INCLUDEPICTURE "cid:image001.jpg@01D48AE6.1B350E00" * MERGEFORMATINET INCLUDEPICTURE "cid:image001.jpg@01D48AE6.1B350E00" * MERGEFORMATINET INCLUDEPICTURE "cid:image001.jpg@01D48AE6.1B350E00" * MERGEFORMATINET INCLUDEPICTURE "cid:image001.jpg@01D48AE6.1B350E00" * MERGEFORMATINET

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

APPEAL CASE NO: CA28/2022

In the matter between:-

SIHLE DIKOME Appellant

and

MINISTER OF POLICE Respondent

JUDGMENT

M GWALA AJ

1. This appeal concerns the order of the Regional Court sitting in Gqeberha.

The court *a quo* awarded damages in favour of the appellant in the sum of R10 000.00 plus costs. The appellant was not satisfied with the award and instituted the present appeal. The appeal is limited to the issue of quantum only.

2. The appellant instituted a claim in the court *a quo* against the respondent for damages she sustained as a result of unlawful arrest and detention at the instance of the members of Police who were acting within the scope of their employment with the respondent. The respondent conceded merits and the trial proceeded on the issue concerning quantum only. In the end, the court *a quo* awarded damages in the aforesaid amount.

3. The appellant was the only person to testify in support of her claim in the court *a quo*. The respondent did not contest the evidence led by the appellant and led no witness of his own. The appellant's evidence was to the effect that she was 23 years old at the time of the trial. In the early hours on 23 January 2020, at approximately 04h45 the police arrived at her place of abode. They woke her up from her sleep. They informed her that they were arresting her because she had fought with another lady who was in the company of the police at the time of the arrest. They took her whilst in her pyjamas and they did not give her an opportunity to change to wear normal clothes.

4. She was arrested in the presence and in the full view of the members of

the community who had come to witness the arrest. First, she was taken to KwaZakhele police station. Later, but still on that morning, she was taken to New Brighten Police Station, processed and detained, still in pyjamas.

5. She described the cell in which she was detained as being filthy. There was an ablution facility which was also dirty with no toilet papers. She could not use the ablution facility because it was filthy. Equally, she could not use the shower as it was filthy too. In any event, she was not provided with towels and soap to bath. She was only shown where the shower was. There was only one mattress provided in that cell with no blankets. It was cold and dark in the cell. In the course of time, she was taken to court where she was kept in the holding cell which she described as dark.

6. She remained in the holding cells but did not make any appearance before the magistrate. Her matter was not called and her name was not listed on the court's roll. At about 16h00 she was released from the holding cells. She was told to go home without appearing before the court and no explanation was given at all.

7. She was employed at the time of her arrest. She was working at a restaurant. She was due for promotion. She stated that as a result of the arrest, her promotion was reversed. She suffered emotional trauma such

that whenever she would observe police entering her work place, she would run and hide herself in the toilets. She could not cope at work as a result she resigned.

8. Outside her employment she was running a business as a hawker on a part time basis. She was selling clothes. Her customers became aware of the arrest and constantly asked her about it. She testified that she still feels embarrassed when people look at her in the streets as they view her as a person who stabs people. She had to stop her business as a hawker because it required her to go door to door and to meet people something which cause an embarrassment to her in view of the manner in which the community views her.

9. As aforesaid her evidence was not challenged by the respondent. The court *a quo*, after analysing the evidence made an award for general damages in the amount of R10 000.00. The award prompted this appeal. The appellant submits that an appropriate award for general damages would be between R110 000 00 and R150 000.00.

10. Before us the appellant contents that the court *a quo*, whilst referring at length to various cases that deal with the determination of quantum in relation to general damages, focused merely on the period of detention and the resultant awards. It did not consider the circumstances that accompanied the arrest and the detention. Simply put, the court *a quo*

merely compared the periods of arrest in the various previous awards but did not consider the surrounding circumstances of each case in particular those applicable to the appellant. Whilst it is proper to have regard to previous awards, it is also important to consider the facts of each case and the surrounding circumstances.

11. The approach for arriving at the quantum of general damages is well established. At all times a court attempts to arrive at fair award to compensate for the negative impact on the feeling of the life of the injured party. There are no two cases that will ever be the same. The award may not adequately compensate the injury but it must be fair and reasonable. It must take into account, for instance, the premium placed against the deprivation of freedom to liberty which is constitutionally protected.

12. The amount of the award for general damages is not susceptible of precise calculation. It is arrived at in the exercise of broad discretion[1] bestowed on the trial Court. The discretion must be exercised reasonably.[2] At the end of the day, a court is called upon to exercise its discretion to determine an amount which it feels is fair and reasonable to both parties, given the particular circumstances of the case in question.[3]

---

[1] ***See Minister of Safety and Security v Augustine and Others 2017 (2) SACR 332 (SCA) para 25.***

[2] ***Dikoko v Mokhatla 2006 (6) SA 235 (CC) para 57***

[3] ***See Komaphe and Others v Minster of Basic Education and Others 2020 (2) SA 347 SCA para 56.***

13. The test whether the appeal court may interfere and replace the trial court's award for general damages is whether the appeal court finds that the trial court has misdirected itself with regard to material facts or in its approach to the assessment, or having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate court. In its determination, the court considers whether the amount of damages which the trial court had awarded was so palpably inadequate as to be out of proportion to the injury inflicted.[4]

14. If that is the case, the appeal court does not only have a discretion but it is obliged to substitute its own assessment for that of the trial court. In doing so the appeal court considers whether the amount of damages which the trial court awarded was so palpably inadequate as to be out of proportion to the injury inflicted. The appeal court may therefore interfere with the award of damages if it finds that the award of the trial court was palpably excessive, clearly disproportionate in the circumstances of the case, grossly extravagant or unreasonable or so high as to be manifestly unreasonable. Also, the appeal court may interfere if a trial court is found to have misdirected itself in its assessment of the damages.[5]

15. The court *a quo* did not take into account the circumstances under which

---

[4] ***Dikoko supra para 57***

[5] ***See Dikoko V Mokgatla 2006 (6) SA 235 (CC) paras 57 and 58.***

the arrest and detention of the appellant took place. The appellant was woken up from sleep in the early hours of the day. The police found her in pyjamas. She was not given an opportunity to change from her pyjamas to wear proper clothes. She was taken in that condition in full view of the people. She was taken to the Police Stations as well as to court, all of which are public places, whilst wearing pyjamas. She was in pyjamas the whole day in circumstances where she had to be among other people. She was kept in dark and dirty cells. She was not given blanket to cover herself even though it was cold.

16. The arrest as well as the detention in the circumstances were so undignified for a human being to be taken to public places wearing pyjamas. This was a serious invasion on her dignity. Even worse, she was not given opportunity to appear before the court. She was simply released from the holding cells at the end of the day and told to leave without any explanation. Her arrest and detention were basically a form of harassment, a conduct unacceptable in civilised society such as ours.

17. The respondent for his part realizes the seriousness of the invasion caused to the appellant and the inadequacy of the award made by the court *a quo*. The respondent does not defend the amount award by the court *a quo*. Instead, the respondent suggests that a higher award ought to have been made.

18. The respondent submits that a sum of R30 000 00 would be appropriate in the circumstances. The appellant on the other hand contends that an amount between R110 000 and R150 000 00 would fair and reasonable. I am of the view that the amount contended for by the appellant is way more excessive.

19. It is trite that in determining general damages the court is required to exercise a wide discretion in order to award what it considers to be fair and adequate consolation having regard to all the relevant facts and circumstances relating to the aggrieved party. There is no amount of money that would constitute adequate consolation for damages to the person of the appellant. That notwithstanding, the award must be fair and reasonable to both parties.

20. In Tyulu[6] Supreme Court of Appeal said the following:-

> *"[26] 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. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right*

[6] ***Minister of Safety V Tyulu 2009 (5) SA 85 SCA para [26]***

to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law".

21. I accept that the amount of R10 000 00 awarded by the court *a quo* is wholly inadequate given the seriousness of the deprivation of liberty. It is not commensurate with the injury inflicted to the person of the appellant. The appellant was merely arrested and detained and kept in the holding cells only to be told at the end of the day to go home without being charged and without appearing before court. Absent any other explanation I can only describe this as malicious and a harassment that was intended to humiliate the appellant. An appropriate award that would be meaningful to deter such conduct whilst giving consolation to the appellant is called for.

22. The constitutional Court in the matter of Mahlangu[7] said thus:-

"[50] It is trite that 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 not rectify the wrong that took place. In Seymour, the Supreme Court of Appeal encapsulated the purpose of damages and said:

"Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss."[8]

[7] ***Mahlangu and Another v Minister of Police (CCT 88/20) [2021] ZACC 10 (14 May 2021)***
[8] ***Footnote omitted***

23. In De Klerk v Minister of police 2019 [12] BCLR 1425, -[2019] ZACC 32 the aggrieved had been in detention for eight days. In that matter, as it is the case in the present matter, the quantum of general damages was not seriously challenged. The court awarded a sum of R300 000.00.

24. In Mahlangu[9] the aggrieved had been detained for eight months and ten days. Taking into account their peculiar circumstances the court awarded them R 550 000.00 and R500 000.00 respectively.

25. I have concluded that an award in the sum of R10 000 00 was wholly in adequate. It does not give due regard to the dignity of the appellant and the premium placed of the freedom of liberty and against deprivation thereof. I am of the view that a sum of R30 000.00 would be just and fair and reasonable in the circumstances and that such an amount should be awarded as consolation to appellant's injury.

26. I turn to deal with the question of costs. The respondent submitted that in the event the appellant achieves success of no more than R30 000 00, the court should limit the costs in favour of the appellant to 04 April 2022, a date on which it is said the respondent made a formal offer of settlement with prejudice to the appellant in terms of Rule 34 of the Uniform Rules. The respondent submits that the appellant should pay the costs from 04 April 2022 to date of hearing the appeal.

[9] ***Footnote 12 supra***

27. The offer of settlement referred to above was not made part of the record. It was not handed up in court either. Consequently, it was not before court. This is important because in terms of Rule 34 of the Uniform Rules such an offer must comply with certain requirements. An assessment must be done to ascertain whether it complies with the requirements. For instance, an offer of settlement made under the Rule 34 must be (i) a written offer; (ii) signed personally by the defendant (respondent in this case) or by the defendant's attorney if the latter has been authorized thereto in writing; and (iii) comply with the provisions of subrule (5).[10]

28. Since the offer of settlement was not made part of the record and since the court was not provided with a copy thereof in any way, the court is left in a situation where it is unable to assess whether such offer of settlement complies with the requirements of Rule 34 of the Uniform Rules. It follows that the court may not take into account such offer of settlement if it cannot ascertain the validity thereof.

---

[10] ***Subrule 5 states as follows:***
"(5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state —
(a) whether the same is unconditional or without prejudice as an offer of settlement;
(b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;
(c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;
(d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone."

29. In the result, I propose an order in the following terms:

27.1 The appeal is upheld with costs;

27.2 The order of the court *a quo* is set aside and substituted with the following:

"(a) The defendant is ordered to pay the plaintiff for general damages in the amount of R30 000.00;

(b) The defendant is ordered to pay the plaintiff's costs of suit".

____

M. Gwala
Acting Judge of the High Court of South Africa

Beshe J,

I agree and it is so ordered.

____

N. G. Beshe
Judge of the High Court

Date of Hearing: **02 December 2022**
Date of Judgment: **07 February 2023**
Counsel for the appellant: **Adv TW Mgidlana**
Counsel for the respondent: **Adv B Ndamase**