IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 22341/2017

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

15/02/2021

In the matter between:

LERATO PRECIOUS MATHE — Plaintiff

and

THE MINISTER OF POLICE — Defendant

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The plaintiff, a 29 years-old female, claims damages against the defendant arising from the unlawful arrest and detention of the plaintiff during November 2016. At the time she was a bank clerk in the employ

of Capitec Bank. At the relevant time of the arrest, she was 24/25 years old.

[2] The aforesaid arrest of the plaintiff was executed without a warrant for arrest and as such it was deemed to be unlawful until the defendant could justify the arrest and subsequent detention. It is trite that once the arrest is proven to be unlawful, the subsequent detention is unlawful. This is common cause between the parties.

[3] When the trial was set down before me, the issues of unlawful arrest and detention and that of the quantum of damages were in dispute. On the eve of the commencement of the trial, the defendant conceded that the arrest was unlawful and the only issue that was to be determined, was that of the quantum of damages to be awarded. Despite having received instructions from the defendant during September 2020 to concede the issue of unlawful arrest, the defendant's legal representatives did not convey those instructions to the plaintiff's attorney sooner than on the eve of the trial.

[4] It is gleaned from the evidence given by the plaintiff, that the concession in respect of arrest being unlawful was well made. In this regard, the plaintiff testified that she had left her branch where she was employed earlier in the day as she was to meet her friends in Sunnyside. She was employed as a bank clerk at the Mamelodi branch of Capitec Bank.

[5] At about 17:00 on 24 November 2016, she was standing on Kotze Street, Sunnyside, Pretoria when a motor vehicle pulled up alongside her. The three occupants of the vehicle identified themselves as police officers. They were not in uniform. It was not clear whether the vehicle had any markings indicating it being a police vehicle, on the probabilities not so identifiable. She did not know any of them and they did not provide their names or their ranks. They accused her of selling drugs on behalf of Nigerians. She denied the allegation. They then invited her into the car as they indicated that she should accompany them to the Sunnyside

Police Station for questioning. Inside the vehicle, the police officer who sat beside her at the back, asked her whether he could search her bag. He found a number of bank cards, 24 in total, of which 21 were debit cards and 3 were credit cards. She was then accused of being in possession of stolen property and thus providing means of money laundering to the Nigerians. The plaintiff denied the allegations and informed the police that the cards were issued to her by her branch of Capitec Bank for use when consulting with clients. The police then took the plaintiff straight to the Sunnyside branch of Capitec Branch to verify her version. She remained in the vehicle whilst one of the police officers entered the bank. It was then confirmed that the cards in question were not stolen. The police took the plaintiff to the Sunnyside Police Station. One of the police officers went to the plaintiff's branch to speak to the branch manager. He was duly informed by the branch manager that the cards were in fact issued to the plaintiff and not stolen, but that she was not supposed to have them with her when she left the branch. Despite being so informed, the police officers nevertheless arrested the plaintiff on the charge of suspicion of being in possession of presumed stolen property and detained the plaintiff in a cell. The plaintiff was only released the next day at approximately 14:00 – 14:30. It is common cause that no criminal proceedings were instituted against the plaintiff, a *nolle prosequi* was issued.

[6] From the foregoing, it is clear that the arrest was technically unlawful. Any initial suspicion of being in possession of presumed stolen property was clearly dispelled when it was corroborated by the branch manager of the plaintiff that she was in lawful possession of the bank cards in question. The only transgression being that the plaintiff was in terms of bank policy not supposed to take the bank cards with her when she left the branch. The plaintiff's explanation of her having the said bank cards in her bag was that she had forgotten to take them out when she left to meet her friends. That transgression is an internal bank issue and does not constitute a criminal offence, certainly not that which she was accused of. There was no reason for the arrest and subsequent

detention of the plaintiff. Her arrest and detention occurred after the verification that the said cards were in the plaintiff's lawful possession. The concession in respect of liability was thus correctly made.

[7] It is trite that the unlawful deprivation of the liberty of a person is remedied by an award of damages.[1] The only issue to be determined is that of the quantum of damages to be awarded. In this regard, a number of factors are to be considered in determining the amount to be awarded.[2]

[8] When determining the quantum of damages suffered, the correct approach is to consider all the facts of that particular case. The determination is not done on a broad approach, irrespective of the particular facts, and the evidence proved in that regard.[3]

[9] The plaintiff testified that when she was initially approached by the police officers in Sunnyside, it was in the presence of members of the public who were walking past and a man who had a stall nearby. She was further insulted by the police officers at the Police Station in the presence of members of the public who were waiting in the area where the public are received by the officials when they have inquiries or wish to lay charges or report incidents. At the time, there were about four members of the public present, as well as a lady who worked in the charge office. She was then detained in a cell approximately 6 x 10 metres, if not somewhat larger. A mattress and a blanket were available and the cell had a toilet. The plaintiff was offered bread and butter and tea for the evening. The next day she was apparently offered a meal consisting of tinned fish and rice. Initially the plaintiff was alone in the cell until about 2:00 when she was joined by a second female person who was arrested for drunken driving.

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[1] See in general Neethling J *et al, Law of Personality,* (2005), 121-122, par 2.4
[2] *Ibid*
[3] *Minister of Safety and Security v Tyulu* 2009(5) SA 85 (SCA) at [26]

[10] No evidence was produced to indicate whether the public, who were in the vicinity when the plaintiff was initially approached by the police officers, could hear the conversation and/or knew the plaintiff, or were aware of the fact that they were police officers. Nor was any evidence led to indicate that the public present in the charge office could hear the alleged insults, or had known the plaintiff, or that they had followed the conversation between the police officers and the plaintiff. In respect of the alleged insults, which the plaintiff offered as insults, amounted to no more than advice that she should stay clear of people who were notorious for drug peddling. She was further vague in respect of some of the other alleged insults.

[11] In respect of her evidence relating to her detainment in the cell, the plaintiff was not convincing. On her own evidence, the cell was in no worse condition than could be expected of a place of incarceration of detainees on an ongoing basis. Of her own accord she was unwilling to use the toilet facilities although it appeared to be acceptable. Her own personal dislike to use the toilet facilities does not render the use thereof impossible or unacceptable. It remains facilities for public use and not private use. No evidence was proffered that the situation and circumstances were such that it rendered the cell unfit for occupation, even in the normal course of events. She declined the meals offered. The plaintiff offered no reason for declining the meals. It was her own choice. The plaintiff's refusal to use the available bedding was due to her own fastidiousness, and not because the condition thereof rendered it non-usable under any circumstances. She merely testified that it smelled of dust. For the greater part of her detention, the plaintiff was alone in the cell and was later joined by another female who was apparently intoxicated. The plaintiff did not testify that she had felt threatened in any way by the presence of the other occupant.

[12] Being arrested and detained is of nature a humiliating experience. *Non constat* that in the eyes of the public you are humiliated in the absence of any further particulars in that regard. No evidence was tendered to

indicate that as a result of the unlawful arrest and detention, the plaintiff has suffered any lasting self-degradation or psychological damage. One is expected to endure the daily hustle-and-bustle that life bestows upon one. Not all of those call for any compensation being offered. In view of the foregoing, it cannot be said that the plaintiff's experience was harrowing.

[13] In the absence of evidence that in the eyes of the possible observers, the plaintiff suffered humiliation, or that less was thought of her by them and where the strangers in all probability would never see or meet her ever again, any perceived humiliation on that score does not in itself warrant any substantial compensation being awarded. The personal experience of humiliation, in particular where the arrest and detention were unnecessary in the particular circumstances, does not call for a large amount of damages to be awarded.

[14] In respect of the issue of quantum, the parties are in disagreement. Initially the plaintiff claimed, in her amended particulars of claim, an amount of R200 000.00. The plaintiff persisted with such amount in the practice note filed on her behalf. However, at the trial her counsel submitted that an amount of R100 000.00 should be awarded and in that regard, reliance was placed on a number of authorities. On behalf of the defendant it was submitted that an amount of between R35 000.00 and R40 000.00 would probably be an adequate amount. Although counsel for the defendant further submitted that an amount of R10 000.00 was recently awarded on similar facts in this Division, no authority for that proposition was submitted.

[15] 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.[4] In the present matter, and having due regard to the particular facts of this matter, an award of a large amount of

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

compensation is not called for, nor warranted. The plaintiff suffered unwarranted inconvenience, injury to her feelings and personal humiliation with no future consequence. To an extent her unfortunate situation was of her own doing, her non-compliance with bank policy. That in itself does not warrant her unfortunate experience. A *via media* is to be found.

[16] In my opinion, an adequate award, bearing in mind the facts as recorded above, would be an amount of R25 000.00.

[17] There remains the issue of interest payable on any amount awarded with specific reference to the date from which such interest should run. It is submitted on behalf of the plaintiff that the appropriate date is the date of demand. In the amended particulars of claim the relevant date for interest to run on the amount to be awarded is pled to be that of the date of the summons. However, the correct date where no demand is made would at best be the date of service of the summons. It is to be noted that the true purpose of the so-called letter of demand in proceedings such as these, is to notify the defendant of the incident and to enable it to investigate the matter. That is the clear purpose of the required notice in terms of the provisions of section 3 of Act 40 of 2002. Where damages are claimed in circumstances as the present, the quantum is only determined by the court after consideration of all the facts. Until the determination is arrived at, the amount is unliquidated. It is trite that in terms of the common law, interest is not payable on unliquidated damages.[5] The court makes a determination of the damages *ex aequo et bono*.[6] Only then the amount is determined. Thus interest on the amount awarded could only then follow.[7] It would be equitable in such

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[5] *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

[6] Visser JP and Potgieter JM, *Law of Damages,* (2003), 472-474, par 15.3.9

[7] Section 2 of the Prescribed Rate of Interest, Act No. 55 of 1975

circumstances to determine a period for payment of the award made, failing which, *mora* interest should then follow until date of payment.[8]

[18] 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. 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. The present matter is not of a complexity that it warranted the attention of the High Court. The amount claimed, and to be awarded, fall within the jurisdiction of the Magistrates' Court. No special circumstances were advanced to warrant the institution of these proceedings in the High Court.

I grant the following order:

1. The defendant is to pay the plaintiff an amount of R25 000.00;

2. The defendant is to pay interest of 7% *a tempore morae* on the amount of R25 000.00 from 10 days of the date of the grant of this order until date of payment;

3. The defendant is ordered to pay the costs of suit on the appropriate magistrate's scale.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

[8] Section 2A(5) of the Prescribed Rate of Interest Act, *supra*

Judgment Reserved:	20 January 2021
On behalf of Applicant:	A C Gobetz
Instructed by:	Loubser van der Walt Attorneys
On behalf of Respondent:	M H Mpahlele
Instructed by:	State Attorney, Pretoria
Judgment Delivered:	15 February 2021