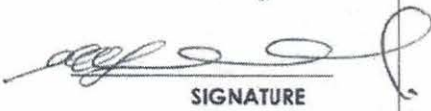


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20/12/2017.



IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA
[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
20 12 17	
DATE	SIGNATURE

CASE NUMBER 3044/2016

TOMMY MOGAKANE

PLAINTIFF

And

MINISTER OF POLICE

1ST DEFENDANT

JUDGMENT

LEGODI JP

[1] In this case, the plaintiff, Mr Mogakane sued the Minister of Police (the defendant) for the actions of police which happened at Skukuza National Park, the allegations being that on or about 11 December 2015 the plaintiff was unlawfully

arrested, detained and assaulted by certain police officials who were acting within the course and scope of their employment with the defendant.

[2] At the start of the hearing of this matter, I was informed that the defendant conceded to merits and liability to compensate the plaintiff. Apparently all police officials involved in the assault, arrest and detention of the plaintiff were not available to testify. This matter therefore was laid before me to determine the amount of damages payable to the plaintiff.

[3] The purpose of an award of damages is to compensate the injured party for loss or hurt rather than to punish the wrong doer. The general rule is that damages should (so far as a monetary award can) place the claimant in the same position as if the wrong or tort has not been committed. The claimant is entitled to recover or be paid the amount which he or she has on the balance of probabilities suffered as a result of the breach, that is, the amount which can be reasonably inferred or assessed from the evidence. The amount will therefore depend on the evidence tendered and the credibility or weight thereof. The effect is the best evidence rule. The better the evidence the more reliable in terms of certainty or accuracy the assessment will be.

[4] There has been a general acknowledgement by the court that the right to liberty is one of the most important right afforded to a person. This has been the case since long before the 1996 Constitution, so it is said, which guarantees certain individual rights. Courts are duty bound to protect persons' liberty when it was illegally infringed on¹. The right of an individual to personal freedom is a right which is always jealously guarded by our courts. Deprivation of personal liberty is regarded by our courts as a serious injury. Unlawful arrest and detention of a person amounts to a serious invasion of this right². After the advent of constitutional democracy, courts continue to reaffirm the view that a right to personal liberty is important.

[5] It is settled law that the arrest and detention of a person are a drastic infringement of his or her basic rights, in particular the right to freedom and human

¹ In re: Willem Kok and Nathiel Balie (1879) 9 Buch 45 at 64.

² Oschse v King Williams Town Municipality 1990 (2) SA 855 at 860 F-G

dignity, and that in the absence of due and proper legal authorisation, such arrest and detention are unlawful³. Interference with a person's right to constitutional liberty can take place and under restrained conditions because in a constitutional democracy personal freedom is highly prized⁴.

[6] The primary purpose of a claim for damages based on an unlawful arrest and detention is to vindicate infringed rights to liberty, that is, to give the aggrieved party compensation in the form of money. There is no fitted formula for the determination of the quantum of damages obtainable through the *actio iniuriarum*. Such a determination is in the discretion of the Judge, who must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair⁵.

[7] Where a right is said to be so important that it has been afforded constitutional protection, any damages to be awarded should reflect that importance. In considering quantum, sight must not be lost of the fact that liberty of the individual is one of the fundamental rights of a man in a free society, which should be jealously guarded at all times and there is a duty on the courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual⁶.

[8] Thulani Nkosi, in his article "Balancing deprivation of liberty & quantum of damages" remarked with lamented as follows:

"When researching the case law on the quantum of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in Southern African courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values.."

³ Theobald v Minister of Safety and Security and others 2011 (1) SACR 399 (GGJ) at 389F

⁴ Zealand v Minister of Justice and Constitutional Development and another 2008 (2) SACR a (CC) at para 12

⁵ J Neethling JM Potgieter LPJU Visser Neethling Law of Personality (Durban: LexisNexis 2005) at 605

⁶ Thandani v Minister of Law and Order 1991 (1) SA 702 at 707A



[9] A case seems to be well made by Thulani Nkosi. I will however not ignore the case law decision binding on this court. For example, when assessing damages for unlawful arrest and detention, courts are not extravagant in compensating the loss as there are many legitimate calls on the public purse to ensure that other rights that are no less important also receive protection⁷. (My emphasis).

[10] I do not understand the Supreme Court of Appeal to be suggesting that heavier amounts for damages should not be awarded in deserving cases, neither do I see it as encouraging infringement of such rights. Perhaps the solution lies in awarding damages jointly and severally against those who had abused their authority in the course of their employment and in some deserving cases order such individuals to pay costs out of pocket for flagrant conduct. Only in that way, will the public purse be preserved for truly deserving matters.

[11] It is important to bear in mind that the primary purpose when assessing damages is not to enrich the aggrieved party, but to offer some much-needed solatium for his or her injured feeling⁸. That means, courts will always be guarded by the facts of each case and not taking its eyes off the purport and object of the protection of such rights as enshrined in the Constitution. It is only when that happens, that confidence in the justice system will be enhanced.

[12] In the instant case, the plaintiff is not only claiming damages for unlawful arrest and detention, but also for damages based on assault mooted out against him by the police. It must be of a great concern that in these days of constitutional imperative where all human rights are entrenched, the police still find it necessary to seek to elicit by force and physical abuse information from persons suspected of having committed offences. It is this kind of conduct which reminds one of the past atrocities with no consequences perpetrated by the police and security forces against activists and ordinary members of the society before democratic South Africa

⁷ Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 326 G

⁸ Minister of Safety and Security v Tyalu 2009 (5) SA 85 (SCA) at 93 C-D



[13] But even most importantly, it must be of a great concern that it is this tendency of relying on suspects to provide the police with information which blocks any attempt on the part of the police to transform and become experts in their own right derived from their own expertise and knowledge in the detection of crimes and those accused of commission of crimes without relying on information forcefully provided by the suspects. Change of mind set and probably training need to be steered in the direction that lays emphasis on competence and excellence in the investigation of crimes.

[14] The story in the instant case as related by the plaintiff in my view, is shocking. He is employed as a game ranger and is stationed at the Kruger National Park. He has been employed by the Park for a period by about 20 years now. On or about 15-16 December 2015, four people arrived at his home. Some were allegedly from the Hawks and others from Kruger Park ECI, that is, Enhancement Crime Investigation Unit in the Kruger National Park, Skukuza. They demanded safe keys from him saying they were looking for horns and firearms.

[15] His wife and children were in the house within the Park. They were very harsh as they demanded the keys for his safe. His firearms in the safe were taken and no horns were found. From there, he was taken to ECI offices in Skukuza. His face was covered with a masking tape, took off his jacket and ordered him to sit on the floor with his legs stretched over whilst his hands were handcuffed. He was then covered with tyre tube around his neck and it rested on his shoulders. He was caused to inhale something like water and could not see where it was coming from as his face was covered. As he breathed the water was getting in his mouth.

[16] They then took a stick or stock, put steels both sides and put him over the stock with his stomach down. They took wooden table, crossed through his legs almost like a dead animal put to dry up. He was left hanging there helplessly and could not move backwards. He was then assaulted all over his body and at the same time demanding that he must produce the firearms they were looking for. He was assaulted over and over again saying the same thing that is, demanding that he must produce the firearm and the horns. At round about 24hours he heard one of them saying 'enough is enough let us leave him'.



[17] He was then taken back towards where they picked him up and left him on the road. He could not walk. His legs were swollen. The pictures which were handed in during his evidence bear testimony to the injuries so sustained both on his arms, legs and feet with clear wounds and the swelling being depicted. One Calvin helped him by carrying him to his home. At home his son carried him into the bed. On 16 December 2015 and on his return from the hospital, the police picked him up again. This was despite the obviously injuries sustained by the plaintiff.

[18] Upon his arrest he was then taken to Skukuza Police Station and was locked in a police cell. The conditions of his incarceration is articulated as follows: He was locked in a cell where there was one boy. The cell is like an open hall. Only blankets without mattresses were in the cell and a toilet. He would not use the blankets as they were thin, very filthy and smelling. He therefore lied on the floor from 16 to 18 December 2015. He was not able to interact with his family during his detention and did not know why his family was not allowed to come and visit him. He was initially ignored and refused to be taken to a hospital after he had fallen ill critically whilst in detention. It was only when the station commander was informed that he was taken to hospital. That was on 17 December 2015. He was taken to hospital because on 16 December 2015 he could not sleep due to the pains. His swollen legs got aggravated. The assault affected an operation which he previously underwent after an accident. The headache became very severe and the whole body was painful. He could not eat the food which was given to him because it was not the type of food prescribed for him. For example, he does not eat meat, he does not drink tea with sugar or any food with salt. As a result, whilst in detention, he only ate bread and drank water.

[19] Since his arrest and detention the attitude of his colleagues has changed towards him. They are no longer communicating with him as they used to do. He is seen as an irresponsible person and a criminal on the allegations of theft of firearms and horns within the Park. In the nearby village where he lives, the villagers and people at church are isolating him.

[20] As I said earlier in this judgment, whilst the plaintiff does not have to be enriched, the hurt both physically and emotionally that he had suffered due to the



conduct of the police deserves an appropriate compensation. In the particulars of claim, unlawful arrest and detention is pleaded as being from 16 to 18 December 2015. It did not cover the events of 15 December 2015 when his right of freedom to liberty was arbitrarily taken from him. Any deprivation of freedom on 15 December 2015 will therefore not be considered for the purpose of the award of damages based on unlawful arrest and detention.

[21] It boggles one mind why the police after having interrogated the plaintiff on the evening of 15 to 16 December 2015 without success and having assaulted him severely when they did not get what they wanted him to admit. The charges against him were ultimately withdrawn on 18 December 2015. The motive on arresting the plaintiff for the second time is questionable. An attempt to allow the injuries to subside could have been the motivation.

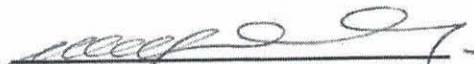
[22] Having regard to all the factors placed before this court, R100 000 for each day of incarceration should be found to be appropriate. As regards the assault, all the discomfort and pain and sufferings caused to the plaintiff, I find R150 000.00 to be appropriate.

[23] Consequently judgment is hereby granted against the defendant as follows:

23.1 Payment in the sum of R200 000.00 for unlawful arrest and detention.

23.2 Payment in the sum of R150 000.00 for assault.

23.3 Costs of the action.


M F LEGODI
JUDGE OF THE HIGH COURT

DATE OF HEARING:
DATE OF JUDGMENT:

14 NOVEMBER 2017
20 DECEMBER 2017

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