

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case Number: 16/13227

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No

08 May 2023

DATE SIGNATURE

In the matter between

LUNGA MILTON KHANYI

Plaintiff

AND

THE MINISTER OF POLICE

Defendant

NUETRAL CITATION: *Lunga Milton Khanyi vs The Minister of Police* (Case Number:13227/2016) [2023] ZAGPJHC 434 8 May 2023.

Delivery: The judgment was delivered electronically through the email to the legal representatives and shall be uploaded on the caselines. The judgment shall be deemed to be delivered on **08 May 2023**.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The plaintiff, Mr Khanyi, instituted action proceedings against the Minister of Police for his unlawful arrest and detention by members of the South African Police

Services (SAPS) on 13 September 2014. He claimed the sum of R600,000, which is made up of the following heads:

(a) General damages – unlawful arrest and detention = R450,000.00.

(b) General damages – malicious arrest and detention= R150,000.00.

[2] The defendant filed its notice to oppose the claim and a plea denying the allegation of unlawful arrest and detention of the plaintiff.

[3] The plaintiff's case, as stated above, is that he was arrested by members of the SAPS on 13 September 2014 around 10h30 in Soweto. At the time of his arrest, the plaintiff was on his way to catch public transport to travel to Sandton City, where he would have met with his friends to travel the following morning to Cape Town. They were travelling to Cape Town to participate in a culinary competition as a group. At the time the police confronted him the plaintiff had a bag containing his clothes and other personal items. The police requested to search his bag for which he did not object but requested that they do it expeditiously as he was in a rush to Sandton City.

[4] It would appear that the police were offended by the plaintiff's response which they regarded as reflecting a negative attitude on his part and thus informed him that the search would be conducted at the police station. Before putting him at the back of the van, they informed him that he appeared like someone who smokes dagga.

[5] The police drove to the Jabulani police, where they detained the plaintiff in the police cell. According to the plaintiff, there were eleven other people in the cell, which number increased later to twenty.

[6] There were two witnesses who testified in support of the plaintiff's claim. The first witness was the plaintiff himself. He testified as follows; after being taken to the police station, he was placed in a dirty cell and provided with blankets and a sponge infested with lice. There were no beds in the cell. The toilet was not working properly. He avoided using it on the first day of the detention. He had no option on the second day but to use it. There was no basin in the toilet to wash their hands. The plaintiff

was taken to the magistrate court on the fourth day of his detention but never appeared in court. He was released without being told as to what wrong he had done. The other complaint that the plaintiff has is that consequent to the arrest, his relationship with his friends, who were supposed to travel with them to Cape Town, broke down because they blamed him for their failure to attend the competition. The other consequence of his arrest was that members of the community treated him with distrust and suspicion, as they regarded him as a criminal.

[7] The plaintiff conceded during cross-examination that the police gave him the document, notice of his rights after the arrest. He also conceded having signed the document but contended that he could not read the document properly because he was confused and thus did not understand the contents thereof.

[8] The second witness who testified in support of the plaintiff's case was his cousin, Mr Johannes Sithole. He testified that he visited the plaintiff's mother, his aunt, to attend some family ceremony which took place on that particular day. He was informed on arrival by the plaintiff's mother that the plaintiff had been arrested. She gave him R20.00 for taxi fares to visit the plaintiff at the prison.

[9] On arrival at the police station, he inquired as to why the plaintiff was arrested and was informed that it was in connection with dagga. He testified further that he and the plaintiff did smoke dagga some time back.

[10] The defendant's case, as indicated earlier, is that the plaintiff's arrest was not unlawful even though the arrest was effected without a warrant of arrest. The defendant did not, however, present any evidence to support this contention.

The legal principles

[11] It is common cause that the plaintiff was arrested without a warrant of arrest. Therefore, the onus to show that the arrest was lawful rested on the police in terms of section 40 of the Criminal Procedure Act (CPA)¹. Section 40 of the CPA provides as follows:

¹ 51 of 1977

"(1) A peace officer may, without warrant arrest any person-

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

[12] The jurisdictional facts which the Minister would have to satisfy to succeed in relying on the provisions of section 40(1) of the CPA is to establish that, at the time the arrest was effected: (i) the arrestor was a police officer; (ii) the arrestor entertained a suspicion; (iii) the suspicion was that the suspect was committing or had committed an offence under a law governing the supply, possession of conveyance of dependence-producing drugs; and (iv) the suspicion rested on reasonable grounds.

[13] The requirements of reasonable suspicion in terms of section 40(1) (b) of the CPA were dealt with in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-H,² as follows:

"The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of the stolen property, knowing it to have been stolen? It seems to me that in evaluating his information, a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact, guilty. The section requires suspicion but not a certainty. However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion."

² 1988 (2) SA 654 (SE) at 658E-H

[14] As indicated earlier, the police provided no evidence to contradict the allegations made by the plaintiff. It follows, therefore, that in the absence of evidence explaining why the arrest was effected without a warrant, and having regard to the plaintiff's version, the arrest has to be regarded as unlawful.

[15] The plaintiff's pleaded case is that he suffered damages as a consequence of the unlawful arrest and detention. He, as a result of the illegal conduct of the police, suffered damages because he was deprived of his freedom and liberty.

[16] It is trite that the deprivation of liberty is a serious matter which would entitle the affected person to claim damages. In *Rahim and 14 Others v Minister of Home Affairs*,³ the Supreme Court of Appeal held that:

"The deprivation of liability is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed, the extent of damages cannot be assessed with mathematical precision. In such cases, the exercise of reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liability, the amount of satisfaction is calculated by the court *ex aequo et bono*. *Inter alia* the following factors are relevant: "

- 27.1 circumstances under which the deprivation of liability took place;
- 27.2 the conduct of the defendants; and
- 27.3 the nature and duration of deprivation ..."

[17] The next issue for determination once it has been established that the arrest was unlawful is that of determining what compensation should be awarded to the plaintiff for the injury suffered. In other words, the court has to determine a just and fair compensation to be awarded to the plaintiff for the wrongful arrest.

[18] In *Olga v Minister of Safety and Security*,⁴ the court remarked:

"In modern South Africa, a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the

³ 2015 [4] SA 433 at paragraph 27.

⁴ 2008 JDRJ582E paragraph 6 (ECD case number 608/207).

case, the personal circumstances of the victim and the nature, extent and degree affront to his dignity and his sense of worth, These considerations should be tempered with restraint and proper regard to the value of money to avoid the motion of an extravagant distribution of wealth from what Holmes J called the "horn of plenty" at the expense of the defendant."

[19] As indicated earlier, the plaintiff claims R600,000.00 for damages arising from the unlawful arrest by the police. The approach to adopt with regard to the assessment of damages was stated as follows in *Minister of Safety v Tyulun*: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 it is impossible to determine an award of damages for this kind of injury with any kind of mathematical accuracy."

[20] The authorities are in agreement that 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.⁶

[21] In the present matter, as stated earlier, the plaintiff was detained from 13 September to 15 September 2014. The seriousness of the unlawful conduct by members of the SAPS in detaining the plaintiff is aggravated by the fact that he was arrested in a public place where members of the public observed the incident. He was thereafter placed in a dirty cell and served with stale food.

⁵ 2009 [5] SA 85 (SCA).

⁶ *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) 325 para 17 and *Rudolph & others v Minister of Safety and Security & others* (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).

[22] In contending that he was entitled to the relief sought in the particulars of claim, the plaintiff relied on other comparable cases, which would serve as guidelines in assessing the reasonableness of the damages claimed.⁷ The defendant argued that if the plaintiff was entitled to compensation, it will only be in the sum of R80,00.00.

[23] Considering the facts and the circumstances of this case, I am of the view that a fair and just compensation for the plaintiff is R250,000.00.

Costs

[24] The defendant's Counsel argued that because of the amount claimed, the plaintiff's case fell within the jurisdiction of the magistrate court and, therefore the costs to be awarded to the plaintiff, if successful, should be on the magistrate court scale. The submission made was that the magistrate's court scale as at 27 March 2014 was at R400 000.00.

[25] In my view, even if the claim fell within the jurisdiction of the magistrate court scale, this is a matter where the circumstances involving the unlawful conduct of the police are of such a nature that the plaintiff was justified in approaching the High Court. The matter involves a breach of the fundamental rights of the plaintiff and the police failing to account as to why the arrest was effected and secondly as to why they detained the plaintiff for the period they did when it was not necessary to bring him before the court. They failed to also provide any justification as why they could not have summoned him to report at the police station.

Order

[26] In the circumstances, the following order is made:

- 1 The arrest and detention of the plaintiff without a warrant of arrest was unlawful.

⁷ In *Van der Laarse v Minister of Police and Another* (31378/2012) [2013] for instance the court awarded R 280 000.00 to the plaintiff for three nights in jail and in *Keitumetsi Letlalo v Minister of Police*, (28575/12) [2014] ZAGPJHC 72 (28 March 2014) the plaintiff, a hairdresser, photographed with his cell phone, when the police officers assaulted two persons. The police demanded the phone, when he refused he was arrested and detained for twenty four hours. He was kept in appalling circumstances. He was awarded R110 000-00.

- 2 The defendant is ordered to pay the plaintiff damages in the sum of R250 000.00.
- 3 The defendant shall pay the prescribed interest calculated from the date of the issue of the summons.

E MOLAHLEHI
Judge of the High Court,
Gauteng Local Division,
Johannesburg

Appearances:

Counsel for the applicant: Adv. Z Buthelezi

Instructed by: Madeleine Gowrie Attorneys

Counsel for the defendant: Adv. DF Makhubele

Instructed by: The State Attorney

Hearing date: 16 January 2023

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