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

REPUBLIC OF SOUTH AFRICA

Case Number: **A127/2022**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 10 August 2023

SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

MINISTER OF POLICE Appellant

and

BAREND FREDERIK BURGER Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The court *a quo* granted judgment in favour of the respondent in respect of three claims, to wit claim 1: unlawful arrest and detention; claim 2: assault and claim 3: malicious proceedings. The court awarded damages in an amount of R 200 000, 00 in respect of each claim.

[2] The appeal is directed at the aforesaid order.

MERITS

Claim1: unlawful arrest and detention

[3] It is common cause that the respondent was arrested on 11 June 2016 at approximately 19:30 at Wierdabrug Police Station by Sergeant Maitji on a charge of assaulting a police officer.

[4] It is trite that an arrest and detention is *prima facie* unlawful, and that the onus was on the appellant to proof the lawfulness of the arrest and detention.

[See: *Amler's Precedent of Pleadings,* Harms, 7th edition, p 46 and the authorities referred to.]

[5] In order to prove the lawfulness of the arrest, the appellant alleged that the arrest was effected in terms of the provisions of section 40(1)(c) of the Criminal Procedure Act, 51 of 1977 ("the Act") and therefore lawful. Section 40(1)(c) allows a peace officer (police officer) to arrest a person without a warrant when such person commits an offence in his/her presence.

[6] In substantiation of the aforesaid allegations, the appellant called the arresting officer, sergeant Maitji. Sergeant Maitji's evidence in chief was finalised on 4 March 2020 and the trial was postponed to 26 November 2021 for cross-examination.

[7] On 26 November 2021, Ms Netshitungulu, the legal representative on behalf of the appellant, informed the court that Sergeant Maitji is no longer willing and able to testify because she is no longer employed and does not have money *"to come this side"*. It is not clear why the appellant failed to take the necessary steps to secure Sergeant Maitji's attendance at court.

[8] Be that as it may, the appellant did not call any further witnesses and opted to close its case.

[9] The only evidence presented by the appellant to proof the lawfulness of the arrest and detention of the respondent was that of sergeant Maitji. The respondent, however, never had the opportunity to test the evidence of sergeant Maitji through cross-examination. In the circumstances, it is apposite to have regard to the status of sergeant Maitji's evidence.

[10] In *Engels v Hofmann and Another* 1992 (2) SA 650 (C), the court was faced with a similar situation. The defendant, Mr Hofmann was giving evidence in chief when the matter was postponed for further hearing. Mr Hofmann, however, suffered a nervous breakdown and, notwithstanding various postponements, could not return to court to conclude his evidence. In the result, his evidence in chief could not be tested by means of cross-examination.

[11] At 651J, the court held as follows:

> *"The case must accordingly be decided as if Hofmann gave no evidence at all."*

[12] I agree. The right to cross-examine is an integral part of a fair trial. Should a court, in considering the matter, have regard to untested evidence, the prejudice to the opposing party is manifest.

[13] In the premises, the court *a quo* was correct in expunging the evidence of sergeant Maitji. Consequently, the appellant did not present any evidence to prove the lawfulness of the respondent's arrest and detention and the court *a quo* was correct in finding in the respondent's favour in respect of this claim.

Assault

[14] The respondent testified that he received a call from his son on the morning of Saturday, 12 June 2016. His son informed him that he is at Wierdabrug Police Station and was kept on a charge of malicious damage to property. The respondent was very concerned and proceeded to the police station in the company of his son's girlfriend to find out whether they could post bail for his son.

[15] At the police station, the respondent was told that he had to wait for the police station commander. Notwithstanding the assistance of an attorney, bail could not be arranged because the station commander was not available. The respondent waited the whole day at the police station only to be told after 18:00 that the station commander went off duty and that another station commander took over.

[16] The attorney assisting the respondent undertook to arrange bail with the new station commander and told the respondent to go home. The respondent

testified that upon his arrival at home, he found his wife in a terrible state. She was extremely concerned and was constantly crying. After an hour, the attorney phoned and informed the respondent that he did not have any luck in securing an audience with the station commander. The attorney informed the respondent that he would endeavour to secure bail for his son the next morning.

[17] The respondent testified that he was very concerned and decided to return to the police station. When the respondent arrived at the police station there was a long queue, and he waited his turn to speak to a police officer. Once at the front, the respondent informed a female police officer that he wants to see the station commander to arrange bail for his son. The police officer told him to wait. Nothing transpired and the respondent, once again, asked the police officer to see the station commander.

[18] The respondent testified that the female officer became rude and told him that his case was not that important. She informed the respondent that he must stand at the back and wait for the station commander. The respondent, being no doubt rather frustrated at that stage, informed the officer that he was a member of the public and had been waiting the whole day. He told her that she has no reason to be unpolite and rude to him.

[19] The respondent, thereupon, took out his cell phone and took a video clip of the police officer, because he wanted to report her to *"higher authorities."* The respondent testified that whilst he was busy taking the video clip: *"I was then jumped on, strangled by three to four policemen that was in the charge office*

and they dragged me .. into a little room, adjourned next to the charge office a private room. And closed the door and threw me on the ground."

[20] The police officers then started kicking him from both sides. One police officer was in front of him and the other two on each of his sides. The police officers punched him with fists, stepped on his face and kicked him in his ribs. The respondent was also kicked in his *"private parts"* and he curled into a ball in an attempt to protect himself.

[21] At some stage, the respondent managed to move into a kneeling position and punched the police officer in front of him in the face. The respondent testified that the attack was so severe at that stage that he realised he should try to do something to protect himself.

[22] The female officer who entered the room prior to the punch, told the respondent that he has assaulted a police officer and instructed the other police officers to arrest him and put him in holding cell.

[23] During cross-examination, the respondent's version was thoroughly tested. The respondent neither deviated from his version nor did he contradict himself.

[24] The court *a quo* was correct in accepting his evidence and finding in his favour in respect of the assault claim.

Malicious prosecution

[25] In order to succeed with a claim based on malicious prosecution, a plaintiff must allege and prove that:

25.1 the defendant set the law in motion, i.e the defendant instigated or instituted the proceedings;

25.2 the defendant acted without reasonable or probable cause;

25.3 the defendant acted with 'malice' or *animus iniuriandi; and*

25.4 the prosecution has failed.

[See: *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA)]

[26] It is common cause that the police officer/s at Wierdabrug police station charged the respondent with assault and that the charge was withdrawn.

[27] Did the police act with reasonable and probable cause? On the plaintiff's own evidence, he hit one of the police officers in the face. The question then arises whether the aforesaid action of the respondent constitutes assault. Mr Westhuizen, counsel for the respondent, submitted that assault consists of an unlawful, intentional act which causes bodily injury to another person.

[28] In *casu,* the police officers were well aware that the respondent's conduct stems from a desperate attempt to stop the unlawful assault perpetrated by them on him. The respondent acted in self-defence and consequently, his conduct was not unlawful.

[29] Being fully acquainted with the facts *supra*, the police officer/s who laid the charge against the respondent could not have acted with reasonable and probable cause.

[30] The last aspect to consider is that of *animus injuirandi,* i.e., an intention to injure. Considering the events that preceded the laying of the charge of assault by the police officer/s, the intention was clearly to injure the respondent. The charge resulted, to the knowledge of the police officers, in the respondent's arrest with the resultant impairment of his right of freedom of movement and personal integrity.

[31] The court *a quo's* finding that the respondent succeeded in proving on a balance of probabilities that the proceedings were malicious cannot be faulted and should stand.

QUANTUM

Unlawful arrest and detention

[32] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 SCA at paragraph 26 said the following about the assessment of damages for unlawful arrest and detention:

> *"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 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".*

[33] In *Ntshingana v Minister of Safety and Security and Another* [ECD 14 October 2003] (case no. 1639/01), Erasmus J stated the following:

> *"The satisfaction in damages to which the Plaintiff is entitled falls to be considered on the basis of the extent of the violation of his personality (corpus, fama and dignitas). As no fixed or sliding scale exists for the computation of such damages, the Court is required to make an estimate ex aequo et bono" Referring to earlier cases when assessing damages brings so much difficulty. The facts of every case need to be taken into context as a whole and only a few cases are considered to be directly comparable. They can, however, be used as a guideline as to what other courts have considered to be appropriate but no higher value should be attached to it".*

[34]. In benchmarking the quantum for damages, Innes CJ, in *Botha v Pretoria Printing Works Ltd and Others* 1906 TS held the following:

> *"If courts of law do not intervene effectively in cases of this kind, then one of the two results will follow- either one man will avenge himself for an insult to himself by insulting the other, or else he will take the law into his own hands. I do not think that the principle of minimising damages in actions of iniuria is sound. Where the injury is clear, substantial damages ought as a general rule be given".*

[35] The respondent was 58 years at the time of the incident and was detained for approximately 15 hours. The respondent testified that he was initially kept in a holding cell and after two hours moved to a *"permanent"* cell. It was in the middle of winter and instead of roof, the cell was covered with a grid. The cell was very dirty and only contained a dirty thin mattress and an old blanket.

[36] The respondent testified that it was extremely cold and that his body ached from the injuries he sustained during the attack by the police officers. The respondent suffers from hypertension and is diabetic. He is on medication for both conditions and must take the medication in the morning and evening. Because he in detention, he could not take his evening medication.

[37] The respondent stated that he could not sleep and remained in a seated position the whole night. It was very cold, and he was in constant pain. The next morning he started feeling dizzy because he did not take his hypertension medication the previous evening. A high ranking officer visited the respondent's cell in the morning and the respondent alerted him to the assault, his injuries and the fact that he urgently required his hypertension medication.

[38] An hour after the visit, paramedics arrived at the respondent's cell and took his blood pressure. His blood pressure was very high at that stage. The paramedics also took note of the bruises on his chest, back and on his *"private parts"*. The respondent testified that his left wrist was terribly sore and that he could not move his left arm. The paramedics did not treat the respondent for any of his injuries.

[39] The respondent was released on bail at 11:00 and went to Unitas hospital for treatment. The respondent was examined, given medication and placed on sick leave for a period of 14 days.

[40] Mr Toma, counsel for the appellant, submitted that the award of R 200 000, 00 on the facts in *casu* was excessive and that an amount of R 15000, 00

should have been awarded. In support of his submission, Mr Toma relied on the case of *Minister of Police & Another v Erasmus* (366/2021) [2022] ZASCA 57 (22 April 2022) in which the Supreme of Appeal awarded an amount of R 25 000, 00 to Erasmus for a 20-hour period of detention.

[41] The Supreme Court of Appeal did not refer to the personal circumstances of Erasmus in the *Erasmus* matter *supra* or to the conditions under which he was detained. The Court, furthermore, did not refer to any authorities in respect of the *quantum* of a claim for unlawful arrest and detention, but merely stated the following at par [17]:

> *" It remains only to consider the award of R50 000 in respect of the arrest and detention of the first period. Mr Erasmus was detained for approximately 20 hours in unpleasant conditions. Nevertheless, there is a striking disparity in the amount of damages that I would award (R25 000) and that of the high court. This justifies this Court's interference with the exercise of the discretion of the high court in this regard. The appeal against the quantum of damages in respect of the arrest and detention for the first period must also succeed and the award must be replaced with one in the amount of R25 000."*

[42] I find the authority in *Minister of Safety and Security v Seymore* 2006 (6) SA 320 SCA, referred to by Mr Westhuizen rather more helpful. Nugent JA had regard to the following awards as a guideline for an appropriate amount to be awarded:

> *"[19] The following awards also provide some indication of how other courts have viewed incursions upon personal liberty (they are by no means exhaustive of the cases that have confronted the issue). In Solomon v Visser and Another,[14] a 48-year-old businessman who was detained for seven days, first in a police cell and then in a prison, was awarded R4 000 (R136 000). In Areff v Minister van Polisie,[15] this court awarded a 41- year-old businessman who was arrested and*

detained for about two hours R1 000 (R24 000). In Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino,16 a businessman who was unlawfully detained for about three hours was awarded R12 000 (R16 978). In Manase v Minister of Safety and Security and Another,17 in which a 65-year-old businessman was unlawfully detained for 49 days, incarcerated at times with criminals, the sum of R90 000 (R102 000) was awarded. In Seria v Minister of Safety and Security and Others,18 a professional man who was arrested and detained in a police cell for about 24 hours, for a time with a drug addict, was awarded R50 000 (R52 000)."

[43] In respect of Seymore's personal circumstances, the Court had regard to the following:

["21] In the present case Seymour was deprived of his liberty for five days. Throughout his detention at the police station he had free access to his family and medical adviser. He suffered no degradation beyond that is inherent in being arrested and detained. After the first period of about 24 hours the remainder of the detention was in a hospital bed at the Rand Clinic. There can be no doubt that the experience was, throughout, traumatic and caused him great distress. But yet there were no consequences that were of sufficient concern to warrant medical attention after Seymour was released. As to the continuing depression and anxiety, I am not sure that can be attributed solely to the arrest and detention. Indeed, in his own words, the making of an award will enable him to finally put the matter behind him. Bearing all the circumstances in mind, in my view, an appropriate award is the sum of R90 000."

[44] Mr Westhuizen stated that the present-day value of the award is R 231 000, 00.

[45] I consider the circumstances of the arrest and detention in the matter of *Rudolph and Others v minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) to be more in line with the facts in *casu.* The Court summarised the circumstances in which the plaintiffs were detained as follows in par 27:

> *"Although the imprisonment of the appellants in the present matter was somewhat shorter than that in the Seymour case (viz for four nights and three days), the humiliating conditions to which they were subjected makes their case more serious than that of the plaintiff in Seymour. The appellants were arrested and detained under extremely unhygienic conditions in the Pretoria Moot police station. The cell in which they were held was not cleaned for the duration of their detention. The blankets they were given were dirty and insect-ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water. Throughout their detention the first appellant, who suffers from diabetes, was without his medication. They were not allowed to receive any visitors, not even family members. The first appellant later wrote a letter to the Commissioner of Police complaining about the conditions of their detention. As regards the last night of their detention, viz the night spent in the Pretoria Central Prison, there is no evidence regarding the conditions under which they were detained. Both appellants testified, however, that their reputations had been negatively affected by the detention - as the first appellant put it, 'in our country a jail bird is a jail bird' - and the first appellant also stated that his illness had been aggravated by his period of detention."*

[46] In considering the appropriate award, the Court stated the following at para [29]:

> *"Counsel for the respondents advanced no argument in respect of the amounts of damages claimed. However, in our view, there can be no doubt that the indignity to which the appellants were subjected merits substantial damages. For the arrest and detention of the appellants in*

respect of the first claim, we consider that an award of R100 000 each (as claimed) would be appropriate."

[47] The present-day value of the award is approximately R 187 000, 00.

[48] In *casu,* the respondent was detained for a shorter period than the plaintiffs in the *Rudolph* matter. Although not as harsh as the circumstances under which the plaintiffs in the *Rudolph* matter were detained, the circumstances were still dismal and the fact that he was detained in an open cell in the middle of winter no doubt aggravated the extreme discomfort the respondent experienced due to his incarceration. The respondent was in pain and without his chronic medication. The humiliation and indignity the respondent suffered due to the malicious actions of the police officers are unimaginable.

[49] Bearing the aforesaid facts in mind and having regard to the awards in *Seymour* and *Rudolph,* I, however, agree with Mr Toma that the amount of R 200 000, 00 is excessive. In my view an award of R 120 000, 00 will be just and fair compensation in the circumstances.

Assault

[50] The assault on the respondent was of short duration and did not result in any permanent injuries. The assault did, however, violate the respondent's bodily integrity and caused severe pain for a period of time. The fact that the respondent had to recoup at home for a period of 14 days, is a further indication of the severity of the assault.

[51] Save for the pain, the respondent needs to be compensated for the emotional shock and humiliation caused by the assault. The respondent was 58 years of age and on all accounts a law-abiding citizen. The assault was perpetrated by the police in the police station, whilst the respondent was seeking the assistance of the very police that assaulted him. The circumstances under which the assault occurred were traumatic to say the least.

[52] Mr Toma referred to *Mgele v Minster of Police and Others* (1257/2011)[2015] ZAECMHC 70 in which an amount of R 150 000, 00 was awarded on a claim for assault. *Mgele* was assaulted from 22h00 until dawn the following morning in the presence of his brother. At trial, *Mgele* was still suffering pain from his injuries. *Mgele also* suffered from erectile dysfunction for some time after the assault and still felt stripped of his manhood when he gave evidence during the trial. The present day value is R214 200, 00.

[53] In *Plaatjies v Minister of Police* (CA165/2021) [2022] ZAECMKHC 8 (3 May 2022), the plaintiff was assaulted by the police in her house at 02h30 in the morning and she sustained bruises on her forearm, scratch marks on her writs, shock and pain in the thumb nail and back-pain. The assault appears to be of short duration and an amount of R 50 000, 00 was awarded in respect of damages.

[54] The respondent's injuries are more severe than the injuries suffered by the plaintiff in the *Plaatjies* matter, and I am of the view that an amount of R 75 000, 00 would adequately compensate the plaintiff for the assault.

Malicious prosecution

[55] The malicious prosecution of the respondent had devastating consequences. The respondent testified that he was employed as a health and safety officer by a reputable company in Pretoria at the time of his arrest. The company had many high-profile clients and was concerned that the respondent's arrest would reflect negatively on its public image. In the circumstances, the company requested the respondent to resign. The respondent felt that he had no choice in the matter and acceded to the request.

[56] The only employment the respondent could find was that of a security manager at Thornybush Nature Reserve in Hoedspruit, Limpopo Province. The respondent appeared four times in court in the criminal matter and each time had to travel from Hoedspruit to Pretoria. The distance between Hoedspruit and Pretoria is 485 kilometres.

[57] The humiliation caused by the fact that the respondent was considered to be a criminal by his employer, is immense. To lose one's employment at an advanced age must cause tremendous emotional and financial stress. It is, furthermore, an insult on one's dignity to appear as an accused person in a criminal court. Each appearance causes, no doubt, a fair amount of anxiety and embarrassment.

[58] The distance the respondent had to travel on numerous occasions due to the malicious conduct of the police is dangerous, time consuming and costly.

[59] Mr Westhuizen referred to the consolidated matter of *Schoombee and Others v Minster of Police and Another* (2680/2014; 994/2015; 995/2015) [2019] ZAECGHC 94 (1 October 2019). The malicious prosecution of the plaintiffs in each of the matters had significant negative implications on their employment. The court awarded an amount of R 90 000, 00 to each of the plaintiffs. The present day value is R 102 000, 00.

[60] The plaintiffs in the *Schoombee* matter did, however, not lose their employment. In view of the serious consequences the malicious prosecution of the respondent had in *casu*, I am satisfied that the amount of R 200 000, 00 is justified.

Costs

[59] The appellant has had limited success in the appeal and a cost order reflecting the respective measures of success the parties had in the appeal will follow.

ORDER

I propose the following order:

1, The appeal is partially upheld and the order of the court *a quo* is substituted with the following order:

Judgment is granted against the defendant for:

1. *Ad claim 1:*

   1.1 Payment of the amount of R 120 000, 00.

   1.2 Interest on the aforesaid amount at the rate of 10,25% per annum, calculated from 9 June 2017 to date of payment.

2. *Ad claim 2:*

   2.1 Payment of the amount of R 75 000, 00.

   2.2 Interest on the aforesaid amount at the rate of 10,25% per annum, calculated from 9 June 2017 to date of payment.

3. *Ad claim 3:*

   3.1 Payment of the amount of R 200 000, 00.

   3.2 Payment of interest on the aforesaid amount at the rate of 10,25% per annum, calculated from 9 June 2017 to date of payment.

4. *Costs of suit.*

2. The appellant is ordered to 80% of the costs of the appeal and the respondent is ordered to pay 20% of the costs.

_____

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.

L BARIT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

11 May 2023

DATE DELIVERED:

10 August 2023

APPEARANCES

For the Appellant:	Advocate Kumbirai Toma
Instructed by:	Shoeman Esterhuizen Attorneys
For the Respondent:	Advocate JG VD Westhuizen
Instructed by:	The State attorney, Pretoria