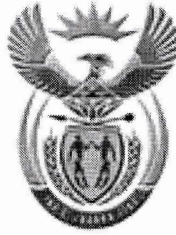


IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 26738/2020

Before: Judge Cowen

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: *no*  
(2) OF INTEREST TO OTHER JUDGES: *no*  
(3) REVISED.

*Alma* 23/2/2022

In the matter between:

BOCCACCIO BHEKUMUZI NHLAPO

Plaintiff

and

THE MINISTER OF POLICE

Defendant

---

JUDGMENT

---

- [1] This is an action for damages arising from an unlawful arrest and detention and an unlawful search of a home and seizure of a vehicle, which took place in November 2019. The plaintiff is Mr Boccaccio Bhekumuzi Nhlapo. The defendant is the Minister of Police.
- [2] The plaintiff instituted these proceedings in September 2020. In the particulars of claim the plaintiff particularised the events relating to the claim in some detail as set out below. The defendant delivered a plea dated 26 October 2020, containing a bald denial of the events as pleaded. The matter came before me on the civil trial roll on 1 February 2022. Mr Naidoo appeared for the plaintiff and Ms Kakaza appeared for the defendant. Shortly before the matter was allocated to me, the parties informed the Court that the defendant had conceded the merits of the claim, and the only issue to be determined was the quantum. The plaintiff seeks between R250 000.00 and R300 000.00 in damages and the defendant contends that an award of approximately R80 000.00 is appropriate. The plaintiff was the only witness who testified about the events and their impact and his testimony was uncontroverted.
- [3] The events unfolded at about 22h30 on 13 November 2019, when the plaintiff was at home watching television. He heard his dogs barking outside. He looked outside and saw police officers trying to get inside his home. There were about seven of them. The police officers asked the plaintiff if they could come inside and they then did. They asked the plaintiff if he was Thabiso and the plaintiff explained that he was not and showed the police his identity document, his drivers' licence, his proof of address (through a municipal account) and a service certificate from work. The police took photographs of the documents. They proceeded to search the house. They then asked if there was a car, to which the plaintiff responded that there was – he had a 2006 Citi Golf – and the police then indicated that the plaintiff should unlock it. He opened the bonnet for them. The police then conveyed that the chassis number had been tampered with and that they were going to impound the vehicle. The plaintiff indicated that he did not want to disturb them doing their duties but disputed any knowledge of tampering. The police officers indicated that the plaintiff must also come to the station notwithstanding his protest. As

they were leaving, an officer said that if the plaintiff paid them R10 000 they would leave him and the car alone. The plaintiff refused. The police officers then put him in the police car and another drove his vehicle to the Kagiso station, where he was read his rights and signed a form. He was then placed in a cell.

- [4] The following day, the plaintiff was charged and he was told he would appear in court the following day. The investigating officer, Mr Ditabane thereafter explained that the vehicle would be taken to the pound to be checked. He asked the plaintiff about the vehicle and the plaintiff explained that he had purchased it from a family member and had had it for about a year. He was kept in the holding cells over two days. He did not appear in court the following day. Rather he was released and the investigating officer informed him that he could go home and that there was nothing wrong with the car. He then went home but without his car. He tried to follow up with the investigating officer about the car and its return. He testified that during a conversation in 2020, the investigating officer informed him that he could not receive the car back because he had instituted a case against the police and the case was not yet finalised.
- [5] The plaintiff is 41 years old and currently employed as a shunter at Kuruman Mine. He was unemployed at the time of the incident. Before that time, he had been employed at Transnet but had been retrenched.
- [6] The plaintiff testified about the conditions of the police holding cells. He explained that there were 14 or 15 people in the cells. The occupants had to sleep on the floor with dirty blankets. There was no door separating the cell from the toilet and inadequate ventilation. There were only small windows. The shower wasn't working and there was only cold water in a small basin. He couldn't shower while there and only showered when he got home. He was given tea and some bread in the morning and rice and chicken in the evening but could not eat because the cell stank from the toilet.



- [7] The plaintiff testified that he felt bad about having been arrested for no apparent reason. He highlighted the loss of trust he had in the police in circumstances where the very people who are meant to protect him, took away his freedom while asking for a bribe. He did not understand why this happened, when he had explained to the police and proved to them that he was not Thabiso, who the police were ostensibly looking for. Furthermore, he confirmed that the police did not have any warrant.
- [8] Under cross examination, Ms Kakaza only put one line of questions to the plaintiff: whether the award that he sought was not disproportionately high and whether R80 000.00 would not be appropriate. The plaintiff responded that he did not think R80 000.00 was appropriate, given the abuse and trauma that he had suffered.
- [9] The Constitutional Court has held that in cases of this sort, “damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do rectify the wrong that took place.”<sup>1</sup> When assessing damages for unlawful arrest and detention, this Court must bear in mind the primary purpose of an award, being to offer much needed solatium for injured feelings: it is not to enrich the party.<sup>2</sup> The award must be commensurate with the injury inflicted.<sup>3</sup> When considering what is a fair and adequate award of damages, however, this Court must consider the nature and importance of the constitutional rights in issue, which in this case include the right to dignity protected in section 10 of the Constitution, the right to freedom and security of the person protected in section 12 of the Constitution which includes the right not to be deprived of freedom arbitrarily or without justice cause and the right to privacy protected in section 14 and the rights protected in section 35 of the Constitution. An award

---

<sup>1</sup> *Mahlangu and another v Minister of Police* [2021] ZACC 10; 2021(7) BCLR 698 (CC); 2021(2) SACR 595 (CC) (*Mahlangu*) at para 50.

<sup>2</sup> *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009(5) SA 85 (SCA); 2009(2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) (*Tyulu*) at para 26 cited with approval in *Mahlangu*, supra n1 at para 51.

<sup>3</sup> *Id.*

should reflect and be commensurate with the value we attach to these rights as a society.<sup>4</sup>

- [10] A multiplicity of factors may be relevant to determining an award depending on the circumstances of the case: an award cannot be arrived at with mathematical precision.<sup>5</sup> In this case, plaintiff is 41 years old and was unemployed at the time. He was unlawfully arrested and detained over two days in unhygienic and inhumane circumstances, his home was unlawfully searched and his vehicle was unlawfully seized in circumstances that amount to harassment. There was not only an infringement of the above rights and detention in unhygienic and inhumane circumstances: the evidence established an improper motive, being the soliciting of a bribe by the very people the Constitution entrusts to protect and secure the inhabitants of South Africa and their property, and to uphold and enforce the law.<sup>6</sup> It also established the ongoing deprivation of property not only without justification but due to the very exercise of the plaintiff's rights in these proceedings.
- [11] In support of the plaintiff's proposed award of between R250 000.00 and R300 000,00 Mr Naidoo referred me to previous cases as a guide. In doing so, he correctly submitted that while the Court may have regard thereto, but must have regard to the facts of this case and not slavishly follow previous cases.<sup>7</sup> Reference was made to a series of cases<sup>8</sup> in which the court made damages

---

<sup>4</sup> Tyulu, supra n2 at para 26; *Radasi v Minister of Police* [2021] ZAGPJHC 79 (31 May 2021) (*Radasi*) at paras 27 to 29. *Raduvha v Minister of Safety and Security and another* [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (*Raduvha*).

<sup>5</sup> *Mahlangu*, supra n1 at paras 52 to 56; Tyulu, supra n2 at para 26 and 27. *Mathe v Minister of Police* [2017] ZAGPJHC 133 2017(2) SACR 211 (GJ) (*Mathe*) at para 19 with reference to Visser & Potgieter *Law of Damages*.

<sup>6</sup> Section 205(3) of the Constitution.

<sup>7</sup> Tyulu, supra n2 at para 26: "Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous".

<sup>8</sup> Eg: *Radasi* supra n3 in which the Court awarded a 20 year old pregnant female the sum of R300 000 in damages for three days of detention in circumstances where the relevant sergeant behaved in a 'high-handed, malicious and highly reprehensible way' that the Court regarded as warranting the community's collective condemnation or denunciation; *Oliver v Minister of Safety and Security and another* 2009(3) SA 434 (W), in which the Court made an award with a current value of R83 707 to a senior police officer arrested in full view of his colleagues and detained for six hours in the station in which he worked; *Nqweniso v Minister of Safety and Security* [2012] ZAECHGHC 84 (18 October 2012) in which the Court made an award with a current value of R128 424 for a deprivation of liberty of approximately 20 hours in a dirty police cell in unhygienic conditions in circumstances where the plaintiff suffered the indignity of being arrested in the presence of her



awards for unlawful arrest and detention ranging between R72 375 (current value) for 4.5 hours<sup>9</sup> and R579 0000 for between 28.5 and 32 hours.<sup>10</sup> Ms Kakaza submitted, on the other hand, that if regard is had to the facts and circumstances of these cases, the higher awards were made in circumstances where the plaintiff suffered the indignity of an unlawful arrest and detention entailing features not present in these proceedings such as a level of publicity, humiliation or seriousness (for example gun shots were fired in one case). She also pointed out that the award in Van der Westhuizen had been substantially reduced on appeal.<sup>11</sup> Ms Kakaza responsibly conceded, however, that the soliciting of a bribe and retaining the plaintiff's vehicle without justification and in circumstances of these proceedings may be regarded as aggravating factors, but she contended that they did not warrant the award contended for. She submitted further that the Court should be guided by lower awards made in other cases not referred to by the plaintiff which when compared to this case, suggest an award of approximately R80 000 might fairly be granted on the facts of this case.<sup>12</sup> Neither party was able to refer me to any case in which the arresting officers had sought to solicit a bribe as occurred here. I have considered the cases referred to, and

---

colleagues for alleged stock theft; *Mahlangu v Minister of Police* 2012 ZAGPJHC 180 in which the Court awarded a current value of R217 127 to a woman arrested with her young child and detained for about two days of unlawful detention in unhygienic and dirty conditions – shots had been fired; *Bantu v Minister of Police and another* [2014] ZAGPJHC 344 (21 November 2014) in which the court made an award with a current value of R232 174 for 48 hours of unlawful arrest and detention: the arrest was public and the detention in unhygienic circumstances; *Mathe supra* n5 in which this Court awarded the plaintiff a current value of R132 261 for unlawful arrest and detention for a period of 37 hours: the detention was in filthy and unhygienic circumstances and the plaintiff was humiliated and felt stigmatised in her arrest: the police had acted in an abusive and high-handed manner in respect of a vulnerable person.

<sup>9</sup> *Minister of Safety and Security v Swart* [2012] ZASCA 16; 2012(2) SACR 226 (SCA): the SCA considered the case to have serious aggravating features, see para 24.

<sup>10</sup> *Van der Westhuizen v Minister of Safety and Security* [2012] ZAGPJHC 207 (10 October 2012)

<sup>11</sup> *Minister of Safety And Security and Another v Van Der Westhuizen* (A5079/2013) [2014] ZAGPJHC 427 (15 January 2014).

<sup>12</sup> *Nel v Minister of Police* (CA62/2017) [2018] ZAECHGHC 1 (23 January 2018) at para 36 (approximately 20 hours of detention, unlawful arrest and detention of a mother with an infant in a dirty cell (R35 000 awarded – unadjusted); *Madyibi v Min of Police* 2020 (2) SACR 243 (ECM) at para 32 onwards (R40 000 (unadjusted) for unlawful public arrest amounting to harassment followed by unlawful detention of one day in a dirty cell); *Mtola v Minister of Police* (CA23/16) [2017] ZAECHMHC 56 (29 June 2017) at para 29 (R125 000 – unadjusted - for humiliating unlawful arrest and unlawful detention for a period of 5 days).

others, including where higher awards were made in cases such as in Mahlangu.<sup>13</sup>

- [12] In my view, the facts of this case warrant an award in the region contended for by the plaintiff and I have concluded that R275 000 should be awarded. In this case, multiple constitutional rights which lie at the core of our bill of rights were violated over the period in question and through the process of unlawful search, seizure, arrest and detention. This occurred in a manner which entailed sustained harassment and an abuse of power by the persons entrusted to protect our society, understandably resulting in a profound loss of trust of the police and a sense of abuse. That a bribe was solicited and the plaintiff's vehicle retained in view of these proceedings and without justification are, in my view, seriously aggravating features. The award must reflect the collective condemnation of our society of conduct of this sort which goes beyond illegality and seriously undermines the rule of law, corroding the systems we rely upon to protect us.
- [13] There was no dispute that the award must attract interest as contemplated by the Prescribed Rate of Interest Act 55 of 1975. In terms of section 2A(2)(a), interest shall run from the date on which payment was claimed by service of the demand or summons, whichever is the earlier. In this case the date of service of the demand is applicable. Both parties' representatives confirmed that the applicable interest rate is 10%.
- [14] The plaintiff is entitled to his costs. The plaintiff submitted that costs should be awarded on a punitive scale in view of the circumstances of the bribe, withholding the vehicle in view of the litigation, and the manner in which the defendant conducted the litigation, specifically defending it on the merits on a bald denial and for no good reason until the very last minute when counsel was appointed and the merits conceded. In the SARB matter the Constitutional Court held:<sup>14</sup> "A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke". I am of

---

<sup>13</sup> Supra n1.

<sup>14</sup> *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 226.

the view that such an award is justified in this matter until the date the defendant conceded the merits.

[15] Ms Kakaza submitted that costs should only be awarded on a Magistrates Courts scale in view of the quantum ultimately sought (and granted). In the circumstances of this case, I am unable to agree.<sup>15</sup> In the pleadings, the plaintiff sought an estimate award within the High Court jurisdiction in circumstances where awards in cases of this sort are difficult to quantify. There are multiple important human rights issues at stake in this case, which also involves matters of public interest and grave public concern. Moreover, the issues, at least on merits, were potentially complex: the defendant only conceded the merits shortly before trial. Also material is that this case carried hallmarks which could well have justified an award beyond the jurisdiction of the Magistrates Court: specifically, the attempt to solicit a bribe, the infringement of multiple rights and the retention of the vehicle without justification and due to the institution of these proceedings.

[16] The following order is made:

- 16.1 The defendant shall pay the plaintiff R275 000 in damages, together with interest at a rate of 10% from the date of demand to date of payment;
- 16.2 The defendant shall pay the plaintiff's costs on a High Court scale such costs to be on an attorney and client scale until the date the defendant conceded the merits.



COWEN J

**Appearances:**

For the Plaintiff: Adv L Naidoo

---

<sup>15</sup> See generally Mathe, supra n5 at paras 41 onwards.



Instructed by: Logan Naidoo Attorneys

**For the Defendant:** Adv N Kakaza

Instructed by: State Attorney

Date of hearing: 1 February 2022

Date of judgment: 23 February 2022