



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

Case Number: **74491/2017**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED: NO
 DATE: 7 November 2023
 SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

NKOSANA THOMAS LESO

Plaintiff

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Defendant

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES

Second Defendant

REGIONAL COMMISSIONER OF CORRECTIONAL SERVICES

Third Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The plaintiff claims for damages he suffered as a result of his unlawful detention.
- [2] In respect of the merits of the plaintiff's claim, Mabuse J in previous litigation between the parties, declared the plaintiff's detention for a period exceeding 48 hours after his initial arrest and detention on 29 July 2014 to have been unlawful. It appears from the facts that the correct date of the plaintiff's arrest is 27 June 2014.
- [3] In the result, the trial only proceeded in respect of quantum.
- [4] Although the plaintiff initially alleged that he suffered both general damages and special damages as a result of his unlawful detention, the claim for special damages was abandoned during trial.

Background

- [5] It is common cause between the parties that the plaintiff was detained and incarcerated from 27 June 2014 to 31 October 2016 at Baviaanspoort Medium Security Prison ("the prison"). The plaintiff was 33 years of age at the time.
- [6] I pause to mention, that the plaintiff was on parole at the time of his arrest. On 29 April 2002, the plaintiff was convicted on charges of attempted rape, attempted murder, robbery with aggravating circumstances and housebreaking and sentenced to 28 years imprisonment.
- [7] The plaintiff was placed on parole on 28 August 2013 after having served a period of 12 years imprisonment.
- [8] On the date of his release the plaintiff was tagged with an electronic monitoring device which device was attached to his ankle. The plaintiff, furthermore, received a Global Position System (GPS) receiver, which receiver had to be in his possession at all relevant times to enable the Department of Correctional Services to monitor his movement.

[9] On 27 June 2014 and whilst at work, the plaintiff lost the GPS receiver, which resulted in his arrest and the revocation of his parole. Whilst incarcerated, his placement on parole was reconsidered and the plaintiff was placed on parole on 31 October 2016.

Point *in limine*: Prescription

[10] The defendants raised prescription on the following basis:

10.1 the plaintiff was arrested on 27 June 2014, which is the date on which the “debt” arose;

10.2 section 11(d) of the Prescription Act, 68 of 1969 (“the Act”) is applicable to the plaintiff’s claim and provides that legal proceedings must be instituted within three years from the date on which the “debt” became due;

10.3 the plaintiff had until 28 June 2017 to institute the present claim, but only served the summons on the defendants on 31 October 2017.

10.4 In the result, the plaintiff’s claim has prescribed.

[11] The plaintiff denied that his claim had prescribed and stated the following in the replication:

11.1 the plaintiff’s claim based on unlawful detention gives rise to separate causes of action for each day he was unlawfully detained;

11.2 section 11(d) of the Act preserved any claim for unlawful detention within the three year period preceding the service of summons on 31 October 2017;

11.3 the plaintiff's claim for unlawful detention for the period 1 November 2014 until his release on 31 October 2017 is therefore still extant;

11.4 a claim for unlawful detention before 1 November 2014 has also not prescribed due to the provisions of section 13(1)(a) of the Act, that provides that the running of prescription is interrupted if a creditor is prevented by "*superior force*" (the impediment) from instituting legal proceedings within the prescribed time limit. A period of prescription shall, in view of the impediment, only lapse a year after the impediment has ceased to exist;

11.5 the plaintiff's incarceration was an impediment as contemplated in section 13(1)(a) and the impediment ceased to exist upon his release on 31 October 2016;

11.6 in the result, the plaintiff had one year to institute a claim for his unlawful detention prior to 1 November 2014,

11.7 summons was served on 31 October 2017 and the plaintiff's claim for unlawful detention prior to 1 November 2014 is extant.

[12] In the heads of argument filed by Mr Phaswane, counsel on behalf of the defendants, the defendants did not take issue with the period after 1 November 2014, but insisted that the plaintiff's claim for the period 27 June 2014 to 1 November 2014 had prescribed.

[13] In answer, Mr Burger, counsel for the plaintiff, submitted that "*superior force*" as contemplated in section 13(1)(a) resulted from the plaintiff's inability whilst in prison to instruct an attorney to institute a claim. From the evidence, it emerged that the plaintiff did consult an attorney in respect of his unlawful detention whilst he was in prison. The plaintiff, however, testified that the consultation was directed at securing his freedom and a claim for damages was not discussed at the time. Thereafter and because the plaintiff could not earn an income as a result of his incarceration, he could not afford the services of an attorney any longer.

[14] In *Lombo v African National Congress* 2002 (5) SA 668 (SCA), the court held that the physical detention of the appellant outside the Republic of South Africa did constitute a “*superior force*”. The reasoning appears at par [25]:

“[25] The physical detention of the appellant outside the Republic of South Africa in circumstances in which he was prevented from pursuing personally any action arising from the alleged assaults and maltreatment inflicted upon him, and totally denied access to anyone who could do so on his behalf, amounted to his being prevented by a superior force from interrupting the running of prescription as I contemplated by s 13(1)(a). Consequently, he had one year from the time this impediment ceased to exist (his release from detention and return to this country) within which to institute action in respect of all causes of action arising from the alleged assaults and maltreatment to which he was subjected during his detention, and his property that was allegedly misappropriated ...”

[15] The “*superior force*” was therefore attributable to the fact that the appellant did not have access to legal representation during his incarceration.

[16] In *Minister of Police and Another v Yekiso* 2019 (2) SA 281 (WCC), the court also considered the concept of “*superior force*” in relation to a plaintiff that was incarcerated. The court held that the plaintiff did have access to legal representation in circumstances where he was legally represented during his criminal trial. In the result, the court held that the plaintiff’s incarceration was not an impediment as defined in section 13(1)(a).

[17] In *casu*, the plaintiff did have access to legal representation and indeed enlisted the services of an attorney whilst he was incarcerated. The question then arises whether the plaintiff’s lack of financial resources due to his inability to generate an income whilst in detention qualifies as “*superior force*” as contemplated in section 13(1)(a).

[18] It is a well-known fact and I take judicial notice thereof, that prisoners have access to legal aid services whilst in prison. The lack of financial means

therefore, in my view, does not constitute an impediment due to a “*superior force*”.

[19] In the result, the period of detention from 27 June 2014 to 1 November 2014 has prescribed.

Evidence

[20] The plaintiff testified that, upon his arrest, he was locked up in single cell for 8 days. The plaintiff experienced the cell as a “*prison within a prison*” and testified that single cells are normally reserved for troublesome inmates. The plaintiff was locked up 23 hours a day with an hour reserved for exercise.

[21] Mr Raphael Vuzimuzi Mabanga (“Mabanga”), who was in charge of the prison explained that the plaintiff was kept in a single cell because he had to appear before the Parole Board before he could be reintegrated into the general prison population. Mabanga emphasised that the single cell had a toilet, a shower, clean water, a mattress and bedding.

[22] After 8 days, the plaintiff was transferred to a communal cell, which housed between 35 to 40 inmates. The cell had bunk beds, a shower and a toilet, which were not separated from the cell. The plaintiff testified that the cell did not allow for any privacy. Mabanga testified that the communal cells are well ventilated and are cleaned with detergents by the inmates who occupy the cell. According to Mabanga there are doors that separate the toilets, showers and sleeping areas from each other.

[23] The plaintiff was allowed access to reading material, which came from either the prison library or a trolley that moved between the cells. The plaintiff received visits from his sister and Mr Andrew Mbungji, the owner of Phahama over weekends.

- [24] In respect of his state of mind, the plaintiff testified that both prison officials and other inmates treated him badly due to the perception that he could not stay out of trouble whilst he was on the outside. The fact that he was re-arrested left the plaintiff confused and in a state of disbelief. The plaintiff testified that “he did not recognise who he was”.
- [25] According to the plaintiff he was threatened by other inmates in his cell but could not report these threats for fear of being perceived as “weak”, and because prison authorities would not respond to such reports. It is not clear from the plaintiff’s evidence what the threats entailed.
- [26] In respect of the plaintiff’s personal circumstances, he testified that he took up residence in Mamelodi after his release on parole. The plaintiff found gainful employment as a labourer at Phahama Supply and Projects, where he worked mainly during the week, and he also worked as a general staff member at a hair salon over weekends.
- [27] The plaintiff became a member of Mamelodi International Assemblies of God, which church he regularly attended. He was welcomed into the congregation and would give advice to congregants on the dangers of getting involved in criminal activities. The plaintiff was, as stated *supra*, arrested on 27 June 2014.
- [28] The plaintiff testified that, upon his release on 31 October 2016, he was not well-received by some members of the community who had lost confidence in him. In respect of the members of the church community, the plaintiff faced difficult questions that he endeavoured to answer to the best of his ability. Some members would accept his explanation that he was arrested for losing the GPS receiver, whereas others were not convinced.
- [29] The plaintiff, furthermore, lost his employment as a result of his detention.

Discussion and submissions

- [30] The plaintiff's claim for unlawful detention is in respect of a period of 2 years, to wit 1 November 2014 to 31 October 2016.
- [31] Mr Burger with reference to case law, submitted that the plaintiff's damages should be calculated at R 5 750, 00 per day for the period of detention, which amounts to an award of R 4 197 500, 00.
- [32] Mr Phaswane did not agree that a so-called "*flat rate*" should apply and submitted that a fair and reasonable compensation for the plaintiff's injured feelings should be awarded in the amount of R 800 000, 00.
- [33] I accept that the plaintiff's detention for a period of two years had a devastating effect on his mental well-being. Due to the lengthy period of detention, the plaintiff lost his employment and standing in the community. The facts of this matter are, however, somewhat different from a situation where a plaintiff's arrest was also unlawful.
- [34] The feelings described by the plaintiff upon his arrest and after his release from prison is directly linked to his arrest. In the result, I am of the view, that the plaintiff's *injuria* emanates from the fact that his right to freedom of movement / personal liberty was infringed upon.
- [35] The right to personal freedom is highly prized in our society and the deprivation thereof is regarded by the courts as a serious injury. [See *inter alia: Mthimkhulu and Another v Minister of Law and Order* 1993 (3) SA 432 (ECD) at 440D].
- [36] Both counsels referred to various authorities in which awards for a similar *injuria* were made.
- [37] I find the following authorities to be helpful. In *Woji v Minister of Police* 2015 (1) SACR 409 (SCA), the appellant was lawfully arrested, but unlawfully detained for a period of 13 months. The appellant's ordeal is set out in para [40] as follows:

“Mr Woji described what can only be regarded as appalling conditions he was faced to endure whilst in detention. Cells were overcrowded, dirty and with insufficient beds to sleep on. He was subject to the control of a gang, whom he said sodomised other prisoners. As a result, he suffered the appalling, humiliating and traumatic indignity of being raped on two occasions, which he did not report to the prison authorities, because he feared retaliation from gang members. As a consequence, he has difficulty in enjoying sexual relations with his girlfriend. He also witnessed another prisoner being stabbed, which made him fearful for his own safety. After eight months he was allocated a single cell. His situation then improved, because he had a bed to sleep on but he was isolated and lonely.”

[38] The court awarded an amount of R 500 000, 00. The present day value of the award is R 745 000, 00.

[39] *In Mahlangu and Another v Minister of Police 2021 (2) SA SACR 595 (CC)*, the applicants were unlawfully detained for a period of 8 months and 10 days. The circumstances under which the applicants were detained are described as follows in para [55] and [56]:

“[55] The relevant factors here are the Mr Mahlangu was tortured by several police officers before he made the confession that led to the deprivation of his liberty. The investigating officer did not disclose the torture and assault to the prosecutor, nor did he inform the prosecutor that the confession was engineered by the assault and torture.

[56] The circumstances under which Mr Mahlangu and Mr Mtsweni were detained for eight months’ and 10 days were unpleasant, to say the very least. In addition, they were placed in solitary confinement for two months to protect them from attack and taunting by fellow detainees who believed that they had killed their relative.”

[40] The court awarded R550 000, 00 damages to Mr Mahlangu and R 500 000, 00 damages to Mr Mtsweni. The present day value of the awards are respectively R 621 600, 00 and R 565 000, 00.

[41] In *Nxomani v Minister of Police* (Eastern Cape Local Division, case number 123/2017, 13 October 2020), the plaintiff was unlawfully detained for a period of 19 months. The court found that the detention must have brought unbearable hardship for the plaintiff and took into account that he was separated from his family even over the Christmas period in 2015. The court did not discuss the circumstances under which the plaintiff was detained and awarded an amount of R 900 000, 00. The present day value of the award is R 1 063 500,00.

[42] Although the periods of detention in the *Woji* and *Mahlangu* matters were a lot shorter than the period in *casu*, the circumstances under which they were detained are markedly more abdominal. To simply add the additional period that the plaintiff was detained in determining the amount of damages suffered by the plaintiff would be a mathematical exercise that does not take the facts in *casu* into account.

[43] I agree with Mr Phaswane that a fair amount of damages should reflect the injured feelings of the plaintiff viewed holistically. The *Nxomani* matter seems to be more on *par* with the facts in *casu* and I deem an amount of R 1 000 000, 00 to be fair and just in the circumstances.

ORDER

The defendants are ordered to pay the plaintiff:

1. An amount of R 1 000 000, 00.
2. Costs of suit.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATES HEARD:

10, 11 &12 October 2023

DATE DELIVERED:

7 November 2023

APPEARANCES

For the Plaintiff: Advocate SW Burger

Assisted by: Advocate S Mohammed

Instructed by: Bowman Gilfillan Inc

For the Defendant: Advocate MS Phaswane

Assisted by: Advocate MV Magagane

Instructed by: The State Attorney, Pretoria