



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

CASE NO. 3411/2021

In the matter between:

PHAKAMISA MADINGANA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

LAING J

[1] This is a claim for damages arising from the arrest and detention of the plaintiff. Only the quantum of damages to be awarded was placed in dispute.

The plaintiff's case

[2] In his particulars, the plaintiff pleaded that two police officers arrived at his residence in the Willowvale district, Eastern Cape, on 18 May 2020. They arrested him on a charge of having breached a domestic violence interdict, handcuffed him, and transported him to the Fleet Street police station in East London, where he was placed in custody. The officers implemented the arrest without a warrant. They confiscated his mobile phone, too, as evidence to be used against him.

[3] On the following day, 19 May 2021, the plaintiff appeared before a magistrate. He was granted bail and released.

[4] The plaintiff alleged that the officers acted maliciously in carrying out the arrest and detention. To that effect, he pleaded that: there was no reason for his arrest; the officers were from Gauteng and had no authority to carry out the arrest in the Eastern Cape; his mobile phone had never been returned to him; the police failed to exercise their discretion in relation to his detention; the officers knew or ought to have known that they lacked authority and that their conduct would lead to harm, yet proceeded with his arrest and detention; and the officers never believed, before and during his arrest, that the plaintiff was answerable to the charge brought against him.

[5] Consequently, the plaintiff claimed damages for the loss of his mobile phone, legal costs, and general damages. He held the defendant liable in the amount of R 500,000.

Defendant's case

[6] The defendant raised two special pleas, based on non-compliance with section 2(2) of the State Liability Act 20 of 1957, and section 3 of the Institution of Legal

Proceedings Against Certain Organs of State Act 40 of 2002. These were no longer in issue by the time that trial commenced.

[7] In his plea, the defendant merely denied knowledge of the allegations. He further pleaded that if it was found that the plaintiff had suffered damages, then the defendant's employees were not the cause thereof.

Issues to be decided

[8] At the start of proceedings, the defendant admitted the facts pertaining to the circumstances of the plaintiff's arrest and detention. He conceded that, in the absence of a proper warrant, the arrest and detention had been unlawful. Notwithstanding, he persisted in his denial that the officers in question had acted with malice.

[9] Regarding quantum, the defendant offered payment of R 7,999 for the plaintiff's loss of his mobile phone. This was accepted. The only issues to be decided were the amount to be awarded in relation to: (a) legal costs allegedly incurred by the plaintiff to defend the charge brought against him; and (b) general damages.

[10] It is necessary to deal, briefly, with the plaintiff's testimony.

Evidence of the plaintiff

[11] The plaintiff testified on his own behalf. He said that officers had visited him at his home in the Willowvale district on the Sunday afternoon of 18 May 2020 and had accused him of violating the conditions of a protection order. They alleged that he had

contacted his ex-wife, insulted her, and taken her motor vehicle. They subsequently arrested him, which was done in front of members of the local community.

[12] Inside the police vehicle, the plaintiff requested a copy of the protection order and discovered that it was incorrect. He had previously applied successfully for the amendment thereof. Consequently, the warrant of arrest was based on the earlier, instead of the later (amended), order. When he attempted to explain this to the officers, they ignored him.

[13] At the police station in East London, the officers charged him, obtained his fingerprints, confiscated his belongings, and placed him inside a holding cell with nine other detainees. The plaintiff described how, upon his arrival inside the cell, he was insulted by the detainees, who searched him and touched his genitals. One of the detainees made sexual advances towards him. Another removed his mattress and blanket. He was made to squat next to the toilet and instructed not to sleep. He stated that the condition of the cell was unfit for a human being.

[14] On the following day, said the plaintiff, he was taken to court where the magistrate granted bail of R 300. One of the arresting officers paid the amount because the plaintiff had no cash with him. The plaintiff subsequently instructed attorneys to represent him in the criminal proceedings, both in East London and Pretoria, after the case had been transferred to Gauteng. The officers failed to attend proceedings and the case was eventually struck off the roll.

[15] The plaintiff testified that his attorneys had billed him for services provided. He stated that he owed Shapiro & Ledwaba Inc the sum of R 26,998 and owed Sipunzi Attorneys an amount of R 9,450.

[16] Regarding the effect that the arrest and detention had had on him, the plaintiff indicated that his reputation had been severely damaged. He had previously occupied the position of speaker at the Mphashe Local Municipality, he was a leader in the African National Congress ('ANC'), a leader in his church, an advisor to traditional leaders, and involved in the campaign to end violence against women and children. After his arrest and detention, he had lost out on various political deployment opportunities and had lost the trust of members of his church and the community in general. He was perceived as a criminal. Consequently, he had experienced embarrassment, a lowering of his dignity, and a loss of self-esteem.

[17] Under cross-examination, the plaintiff admitted that the amended order prevented him from inflicting physical and emotional abuse on his ex-wife. He denied that he had violated the order but conceded that his ex-wife had laid a complaint against him and had made allegations. He also conceded that she had applied for orders against him in both East London and Pretoria.

[18] In relation to his divorce proceedings, the plaintiff averred that his ex-wife was using the orders to exclude him from his share of the joint estate. He stated that she had pressed a charge of theft against him, alleging theft of the motor vehicle. He admitted that his ex-wife had also pressed a charge of rape. The resulting criminal proceedings had, however, come to nothing.

[19] Still under cross-examination, the plaintiff admitted that he had been unemployed. The ANC had, nevertheless, looked after him. Its assistance had come to an end after his arrest and detention. He did not dispute that he had been in custody for less than 24 hours and agreed that the reason for the officers having proceeded against was his ex-wife's complaint, which stemmed from the tumultuous relationship that he had with her. The plaintiff conceded that he had not yet settled his attorneys' outstanding fees but said that they had permitted him an opportunity to do so in due course.

Legal framework

[20] The principles that are relevant to the matter will be discussed in the paragraphs that follow.

[21] As a starting point, it is helpful to refer to the observations made by Potgieter (et al):¹

'In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bono*. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or "malice" on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the *actio iniuriarum* also has a punitive function.²

[22] The context of an award of damages for unlawful arrest and detention must always be informed by the constitutional right to freedom and security of the person. This includes the right not to be deprived of freedom arbitrarily or without just cause.³ The rights in question lie at the very heart of our constitutional dispensation and are a response to the rampant abuse of individual freedom and security that occurred in our past. Consequently, a balance must be struck between upholding and enforcing such

¹ Potgieter (et al), *Visser & Potgieter: Law of Damages* (Juta, 3ed, 2012).

² At paragraph 15.3.9, 545-8, footnotes omitted.

³ Section 12(1)(a) of the Constitution of the Republic of South Africa, 1996.

rights and ensuring that the award corresponds accurately to the circumstances of the matter and does not amount to the over-compensation of the plaintiff.

[23] The balance was evident in *Olgar v Minister of Safety and Security*,⁴ where Jones J observed that a just award of damages should express the importance of the constitutional right to individual freedom. At the same time, the award should properly consider the facts of the case, the personal circumstances of the victim, and the nature, extent, and degree of the affront to his or her dignity and sense of personal worth.⁵

[24] In *Minister of Safety and Security v Tyulu*,⁶ Bosielo AJA held that:

‘...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 to personal liberty and the seriousness with which any arbitrary 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 *iniuria* 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.’⁷

[25] The above principles provide a basic framework for an assessment of the plaintiff’s claim. We proceed, at this stage, to deal with the issue of legal costs, after which the court will consider the issue of general damages.

⁴ 2008 JDR 1582 (E).

⁵ At paragraph [16].

⁶ 2009 (5) SA 85 (SCA).

⁷ At paragraph [26], footnotes omitted.

Discussion

[26] For the sake of convenience, the issues will be treated separately, under their respective headings.

Legal costs

[27] The plaintiff has claimed payment of the legal costs associated with his defence of the charge pertaining to his violation of the order. He admitted under cross-examination that his wife had laid the complaint that had led to the subsequent proceedings in the Magistrates' Court in East London and later Pretoria, after the case had been transferred.

[28] The above admission effectively put an end to the plaintiff's claim. He did not incur any legal costs in attempting to secure his release. He was released at his first appearance on the day after his arrest once he had been granted bail, which was, interestingly, paid by one of the officers involved. Whether he had been arrested or not, he would still have had to contend with the proceedings that had been instigated or instituted by his ex-wife. The costs incurred in instructing attorneys to defend him in such proceedings had nothing to do with his unlawful arrest and detention. The claim for payment thereof is a delictual claim, but there is simply no causal link.

[29] To the extent that the defendant, in argument, suggested that the plaintiff has relied on a claim for malicious proceedings, the court does not interpret the particulars as disclosing a cause of action to that effect. There is, in any event, no evidence of malice. This will be discussed further in the paragraphs that follow.

[30] Ultimately, the plaintiff seems not to have pursued his claim for legal costs in relation to the proceedings set in motion by his ex-wife.⁸ If indeed so, then this was a prudent decision.

General damages

[31] The extent of the award for general damages lies entirely within the discretion of the court.⁹ This depends on the circumstances of the matter.

[32] In his particulars, the plaintiff alleged that his arrest and detention were accompanied by malice. He listed several grounds to that effect. These can be reduced to the following: there was no reason for his arrest and detention, the officers lacked an honest belief that the proceedings were justified, they had no jurisdictional authority to carry out the arrest and detention, and the plaintiff's mobile phone has never been returned to him.

[33] The arrest of a person without a warrant is allowed under section 40(1)(q) of the Criminal Procedure Act 51 of 1977 ('the CPA') when he or she is suspected of having committed an act of domestic violence. In *Minister of Safety and Security v Mondile*,¹⁰ however, Roberson J held that such act be of a physical or sexual nature, accompanied by violence, as opposed to emotional abuse.¹¹ It was on this basis that the defendant correctly conceded that the arrest and detention of the plaintiff had been unlawful. Crucially, however, the plaintiff admitted that his ex-wife's complaint had led to the proceedings against him. His testimony was that the officers had relied on her allegation that he had violated a protection order, which they showed to him at his request, as the basis upon which to arrest and detain him. There was no evidence to demonstrate that

⁸ The claim for legal costs was omitted from the draft order that the plaintiff proposed.

⁹ See Potgieter (*et al*), n 1, *supra*.

¹⁰ 2014 JDR 1498 (ECG).

¹¹ At paragraph [24].

they had lacked an honest belief, based on reasonable grounds, that his arrest and detention were justified.¹²

[34] Regarding the remaining grounds, counsel for the plaintiff did not refer to any legislative or common law source for the argument that the officers had lacked jurisdictional authority to arrest and detain the plaintiff. The plaintiff, in any event, admitted that his ex-wife had obtained the order and subsequently made a complaint in Gauteng, which was acted upon by the officers in question. The court is not convinced that anything turns on the point. At the least, it can hardly be contended that it demonstrates malice.

[35] The plaintiff also admitted, under cross-examination, that his ex-wife had alleged that he had violated the order by sending threatening messages to her from his mobile phone. He conceded that it had been confiscated by the police for further investigation. Again, this is no indication of malice.

[36] Turning to the circumstances of the arrest and detention, counsel for the defendant argued that the plaintiff advanced evidence that was extraneous to the pleaded facts. In his particulars, the plaintiff had alleged the following:

‘...On or about 18th of May 2020 approximately at 15h00 and at the Plaintiff’s residence, there arrived two police officers who introduced themselves to the Plaintiff as Sergeant Momale (male) and Mabatho (female), from Garsfontein Police Station, Pretoria, Gauteng Province, whose full and further particulars are unknown to the Plaintiff, and did wrongfully and unlawfully arrest the Plaintiff without a warrant or justifiable cause.

...The said members informed the Plaintiff that he was arrested on a domestic violence act count, and thereafter handcuffed him and further ferried him to Fleet Street Police Station, East London, which is more than 300 km from scene of arrest.

¹² See the requirements for proving lack of reasonable and probable cause in *Prinsloo v Newman* [1975] 2 All SA 89 (A). Furthermore, see the discussion of the elements of a claim for malicious proceedings in Harms, *Amler’s Precedents of Pleadings* (LexisNexis, 9ed, 2018).

...On arrival at the station, the Plaintiff was charged for breach of domestic violence interdict and further detained in custody.

...Before detention, the said members confiscated Plaintiff's iPhone 5 and booked it for evidence.

...The next day, on the 19th of May 2021, Plaintiff appeared before court and was admitted on bail for R 300, without objection.¹³

[37] The above paragraphs were admitted by the defendant in his plea. During his testimony, however, the plaintiff described in detail the conditions of his detention, including the sexual molestation and humiliation that he had experienced at the hands of the other detainees.

[38] Counsel for the defendant argued that the above evidence was inadmissible since it had not been pleaded. Reference was made to *Hillman Brothers Ltd v Kelly & Hingle*,¹⁴ where Krause J remarked that the object of all pleadings was to inform an opponent of the case that he or she had to meet.¹⁵ Similarly, in *Minister of Safety and Security v Slabbert*,¹⁶ Mhlantla JA observed that:

'...The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

...There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question was canvassed fully by both sides at the trial.¹⁷

¹³ Sic.

¹⁴ 1926 WLD 153.

¹⁵ At 154.

¹⁶ [2010] 2 All SA 474 (SCA).

¹⁷ At paragraphs [11] to [12].

[39] Consequently, argued counsel for the defendant, if the plaintiff had intended to rely on the facts pertaining to the conditions of his detention, then he ought to have pleaded these in his particulars. He cannot present a case that is different to the case pleaded. He ought to have alerted the defendant to the facts in question.

[40] The plaintiff's cause of action, however, is the *actio iniuriarum*. The arrest and detention of a claimant is *prima facie* wrongful because it consists of the deprivation of his or her liberty. Strict liability attaches to such conduct, and it is unnecessary for the plaintiff to allege and prove fault, an intention to injure or knowledge of wrongfulness on the part of the defendant.¹⁸ An onus rests on the defendant to prove the lawfulness of the arrest and detention.¹⁹

[41] Accordingly, it was unnecessary for the plaintiff to have alleged in his particulars the facts pertaining to the conditions of his detention. Counsel for the plaintiff pointed out that rule 18(4) of the Uniform Rules of Court ('URC') requires a litigant to plead only the material facts upon which a litigant relies. Van Loggerenberg (*et al*) observes that material facts, not evidence, must be pleaded. It is important, too, to distinguish between *facta probanda* (the facts that must be proved) and *facta probantia* (the facts that would prove those facts).²⁰

[42] There is, therefore, no basis for the argument advanced by counsel for the defendant. The plaintiff's testimony regarding the conditions of his detention was indeed admissible and can be considered for purposes of deciding the extent of general damages to be awarded.

¹⁸ *Minister of Justice v Hofmeyr* [1993] 2 All SA 232 (A); *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA).

¹⁹ *Minister of Law and Order v Hurley* [1986] 2 All SA 428 (A); *Tödt v Ipser* [1993] 2 All SA 296 (A); *Lombo v African National Congress* [2002] 3 All SA 517 (SCA). In general, see the discussion of arrest and detention in Harms, n 12, *supra*.

²⁰ Van Loggerenberg (*et al*), *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 20, 2022), at D1-232A to D1-232B.

Relief and order

[43] The court was referred to several decisions for purposes of deciding the quantum to be awarded. From these and additional authorities considered, it has been almost impossible to discern a clear methodology. In *Madze v Minister of Police*,²¹ Plasket J aptly remarked that:

'...I have given consideration to comparable cases but they are very much dependant on their own facts and usually are influenced by the conditions that the detainee experienced and their effects on him or her. Even so, the cases vary from awards that appear on the generous side to those that appear to be parsimonious.'²²

[44] There are two recent decisions in the Supreme Court of Appeal that are of some assistance. In *Brits v Minister of Police and another*,²³ the appellant was the owner of a dealership in second-hand goods and scrap metal and had been arrested and detained for approximately one day on a charge of having been complicit in the offence of possession of stolen property. The court awarded damages of R 70,000 for unlawful arrest and detention. Several months later, in *Diljan v Minister of Police*,²⁴ the court dealt with a claim for damages for unlawful arrest and detention brought by a grandmother and community caregiver. She had been kept in custody for just short of three days in appalling conditions. The court awarded damages of R 120,000 and had this to say:

'...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 each 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

²¹ 2015 JDR 2680 (ECG).

²² At paragraph [16].

²³ (759/2020) [2021] ZASCA 161 (23 November 2021).

²⁴ (746/2021) [2022] ZASCA 103 (24 June 2022)

issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above.²⁵

[45] The plaintiff in the present matter has claimed general damages in the amount of R 400,000 for having been kept in custody for less than 24 hours. Considering the above awards, this is simply exorbitant.

[46] There are a few recent judgments from this division that must be mentioned. In *Minister of Police v Page*,²⁶ a full bench awarded damages of R 30,000 to the claimant, who had been arrested on a charge of arson and detained for one day. A year later in *Shode v Minister of Police*,²⁷ a full bench awarded damages of R 40,000 to the claimant, who had been arrested on a charge of domestic violence and detained for 22 hours. A few weeks after that, in the unreported decision of *Antonie v Minister of Police*,²⁸ a full bench awarded damages of R 50,000 to the claimant, who had been arrested on a charge of domestic violence and detained for a period of 38 hours.

[47] There is no indication, in the present matter, that the conduct of the officers who carried out the arrest and detention of the plaintiff was harsh or degrading. Nevertheless, the plaintiff's evidence that he had been arrested in front of members of the community was undisputed. This would undoubtedly have been an embarrassing experience. Moreover, it was not disputed that he had held a position of high political office and that he was a leader in the ANC, his church, and his community. The arrest and detention would have attracted adverse publicity and would have certainly undermined his reputation. It was, furthermore, not disputed that he had undergone a humiliating and traumatic 24 hours inside the police holding cell.

²⁵ At paragraph [20].

²⁶ 2021 JDR 0757 (ECGEL).

²⁷ 2022 JDR 1226 (ECM).

²⁸ Unreported, Case no. CA 105/2021, Eastern Cape Division, Makhanda.

[48] In the circumstances, an award of R 80,000 would seem to be fair and reasonable. Ultimately, the court cannot fail to recognise that the plaintiff's constitutional right to liberty and security of his person was infringed.

[49] Regarding costs, counsel for the defendant argued for the application of the Magistrates' Court scale. Mindful of the seriousness of the matter and having had regard to the case law to which the court was referred,²⁹ the court is of the view that the High Court scale is appropriate. Nevertheless, the plaintiff was not successful in his claim for legal costs in relation to the charge brought against him. His claim for general damages was, moreover, exorbitant. He is not entitled to his full costs.

[50] Consequently, the following order is made:

- (a) the defendant is ordered to pay the plaintiff the amount of R 80,000 for damages;
- (b) interest thereon will be incurred at the prescribed legal rate, from the date of receipt of demand until the date of payment; and
- (c) the defendant is directed to pay 80% of the plaintiff's costs, on a High Court scale.

JGA LAING

JUDGE OF THE HIGH COURT

²⁹ See *Rahim and others v Minister of Home Affairs* 2015 (4) SA 433 (SCA). Also see *Madze*, n 21, *supra*.

APPEARANCES

For the plaintiff: Adv Nzuzo, instructed by Yokwana Attorneys, Makhanda

For the defendant: Adv Appels, instructed by Lulama Prince Inc, Makhanda

Last date for submission of written argument: 13 December 2022

Date of delivery of judgment: 4 April 2022