REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓

21/10/2015
DATE

SIGNATURE

CASE NUMBER: 34632/2014

In the matter between:

LESEGO JABULANI NGCOBO

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

CHAITRAM AJ:

INTRODUCTION:

[1] The plaintiff sued for payment of damages of six hundred and fifty thousand (R650 000-00) arising from his alleged unlawful arrest and detention by the police.

[2] The parties agree that the plaintiff was arrested and detained by the police, and that his arrest was lawful.

[3] Despite the arrest having been lawful, the parties further agree that the plaintiff's detention was unlawful. The parties, however, disagree on the duration of the plaintiff's detention. The plaintiff states that he was detained for approximately two days and fourteen hours, whilst the defendant contends that he was detained merely for twelve hours.

[4] The only two questions before the court are, accordingly, the period of the plaintiff's detention, and the amount of damages that may be awarded to him.

THE FACTS AND EVIDENCE RELATING TO THE PERIOD OF DETENTION:

[5] According to the plaintiff, in the late evening of Friday, 30 May 2014, he, together with his colleague, Mr Xolani Ndaba (Ndaba), had met for dinner with a client at a restaurant-cum-tavern called Gagasi near Alberton, where they discussed an interior-decorating job that the plaintiff was to undertake for the client on the following day. It was, apparently, a long and pleasant evening when, it appears, they consumed liquor

as well. As he was exiting Gagasi in the early hours of 31 May 2014, at about 01:30, and whilst on the pavement, the plaintiff continued to consume liquor. At that point he, together with Ndaba, was arrested by the police for drinking liquor in public.

[6] They were taken to the Alberton police station and detained in the police cells at about 02:00 without being charged.

[7] According to the plaintiff, they remained in custody until Monday, 02 June 2014 when they were released at about 16:00, after being handed a Written Notice to Appear in Court in terms of the provisions of Section 56 of the Criminal Procedure Act, 51 of 1977 (the J534 Notice).

[8] Ndaba, who testified as well, corroborated the plaintiff's evidence that they had been detained until about 16:00 on Monday, 02 June 2014.

[9] Ndaba's evidence differed from the plaintiff's in that Ndaba suggested that they were actually arrested at about 21:00 on the evening of 30 May 2014.

[10] Sergeant Thokozile Ngwenya (Sgt Ngwenya), who was the only witness on behalf of the defendant, relied on the information contained in the police records, namely certain paperwork and registers which she had participated in completing, in disputing that the plaintiff, and for that matter, Ndaba as well, were released from police custody on 02 June 2014. Her evidence was that the police records showed that the two were released at about 14:00 on 31 May 2014.

[11] Sgt Ngwenya relied specifically on certain entries made in the SAP 10 register (the Occurrence book) and the SAP 14 register (the cells register), together with the contents of the J534 Notice.

[12] Specifically, the cells register records the plaintiff as having been arrested at 01:20, detained at 02:10, and released from custody at 14:15, all on 31 May 2014.

[13] The extract of the Occurrence book register that Sgt Ngwenya presented into evidence records that she released the plaintiff from custody at 14:15 on 31 May 2014.

[14] The J534 Notice that was handed by the police to the plaintiff at the time of his release is signed by Sgt Ngwenya, is dated 31 May 2014 in manuscript, and bears a police date stamp of 31 May 2014.

[15] Sgt Ngwenya's evidence was that a colleague had assisted her in completing the J534 Notice but that she had indeed checked and signed it, that a colleague had completed the cells register at the time of the plaintiff's release, and that she had completed the entry in the Occurrence book relating to the plaintiff's release. She contended that all of these steps could only have occurred simultaneously.

ASSESSMENT OF THE EVIDENCE:

[16] The plaintiff bears the onus of proving the duration of his detention in police custody.

[17] The evidence of the plaintiff and Ndaba on the period of their detention was quite simple, and, perhaps, overly so. They both simply stated that they had been released on Monday, 02 June 2014 at about 16:00. The court would have preferred a greater degree of particularity relating to their evidence in this regard, especially in the light of the police records reflecting otherwise. Their counsel ought to have garnered the relevant details from them. The plaintiff's legal team, no doubt, had had insight of the police records in advance. The factual basis for stating that they were only released on 02 June 2014 was scant.

[18] It is curious that they would have said nothing to the police about their continued detention over the alleged two and a half days that they had been held in custody. One would have expected them to complain about not being released, or, at least, to enquire of the police why they continued to be held in custody for such an extended period. It is different to suggest that they attempted to do so but were ignored by the police and so forth, but, on their evidence, they apparently did nothing. It was the court that eventually had to ask Ndaba whether he had slept in custody for two nights. The reason for the question was that Ndaba had said that they had been arrested at about 21:00 on 30 May 2014. Although Ndaba had merely meekly agreed that they had slept in police custody for two nights, plaintiff's counsel did not pursue the line of clarifying which two nights it was that he was referring to, and so forth. It was not for the court to garner his evidence.

[19] In view of the fact that the duration of the detention was pertinently in issue, more effort ought to have been put into presenting the factual evidence in support of this instead of merely blandly alleging what the time of detention and the time of release was.

[20] Details such as the chronology of events in the cells for that period, coupled with details of the different phases of the days that they experienced, together with their communications with the police, and whether they were allowed to contact their family or a lawyer, and so forth, may have assisted in enhancing the credibility of their evidence about the period of their detention. After allegedly having spent over two and a half days in custody, it seems unusual that no family member or other person was able to be called to corroborate their alleged date and time of release from custody.

[21] The plaintiff and Ndaba also differed significantly on the time of their arrest, which invokes scepticism in their ability to appreciate times, dates, and events. The impression that they created was that they were either very confused about how much time they had actually spent in custody, or they had agreed with each other in advance to present a particular version relating to the time of their release from custody in order to maximise their award of damages. However, they failed to properly think-through the chronology of events of that weekend, or to suggest any plausible reason for the police' records differing from their version so significantly.

[22] Sgt Ngwenya, indeed, and understandably, had no personal recollection of the matter. She had reported for duty on the morning of 31 May 2014 at about 05:45 to commence her twelve-hour shift at 06:00. She was in charge of her shift on that day. There was nothing special or unusual about this case. She would have had many prisoners and other issues to address. It was just another day in the life of a police officer who was office-bound, and she went about her business as usual.

[23] She eventually got around to addressing the issue of the prisoners who had been arrested and detained prior to her starting her shift, and it appears, according to the extract of the cells register, that the plaintiff was simply one of various others who had been arrested. She set about assessing their continued detention and, correctly, decided to release the plaintiff and Ndaba, among others, on the J534 Notice.

[24] In her evidence, she was wrong to have initially stated that she had personally attended to all of the necessary procedures in releasing the plaintiff, whereas, in reality, she had been assisted by her colleagues. Plaintiff's counsel suggested that she was, therefore, not a credible witness. I cannot agree. She corrected herself as soon as she realised her error, and she was not mala fide. There is nothing, ostensibly, wrong with her colleagues assisting her with the completion of paperwork. Police work is sometimes a team-effort. The formalities that are to be performed for the release of a person from police custody on a J534 Notice entails a fair bit of paperwork. The J534 Notice requires very specific information and extra care needs to be taken to ensure that the offence for which the person has been charged is expressed legally correctly. Various registers need to be completed and cross-referenced with corresponding numbers, all of which can only practically take place simultaneously. All of this can become quite daunting if one has to do it all by oneself in respect of various prisoners. There was, accordingly, no harm in Sgt Ngwenya being assisted, as long as she had proper control of the exercise, and took responsibility for its consequences.

[25] In this matter, the probabilities are that Sgt Ngwenya was assisted by her colleagues in having the plaintiff escorted from the police cells to the charge office, or as she indicated, a little office next to the charge office that was designed for this purpose.

One of her colleagues had probably completed the J534 Notice, whereafter it was checked and signed by Sgt Ngwenya, who, simultaneously, made the Occurrence book entry about the plaintiff's release. Her first colleague, or a different one, would have completed the cells register.

[26] It does not matter that different people had attended to the different documents/registers. What matters is that they were all done substantially simultaneously and correctly. In these circumstances, the plaintiff and Ndaba cannot be faulted for perceiving that they had not been released by Sgt Ngwenya, but by a male police officer. It really seems to have been a team effort where the plaintiff and Ndaba had not considered Sgt Ngwenya as having played the dominant role. It must be remembered that Sgt Ngwenya was in charge of the shift and that her role would have been more supervisory in nature. At face value, there is nothing untoward that occurred in this exercise.

[27] The plaintiff seems to suggest that the police may have negligently overlooked Ndaba and him in the police cells until Monday, 02 June 2014, that they had probably suddenly realised their mistake at about 16:00 on that day, knew that they had done wrong, and had manipulated the J534 Notice and the other registers to create the impression that it had all been done on 31 May 2014. The only other alternative suggestion is that all of the paperwork was, in fact, done on 31 May 2014, but that the police, either negligently, or maliciously, only released them on Monday, 02 June 2014.

[28] Both these suggestions are highly improbable. It is abundantly clear that the J534 Notice, together with the other police registers were required to be completed in a

strictly chronological sequence that would have been very difficult to manipulate convincingly for longer than an hour or so under those circumstances. Both, Ndaba and the plaintiff, would have needed to provide the police officers with their personal details for the completion of the J534 Notice, and this would, practically, have been done whilst the two were with the police officer who completed the Notice. Ndaba's and the plaintiff's evidence were that they were never returned to the police cells after that exercise, but were released. Besides, the police had no motive to hold them in custody any longer after the completion of the J534 Notice. In the absence of these suggestions, which the court rejects peremptorily, there is no other rational explanation for how the plaintiff would have come to be released only on 02 June 2014 at 16:00.

[29] The plaintiff's version of the duration of his detention is, accordingly, rejected. The court is satisfied that the plaintiff was released from police custody on 31 May 2014 at about 14:15.

PLAINTIFF'S QUANTUM OF DAMAGES:

[30] As the defendant had conceded that the plaintiff's detention was unlawful, the court will proceed to assess the plaintiff's award of damages.

[31] At the outset, a plaintiff needs to ensure that he properly and adequately pleads his heads of damages as he will be bound by them. The court is not at large to award damages to a plaintiff who does not plead and prove the nature and extent of the damages that he claims he has suffered. It is also not permissible, as this plaintiff

attempted to do at one point, to rely on the details of the plaintiff's detention pleaded in the summons in substantiation of his quantum of damages. Unless the facts in the summons have been admitted as the truth, appropriate evidence must be presented in substantiation of those allegations, as they would remain mere allegations and not evidence.

[32] In this matter, after having briefly described the conditions under which he was detained, the plaintiff pleaded the following in his summons:

> *'As a result of the above injury to the plaintiff's privacy, dignity and bodily integrity, plaintiff suffered damages in the sum of R650 000-00'.*

[33] All of these allegations were disputed by the defendant.

[34] The full extent of the plaintiff's evidence in support of his quantum of damages consisted of the following:

In his evidence in chief:

Counsel: *How did you suffer from this detention?*

Plaintiff: *My reputation suffered as my relationship with the person that I was with was not the same.*

I was also unable to pay my rental because of this.

At home, my parents were worried about me because they did not know of my whereabouts.

Counsel: *What were the conditions in the cells?*

Plaintiff: *It was cold. It was May. I was not wearing warm clothes. The toilet was nearby. The place was untidy. There was one blanket. It was very cold.*

Counsel: *Anything else?*

Plaintiff: *It was not good for me as I could not keep up with the payment of my rental. I had a conflict with my landlord because of this and had to move out as I could not pay my rent. I was supposed to be working on that weekend with that client. The deal was confirmed.*

[35] Under cross-examination, his evidence was the following:

Counsel: *Sgt Ngwenya will say that the toilet was working and the cells were clean.*

Plaintiff: *I cannot comment if she came to see it.*

Counsel: *You said it was cold. Was there a mattress in the cell?*

Plaintiff: *A thin sponge thing. I slept on it.*

Counsel: *The toilet was nearby. Nothing else was wrong with the cell?*

Plaintiff: *The place was filthy. The toilet was not flushing. It was not comfortable.*

Counsel: *Why did you not say this in your evidence in chief?*

Plaintiff: *By the toilet being nearby, I meant that it was smelly.*

Counsel: *For two days you didn't use the toilet?*

Plaintiff: *I tried but not in the way one would normally use it.*

Counsel: *That's all?*

Plaintiff: *Yes.*

[36] This evidence does not come remotely close to justifying the amount claimed under the plaintiff's pleaded heads. His evidence on the quantum of his damages was woefully inadequate and will certainly serve to limit his damages. The following circumstances will also limit his damages.

[37] In terms of his heads of damages, and for present purposes, the court will regard the plaintiff's "injury to his privacy" as being synonymous with the injury to his dignity. There was no evidence of any injury to his bodily integrity. Importantly, there was no pleaded claim for the loss of his liberty. The only part of his pleading that was consistent with his evidence was his claim for the injury to his dignity.

[38] In his evidence, he alluded to an injury to his reputation and a loss of income. However, neither of these heads were either pleaded or properly proved. His references to these will, consequently, be disregarded in the assessment of his quantum of damages.

[39] The overall presentation of his evidence in support of his quantum was quite weak, and it was clear to the court that he had not been properly prepared by his attorney to address the key aspects of his damages. For instance, hardly any attention was given to his personal details. His, age, occupation, and standard of education were merely established in passing. His social standing is unknown. The court does not know enough about who he is as a person. The conditions of his detention are scant. For instance, the court heard nothing about how many people he had to share the cell with and what the effect of that was; nothing was said about the standard of food provided or whether any food was provided at all; it is not known whether the plaintiff had any

complaints about washing facilities and other basic human needs; the manner in which he was treated generally by the police is not clear. Courts cannot take judicial cognisance of the conditions of a person's incarceration. Unless the necessary facts are either admitted by the opposing side, or established in the evidence, a plaintiff will not receive the benefit of negative circumstances that he may have suffered.

[40] In this matter, the plaintiff has admitted that his arrest was lawful. He, therefore, cannot benefit by the circumstances under which his arrest was effected, and the accompanying trauma that he may have experienced in being taken to the police station and processed through the system, unless this was done in an unduly heavy-handed manner or exceeded the bounds of reasonableness. There was, in any event, no suggestion of that.

[41] The plaintiff's bad faith in attempting to exaggerate the duration of his detention does tend to leave a sour taste in one's mouth, but this fact, by itself, cannot serve to either enhance or diminish the damages that he had suffered for the actual period of his detention.

[42] The following factors will, nevertheless, enhance the plaintiff's damages.

[43] The charge against the plaintiff, loosely referred-to, was originally one of drinking liquor in public, not public drunkenness. Whereas in relation to the latter charge the police may have been entitled to detain the plaintiff for a while if his own safety or the safety of the public required it, it would have required unusual circumstances in order to justify detaining the plaintiff on the former charge. There were none, and the defendant

correctly conceded that the plaintiff's detention was unjustified. The police ought to have arrested the plaintiff, taken him to the police station, and issued him with the J534 Notice as soon as practically appropriate in the circumstances. There was no need to have detained him at all.

[44] The court accepts that Sgt Ngwenya, upon reporting for duty, may have had various duties to address all at once. However, in my view, all issues relating to the people in her custody at the police station, especially the issue of their continued detention, ought to have ranked far higher on her list of priorities than it had. Had she given this matter her attention sooner, it would have limited the plaintiff's suffering and, consequently, the defendant's liability for damages.

[45] I am not persuaded by Sgt Ngwenya's evidence relating to the conditions in the cell that the plaintiff was held in, especially in relation to the functioning of the toilet. The probability is that she would not have personally checked the functioning of the toilet in the male cells and would have relied on reports from others. No one else testified about this. Her suggestion that such problems would have been noted in the Occurrence book, and that no such entry was made, is unpersuasive and cannot be preferred over the evidence of the plaintiff and Ndaba who actually had to experience the non-flushing toilet.

[46] Although the plaintiff did not explain what he had meant by stating that the place was 'filthy', the court is prepared to accept that the cell was, generally, in an unhygienic condition.

[47] The court also accepts the evidence that it was cold at that time, and that the people who were held in custody ought to have been appropriately provided-for in terms of proper sleeping facilities and enough blankets. This was not done.

[48] The general conditions of the plaintiff's detention were unacceptable, and would have seriously infringed on his dignity as a human being.

[49] Regarding the plaintiff's deprivation of his liberty for twelve hours: Although he has not quantified his case for his loss of freedom under a specific head, the general tenor of the case was conducted by both sides as though he had, and the concession by the defendant relates specifically to the fact that the plaintiff was unlawfully detained for 12 hours. The concession entails an acceptance that the plaintiff may be awarded damages for the period of his detention, ergo he has established an entitlement to be awarded an appropriate amount of damages for twelve hours of his loss of freedom.

[50] The plaintiff is a thirty four year old man, apparently single, and apparently employed as an interior decorator. Except for this incident, there was nothing to suggest that he is not an upstanding member of society.

[51] In considering an appropriate award of damages, the court is mindful of what was said in *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 SCA, at para [26], namely, *'...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.'

[52] Both counsel referred the court to various other cases relating to comparable awards of damages. It is not necessary to repeat them here. Comparable awards serve as valuable guides to a court, but there is no substitute for the peculiar facts of each case as a basis for the assessment.

[53] In my view, considered as a whole, an appropriate amount to be awarded to the plaintiff as damages under his proven heads is the amount of twenty five thousand Rand.

[54] Regarding the costs of the action, the defendant's counsel argued that the plaintiff was aware that his claim fell well within the monetary jurisdiction of the magistrate's court, yet he elected to institute his action in the High court. She submitted that there was no justifiable reason advanced why the action could not have been instituted in the less expensive forum of the magistrate's court. I agree. The plaintiff's counsel was invited to submit reasons why the plaintiff's award of costs ought not to be limited to the magistrate's court scale of costs, but she could advance no cogent reasons for this.

[55] It is clear that the plaintiff was aware of the true parameters within which his award was likely to fall. In his letter of demand of 18 June 2014 to the defendant, he had sought damages of merely R100 000-00, yet in his summons three months later, the quantum had inexplicably increased to R650 000-00. At the conclusion of the trial, plaintiff's

counsel submitted that an appropriate amount to be awarded to him would be R120 000-00. The ultimate award is merely R25 000-00.

[56] Litigants whose cases fall within the jurisdiction of the magistrates court are obviously entitled to institute their action in the High court, but unless there is some objectively reasonable motivation for them to prefer the High court, they do run the real risk of being awarded costs on the magistrates court scale. Defendant's counsel referred to the following statement of the court in *Vermaak v Road Accident Fund* 2006 JDR 0182 (SE), which I consider to be apt:

> '*The high court frequently restricts costs to the magistrates' courts scale on the ground that the plaintiff could and should have proceeded in the magistrate's court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the judgment or settlement is always a significant factor in balancing fairness.*
> *The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more in the way of costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration…. As a general rule the proper exercise of a court's discretion on costs provides a powerful deterrent against bringing proceedings in the High court which might more conveniently be brought in the magistrates court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour*'.

[57] I agree that this is an appropriate case in terms of which the plaintiff's recovery of his costs ought to be limited.

[58] In all the circumstances, judgment is entered in favour of plaintiff for:

1. Payment of R25 000-00;
2. Interest thereon at 9% per annum with effect from 29 September 2014 to date of payment;
3. Costs of suit on Scale B of the scale of costs and fees applicable to proceedings in the magistrates court.

A CHAITRAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances:

On behalf of the Plaintiff: Adv. R Letsipa
On behalf of the Defendant: Adv. N Yina

Date Heard: 13 October 2015
Date Judgment Delivered: 21 October 2015.