



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

In the matter between:
47/2022

Case No: CA

CHRISTOPHER PAPANA

First Appellant

PATRICIA MAY

Second

Appellant

PHINDILE POKILE (aka SIYABULELA KHALIPI)

Third

Appellant

SIPHOSETHU NTETE (aka ESETHU NTETE)

Fourth

Appellant

PHUMEZA VERONICA POTWANA

Fifth Appellant

AVIWE NOTYAWWE

Sixth Appellant

YAMKELA ANAM RALO

Seventh

Appellant

LUNGISWA BABRA TAMANI

Eighth

Appellant

ANESIPHO NTETE (aka ANESIPHO NTOMO)

Nineth

Appellant

SINESIPHO SOPHILE

Tenth Appellant

LINDA GAVENE (aka NOMONDE SILO)

Eleventh Appellant

LUZUKO NOEL KONDILE Appellant	Twelfth
MALIBONGWE NGCOBONDWANA Appellant	Thirteenth
MONWABISI XOTOVA Appellant	Fourteenth
NOMISELO MATOMANA	Fifteenth Appellant
THEMBISA L MANTILE (aka RANGULA)	Sixteenth Appellant
XOLELWA NONZE Appellant	Seventeenth
AMANDA MDILITWANA Appellant	Eighteenth

and

MINISTER OF POLICE	Respondent
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APPEAL JUDGMENT

BANDS J:

[1] In reaction to the Covid-19 pandemic, a national state of disaster was declared on 15 March 2020 in terms of the Disaster Management Act, 57 of 2002. In terms of the Disaster Management Regulations,¹ a “hard lockdown” commenced on 27 March 2020 (“*the March 2020 regulations*”).

¹ Published in terms of section 27(2) of the Disaster Management Act 57 of 2002: GN 318 of 2020 in GG. No 43107 (18 March 2020), and as amended by GN 398 of 2020 in GG. No 43148 (25 March 2020).

[2] The restrictions imposed by the March 2020 regulations were relaxed on several occasions, as a consequence of which the country was placed on various alert levels, each of which was regulated by ongoing amendments to the regulations. During the period of 1 June 2020 to 17 August 2020, South Africa was placed on lockdown alert level 3. In terms of regulation 33(1A) of the regulations, as amended on 12 July 2020, by publication in Government Gazette 43521:

“Every person is confined to his or her place of residence from 21h00 until 04h00 daily, except where a person has been granted a permit, which corresponds with Form 2 of Annexure A, to perform a service permitted under Alert Level 3, or is attending to a security or medical emergency.”

[3] It was common cause, in the court below, that the appellants were arrested without a warrant, by members of the South African Police Service on Friday, 24 July 2020, for contravening Regulation 33(1A). The appellants were detained at the Joza Police Station until taken to the Magistrates' Court, Grahamstown (as it then was) at 08h00 on Monday, 27 July 2020. The appellants were thereafter released on warning at 12h00 that same day.

[4] The appellants, aggrieved by their arrest and detention, instituted separate action proceedings against the respondent, claiming: (i) damages for their alleged unlawful arrest and detention (under claim one); and (ii) special damages for legal fees, allegedly incurred by the respective plaintiffs, in defending the criminal charges against them (under claim 2). These individual actions were thereafter consolidated by order of court on 22 February 2022.

[5] In respect of claim one, the lawfulness of the appellants' arrest and subsequent detention; the period of the appellants' detention; and the quantum of the appellants' claim remained in dispute. The disputed issues in respect of claim two, centred around the appellants' entitlement to the damages claimed and the quantum thereof. Significantly, prior to argument, in the court below, the appellants abandoned their second claim. I return to this aspect later insofar as it is relevant to the order of costs granted by the trial court.

[6] On the pleadings, the appellants contend that their arrest and detention was wrongful and unlawful inasmuch as there existed no grounds to suspect that they had committed a schedule 1 offence. It was further pleaded that the members of the South African Police Service ("*the SAPS members*") did not entertain a reasonable suspicion that the appellants had committed an offence and that such suspicion rested on reasonable grounds. The appellants further pleaded that the SAPS members failed to exercise their discretion to arrest and detain the appellants rationally,² and consequently, that such discretion was exercised unlawfully. The basis for the attack on the SAPS members exercise of discretion is canvassed on the pleadings and need not be repeated herein given the concession on behalf of the appellants, which I deal with hereunder.

[7] On the other hand, the appellants' arrest, as pleaded by the respondent, was effected in terms of section 40(1)(a) of the Criminal Procedure Act, 51 of 1977 ("*the CPA*"). Accordingly, on the respondent's version, the considerations which come into play in respect of an arrest effected in terms of section 40(1)(b) of the CPA, are of no moment.

² Although not pleaded in exact terms.

[8] On 10 February 2022, judgment was granted by the Regional Court, Grahamstown (as it then was), in the following terms:

"In respect of Claim 1

- (a) *The claim for unlawful arrest is dismissed.*
- (b) *The continued detention of the 18 plaintiffs from 14h00 on Saturday 25 July 2020 until 08h00 Monday 27 July 2020 was unlawful.*
- (c) *The defendant is liable to compensate the 18 plaintiffs for damages arising from the plaintiffs unlawful detention in the following manner:*
 - (i) *in respect of the thirteen (13) female plaintiffs (the 2nd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 15th, 16th, 17th and 18th plaintiffs) and the 13th plaintiff in the amount of R30,000-00 (thirty thousand rand) for each of these plaintiffs; and*
 - (ii) *in respect of the four (4) remaining plaintiffs (the 1st, 3rd, 12th and 14th) in the amount of R20,000-00; and*
 - (iii) *interest on the amounts awarded, calculated at the prevailing prescribed rate, from date of judgment;*
- (d) *The defendant is ordered to pay the 18 plaintiffs costs of suit in respect of the first claim on a party and party scale, such costs to include the costs of Counsel, at a rate not exceeding 3 times the tariff, subject to the discretion of the Taxing master/mistress in respect of the first claim only."*

In respect of Claim 2

- (e) *The second claim is dismissed.*
- (f) *The plaintiffs to pay the defendants costs in respect of claim 2 only, on a party and party scale, such costs to include the cost of Counsel, at a rate of not exceeding 3 times the tariff, subject to the discretion of the Taxing master/mistress in respect of the second claim only.*

In respect of costs and interest thereon (both claims)

- (g) *Costs of suit to be paid within (fourteen) 14 days after taxation. Interest a tempore morae on the taxed costs, calculated at the prevailing prescribed*

rate, from a date fourteen (14) days after taxation, to date of final payment in respect of both cost order.”

[9] It is this judgment, which forms the subject matter of the present appeal.

[10] Distilled to their essence, the grounds of appeal are that the trial court erred in finding that the appellants' arrest was lawful and that the magistrate had misdirected himself in his findings regarding the lawfulness of the appellants' detention for the following periods: (i) from the time of the appellants' arrest, at 21h15 on Friday, 24 February 2020, until 14h00 (on Saturday 25 July 2020); and (ii) from 08h00 on Monday, 27 July 2020, until approximately 12h00/13h00 on the same day. The point was also taken that the trial court erred and misdirected himself in respect of his assessment of the quantum of damages to which the appellants were entitled, this of course being inextricably linked to, *inter alia*, the period of detention determined by the trial court to be unlawful. Lastly, the appellants appealed against the magistrate's finding that the appellants were liable for payment of the respondent's costs in respect of claim two.

[11] In order to succeed with their appeal, the appellants must establish that the magistrate's judgment is assailable on the basis of error or misdirection. In the event of such a finding, and should the appellants succeed in their appeal in full, they would be entitled to the payment of damages arising from their unlawful arrest and subsequent unlawful detention for a period of 63 hours, calculated from 21h15 on Friday, 24 February 2020, until approximately 12h00 on Monday, 27 February 2020.

The lawfulness of the appellants' arrest

[12] Whilst much was made regarding the lawfulness of the appellants' arrest (or rather, the lack thereof), in the court below, as well as in the notice of appeal, it is apposite to mention that Ms du Toit, who appeared on behalf of the appellants, conceded the lawfulness of the appellants' arrest, during argument before this court, and in doing so, conceded the correctness of the court a quo's finding in this regard.

[13] On a conspectus of the evidence before the trial court, and more particularly the uncontested evidence of the respondent's witnesses, Lieutenant Colonel Johan Botha ("*Lieutenant Botha*"), the arresting officer, and Colonel Nomsa Evelyn Mtshagi ("*Colonel Mtshagi*"), the station commander situated at Joza Police Station, such concession was properly made. I pause to mention that the appellants, in their notice of appeal, took no issue with the trial court's credibility findings in respect of the second and thirteenth appellants, who testified in the court below, nor in respect of the respondent's witnesses, which findings I cannot fault.

[14] In light of the aforesaid, I need not deal with his aspect in greater detail, which will serve only to unnecessarily burden this judgment.

[15] I accordingly turn to the period of detention, as assessed by the trial court.

The period of unlawful detention as assessed by the trial court

[16] Given the consequences that the appellants' concession has on the computation of the period of the appellants' unlawful detention, the appellants' counsel was invited, in the circumstances, to comment on the time that the appellants contend their detention to have become unlawful. In answer, Ms du Toit submitted that the lawfulness of the detention persisted up until 23h55 on Friday, 24 July 2020, this being the time recorded in the second appellant's Notice of Rights in terms of the Constitution.

[17] Such submission, however, fails to take into account the uncontested evidence of Lieutenant Botha, regarding the extensive administrative process, which had to be undertaken in respect of all eighteen appellants, upon their arrival at the police station shortly after midnight, which process was completed at approximately 04h30 on Saturday morning, 25 July 2020. When asked to elaborate on what he meant by processing, Lieutenant Botha testified that:

"...we had to do all the arrest statements, we had to do the notice of rights, the SAP14, then we had to hand all the weapons and the stuff into the SAP13 as evidence, and then after that was done we had to take them through the cells, because of the Covid regulations we just couldn't take them into a group into the cells, we had to ensure that social distancing take place, so we had to take two or three at a time through the cells, where there was another process there Your Worship of putting them through the SAP14, ensuring that they are placed in the cells, ensuring that their property was taken from them and booked into the SAP22's property register, so the administrative side of it took quite a while Your Worship to get the 18 people processed and through the books and into the cells."

[18] According to Lieutenant Botha, once the aforesaid administrative duties are complete and the suspects are in their cells, the docket is then handed over to an investigating officer, whereafter a further administrative process ensues. As part of this process, the investigating officer is tasked with verifying the personal information of each suspect prior to a decision being made as to the manner of his release. In this regard, it was his evidence that:

“...your address should be followed up, where do you stay, are you really the person who you said you are, so ID documents needs to be obtained from your house, statements need to be obtained from fellow people, or fellow persons in the community that knows you if you don't have ID documents with you, the charging process is quite a lengthy process, finger prints needs to be taken, warning statements needs to be taken, to process 18 suspects as a detective Your Honour, and you have skeleton staff, is going to take you quite a while.”

[19] On the second appellants own version, which was corroborated by the objective evidence placed before the trial court, she was still being processed at 13h30 on Saturday, 25 July 2020, this being the time that the SAPS 3M(m) form, more commonly referred to as a warning statement, was completed. Apparent from page 12 of the warning statement is that the second appellant certified the correctness of the record of interview at 13h45 on 25 July 2020. Moreover, the thirteenth appellant's warning statement was signed thereafter at 14h00. In light of the aforesaid, I can accordingly find no fault with the trial court's finding that the processing continued up until at least 14h00 on 25 July 2020 and that same was necessary and justified.

[20] Having said that, the trial court's finding that the period of detention at court, from 08h00 on Monday, 27 July 2020, until the appellants' release at approximately 12h00, is lawful, requires further comment.

[21] Such finding appears to have been premised on the magistrate's view that "*[t]he further period of detention at court until the release of the plaintiffs at 12h00 appears to be reasonable for the processing and first appearance of 18 accused people at court.*" On the evidence before the trial court, there is nothing to suggest that the detention, once it had become unlawful at 14h00 on 25 July 2020, became lawful due to some or other intervening event. Ultimately, the purpose of an arrest is to bring the arrested persons before court. Accordingly, the appellants' attendance at court flowed from their arrest on 24 July 2020. It could hardly be argued, nor do I understand it to have been suggested, that such court attendance was not foreseeable in the circumstances.³

[22] I am accordingly satisfied that the magistrate misdirected himself in finding that the period of detention between the hours of 08h00 and 12h00 on Monday, 27 July 2023, were lawful, and that such misdirection warrants the interference of this court.

[23] In light of the aforesaid, the appellants were unlawfully detained for a period of 46 hours, calculated from 14h00 on Saturday 25 July 2020, until their release on Monday, 27 July 2020, at approximately 12h00.

³ *De Klerk v Minister of Police* (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC).

Quantum

[24] It is settled law that the quantum of damages to be awarded to a plaintiff in cases concerning the deprivation of liberty, is in the discretion of the trial court. The Constitutional Court in *Dikoko v Mokhatla*⁴ commented as follows regarding the approach of an appellate court to the question of whether it can substitute a trial court's award of damages:

' . . . [S]hould an appellate Court find that the trial court had 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, it not only has the discretion but is obliged to substitute its own assessment for that of the trial 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.'

[25] For present purposes, it is worth recounting the comments of the Supreme Court of Appeal in *Tyulu v Minister of Police*:⁵

"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

⁴ 2006 (6) SA 235 (CC).

⁵ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA); 2009 (5) SA 85 (SCA) para 26.

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.”

[26] Leaving aside the above finding in respect of the magistrate’s misdirection regarding the period of unlawful detention, and for the reasons set out herein below, I am further of the view that the disparity in the amount of damages awarded by the trial court and what I consider to be an appropriate amount, is striking. This on its own, constitutes a material misdirection. Moreover, the magistrate, in assessing the quantum of damages to be awarded to the respective appellants, differentiated between male and female appellants for no cogent reason. Emphasis was also placed on the cumulative award in respect of all eighteen appellants, and the impact that such cumulative award may have on the public purse. Whilst the magistrate admittedly placed weight on the facts and circumstances of the case which were relevant to its assessment of damages, I am satisfied that the trial court, in certain respects, misdirected itself in the application of the legal principles relevant to claims on this nature.

[27] In *Kammies v Minister of Police and Another*,⁶ the plaintiff was detained for three days and awarded damages in the sums of R70,000. In *Rahim and Others v Minister of Home Affairs*,⁷ the Supreme Court of Appeal awarded damages ranging from R3,000.00 for a period of four days and R20,000.00 for 30 days’

⁶ *Kammies v Minister of Police and Another* [2017] ZAECPEHC 25.

⁷ *Rahim and Others v Minister of Home Affairs* [2015] 3 All SA (SCA).

unlawful detention. In *Brits v Minister of Police & Another*⁸ the Supreme Court of Appeal considered an award of R70,000.00 to be appropriate for a period of detention of one day. Lastly, in *Nel v Minister of Police*,⁹ this court concluded, on the facts of that matter, that R35,000.00 would be appropriate for a period of 20 hours' detention.

[28] Having considered all the facts germane to the present proceedings, including the circumstances under which the deprivation of the appellants' liberty took place; the relatively short duration thereof; the absence of an improper motive on behalf of the respondent; the conditions of the cells in which they were detained; and the humiliation experienced by them; I consider an amount of R60,000.00 in respect of each appellant to be an appropriate award of damages in respect of their unlawful detention.

[29] I now turn to the issue of costs in respect of the appellants' second claim. On a consideration of the record of proceedings, I can see no basis upon which to interfere with the discretion of the trial court in this regard.

[30] In light of the aforesaid, the appellants' appeal is to be upheld. Albeit only partially successful, I see no reason why costs should not follow the event.

[31] In the result, the following order is issued:

1. The appeal is upheld, with costs.

⁸ (759/2020) [2021] ZASCA 161 (23 November 2021).

⁹ (CA62/2017) [2018] ZAECGHC 1 (23 January 2018).

2. The order of the court *a quo* set out in paragraphs (b) and (c) in respect of claim 1 is set aside and substituted with the following:

“(b) *The plaintiffs’ detention from 14h00 on Saturday, 25 July 2020, until 12h00 on Monday, 27 July 2020, is unlawful.*

(c) *The defendant is ordered to pay each of the first to eighteenth plaintiffs the sum of R60,000.00 as and for damages arising out of the plaintiffs’ unlawful detention.”*

I BANDS
JUDGE OF THE HIGH COURT

I agree.

D VAN ZYL DEPUTY JUDGE PRESIDENT
JUDGE OF THE HIGH COURT

Heard: 10 February 2023
Judgment delivered: 8 August 2023

For the appellant:

Adv du Toit

Instructed by:

NN Dullabh & Co

For the respondent:

Adv Watt

Instructed by:

Messrs Zilwa Attorneys