

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

23/9/2016

Case Number: 24776/ 2012

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

DR A. H. N.

Plaintiff

and

MINISTER OF POLICE

1st Defendant

WARRANT OFFICER MASEMOLA

2nd Defendant

BRIGADIER MANGANYE

3rd Defendant

CAPTAIN BEN TSOKU

4th Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The plaintiff has instituted a claim against the defendants arising from his alleged unlawful arrest and detention (claim 1); and for legal costs incurred as a result of the plaintiff's alleged unlawful arrest and detention (claim 2). The plaintiff alleges that the alleged unlawful arrest and detention, and the consequent legal costs incurred, was as a

result of the actions the members of the South African Police Service ("SAPS") acting within the course and scope of their employment.

[2] In his particulars of claim the plaintiff is claiming damages in the amount of R 700 000.00 (claim 1) and R 60 000.00 (claim 2).

[3] It is the plaintiff's case that on 15 June 2011 he was unlawfully arrested and detained until around 14h00 on 16 June 2011, even after the High Court had, on 15 June 2011 and at around 21h00, granted him bail, which order was given to and ignored by officers at Lyttleton police station.

[4] It is the defendants' contention that the plaintiff was lawfully arrested and detained in terms section 40(1) of the Criminal Procedure Act¹ ("the CPA") and detained on suspicion of having committed a schedule 1 offence², namely, rape, after a complaint was made against him.

[5] The following facts are not in dispute:

- 5.1. that on 15 June 2011 and at around 11h00 the plaintiff was arrested by members of the SAPS;
- 5.2. that the arrest was as a result of a charge of rape laid against the plaintiff by a member of the public;
- 5.3. that the plaintiff was held in custody at the Lyttleton police station, Pretoria;
- 5.4. that the plaintiff was granted bail by the High Court on 15 June 2016; and
- 5.5. that the plaintiff was released from custody on 16 June 2011 at around 14h00.

[6] At the hearing of this matter, plaintiff's counsel conceded that plaintiff's arrest was lawful in that a complaint of rape had been registered at the Lyttleton police station. Further, plaintiff's counsel conceded that in the light of the lawfulness of the plaintiff's

¹ Section 40(1) of the Criminal Procedure Act 51 of 1977 ("the Act") reads as follows: "(1) A peace officer may without a warrant arrest any person -... (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act."

² Schedule 1 of the Act provides that "Any offence, except the offence of escaping from lawful custody ... the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine."

arrest, his detention up to the stage when the police received notice of the High Court's order releasing him on bail, was also lawful.

[7] In the light of the concessions made on behalf of the plaintiff, the issue of legal costs (claim 2) falls away since these were incurred in order to secure his release on bail.

[8] The issue to be determined is whether the continued detention of the plaintiff after he was granted bail was unlawful. If it was, then the next issue to be determined is the quantum of the loss suffered by the plaintiff through his continued detention after bail was granted.

[9] The plaintiff, Dr N, testified as follows. He is a business strategist advisor for large companies advising them on their turnaround strategy. On 15 June 2011 and between 10h00 and 10h30, he was called by a police officer who wanted to come and see him at the office. Two police officers came to his office and requested him to accompany them to the police station as there was an allegation of rape against him. At the police station he was informed that he is being charged of rape due to an allegation made by a family member. After being given an opportunity to make one phone call, he was escorted to the cells and his valuables were taken. He was put in a 2 x 2m² dirty cell which reeked of urine. Later in the afternoon, he was booked out and his fingerprints taken and given a copy of his constitutional rights. He was again taken back to the cell and served lunch. In the meantime his wife was trying to get him released on bail. Later that same evening he was taken to a bigger cell which was about 2 X 4m². This cell was also appalling and had a couple of yellow mattresses covered with urine and blankets which felt wet.

[10] Dr N further testified that two years prior to his arrest and detention, he had undergone a major operation to remove half of his colon. He was as a result on chronic medication. As he did not have his medication his stomach was bloated. He asked one of the officers in attendance to get him his medication and that officer refused. It was only around 02h00 the following morning that his wife was allowed to bring him his medication. Furthermore, Dr N testified that although a High Court order granting him bail was granted at 21h20 on 15 June 2011, the officers at the station refused to listen to her wife's and attorney's pleas to be released. The officers informed them that they were waiting for the investigating officer who would arrive the next morning as he was the only

one who had the authority to release him. The next morning at around 10h00 the investigating officer completed some documents, cuffed him, took him outside and he was taken to the Steve Biko hospital. At the hospital the handcuffs were removed and several tests were done before the plaintiff was returned to the police station where he was released.

[11] During cross-examination Dr N indicated that prior to his arrest he had not experienced any traumatic incident. He conceded that once a complaint of rape was made, the police had a duty to arrest him and investigate the complaint. He further conceded that the trauma of attending court was not caused by the police. Furthermore, he admitted that after his father died in 2010 he was severely depressed and had to attend hospital. He further admitted that as a result of his depression prior to his arrest he had in 2009 consulted with a psychiatrist. However, he testified that the death of his father was not such a traumatic experience that it affected his business. Dr N further admitted that he had not informed Mr Moorcroft, Dr Peche and Dr Peta that he had seen a psychiatrist. Finally Dr N testified that he was traumatized and humiliated from being treated as a criminal and being escorted through hospital with handcuffs.

[12] The next witness called by the plaintiff was the plaintiff's wife, Mrs Annette N. She testified that after being informed that her husband has been arrested she managed to get a lawyer, a Mr Joubert, to assist in securing bail for her husband. Bail in the amount of R5 000 was granted by Judge Murphy at around 21h30 in the evening. She took the order granting bail to the plaintiff to the officers at the Lyttleton police station. She arrived at the police station around 23h00. However warrant officer Masemola queried why bail was set at R5 000 instead of R 10 000. She decided to call judge Murphy but warrant officer Masemola slammed the phone down and refused to speak to the Judge. Mr Joubert tried to reason with warrant officer Masemola. Furthermore, warrant officer Masemola phoned Brigadier Manganye who told him not to release Dr N. She further testified she continued trying to talk to the second and fourth respondents to let her take medication to the plaintiff. At around 02h00 the next morning (16 June 2011) warrant officer Masemola finally took the medication to Dr N. Dr N's bail was paid at 10h20 the next morning. Mrs N confirmed that they paid their lawyer an amount of R62 804.16 as legal fees.

[13] The next witness called by the plaintiff is Mr Harold Sean Moorcroft, a clinical psychologist. In his report he sets out the plaintiff's biographical facts which were read into the record. Mr Moorcroft testified that he got the plaintiff's biographical facts from the plaintiff. In brief, his evidence was that after consulting with the plaintiff, he found that the plaintiff suffered from acute stress disorder. In describing what he considered to be trauma, he opined that the plaintiff would have suffered trauma if he had seen his father die but that if it was only the passing on of his father that could be described as grief. He further testified that his first consultation with the plaintiff was on 23 June 2011 and that he subsequently consulted with the plaintiff on 30 June 2011. In his opinion the plaintiff has recovered well from his ordeal. Mr Moorcroft further testified that during June 2013 he again consulted with the plaintiff and that the plaintiff was suffering from flashbacks of the 2011 incident. He testified that the plaintiff felt a sense of despair and of isolation. Mr Moorcroft testified that he diagnosed the plaintiff as being under extreme trauma based on the way he described his situation. In his opinion the plaintiff's incarceration was the most traumatic aspect of the incident in that he felt humiliated and under threat of bodily harm. He opined that being accused of rape would have contributed to the plaintiff's stress anxiety which could constitute trauma.

[14] The next witness called by the plaintiff was Dr Annemie Peche, a neuropsychologist. Her report was also read into the record. She consulted with the plaintiff on 10 September 2015. It was her opinion that the plaintiff appeared to have a sterling background. However after his arrest and detention and since he had never been exposed to such circumstances, he felt he was not in control of his life. In her opinion this was traumatic.

[15] In cross examination, Dr Peche testified that the plaintiff told her that he was not given his medication at all even though it is common cause that he was given medication in the morning following his arrest. She testified further that the plaintiff told her that whilst in the cells, he felt nauseous and that the cell he was kept in was dirty and cold. Further that the plaintiff felt humiliated in that he did not expect to be arrested and was fearful. She further testified that the plaintiff did not mention that he had consulted with a psychiatrist for stress, and if he had he would have investigated that. In her opinion plaintiff's loss of business was related to the stress he suffered as a result of the accusation of rape and the subsequent arrest and detention. She opined that a false

accusation of rape would have a very negative impact on a person. In her opinion the plaintiff had high tension levels and depression. About the trauma Dr N experienced due to the arrest and detention, he after his release he battled to cope and ended up resigning as managing director of the company he worked for. The accusation of rape embarrassed him and did not want to be around people. He even attempted committing suicide.

[16] The defendants did not call any witnesses.

[17] Section 12(1) of the Constitution provides that:

"(1) everyone has the right to freedom and security of the person which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial."

[18] In *Arse v Minister of Home Affairs*³, the court held that once it is established that a person has been detained, the burden of justifying their detention rests on the detaining authority. Furthermore, in *Minister of Safety and Security v Sekhoto*⁴ the court stated that:

"It could hardly be suggested that an arrest under the circumstances set out in s 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary. And an unlawful arrest will not necessarily give rise to an arbitrary detention. The deprivation must, according to Canadian jurisprudence, at least be capricious, despotic or unjustified."

[19] In argument Counsel for the plaintiff claimed damages for the injuria caused by detention of the plaintiff; and secondly, legal costs relating to costs after bail was granted. Counsel argued that it was not disputed as to what happened at the police station. Counsel further submitted that the police officers who attended to the plaintiff demonstrated a contempt for the institution of the court. Counsel argued that the plaintiff

³ 2012 (4) SA 544 (SCA) at page 265.

was released after Van Tonder intervened. It is Counsel's submission that the detention of the plaintiff was intentional and malicious. Counsel urged this Court to take into consideration the conditions under which the plaintiff was kept, which according to counsel was not fit for human residence. Counsel further argued that a punitive award should be granted in order to send a message to the police.

[20] On behalf of the defendants the unlawfulness of the detention of the plaintiff after the police became aware of the order granting him bail, was conceded. Counsel for the defendants estimated that the unlawful detention of the plaintiff was approximately 16 hours. Counsel further submitted that the legal fees incurred by the plaintiff could not go beyond the time the plaintiff was released on 16 June 2011. With regard to quantum of damages to be awarded, counsel submitted that even though the defendants' witnesses did not testify, the plaintiff's experts were not helpful. Counsel submitted that the plaintiff's experts could have conceded that the trauma suffered by the plaintiff could not have emanated solely from the period after bail was granted. According to counsel, the plaintiff's trauma could have been caused by optimum fear of being in a cell.

[21] Counsel for the defendants further submitted that the court should be cautious in accepting the opinions of the plaintiff's experts in that they themselves conceded that their conclusions were based on information given by the plaintiff which was not totally correct. Counsel suggested that an appropriate award would be R90 000.

[22] The defendants have conceded that the plaintiff's continued detention after the police became aware that the plaintiff had been granted bail, was not justified. What needs to be determined is the quantum of damages to be awarded for the injuria suffered by the plaintiff for his unlawful detention. The defendants' counsel's suggestion that the period of detention was approximately 16 hours, was not disputed by the plaintiff. In determining the quantum of damages to be awarded to the plaintiff, cognisance must be taken that the defendants has acted in contempt of a court order. The fact that the investigating officer was not present when they became aware of the order releasing Dr N, is of no moment. There was a court order and there was an obligation on their part to comply with it.

⁴ 2011 (1), SA (SCA) at para [25].

[23] In *Minister of Safety and Security v Seymour*⁵ the Supreme Court of Appeal held that:

"[20] Money can never be more than accrued *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."

Further, in *Minister of Safety and Security v Tyulu*⁶ the court stated that:

"[26] In their 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. 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 deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of 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 320 (SCA) at para 17; *Rudolph & Others v Minister of Safety and Security* 2009 (5) SA 94 (SCA))."

[24] At the time of his unlawful detention, the plaintiff was 42 years old, holding a

⁵ 2006 (6) SA 320 (SCA)

doctorate in Business Management. At the time he was the managing director of his company and also held the position of strategic advisor to various companies. It is common cause that due to emotional and other factors, the plaintiff could not continue with his business and had to close it. It is also common cause that prior to the incident in question the plaintiff had some emotional challenges which led to him consulting with a psychiatrist and suffered depression after the death of his father. Whether or not it was his arrest and detention which led to him attempting to commit suicide in 2013 or it was due to his previous emotional challenges did not come out clearly during the trial. Further, it is common cause that Dr N's detention after the police became aware of the order releasing him on bail was for approximately 16 hours. What became apparent during the trial is that the various experts the plaintiff had consulted and had called as witnesses, attributed his deteriorating mental state to his alleged unlawful arrest and his detention, ignorant of the fact that prior to his arrest and detention the plaintiff had been under the care of a psychiatrist and that he was not unlawfully arrested and was not detained for a whole day.

[25] Mindful of what was said in *Sandler v Wholesale Suppliers Ltd*⁷, in determining the appropriate quantum for damages suffered, I have taken into account the plaintiff's age, marital status, his position in society and the conduct of the police officials and the conditions he was kept under while in custody. I have also considered the authorities I was referred to. I am of the view that an appropriate award of damages for the plaintiff's unlawful detention is an amount of R350 000.00. Furthermore, I am of the view that the plaintiff is entitled to legal costs incurred in securing his release after he was granted bail up to the stage of his release.

[26] Although the plaintiff has asked for a punitive cost order against the defendant in the event of his claims being successful, I am of the view that it would not, under the circumstances, be in the interests of justice to grant such an order.

[27] Accordingly the following order is made:

⁶ 2009(5) SA 85 (SCA)

⁷ 1941 AD 194 where the court stated at 199 that: "the amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending

1. The defendants are ordered, jointly and severally, the one paying to be absolved, to pay the sum of R350 000.00 to the plaintiff as damages.
2. Interest payable at 15.5% per annum from date of this order.
3. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs incurred for the release of the plaintiff after they became aware of Judge Murphy's order up to the time of the plaintiff's release.
4. The defendants to pay the costs of this action.

NP MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For the Plaintiff: Adv Botha SC

Instructed by: GP Venter Attorneys

For the Defendants: Adv Mphahlele

Instructed by: State Attorney

on the Judge's view of what is fair in all the circumstances of the case."