SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A3039/2011

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **11 June 2013**

DATE: 9 April 2013

SPILG SIGNATURE SIGNATURE

pp MLaw-21 AJ.

TAKAWIRA, BIGGIE Appellant/Plaintiff

and

THE MINISTER OF POLICE Respondent/Defendant

JUDGMENT

SPILG, J:

INTRODUCTION

1. The appellant sued the respondent for wrongful arrest and detention arising from an incident which occurred on Saturday 5 September 2009. He claimed damages of;

   a. R100 000 for wrongful arrest and detention, comprising deprivation of liberty, *contumelia* inconvenience and discomfort;

b. R10 000 for wrongful assault based on two separate incidents at the Johannesburg Central Police Station ("*Jhb Central*") where police kicked him and stood on his foot then later struck him with their open hands.

2. On 9 March 2011 the learned Magistrate upheld the claim for wrongful detention awarding damages of R20 000. The wrongful arrest and assault claims were dismissed.

3. The appeal is against the quantum awarded for the detention as well as the dismissal of the assault claim. In its notice of appeal and in the heads of argument the appellant incorrectly assumed that the court *a quo* had awarded damages for both the arrest and detention. This is incorrect. The learned magistrate dealt with the arrest at paras 27 to 34 and found that the appellant was lawfully arrested" *in order to have him before the court"* on suspicion of loitering with the intention of committing an offence.

4. It is precisely because the appellant was not brought before court prior to his release, despite being detained for two days which includes a weekday, which was considered by the learned magistrate to be material in finding that the detention was unlawful. However in order to properly deal with the appeal against the damages award of R20 000 which was in respect of the finding that there was only an unlawful detention it is necessary to traverse the issues regarding both the arrest and the detention.

MAGISTRATE'S FINDINGS

5. At the time of his arrest the appellant was 35 years old, married and appears to have been a trainee tour guide.

6. The learned magistrate found the following facts proven. At the time of the appellant's arrest, warrant officer Ramafemo together with his team of policemen were on public safety enforcement duty in von Wellig Street- which he described as a crime hotspot in the CBD. They arrested a number of suspects for various petty offences such as illegal gambling and drunkenness. There were also a number of suspects arrested for loitering because they had remained in the same spot for an unreasonably long time without reasonable explanation, and after being requested to move along either did not or kept returning.

7. It was common cause that the appellant was arrested on suspicion of loitering. The court accepted that the warrant officer could not recall if he specifically had arrested the appellant or even had witnessed the arrest. The warrant officer however set out the basic *modus operandi* adopted and the court accepted that he did not witness any assault. The court accepted that he did specifically enquire from those detained if they had any complaints and that no one came forward.

8. The learned magistrate accepted the warrant officer's testimony that the appellant could have been warned to appear before court although it first would have been necessary to book him into the police cells under a SAP14. The warrant officer explained that they would have handed those arrested, including the appellant, to the duty officers at Jhb Central as their duty was limited to arresting suspects and handing them over at a police station. The court effectively found the warrant officer to be an honest and reliable witness.

9. The appellant testified that a group of police officers stopped the appellant and searched him. They found his Zimbabwean passport, R200 cash and his tourist badge. They then presented him with the option of either handing over his cash or being put in a truck and

taken to Jhb Central. According to the appellant, the policemen only mentioned his failure to carry an identity document and did not say that he was suspected of committing an offence. The appellant told them that the money was not his, to which they responded that either he gives them the R200 or else he will be taken to Jhb Central where he would be required to pay R300.

10. According to the appellant the policemen escorted him across to a female police officer whose name was Ntimkulu. When she saw the appellant looking at her name tag she said that he could do nothing to her. This frightened him and when the opportunity presented itself he ran away as he was concerned that his passport would be taken from him.

11. After an undisclosed distance the appellant claimed that he realised the futility of running away, stopped and the policemen then took hold of him and proceeded to take him in the direction of their truck.

12. It was at this stage that his leg was kicked while another policeman stepped on his bare feet twice while demanding whether he thought he was being clever.

13. The appellant was in fact arrested at shortly after 11h00 in the morning. He was then placed in the truck with nine others. The truck remained there for a lengthy period while the number interned in the truck increased to almost 35. They comprising both South Africans and foreign nationals. The truck only arrived at Jhb Central at about 15h40. Accordingly he had spent more than three and a half hours in the truck. This part of the appellant's testimony was accepted.

14. The appellant claimed that while at the police station, and after being informed of the reason for his arrest, two officers hit him on the back of his neck. The assault was very painful. The appellant claimed that he then said that he would open a case against them.

They laughed and told him that he could not do so as they were placing him in the cells. He was transferred to a cell with some 30 others. The cell was a large room with a concrete bench and a toilet in the corner.

15. The learned magistrate was not prepared to find on a balance of probabilities that the appellant had been assaulted or that his initial arrest was unlawful. Of particular relevance in reaching this conclusion was that counsel had not put to the warrant officer any of the allegations regarding the bribe and that the appellant's explanation for fleeing the scene was unconvincing despite the appellant generally coming across as an honest person. The court found that there were aspects of the appellant's evidence which required to be approached with caution. The court determined that the act of fleeing itself added to the police's reasonable suspicion for suspecting the appellant of loitering.

16. The appellant was held in custody until about 17H00 on 7 September; a period of just over two days since being booked in. He was never brought before a court although the 7th was a Monday.

17. The respondent elected not to call any witnesses to explain the continued detention of the appellant or why he was not released on a warning or accorded bail as the warrant officer testified was the norm in such a case.

18. The court *a quo* found that the detention of the appellant was *"without doubt ... unlawful, as the Defendant did not give any reason as to why the Plaintiff was not given an option to be released either on his own recognizance, or given an option to pay an amount of bail sufficient to secure his attendance or have to pay an admission of guilt fine if he wanted to"* and referred to the

appellant's right under section 12 of the Constitution not to have his freedom curtailed without just cause.

WRONGFUL ARREST AND THE ASSAULT

19. In my respectful view the learned magistrate was correct in finding that the initial arrest was lawful and did not err, as contended for in the appeal, in holding that the appellant had failed to prove the assaults allegedly perpetrated on him.

The following points are of particular relevance: The warrant officer adequately set out the basis upon which an arrest for loitering was effected on the day in question. The appellant's unsatisfactory explanation for fleeing the scene taints the weight that can be placed on his version. The appellant's version as to why he was arrested was also premised on his refusal to pay a bribe, yet this version of events was not put to the warrant officer. Nor were any of the events surrounding the alleged bribe, particularly bearing in mind the number of policemen who the appellant claimed in evidence had accosted him and the allegation that they then brought him to the female officer.

20. If these events had occurred, then bearing in mind the alleged number of policemen engaged in apprehending only one suspect, one would have expected this version to have been put to the warrant officer as an incident he would have observed. However it was only during the appellant's subsequent testimony that he claimed that the warrant officer was not at the scene at all; a version one also would have expected to be put to the warrant officer during his earlier cross-examination. The failure to challenge the warrant officer's claim to have been present during the operation is an additional factor to support the other reasons upon which the learned magistrate declined to find either that the

appellant had been assaulted or that the initial arrest was wrongful. The appeal against the finding that the appellant had not been assaulted therefore fails.

QUANTUM

21. The learned magistrate considered a wealth of case law including the SCA decision of *Minister of Safety and Security v Tyulu* 2009(5) SA 85 (SCA). The court *a quo* placed great reliance on it to come to the conclusion that R20 000 was an appropriate award. In *Tyulu* the SCA considered R15 000 to be appropriate where a magistrate had been detained for a short period. Unfortunately the learned magistrate erred in believing that the final award in *Tyulu* was for both an unlawful arrest and the subsequent detention of short duration. It also appears that social status, relative to that of the plaintiff in *Tyulu,* also played a significant role in the amount awarded (see at para 42 of the court *a quo's* judgment).

22. In my respectful view the learned magistrate erred for a number of reasons in considering *Tyulu* to be the appropriate yardstick. Firstly the facts in *Tyulu* are themselves unusual because the plaintiff had been arrested twice. The SCA confirmed that the initial arrest was unlawful but that the second, effected a short while later, was lawful. This meant that the period of detention from the second arrest onwards was also lawful.

23. The plaintiff In *Tyulu*, a magistrate, was arrested in the early hours of a Sunday morning on suspicion of being drunk in a public place and was placed in a police van. After traveling a short distance he was identified by a witness to a motor collision as the driver of one of the vehicles involved in the accident. On arrival at the police station he was then charged with driving a motor vehicle while under the influence of alcohol. The blood sample taken revealed that the plaintiff was moderately under the influence, which added

to the suspicion that he had been driving under the influence of alcohol at the time the collision occurred. The plaintiff was released the following day on his own recognisance and no criminal proceedings were subsequently instituted against him.

24. Since the second arrest was found to be lawful (but not the first) the damages awarded did not relate to the detention pursuant to it. The award related only to the first arrest and was affected by the manner in which the plaintiff was manhandled and the fact that he was detained, albeit briefly, prior to the police effecting the second and lawful arrest (see especially at para 23 and 24 of *Tyulu).* Moreover, in my view the degree of deviation by the police from the requirements of what could constitute a lawful arrest in the case of *Tyulu* bears little comparison to the failure in the present case to offer any explanation for detaining the appellant over a period of two full days, with the consequence that he was obliged to spend two nights in the cells away from his family. In my respectful view the learned magistrate accordingly erred in regarding *Tyulu* as an appropriate yardstick.

25. I am also of the view that the court *a quo* over-emphasised the role of social status as a justifiable discriminating factor. Status in the community has been and remains a factor to be weighed, but not the only factor nor necessarily the dominant factor which weighs positively on the *overall* quantum or for that matter inevitably must diminish it in any given case.

26. In order to demonstrate that the learned magistrate erred in overemphasising social status to the detriment of dignity it appears necessary to revisit the underlying principles upon which quantum for wrongful arrest and detention are premised, at the very least to demonstrate that they have always included a consideration of what is now an entrenched constitutional value in addition to the right to freedom; namely the right to dignity.

27. Under common law a claim for unlawful arrest and detention is a delict based on an infringement of rights to dignity, reputation, liberty and personal integrity. See *Matthews and Others v Young* 1922 AD 492 at 503. See also *Mabaso v Felix*, 1981 (3) SA 865 (A); *Minister of law and Order & Others v Hurley & Another,* 1986 (3) SA 568 (A) 589E-F; *Minister van Wet en Orde v Mtshoba,* 1990 (1) SA 280 (A)284E-H and 286B-C; and *Law of Damages* by PJ Visser and J Potgieter, 1993 para 7.3, footnote 128.

28. In such cases although the delict does not necessarily cause pecuniary loss (similar to assault and defamation) it nonetheless will constitute an injury to what is loosely termed rights to "*personality*". In such a case our law allows a claim both under the *actio iniuriarum* for sentimental damages (ie, where pecuniary loss is not an element) provided wrongfulness and intent to arrest or detain can be established and under the *lex Aquilia* for any consequent patrimonial damages that may be proven; such as loss of income where either *dolus* or *culpa* can be demonstrated. See generally *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) and *Matthews* at 503 to 505.

29. A delictual claim for damages may also be brought in terms of Section 12(1) (a) of the Constitution. By definition such a claim is based on the unreasonable and unjustifiable infringement of

an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause. See *Zeeland v Minister of Justice and Constitutional Development & Another,* 2008 (4) SA 458 (CC), at paras 24, 25 and 35.

30. The present claim is restricted to damages under the *actio iniuriarum*. Accordingly issues of relative income, which would result in a much higher award under the *lex Aquilia* to a professional graduate in an executive position than to an unskilled wage earner, do not arise.

31. Under the *action iniuriarum* the injury to personality involves an element of *contumelia* or insult and what "*... had at first been the remedy for an unjust attack on the honour of another thus gradually became a general remedy for any vexatious violation of another person's rights"*; per *Matthews* at 504.

32. Our common law was also well settled with regard to the value of the right invaded by unlawful arrest and detention, Lord De Villiers in *Sigcau v The Queen*, 12 (SC) 256 at 263, refers to the right of every inhabitant to protection against any illegal infraction of personal liberty. Malice increases the damages awarded and can take the form either of abusing power or acting with an ulterior motive.; see *Birch v Ring*, 1914 TPD 109 and more recently, *Louw & Another v Minister of Safety and Security & Others,* 2006 (2) SACR 178 (T)

33. *Matthews* identified the invasion of rights broadly and confirmed that it was not confined to the invasion of one's honour; a feature which, in its application, would place a premium on social status.

34. The seriousness of the deprivation of personal liberty was highlighted in *May v Union Government* 1954(3) SA 120 (N) at 130. In addition Broome J extracted from the consequences of unlawful detention its imputation of criminal conduct-aggravated where there was no reasonable suspicion. This case was adopted and applied in *Minister of Safety and Security v Seymour* 2009 (6) SA 320 (A) at paras 12 and 14.

35. In *Seymour* Nugent JA pertinently referred in para 10 to the degree of humiliation to which the plaintiff is subjected as a factor to be taken into account when assessing quantum.

36. Neethling, Potgieter and Visser in *Neethling's Law of Personality* identify the factors affecting the amount of the award as relating to the invasion of a broad category of rights which may be distilled to include, the right to personal liberty, the right not to be arbitrarily arrested without lawful cause, the right to dignity and the right to one's reputation which includes the right not to be defamed.

37. I have deliberately distinguished the right to dignity from the right to reputation. The former is concerned with one of the most fundamental rights guaranteed under the Constitution which may be understood to be dominated by a right to self-worth and a fundamental entitlement not to have that intrinsic worth unlawfully degraded, humiliated or rendered vulnerable and impotent to a reasonable apprehension of the wrongful infliction of harm. As indicated in *Seymour* at para 14, and illustrated by the above passage from *Matthews*, the values now constitutionalised were well integrated into the *actio iniuriarum* under our common law.

38. The present case however raises a concern with regard to the store placed on certain of the factors while not fully appreciating the element of dignity, which I comprehend to include the positive entitlement to self-respect, self-esteem and self-worth as well as the right not to be degraded or humiliated. By what measure can we hold that a magistrate when arrested in front of his family suffers greater personal indignity than a dropout in similar circumstances? While reputation will concern itself with social standing, by what margin will the award increase where there was some rational, albeit inadequate, attempt to justify the arrest when compared to the case of a humble working class man who without any justification, is arrested in front of his wife and child? Can the degradation and humiliation be any less because of social status?

39. The point sought to be illustrated by reference to long established case law is that there are a multiplicity of rights invaded and care should be taken to have regard generally to both their broad extent and also their comparative weighting, as opposed to isolating as the dominant criteria the extent to which the invasion of the right affected the plaintiff's objective social status in the community.

40. These general concerns appear to be justified by the acknowledgement that the right to dignity, under Section 10, is with the right to the life, the most prized of our constitutionally protected rights. In *S v Makwanyane & Another,* 1995 (3) SA 391 at para 327, Justice O'Regan stated that:

"The right to life was entwined with the right to dignity. The right to life was more than existence, it was a right to be treated as a human being with dignity, without dignity human life was substantially diminished, without life there could be no dignity."

41. Since dignity has always been an essential facet of *contumelia* the value it is given under our Constitution ought not to be overlooked when all factors are taken into account. Compare Visser and Potgieter in *Law of Damages* at p 425 at para 3.9 who suggest that dignity is treated as an additional feature, not as one of the intrinsic elements of the broad range of rights

infringed. I regrettably cannot agree that this statement correctly reflects our present day law; not only for reasons that appear earlier but also in view of the acknowledgment of *dignitas* as one of the essential rights protected under the *actio iniuriarum*. See *Jansen van Vuuren & Another NNO v Kruger,* 1993 (4) SA 842 (A) at 849E-F. Although the court there was more concerned with the element of privacy (by reason of the issues requiring consideration before it) the passage concludes that ultimately the right is better classified as a *"right of personality"*, referring to *S v A and Another* 1971 (2) SA 293 (T) at 293D-G.

42. It is trite that an enquiry into unlawful detention (as with arrest) seeks to determine the extent to which the various affected rights of personality were impaired and their duration. The enquiry involves both a subjective element based on the emotional effect of the wrong committed to the plaintiff (such as the humiliation or anguish of suffering the injustice, the loss of self-esteem and self-respect) and an objective impairment based on the external effects of the wrong (such as loss of reputation in the eyes of others).

43. Neethling, Potgieter and Visser in *Delikte Reg, (*2de uitgawe) at 240-241 indicate that in cases involving insult, the emotional reaction of the individual is of primary importance but plays a secondary role to the objective diminution of a person's standing in the community in defamation and invasion of

privacy cases. See also Visser and Potgieter, *The Law of Damages,* (1993) at pages 87-88. The upshot is that in cases of unlawful arrest and detention where the subjective effect on the plaintiff of the invasion of his dignity is a significant element in considering an appropriate award and where the penal element of *contumelia* is similarly based on an invasion of *dignitas* its weighting when considering an appropriate award and when comparing other cases ought not to be understated.

44. Self-worth, including the *sequelae* of being degraded and humiliated, cannot be weighted by reference to social status or necessarily by age, where equality is our constitutional lodestar. The value of one's dignity is not judged by status; if anything, it is judged by the individual's intrinsic system of values. Even in the case of a youngster, the question of the long term debilitating effect of the impairment of dignity should discourage an award which discriminates by reference to age rather than effect. The right to liberty which must be taken into account is classless and while the immediate effect of incarceration may more gravely affect an older person its long term *sequelae* might be as damaging, if not more so, on a very young person. Each case is dependent on its own facts.

45. I return to the appellant's claim. The degradation of being helpless and impotent in circumstances where there was no

reason to detain him over the two nights and without being able to share a meal or spend those nights with his family is self-evident from the record.

46. I conclude that that the learned magistrate erred in distinguishing the social standing of the appellant to the extent he did. This amounted to an error in law which leaves it open for this court to consider *quantum* afresh. In any event having regard to the other cases to which reference will be made and which appear to be more apposite, the award is strikingly inappropriate.

47. The most important case is the SCA decision in *Seymour* to which reference has already been made, and to which all the other considerations are subject. Although the learned magistrate also referred to *Seymour* where the SCA reduced the award to R90 000 for wrongful arrest and detention but this case played no further role in the court *a quo's* deliberations. I have also had regard to the plethora of recently cited judgments, including *Theulo v Minister of Safety and Another*, 2009 (6) SA 82; Van *Rensburg SUPRA*, *Rampal v Minister of Safety and Security,* 2009 (1) SACR 211 (E); Galman *v Minister of Safety and Security,* 2008 (1) SACR 446 (W); *Olivier v Minister of Safety and Security & Another,* 2008 (2) SACR 387 (W); and *Louw*.

48. The basic enquiry, as I attempted to illustrate earlier, remains one which attempts to gauge the extent to which the unlawful detention

has caused the individual concerned to suffer indignity, unjustified humiliation or loss of self-worth and give it a monetary value.

49. At face value the present case presented the magistrate with little to go on because the State led no evidence to explain why the appellant was not released on a warning or given what is loosely termed *"police bail"*, as the warrant officer testified ought to have occurred. The fact that a defendant declines to offer an explanation for continued detention in such circumstances cannot inure to its benefit. Silence in certain circumstances where an explanation is expected may not necessarily justify a finding of malice. In the present case it is difficult to resist that conclusion in light of two glaring features: Firstly, the warrant officer's testimony that he personally expected the appellant to be released on one or other basis within a short time after his detention and secondly, that the appellant was not brought before a court on Monday morning but was released without more later that very day. If there was a genuine mistake then it was for the defence to provide the explanation. Without any explanation the failure to have released the appellant when expected in the circumstances and as confirmed by the warrant officer is an aggravating factor which the learned magistrate also ought to have taken into account.

50. Indeed a particularly egregious factor is that in the present case there was, in the absence of an explanation, a manifest abuse of power; the appellant's inexplicable continued incarceration was effectively at the whim of the officers at the police station who had custody over him.

51. Accordingly the amount awarded is also significantly inappropriate,

whether viewed on the basis that malice could reasonably be inferred from the failure to provide an acceptable explanation, or that the failure to justify the lengthy incarceration without the appellant being brought before a court is itself an aggravating factor and reflects lack of remorse.

52. The list of cases referred to is unfortunately getting larger almost on a weekly basis; an indictment on the failure of the police to perform their duties of arrest and detention under the law. Suffice it that those to which I have already referred indicate a range of between R65 000 and R90 000 as an appropriate award during 2011where the subsequent detention was unlawful and the plaintiff had been incarcerated for a relatively short duration. I consider the cases of *Seria v The Minister of Safety and Security* [2005] 2 All SA 614 (C) and *Stapelberg v Afdelingsraad van die Kaap* 1988(4) SA 875 (C) to be relatively appropriate comparators regarding the indignity or humiliation endured, with the qualification that in the former the circumstances underpinning the arrest were less egregious while in the latter the detention was for a much shorter period with none of the further consequences endured by the present appellant. I have also had regard to *Khutsoane v Minister of Safety and Security* (SGHC case no 19987/08, judgment of 23 November 2009, unreported) where I awarded R90 000 in respect of wrongful arrest and detention in a more serious case where the period of detention was longer.

53. The present case cannot in my view compare with the type of case for which an award at the upper scale was made. However the failure to release the appellant on such a minor charge resulting in his unlawful detention for a second night and then not to bring him before a court on the following morning but to release him well into the afternoon takes this case above the lower range of damages awarded.

54. I am of the view that an amount of R75 000 is appropriate based on values at the time the magistrate's award was made.

INTEREST

55. *Mr Oppenheim* on behalf of the appellant argued that in terms of the Prescribed Rate of Interest Act 55 of 1977 a plaintiff suing in delict is entitled to interest reckoned from date of demand or at least from date of service of summons.

56. I do not agree that the Act can be construed as applying indiscriminately to all illiquid claims. On the contrary common sense dictated that the starting point is the date upon which the damages are assessed. The learned magistrate purported to assess them not at date of demand or at date of summons, but at date of judgment. The amount ordered was therefore not an amount that came into existence on any date sooner than the date of judgment- any such amount would have been less if regard is had to the erosion of the value of money. The corollary is that the amount actually determined was not an amount due and payable at any date sooner than the date of judgment.

57. If the magistrate had purported to calculate the quantum at some earlier date then there would be merit in the contention advanced.

Such a course to the best of my experience is unheard of. Damages of this nature are assessed at date of judgment and any attempt to claim interest on it from an earlier date would negate the very basis of the determination, and require a discounting value for inflation or CPI to be taken into account- a most unrealistic and futile task when the obvious route is to calculate damages at current values at the date when judgment is delivered.

58. The methodology adopted by magistrate in calculating damages at the present day values at date of judgment therefore renders the provisions of section 2A(3) of the Prescribed Rate of Interest Act operative and precludes reliance on section 2A(1). Accordingly the submission that the learned magistrate erred in not allowing interest from a date earlier than date of judgment is unsuccessful.

59. I have sought to remain consistent with this approach by replacing the damages award with one that I believe ought to have been awarded at the date of the court *a quo's* judgment since it is that judgment which is appealed. I am able to do this because of the number of cases reported on the subject during that period. Interest will therefore run as form date of delivery of judgment by the court *a quo.*

ORDER

60. It is for these reasons that the following order was handed down on 9 April 2013:

1. *The appeal is upheld in part.*

2. *The order of the Magistrates' Court of 9 March 2011 is set aside and replaced with the following;*

a. *In respect of Claim A the Defendant is to make payment of the sum of R75 000;*

b. *Claim B is dismissed;*

c. *The Defendant is to pay interest on the aforesaid amount at the prescribed rate as from 9 March 2011;*

d. *The Defendant is to pay the costs of suit including counsel's costs, as per tariff;*

3. *The Respondent is to pay the costs of the Appeal.*

MLONZI AJ

I agree

SPILG J

It is so ordered

DATE OF HEARING:	19 April 2012
DATE OF ORDER:	9 April 2013
REASONS FOR JUDGMENT:	11 June 2013
LEGAL REPRESENRTATIVES:	
FOR APPELLANT:	Adv Oppenheim Wits Law Clinic
FOR RESPONDDENT:	Adv Lebenya State Attorney