Essential to an appeal is the extent to which an appeal court can interfere with the judgment of the court a quo on the issue of quantum. In *Road Accident Fund v Guedes*⁶, [2024] ZASCA 56, In quoting from LAWSA, the court summarised the applicable principles regarding the interference of an appeal court:

‘Where the amount of damages is a matter of estimation and discretion, the appeal court is generally slow to interfere with the award of the trial court - an appellate tribunal cannot simply substitute its own award for that of the trial court. However, once it has concluded that interference is justified... the appeal court is entitled and obliged to interfere.’

[18] Interference is warranted only in specific circumstances, such as where there has been an irregularity or material misdirection, where the decision was based on totally inadequate facts, or where the award is so excessive or so low that it induces a sense of shock, implying that the court did not exercise its discretion properly.

⁵ Cf *Mokonyane v Minister of Safety & Security and Another* (33976/08) [2010] ZAGPPHC 183 (5 November 2010) para 9.

⁶ *Road Accident Fund v Guedes* (611/04) [2006] ZASCA 19; 2006 (5) SA 583 (SCA) (20 March 2006) para 8.

[19] Ultimately, the award must be fair and proportionate to the injury inflicted. In *Zondo v Minister of Police*⁷ the court emphasised that ‘our law requires a reasonable correlation between the injury sustained and the compensation awarded.’

Analysis: The quantum of damages

[20] The appellant contends that the magistrate adopted a ‘mechanical calculation’ by focusing almost exclusively on the 48-hour duration of the detention, at a rate of approximately R20 000 per day, and failed to weigh the numerous aggravating factors present in this case properly.

[21] The magistrate’s judgment, after setting out the facts, referred to three previous awards involving shorter periods of detention and arrived at a R40 000 award. The issue is whether this discloses a material misdirection warranting the interference of this Court.

[22] In her judgment, the magistrate did not state that she was calculating a daily rate. In considering the judgment of the Court a quo in its totality, it appears that after consideration of the facts and comparable cases, the Magistrate arrived at a figure she considered appropriate. This is precisely the kind of evaluative judgment that falls within a trial court’s discretion.

[23] The appellant argues that the magistrate failed to attach sufficient weight to the aggravating factors. However, the weight to be attached to various factors is a matter for the exercise of discretion. A mere difference of

⁷ *Zondo v Minister of Police* (2024/083242) [2025] ZAGPJHC 1140 (6 November 2025) para 13.

opinion on the weight of any particular factor does not constitute a material misdirection.

[24] The appellant argues that the magistrate should have awarded more because of the particularly egregious circumstances. However, R40 000 for a 48-hour detention is not a nominal amount. It is within the range of awards that courts have made in comparable matters. Whether it is at the lower end of the range is a matter of judgment, not a matter of law.

[25] The appellant elected to present her evidence by way of affidavit, which is permissible in default judgment proceedings in terms of the Magistrates' Courts Rules⁸. However, this procedural choice defines the scope of the evidence before the court *a quo*. The appellant's affidavit set out the facts of the arrest and detention in detail, but did not contain expert psychological evidence quantifying the emotional harm or evidence of any special damages. The Court *a quo* had before it only the appellant's own account of her suffering, but no expert corroboration.

[26] A review of recent case law reveals that the conditions described by the appellant are regrettably common. These cases demonstrate that courts are frequently confronted with evidence of dirty cells, broken toilets, inadequate bedding, and overcrowding. These conditions have become so ubiquitous in unlawful detention claims that they might properly be regarded as the baseline against which claims are assessed, rather than as aggravating factors justifying a premium.

⁸ Magistrate's Court Rule 12(4).

[27] If most cases where the plaintiff complains of dirty cells and broken toilets were treated as presenting ‘special circumstances’ warranting an elevated award, the baseline for damages would steadily increase. This could give the impression that unlawful detention claims are like a lottery, where the existence of poor conditions, however frequent, justifies increasingly higher awards.

[28] Such an approach would offend the principle stated in *Tyulu*⁹ that the purpose is not to enrich the aggrieved party but to offer solatium for injured feelings.

[29] On this evidence, the award of R40 000.00 cannot be said to be so unreasonable that no court properly directing itself could have arrived at it. The award is within the range of permissible options available to the magistrate.

[30] The appellant has not established that wrong principles influenced the magistrate’s decision, or that she misdirected herself on the facts, or that her decision could not reasonably have been reached by a court properly directing itself. In the absence of such a case on appeal, this Court cannot interfere.

[31] The appeal on quantum must therefore fail.

Legal principles in the discretion in awarding costs

[32] The appellant also appeals against the magistrate’s omission to award the costs of drafting the heads of argument, despite a specific prayer for these

⁹ *Op cit* fn1.

costs. In the appellant's written heads of argument filed in the court a quo, the appellant prayed for 'a cost order on a party and party scale including the cost of preparation and drafting the heads of arguments as well as the travelling fees.' This prayer was repeated in the conclusion of those submissions.

[33] The magistrate's order specifically included 'preparation and travelling costs' but omitted heads of argument costs. No reason was given for this omission.

[34] The question is, in exercising the Magistrate's discretion in awarding costs, whether this omission constitutes a material misdirection.

[35] The award of costs is likewise a matter within the discretion of a court. In *Zuma v Office of the Public Protector and Others*¹⁰, the SCA stated:

'In granting a cost order, a lower court exercises a true discretion. An appellate court will not interfere with the exercise of that discretion unless there was a material misdirection by the lower court.'

[36] The SCA elaborated further on this issue as follows¹¹:

'Interference is warranted only where the discretion was not exercised judicially; the decision was influenced by wrong principles; the decision was affected by a misdirection on the facts; or the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles. It is not sufficient on appeal against the cost order simply to show that the lower courts order was wrong.'

¹⁰ *Zuma v Office of the Public Protector and Others* (1447/2018) [2020] ZASCA 138 (30 October 2020) at para 19.

¹¹ *Op cit* fn 10, para 20.

[37] In Directive 6.11 of the Regional Court Practice Directives¹² it is stated:

‘Unopposed applications and default judgments shall be dealt with on the papers which shall include heads of arguments or written submissions from the party concerned where necessary. Such heads of argument shall be filed electronically with the Registrar/Assistant Registrar or where so directed, with the presiding officer concerned.’ (emphasis added)

[38] The presence of these items in the tariff does not create an automatic entitlement by a party to litigation. It merely provides a mechanism for charging for this work if it was necessarily performed. The taxing master retains the discretion to disallow the item if the heads of argument were unnecessary, prolix, or otherwise not required.

[39] In *Ngema v Road Accident Fund*¹³ in referring to *Port Elizabeth Road Transportation Board v Liesing*¹⁴ and *Jackson and Ginsburg, NNO v Steenkamp*¹⁵, Nicholson J considered a similar issue and stated:

‘I am of the view that the ratio in the cases of Meyburg and Liesing is correct. The corollary of this is that if there is a Practice Directive of this division that heads of argument be filed by both parties in Opposed Motion proceedings, fees relating to heads of argument must be allowed.’

[40] These authorities establish that heads of argument are prepared primarily to assist and convenience the court in understanding and deciding the case. The costs of preparing or perusing heads of argument are not automatically recoverable. Recoverability depends on whether the heads of

¹² The Regional Court Practice Directives (2024 Revision).

¹³ *Ngema v Road Accident Fund* (234/2005) [2008] ZAKZHC 98 (1 January 2008) para 14.

¹⁴ *Port Elizabeth Road Transportation Board v Liesing* 1968 (4) SA 401 (E).

¹⁵ *Jackson and Ginsburg, NNO v Steenkamp* 1973 (1) SA 309 (T).

argument were required by the Rules of Court or by a practice directive. If they were not required, the taxing master has a discretion to disallow them.

Analysis: The discretion in awarding costs

[41] In the Regional Court, which is a creature of statute without inherent jurisdiction, the recoverability of costs is strictly governed by the rules. Practice directive 6.11 permits the filing of heads of argument in unopposed motions "where necessary," but it is not mandatory. The determination of necessity is a matter for the court's discretion and, ultimately, for the taxing master on taxation.

[42] In the Regional Court, practice directive 6.11 permits the filing of heads of argument 'where necessary', but it is not mandatory. No rule or practice directive requires the filing of heads of argument in default judgment matters. The determination of necessity is a matter for a court's assessment.

[43] The Magistrate may have considered that the heads of argument were not necessary, or that the preparation fee adequately covered them, or that the time spent on them was excessive. In the absence of any indication to the contrary, we must assume that the magistrate exercised her discretion properly.

[44] Crucially, the appellant bore the burden of placing a complete record before this court to demonstrate a misdirection. The record does not contain a transcript of the proceedings or a note by the magistrate recording what occurred. This Court cannot speculate about what submissions were made on the date of the hearing before the Court a quo. The absence of evidence means this Court cannot conclude that the Magistrate misdirected herself.

[45] Moreover, even if it could be determined what, if anything, moved the Magistrate to make the cost order in the manner she did, the Magistrate's decision falls within the range of permissible options available to her. As stated in *Zuma*¹⁶, interference by an appeal court is warranted only where the discretion was not exercised judicially, or the decision was influenced by wrong principles, or the decision could not reasonably have been reached by a court properly directing itself. The appellant has not established any of these grounds.

[46] The determination of whether heads of argument were 'necessary' is ultimately a matter for the taxing master on taxation. The court's costs order establishes the basis and scale of costs. The taxing master then determines, in the exercise of his or her specialised discretion, which specific items were necessarily incurred.

[47] The Court a quo's general order for costs on a party and party scale, which included 'preparation and travelling costs', is sufficient to allow the taxing master to consider whether heads of argument were necessarily incurred. If the taxing master concludes that they were, he or she may allow them under the general order. If not, they may be disallowed.

[48] The appeal must therefore fail.

¹⁶ *Op cit* fn 10.

Order

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

1. The appeal is dismissed.
2. The order of the court a quo is confirmed.
3. There shall be no order as to the costs of the appeal.




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

I agree




T MASIKE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances

For appellant :Adv D Smit
Instructed by :Jan Ellis Attorneys
:Mahikeng