



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

CASE NUMBER: 18817/2016

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

9/03/2023

DATE

SIGNATURE

In the matter between:

ZAHEER HOOSAIN

Plaintiff

And

THE MINISTER OF POLICE

Defendant

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] In this matter Mr Zaheer Hoosain (“the Plaintiff”), an adult male, instituted an action for unlawful arrest and detention against the Minister of Police (“the Defendant”). As set out in his combined summons the plaintiff claimed the following;

1. Claim A- delictual damages based on unlawful arrest and detention in the amount of R 400 000.00, and
2. Claim B- damages sustained due to assault during arrest in the amount of R 150 000.00.

[2] When the trial in this matter came before me on 6 March 2023, the plaintiff abandoned Claim B for damages in respect of assault during his arrest, thus the trial only proceeded on Claim A, damages incurred in respect of unlawful arrest and detention.

[3] Furthermore, the defendant conceded to its liability as a result of the unlawful arrest and detention.

[4] In the light thereof, the only issue remaining for the decision of this Court is the determination of the amount of damages suffered by the plaintiff as a result of his unlawful arrest and detention.

The Facts

[5] The following facts are common cause in this matter:

5.1. The plaintiff was arrested on 29 November 2014 at around 20h00, while he was transporting passengers to a wedding celebration in Eldorado Park. The arrest was effected by Constable Thinawanga, a member of the South African Police Services stationed at Eldorado Park Police Station.

5.2. When Constable Thinawanga effected the said arrest, he did so without a warrant.

- 5.3. At all material times the said officer was employed as a member of the South African Police Services and acted within the cause and scope of his employment with the defendant.
- 5.4. The plaintiff was charged with Possession of Drugs and detained in custody at Eldorado Park Police Station.
- 5.5. On 1 December 2014 the plaintiff was transported to the Kliptown holding cells, and around 12h00, the plaintiff was released from detention without appearing in Court.

The Evidence

- [6] The plaintiff testified under oath in the matter. He stated, that at the time of the incident he was 25 years of age, married and the father of three minor children, aged 1 (one), 4 (four) and 8 (eight) years old. He attended school until grade 11 (eleven). He was self-employed as an Uber driver, transporting school children.
- [7] On the day of his unlawful arrest, at 20h00, he was transporting passengers, two female and two male persons to a wedding. While travelling on the N12, members of the South African Police Service stopped his vehicle. The police officers instructed them all to alight from the vehicle, after which the vehicle was searched, and nothing was found inside the vehicle. The plaintiff handed his driver's licence to the officer on request whereafter his person was searched and nothing was found in his possession. The plaintiff and one of the male passengers were arrested for possession of drugs and they were transported to the Eldorado Park Police Station.
- [8] The plaintiff testified that prior to him being placed inside the police vehicle, he was choked and as a result he lost consciousness. He only regained consciousness on arrival at the Eldorado Park Police Station.
- [9] The plaintiff described the conditions in the Eldorado Park police cell, where he was detained as follows;
 - 9.1. The cell was damp and the floor wet,

9.2. There was no running water inside the cell and as a result the toilets were blocked,

9.3. The walls were smeared with human faeces, and

9.4. There was no mattress to sleep on, and he was provided a dirty blanket.

[10] The plaintiff testified that he was not given supper on the night of his unlawful arrest. He only had bread and tea/juice for breakfast and supper on the Sunday. Due to his religious beliefs, he was unable to eat lunch. He is Muslim and therefore, he was only permitted to consume Halal food, this was reported to the police officers in charge, to no avail.

[11] The plaintiff further stated that he was not given the opportunity to phone his family, in order to inform them of his whereabouts, and he was also not allowed any visitations.

[12] The defendant did not call witnesses in the defence case.

The Law

[13] The primary purpose of compensation for damages of the kind claimed in the present case was succinctly stated by Bosielo AJA in *Minister of Safety and Security v Tyulu*¹ as follows:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. I readily concede that it is impossible to determine an award of damages . . . with . . . mathematical accuracy. 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. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* **2006 (6) SA**

¹ [2009] ZASCA 55; 2009 (5) SA 85; 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) para [26].

320 (SCA) 325 para 17; *Rudolph & others v Minister of Safety and Security & others* (380/2008) **[2009] ZASCA 39** (31 March 2009) (paras 26-29)”

[14] In *Diljan v Minister of Police*² the Supreme Court of Appeal said:

“[17] Thus, a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required solatium, the defendant (the Minister in this instance) should not be treated as a ‘cash-cow’ with infinite resources. The compensation must be fair to both parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.

[18] The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.”

[15] The Supreme Court in the matter of *Diljan supra*³ further referred to exorbitant amounts of damages claimed by litigants, and said;

“A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be ‘thumb-sucked’ without due regard to the facts and circumstances of a particular case. Practitioners ought to know the reasonable measure of previous awards, which serve as a barometer in quantifying their clients’ claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above.”

Evaluation

[16] I now revert to the facts of the present case, which are neither complex nor controversial.

² [2022] ZASCA 103.

³ See para [20].

- [17] In respect of the issue of *quantum*, the parties are in disagreement. The plaintiff argued that an amount for damages of R 200 000.00 would be fair and reasonable in the circumstances. Mr Malema, on behalf of the plaintiff, quoted case law in reliance of the award referred to.⁴
- [18] The defended contended that such an amount is excessive and that an award of R 40 000.00 would be an adequate amount. Ms Lekgetho in turn referred the court to case law in support of her argument.⁵
- [19] It is trite that amounts awarded in other matters may be of some guidance, it is also trite that each case is to be considered on its own peculiar facts.⁶
- [20] At the time of the incident the plaintiff was a young man of 25 years old, he was married and was the father of three minor children. He earned an income as an Uber driver in order to support his family. While performing his duties he was unlawfully arrested.
- [21] Furthermore, the plaintiff was detained for nearly 2 (two) days, under appalling circumstances, the police cell was damp and wet, there were not running water, the toilet was blocked and the blankets were dirty. The plaintiff was not allowed to make a phone call nor to receive visitors. Due to his religious believes, he ate bread only, as there was no provision made for Islamic dietary requirements.
- [22] The plaintiff was unlawfully arrested in the presence of passengers, his clients. He did not resist his arrest and gave his full co-operation.
- [23] The plaintiff was only released on 1 December 2014 without any criminal proceedings being instituted against him because the prosecutor declined to prosecute the matter. He was detained for a period of 40 hours. I take cognisance of the fact that in the absence of evidence linking the plaintiff to the crime he was released without appearing in Court.

⁴ *Louw and Another v Minister of Safety and Security and Another* 2006 (2) SA SACR 178 (T), *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (W), *Van Rensburg v City of Johannesburg* 2009 (2) SA 101 (W), *Lepasa v Minister of Police* case no 04299/15 date delivered 6/2/2023, Francis J.

⁵ *Diljan v Minister of Police supra*, *Poswa v Minister of Police* 2022 LNQD 89 (ECLM), *Morwangwana and Another v Minister of Police* (2022) LNQD 19 (GJ), *Mathe v Minister of Police* [2021] ZAGPPHC 79, *Mandleni v Minister of Police* unreported judgment dd August 2013 Case number 2011/3809310.

⁶ *Minister of Safety and Security, supra*, at [26].

[24] The plaintiff suffered unwarranted inconvenience, injury to his feelings, personal humiliation and embarrassment with no further consequence.

[25] The circumstances surrounding the arrest were (putting aside that the very fact of being arrested must, in itself, is a traumatic event) not as traumatic or appeared to have had long term psychological effects upon the plaintiff as has been the case in so many similar matters dealt with by our courts. Having said that, being detained for no reason at all, must have been a frightening experience.

[26] Having given careful consideration to all relevant facts, I believe that justice would be done were I to award the plaintiff an amount of R 90 000.00.

Interest

[27] The plaintiff claims interest on the amount at the rate of 9% from letter of demand in terms of section 3 of Act 40 of 2002,⁷ dated 11 December 2014. The defendant disagreed with the contention made in this regard.

[28] It is important to note, that where damages are claimed as in the circumstances as present, the *quantum* is only determined by a court after consideration of all the facts. Until the determination is arrived at, the amount for damages is unliquidated.

[29] It is trite, that in terms of the common law, interest is not payable on unliquidated damages.⁸ The court makes a determination of the damages *ex aequo et bono*.⁹ Only then the amount is determined. Thus, interest on the amount awarded could only then follow.¹⁰

[30] It would be equitable in such circumstances to determine a period for payment of the award made, failing which, *mora* interest should then follow until date of payment.¹¹

⁷ Institution of Legal Proceedings against Certain Organs of State, Act 40 of 2002.

⁸ *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 31-33; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994(4) SA 747 (AD) at 779A-E.

⁹ Visser JP and Potgieter JM, *Law of Damages*, (2003), 472-474, par 15.3.9.

¹⁰ Section 2 of the Prescribed Rate of Interest, Act No. 55 of 1975.

¹¹ Section 2A (5) of the Prescribed Rate of Interest Act, *supra*.

Costs

[31] There is a further issue to be considered, namely that of costs and in particular that of the scale upon which the costs are to be determined. There is no reason why the normal principle of costs following the event should apply.

[32] The award of costs and the scale upon which the costs are to be determined fall within the discretion of the court. The court has an unfettered discretion in that regard.

[33] In my view, the plaintiff was justified in instituting the present action in the High Court. As correctly argued by his Counsel, the plaintiff's arrest was entirely without any justification, nor did the defendant bother to proffer any such justification. If anything, the defendant's plea amounts to a bare denial.

[34] Although the *quantum* falls within the jurisdiction of the Magistrate's Court, the plaintiff was, in my view, justified to in seeking redress in the High Court.

[35] In *Mvu v Minister of Safety and Security*¹² Willis J (as he then was) cited with approval a number of authorities which enunciate the principle that in matters such as the present one, courts generally award costs on a High Court scale because of the significance they attach to issues of unlawful arrest and detention.

[36] Added to the above it must be emphasized that public officers as in the present matter, police officers must be made aware that Courts will not tolerate unlawful behaviour on their part which results in members of public whom they serve, suffering injury at their hand.

Order

[37] In the result the following order is made:

1. The defendant is ordered to pay the sum of R 90 000.00 (ninety thousand rand) to the plaintiff, as damages.

¹² 2009 (2) SACR 291 at para [17].

2. Interest thereon at the prescribed rate of interest from 10 (ten) days of the granting of this order until date of final payment.
3. The defendant shall pay the plaintiff's costs on a High Court scale.



**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 9 March 2023.

DATE OF HEARING:

6 & 7 March 2023

DATE JUDGMENT DELIVERED:

9 March 2023

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