REPUBLIC OF SOUTH AFRICA

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

CASE NO: 16924/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

SENYATSI ML — 09 JULY 2021
SIGNATURE — **DATE**

In the matter between:

KGAHLISO RUDY PHADU — **Plaintiff**

and

MINISTER OF POLICE — **Defendant**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 09 July 2021*

SENYATSI J:

[1] On 9 July 2016, two women were allegedly raped, robbed of their cellular phones, kidnapped and assaulted at gunpoint by a male person. The alleged crimes took place at night, around 22h00 at Ivory Park, Tembisa in Gauteng Province.

[2] The victims of the crimes laid charges with the police. Of the two ladies, only one of them, hereafter referred to as Sibongile Mpetla, claimed she could identify the perpetrator.

[3] More than two months after the incident, the plaintiff, Mr Kgahliso Rudy Phadu, was arrested by Sergeant Baloyi, a member of the South African Police Services, as a suspect for the crimes. He was charged with rape, robbery, assault, and kidnapping. He was arrested without a warrant and kept in custody for 39 days. He was later released on bail on 04 November 2016 and the charges against him were permanently withdrawn during February 2017 due to the fact that the DNA semen tests returned a negative result and could not link him to the rape incident.

[4] Following the arrest and the withdrawal of charges, the plaintiff sued the defendant for wrongful arrest and detention, claiming damages for harm suffered as a result thereof.

[5] The plaintiff contends that the investigating officer who effected the arrest did not act reasonably in the circumstances as he failed to thoroughly investigate the case. He further contends that there was no identikit drawn of the alleged perpetrator as described by one of the victims of the crimes and in particular that no investigations regarding the alleged used firearm were done.

[6] The defendant contends that the arrest was lawful and justified in terms of section 40 of the Criminal Procedure Act of 1977 in that the plaintiff was pointed out by one of the victims as the perpetrator in the alleged crimes.

[7] The plaintiff called four witnesses. He was first to give evidence in support of his claim. He testified that on 26 September 2016, the day of his arrest, he was at the hair salon which is next to his home. While seated he saw a man that he had previously seen on 3 September 2016. He recalled that the unidentified man had told him that someone had likened him to a rape suspect. The man had not told him who he was. That strange man then gestured to another man to enter the salon.

[8] In fact, at the commencement of his testimony, the plaintiff revealed how on return from a soccer game on 3 September 2016 he met an unidentified stranger who had intimidated him about the fact that someone thought he looked familiar to a rapist. On the day of his arrest, once the second man entered the salon premises he was confronted, forcefully pressed to the seat, and handcuffed. He claims that he was not informed of the reasons for his arrest and what the charges against him were. The second man who came in also did not introduce himself.

[9] He testified that when he questioned why he was being arrested, he was told that he would explain himself before a court. It is his further evidence that one of the patrons at the salon, known to him as “Zakes” unsuccessfully tried to intervene and asked the unidentified arrestor the reason for the arrest. The arrestor responded by telling Zakes not to interfere.

[10] Before he was taken away and while in handcuffs the plaintiff asked if he could use the bathroom. He was escorted to the bathroom and thereafter taken to an awaiting white Toyota Corolla vehicle which was parked outside the salon. He noticed that the arrestor's vehicle was not marked as a police vehicle. Upon arrival at the vehicle, he was ordered to enter the unmarked vehicle and found a female passenger inside who proceeded to tell the plaintiff that: *"you know what you did"*. The plaintiff was taken to Ivory Park Police Station and after his first appearance at Thembisa Magistrate's Court, transferred to Modderbee prison to await trial.

[11] Upon being taken to the Ivory Park police station in the company of arresting officer, the plaintiff was asked about the two other people that were in the car, the unknown female passenger and an unknown man that he met on 3 September 2016. He responded that he recognised the man as the same man he had seen on 3 September 2016 but he did not know the female and was seeing her for the first time. He again mentioned that his rights were not read to him at the police station or the salon during the arrest.

[12] After his first appearance at Thembisa Magistrate's Court, the plaintiff was transferred to Modderbee prison and kept there for 39 days until his release on bail on 4 November 2016. It is his evidence that while in custody at Modderbee prison, he was threatened with sexual abuse. He explained that the threat made him depressed and as a result, he attempted to take his own life by cutting his wrists with a razor blade in the hope that he would bleed to death. The intervention of a fellow inmate saved his life and he was then offered protection by the said inmate. It is worth noting that the plaintiff became very emotional when revealing that part of his experience in prison. During testimony, he

sobbed and stated that he did not understand why he was accused of such serious crimes, crimes he had no knowledge of.

[13] Under cross-examination by Mr Bangisi, counsel for the defendant, put it to the plaintiff that the arresting officer introduced himself on the day of the arrest and read out to him his constitutional rights. This version was seriously denied by the plaintiff. The plaintiff also denied that he had ever met the woman before his arrest on 26 September 2016. He admitted that he had seen another man who pointed him out whilst he was seated in the salon. The plaintiff further denied that he was informed of the reasons for his arrest.

[14] The plaintiff also testified that present at the salon was Mr Gerald Shabangu, the salon owner and about five other people including Zakes, who in his view could corroborate his version of events.

[15] The second witness to testify on behalf of the plaintiff was Mr Zakhele Michael Radebe, also known as 'Zakes'. He testified that upon his arrival at the hair salon the people present were Mr Gerald Shabangu, Tupac, and the plaintiff. He came into the hair salon and sat waiting for his turn as he normally did.

[16] As he was seated, an unidentified man came into the hair salon and stood by the door. That man called someone by a hand gesture. Shortly thereafter, a second man then entered the hair salon. The first man then pointed out the plaintiff. The second man approached the plaintiff and pressed him down. The second man looked angry and aggressive as he was pressing the plaintiff to the chair with excessive force and reached for his handcuffs. While observing the arrest, he then asked the man as to what was happening as the plaintiff was not resisting arrest. He was instructed not to interfere. The plaintiff asked to use

the bathroom. The plaintiff was escorted to the bathroom and upon his return, he was taken outside into an unmarked white Toyota Corolla sedan. He was concerned by what had happened and as a result he took photos of the said vehicle using his cell phone.

[17] He confirmed that the plaintiffs' home is opposite the hair salon. He stated that the plaintiffs' mother was called onto the scene of the incident and informed of her sons' arrest. On being questioned about the pictures under cross-examination, he replied that the photos he had taken on the day of the arrest were no longer available as he had lost the cellular phone that contained the pictures. He further corroborated the plaintiffs' version that the arresting officer never introduced himself and no reason was proffered for the arrest.

[18] The third witness to testify on behalf of the plaintiff was Mr Gerald Shabangu, the owner of the salon. He confirmed that there were five people present in the salon at the time of the arrest. He stated that while the plaintiff was seated a strange man entered the salon and asked the plaintiff whether he remembered him. The plaintiff asked him who he was, to which no answer was given. Then a second man entered the salon and pressed the plaintiff to the seat and proceeded to handcuff him. Zakes asked the second man why the plaintiff was being handcuffed and the man told him to let the law take its course. The plaintiff asked to use the bathroom and was taken thereto. From the bathroom, the plaintiff was taken to a white Toyota Corolla sedan and driven away.

In his evidence, he pointed out that he did not assume that the men were police officers. He also confirmed the plaintiffs' version that the men did not introduce

themselves as police officers and they were not in police uniform but rather casually dressed.

[19] The fourth witness to testify was Mr Thembelani Fikifiki Lephoto who testified as an expert witness. He holds a Masters degree in Clinical Psychology from the University of Zululand which he obtained in 2012. He has been in active private practice since 2014. He offers psychotherapy to patients with psychological issues and has experience in report writing, amongst them medico-legal reports.

[20] He testified that on 22 January 2020 he carried out an interview in Sepedi on the plaintiff. The report was finalised on 7 February 2020. The purpose of the report was to assess and diagnose the impact of the arrest and imprisonment. After testifying about the background given to him by the plaintiff, he further testified that the psychological effects the plaintiff has are nightmares about the arrest and detention, he also suffered from psychological trauma, personality and behavioural changes as well as anger and aggression towards people.

[21] In his assessment, he concluded that the plaintiff suffered from mood disorders and post-traumatic stress disorder. Mr Lephoto recommended that the plaintiff be referred to a clinical psychologist and psychiatrist for further attention. He conceded that he had not published any article in any medical journal but maintained that the tools he relied on to assess the plaintiff are used regularly in the field. His mandate in the plaintiffs' case was to assess and he did not do any intervention programme. He maintained that one assessment would not be enough and that the plaintiff needed further medical attention. After Mr Lephotos’ evidence, the plaintiff closed its case.

[22] The defendant called one witness, namely Detective Sergeant Jacky Baloyi. He testified that he has been with the South African Police Service for 15 years and has been a detective sergeant since 2009. He testified that he knew about the arrest of the plaintiff. He stated that he started investigating the charges on 11 July 2016 when the case was opened.

[23] As part of his investigation, he interviewed the complaints regarding the details of the incident. Only one victim, Sibongile Mpetla, stated that she could identify the perpetrator. Almost two months after the charges were laid, he received a phone call from one of the complainants on 26 September 2016, informing him that she had seen the suspect. Following up on the lead he was taken to an address in Ivory Park by the complaint. He was in the company of a colleague. His colleague has since been dismissed from the police service.

[24] Upon arrival at the address, the complainant pointed out the suspect at the neighbour's house. He stated that he went to the suspect and introduced himself. He said he warned him of his rights and informed the plaintiff about the arrest. He confirmed that the plaintiff did not resist arrest. He testified that although there were people in the neighbours' house from which the arrest took place, he did not speak to any of them. He took the plaintiff to Ivory Park Police Station where upon arrival he was made to sign a copy of his constitutional rights.

When questioned whether he had met the plaintiff before the day of his arrest he responded that he met the plaintiff for the first time on the day of his arrest. He was never at court during the plaintiff's subsequent court appearances after the arrest. Under cross-examination, he admitted that he completed the basic

detective course in 2015. He also confirmed, from the content of the docket, that the suspect was only identified as tall and dark according to the statement taken on 9 July 2016. The witness also confirmed that the alleged crime took place at around 22h00 at night at Ivory Park, Tembisa. No facial features were mentioned in the statement and he never ordered the identic kit. The only reason for the arrest of the plaintiff was as a result of the call from Sibongile Mpetla.

[25] The witness conceded that the identikit was never used to investigate the crimes. He also told the court that the firearm used in the crimes was never investigated. Sergeant Baloyi further conceded that after being shown the notice of rights form, the plaintiff was required to sign as a suspect, this did not happen and the form remained unsigned. Despite this fact, the witness insisted that the constitutional rights were read to the plaintiff.

[26] In light of the above facts the issues that require careful determination are as follows:

(a) Whether the detention was wrongful and unlawful;
(b) Whether the amount claimed is justifiable in the circumstances.

These issues will be dealt with in the context of the legal principles applicable.

[27] The basis of liability for unlawful arrest and detention should be considered through the constitutional right guarantee in section 12 (1) of the Constitution not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all

persons in the Republic.[1] These rights, together with the right to human dignity, are fundamental rights, entrenched in the Bill of Rights.[2]The state is required to respect, protect, promote and fulfil these rights, as well as other fundamental rights.[3]

[28] It is trite that this is a delictual claim which comprises of wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote.[4] When the harm in question is a violation of a personality interest caused by intentional conduct then the person who suffered the harm must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered.

[29] A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements[5]:

> (a) the plaintiff must establish that his liberty has been interfered with;
> (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving his liberty and not that the defendant knew that it was wrongful to do so;
> (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not and;
> (d) the plaintiff must establish that the conduct of the defendant must

[1] See Mahlangu and Another v Minister of Police (CCT 8820) [2021] ZACC 10 at para [25]
[2] See Section 10 of the Constitution states that every person has inherent dignity and everyone has the right to have their dignity respected and protected
[3] Section 7 (2) of the Constitution, Section 7(1) provides that this 'Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom
[4] See De Klerk v Minister Police 2020 (1) SAXCR 1 (CC)
[5] See Loubser et al, The Law of Delict South Africa 2 ed (Oxford University Press Southern Africa (Pty) Ltd, Cape Town 2021) at 21

> have caused, both legally and factually, the harm for which compensation is sought.

[30] In the present action, the claim is restricted to damages under the *action iniuriarum.* Under *the action iniuriarum* the injury to personality involves an element of *contumelia* or insult.

[31] When the charges were laid in July 2016, the defendant's members had ample time to investigate the charges. The police had at their disposal, the capacity to prepare the identikit based on at least what was related to them in a statement by Sibongile Mpetla. She was the only one of the two victims who said she could positively identify the suspect. Sergeant Baloyi, as an investigating officer in the case, failed significantly to ensure that the preparation and finalisation of the identikit by his colleagues was finalised. As a consequence; when leads such as the call received from the complainant, Sibongile on 26 September 2016 was given to him, he ought to have by that time finalised the identikit to at least have a picture to compare the identified suspect with, having first discussed same with the complainant. He failed to discharge a basic detective duty especially given that the alleged crimes were committed in the dark around 22h00. Any arrest ought to have been approached with caution as it may out to be wrongful. It is disappointing that someone with 15 years of experience in detective policing could fail to do such a bare minimum.

[33] There has not been any explanation proffered by the defendant on reasons why Sibongile Mpetla has not been called as a witness to assist this court on her observations of the suspect. It was in my respectful view, improper for Sergeant Baloyi to rely on the identification features of the suspect as only "tall and dark",

given that there are many "tall and dark" male persons in Ivory Park. Reliance on these two features to effect an arrest of the plaintiff was grossly invasive, wrongful and unlawful.

[34] The plaintiff has been able to show that the arrest was unlawful. I have no reason to reject the evidence that when Sergeant Baloyi effected the arrest on 26 September 2016, he did not introduce himself nor did he read the constitutional rights to the plaintiff. This was confirmed by Mr Zakhele Radebe, who was concerned about why the plaintiff was in handcuffs. On being asked what was happening, Sergeant Baloyi simply replied that Mr Radebe should not interfere with what was happening. Sergeant Baloyi himself confirmed that he did not speak with anyone. It follows that the version of the plaintiff as corroborated by Mr Radebe on this point must, on balance of probabilities, be accepted.

[35] Another important consideration on the wrongfulness of the arrest is what has been conceded in cross-examination of Sergeant Baloyi regarding failure to ensure that the constitutional rights form was signed by the plaintiff. It should be remembered that Sergeant Baloyi failed to ensure that the Constitutional Rights form was signed by the plaintiff. Although he insisted under re-examination by Mr Bangisi that he read the constitutional rights to the plaintiff, this does not appear to be the case. In my respectful view, it is highly unlikely that he read these rights to the Plaintiff. I hold this view based on the manner in which the plaintiffs' arrest was rushed. In fact, despite the fact that two months had elapsed since the charges were laid Sergeant Baloyi had not made any headway with his investigation. He could not even get the identikit finalised which was unfortunate. The manner in which some of our police members rush

into effecting arrests, calls for a review in how crime detection within our police is done. If proper processes are in place and enforced on members of our police, this in my respectful view will minimize the number of rushed arrests which either do not result in convictions or become wrongful. I hold this view because the defendant faces the significant number of claims of this nature quite regularly in our courts.

[36] The results of the DNA semen test on the plaintiff about the alleged rape seems to be the only crime that was under investigation. In fact, the results proved to be decisive in ensuring the permanent withdrawal of the charges against the plaintiff. When questioned about the rest of the charges the investigating officer, Sergeant Baloyi, was not helpful on what happened to the rest of the charges. Although he insisted that he was investigating other charges, that part of the evidence is not supported by any fact.

[37] Our Constitution ensures the personal liberty of all persons in South Africa is jealously guarded. Consequently, arbitrary deprivation of liberty by any organ of the state must be visited upon with appropriate sanction by our courts. I hold the view that the arrest of the plaintiff was wrongful and unlawful and not protected by section 40 (1) of the Criminal Procedure Act.

[38] The second issue that should be determined is the quantum of the damages suffered. Settled with regard to the value of the right invaded by unlawful arrest and detention. [6]

[6] See Sigcau v The Queen, 12 (SC) 256 AT 26

In *Sigcau v The Queen*[7], the court 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.[8]

[39] The seriousness of the deprivation of personal liberty was highlighted in *May v Union Government*[9]. The degree of humiliation is also a factor to be taken into account to make a determination on the quantum.[10]

[40] Neethling Potgieter and Visser in Neethling's Law of Personality identify 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 ones' reputation which includes the right not to be defamed.

[41] The Court confronted with the request to determine the quantum of damages should award just and equitable general damages. There is no reason not to award general damages in this case.

[42] In the present case the plaintiff claims in total the sum of R 6 million divided as follows:

(a) unlawful arrest and detention (39) days R2 000 000;

(b) Deprivation of freedom and liberty R 1 000 000;

(c) Loss of amenities of life R 1 000 000;

(d) Impairment of dignity and reputation R 500 000 and

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[7] Supra

[8] See Birch v Ring 1914 TPD 109; Louw and Another v Minister of Safety and Security and Others 2006 (2) SACR (178) (T)

[9] 1954 (3) SA 120 (N) at 130

[10] See Minister of Safety and Security v Seymour 2009 (6) SA 320 (A) at paras 12 and 14

(e) Psychological trauma R 1 500 000.

For the purpose of my Judgment, I will deal with the determination of the quantum as a globular amount under general non-patrimonial damages.

[43] The plaintiff is a fairly young man who was at school at the time of his arrest. He was still staying with his parents. He is no longer at school and his intimate relationship has collapsed as a result of the arrest. It cannot be denied that he will carry with him the stigma of the arrest for the rest of his life. Consequently, an award will be made, which in my view, is fair and reasonable not only to the plaintiff but also the defendant. The claim must therefore succeed.

ORDER

[44] The following order is made:

(a) The defendant is ordered to pay the sum of R650 000 to the plaintiff;

(b) The interest payable will be at the rate of 10.25% per annum calculated from the date of delivery of the letter of demand to the date of payment of the amount under (a) above.

(c) Cost of suit.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 09 March 2021

Date of Judgment: 09 July 2021

Plaintiff's Counsel: Adv MJ Ngobeni

Instructed by: Segala Seshibe Attorneys

Defendant's Counsel: Adv N Bangisi

Instructed by: State Attorney, Johannesburg