IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

(4) Date: **08.09.2023** Signature:_____

CASE NO 58534/2012

In the matter between:

INA HOOGENDOORN Plaintiff

And

MINISTER OF POLICE Defendant

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is a civil claim against the Minister of Police. The matter proceeds on quantum only since merits have already been dealt with in an earlier appeal, and the first defendant has been held 100% liable for the plaintiffs proven or agreed damages due to an unlawful arrest and detention.

[2] On 4 November 2010 the plaintiff, then 49 years old, was allegedly involved in a police incident when, according to the particulars of her claim, she was arrested without a warrant by members of the Special Commercial Crime Unit. She was detained at the SAPS Krugersdorp holding cells until 8 November, and after bail was refused, detained at Sun City Diepkloof Prison and after re-appearing in court released on bail on 12 November 2010.

B. BACKGROUND

[3] On 4 November 2010. She went to gym in the afternoon and arrived home about 18h00/18h30. She was busy making supper when her youngest son told her that there are men busy taking her husband into custody.

[4] Thereafter the detectives took her and her son into custody. They were taken to Krugersdorp Police station at about 11h00 pm. The plaintiff was locked up in the holding cell of about 5 metres by 5 metres with a toilet and shower with no doors.

[5] On Monday 8 November, Officer Maleka took the plaintiff and other detainees in a motor vehicle to Protea Court. She was later taken to a courtroom for bail purposes. Her daughter-in-law, Pastor, brother-in-law, her sister and husband were in attendance. She felt humiliated. Her son Jannie was granted bail but her husband and her were denied bail.

[6] The plaintiff was there after taken to Sun City prison in a police van and detained there.

[7] On Friday 12 November she was again taken to Protea court and after bail was granted, she was released.

[8] The relationship between the applicant and husband broke down thereafter and they divorced.

[9] She was emotionally frustrated and angry for three months after her release. She just wanted to stay at home and did not go out. During this time, she cried a lot and studied the Bible in an attempt to get her life back in order.

[10] She also consulted a Psychologist, Ms. Anita Painter. The latter filed a comprehensive report regarding the emotional sequelae of the ordeal which the plaintiff went through during her incarceration.

[11] Anxiety persists especially whenever she sees police roadblocks.

[12] After giving her evidence, the plaintiff was thereafter cross-examined at length by Ms. Bothma. She was quizzed about her son's age and whether he was a minor. It was suggested to her that her arrest was conducted in private and that she had been treated humanely in detention. She conceded that she had not been handcuffed on arrest, but otherwise, nothing of consequence emerged from this cross examination.

[13] Mr. Venter then closed the plaintiff's case, and Ms. Bothma likewise closed the case for the defendant without calling any evidence. Both Counsel addressed the court thereafter.

[14] Mr. Venter submitted that it is common cause that the plaintiff's subjective experience of 4 November to 12 November 2010 in detention was unlawful. Her Constitutional right to freedom and movement was breached in a severe fashion.

[15] Further, he continued, the plaintiff did not overplay her situation by breaking down in tears before court. Nothing in her evidence is outlandish or disproven.

[16] The only arrow in the quiver of the defendant is a bare allegation without any basis that the plaintiff is a single witness and that her version should without more, be rejected.

[17] Mr. Venter referred the court to the matter of *Santam v Biddulph* 2004 (5) SA 586 (SCA) where the court stated:

> *"The Court held that the test for a reliable witness was not whether a witness was truthful or reliable in all that he said, but whether on a balance of probabilities the essential features of the story, which he told, were true. The Court agreed that Mr Sigasa might not have been a satisfactory witness in all respects. However, the Court was very critical of the trial court in its rejection of Mr Sigasa's evidence on the basis of his veracity as opposed to the reliability of his evidence. The Court drew attention to the limited value of a finding on demeanour where evidence had been given through an interpreter and warned that the importance of demeanour as a factor in the overall assessment of evidence should not be over-estimated."*

C. ASSESSING THE QUANTUM OF DAMAGES

[18] In *Motladile v Minister of Police*[1] the court followed a numerical approach to the assessment of damages for unlawful arrest and detention in a trend that had developed in the North-West Division to award R15 000.00 per day.

[1] *Motladile v Minister of Police* [2023] ZASCA 94.

[19] In *Minister of Safety and Security v Tyulu*[2] the Supreme Court of Appeal set the award of damages at R15 000.00 consequent to an unlawful arrest of a Magistrate for 15 minutes. This was in 2009.

[20] The determining factors in cases where a court must decide on the quantum of damages for unlawful arrest and detention, are amongst others:

(a) The manner in which the arrest was effected.

(b) The age of the plaintiff.

(c) The conditions of the cell in which the plaintiff was kept, and,

(d) The duration of detention.

[21] In Visser & Potgieter, Law of Damages[3], the following factors are listed that can play a role in the assessment of damages:

> "In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bona*. 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

2 *Minister of Safety and Security v Tyulu* (327/08) **[2009] ZASCA 55** (27 May 2009)

3 Visser & Potgieter, Law of Damages, 3ed Pages 545 – 548.

(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".

[22] Every case must be dealt with, having regard to its own unique facts and circumstances.

[23] The conditions in which the plaintiff was detained were unclean, crowded, lacked privacy, demeaning and gave the plaintiff cause for concern for her personal safety.

[24] In the *Minister of Safety and Security v Tyulu*[4] Bosielo JA pronounced himself on the issues a court should take into consideration when assessing what would be an appropriate amount of damages in matters of this nature as follows:

4 *Supra*

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not 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 made 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 of the facts of the particular case and to determine the quantum of damage on such facts* ***(Minister of Security and Seymour 2006 (6) SA 320 (SCA) at para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) [2009] ZASCA 39 paras 26-29)."***

[25] In exercising its discretion judicially, the court must strive to be balanced and even-handed. Holmes J (as he then was) stated in *Pitt v Economic Insurance Company Limited*[5] that:

[5] Pitt v Economic Insurance Co. Ltd 1957 (3) 284 (D) at 287E

"The court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense".

[26] In the instant case it is worth placing on record, without dwelling thereon, that the apparent trigger of this unfortunate incident was the plaintiff's erstwhile husband and his dodgy financial dealings, which resulted in the arrest of the plaintiff and her son over and above the said husband. This led to the plaintiff's son having to repay some funds back to some complainants. Having so alluded, nothing here absolves the police officers from prefacing any arrest with meticulous investigation. This evinces a case of overzealousness to arrest and negligence as distinct from outright malice.

[27] The plaintiff was the sole witness who testified in the matter, she is a mature, soft-spoken lady of mild personality from what I could observe of her demeanour. This saga must have truly dented her dignity and humiliated her no end. She is not given to exaggerating in her manner of narration.

[28] In *Masisi v Minister of Safety and Security*[6] Makgoka J (as he then was) had to consider a matter where a spiteful police officer threw his weight around and, out of pure spite and malice, arrested an officer from the nearby High Court who had earlier visited a detainee.

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6 Masisi v Minister of Safety and Security [2010] ZAGPPHC 280; 2011 (2) SACR 262 (GNP)

[29] I have considered a vast array of matters for comparison of awards made. For example, *Ratshilumela (Sylvia) v Minister of Police*, *Mdluli v Minister of Police*[7] and those submitted by plaintiff's Counsel in his comprehensive heads of argument for consideration. None of the matters fall squarely within the purview of the current facts under consideration to be an accurate guide.

[30] The appropriate amount to be awarded as *solatium* is in my considered opinion R350 000.00 (three hundred and fifty thousand rand only).

[31] The plaintiff should not be rendered out of pocket due to pursuing this matter, the normal rule on the issue of costs should apply.

[32] I therefore make the following order:

32.1 The defendant is ordered to pay the plaintiff an amount of R350 000.00 (three hundred and fifty thousand rand only) in respect of her wrongful arrest and detention.

32.2 Interest thereon will run at the prescribed rate *a tempore morae* from the date of this order until date of payment.

32.3 The respondent is ordered to pay plaintiff's costs.

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J.S. NYATHI

Judge of the High Court

[7] Mdluli v Minister of Police [2010] ZAGPPHC 280; 2011 (2) SACR 262 (GNP)

Gauteng Division, Pretoria

Date of hearing: 17, 18 and 19 July 2023

Date of Judgment: 08 September 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 08 September 2023.