



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **10144/2015**

In the matter between:

**MDUNYISWA MTOLO**

**PLAINTIFF**

and

**THE MINISTER OF POLICE**

**DEFENDANT**

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**Coram:** Mossop J

**Heard:** 21, 22, 23 August 2023

**Delivered:** 23 August 2023

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**ORDER**

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**The following order is granted:**

1. The defendant is to pay the plaintiff the amount of R3 367 200, in respect of:
  - 1.1 Contumelia and deprivation of freedom arising from malicious arrest and detention: R3 million
  - 1.2 Impairment of dignity, good name and reputation arising from malicious prosecution: R300 000.00
  - 1.3 Loss of earnings: R67 200.00

2. Interest shall run on the aforesaid amount of R3 367 200 from date of service of the summons until date of final payment.
3. The defendant shall pay the plaintiff's costs on the scale as between attorney and client.

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## JUDGMENT

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### **Mossop J:**

[1] On 27 May 2021, Naidu AJ, in part, granted the following order:

- '1. The arrest of the Plaintiff on 12 September 2011 and the consequent detention and prosecution were actuated by the Defendant's servants with malice.
2. The Defendant is ordered to pay the Plaintiff's costs on a scale as between attorney and client.
3. The matter is adjourned sine die for the hearing regarding the question of quantum of damages incurred by the Plaintiff.'

The order was granted after the learned acting judge was asked to determine the issue of liability of the defendant for the arrest and detention of the plaintiff.

[2] Naidu AJ's appointment as an acting judge has come to an end and the matter was accordingly allocated to me to determine the plaintiff's quantum of damages. Before me, Mr Mathonsi appeared for the plaintiff and Mr Sibeko appeared for the defendant, as they had done when liability was determined. Both counsel are thanked for the assistance that they have provided to the court.

[3] It is perhaps prudent to briefly mention the facts that Naidu AJ found to have been proven when he deliberated on the issue of liability. The plaintiff was arrested by members of the South African Police Services (SAPS) on 12 September 2011 on two counts, being a count of housebreaking with intent to steal and theft of saddles and a count of

theft of a motor vehicle. He remained in detention from the date of his arrest, having failed to be admitted into bail when he made such an application. On 24 June 2013 the housebreaking charge was withdrawn against him. He remained in custody on the theft of motor vehicle charge until it, too, was withdrawn on 9 June 2014.

[4] The plaintiff was initially detained along with one Mr Fanyana Ngcobo (Mr Ngcobo) at the Plessislaer Police Station where he remained for two days and then was detained at the Camperdown Police Station for two days. Neither of these periods of detention were recorded in the record books of either police station. The balance of his incarceration of nearly two years and eight months was spent at New Prison, Pietermaritzburg.

[5] When the applicant applied for bail at the Richmond Magistrate's Court, the investigating officer opposed that application and testified that the plaintiff had been arrested in the stolen motor vehicle that formed the subject matter of the second charge that he faced. In truth and in fact he had been arrested at his place of employment and not in a stolen motor vehicle. The learned acting judge found further that a police witness, one Leremu, had lied in his evidence either before the learned acting judge or in his evidence at the trial of Mr Ngcobo regarding the arrest of Mr Ngcobo. The learned acting judge was singularly unimpressed with the defence witnesses. In this regard the following extract from his judgment is both illuminating and yet disturbing at the same time:

'[134] Regarding the detention and prosecution of the Plaintiff, the evidence points to [sic] strongly to the possibility that Bheki Cele, Leremu, Phungula and Sibiya, acting in concert, conspired to fabricate evidence against the Plaintiff which formed the basis for his detention and prosecution on charges of theft of the white Toyota Hilux motor vehicle and the theft of the saddles. There can be no debate about the fact that the Defendant's servants had instigated the prosecution of the Plaintiff on both charges.

[135] Apart from the evidence of those police officials involved in the conspiracy referred to in the preceding paragraph hereof, there is not a single iota of independent and objective evidence against the Plaintiff linking him with either

the theft of the motor vehicle or the theft of the saddles, yet he was charged with both. Any chance which the Plaintiff might have had of getting bail on his first appearance in court was extinguished when the magistrate was informed, at the instance of Sibiya, that he had another charge pending against him.'

[6] Finally, the learned acting judge found, as the plaintiff had urged him to find, that the SAPS witnesses had acted with malice in acting as they did. This finding was based upon the lies that had been uttered by them, the absence of evidence implicating the plaintiff in any of the charges that he faced and the failure by the SAPS to investigate the motor vehicle case because they knew that the plaintiff was not involved in that matter. The court found that implicating the plaintiff in the housebreaking matter was a stratagem designed to place an impediment to his release on bail in the motor vehicle theft matter.

[7] Yesterday I heard only the evidence of the plaintiff on the issue of quantum. The defendant had indicated at the commencement of the hearing that it would call a witness in rebuttal of the plaintiff's evidence but, in the end, it decided against doing so. The evidence of the plaintiff thus remains uncontradicted. That does not necessarily mean that everything that he testified about can simply be accepted: evidence that is clearly exaggerated or not in accordance with ordinary human experience may be rejected notwithstanding that it is not met with evidence to the contrary.

[8] The plaintiff testified that he was detained for a period of two years and eight months before the last charge was withdrawn and his liberty was restored to him. His unchallenged evidence was that, astonishingly, he made a total of 37 court appearances whilst detained. It is a sad indictment of the justice system generally that a matter can be prolonged for this length of time without judicial objection, only for all the charges to be withdrawn.

[9] The plaintiff testified that he was arrested in the presence of his fellow employees, some of whom lived in the same area at which he resided. He was manhandled by his arrestors and testified that he was embarrassed about what occurred and that such conduct impaired his dignity. He felt that his fellow employees would now always regard him as being a criminal. The plaintiff testified further that the conditions under which he was initially detained at the two police stations were, simply put, disgusting. The cell at the Plessislaer Police Station was unclean. Blankets in the cell appeared to have been vomited upon but not cleaned and there were blood splatters all over the cell. He explained that he was in a state of shock because of what was happening to him. He observed members of the SAPS assaulting other detainees and lived in fear that he, too, would be assaulted. He spent two or three days at this police station and was then taken to Camperdown Police Station where the conditions were similar to those at the Plessislaer Police Station. He spent two days at this police station. He was then taken to Bizana in the Eastern Cape province. He and two others were placed in the luggage area of a Toyota Fortuner motor vehicle for this lengthy journey.

[10] Matters only improved when the plaintiff was removed to New Prison. However, on his arrival at the prison, he suffered the humiliation of being required to strip naked and jump around in front of prison officials and other inmates to establish whether he was in possession of any prohibited contraband concealed on or in his body. He had to go through this ritual every time he returned from court – thus he suffered this indignity at least 37 times.

[11] At New Prison he experienced overcrowding and poor food quality. He was initially placed in 3,5-meter square cell, which he would be required to share with up to ten other inmates. He described this cell as ‘the box’. The box contained a steel bed but no mattress and had an exposed toilet. The toilet would have to be used in full view of the other occupants of the cell. He was then moved to another cell which was the

same size as the box but which the plaintiff described as being clean and which he regarded as being habitable by human beings. He was in this cell for one year, and had to share it with between four and six other inmates.

[12] The plaintiff described the quality of the food in prison as being 'poor'. It took him some time to become accustomed to it. It was generally tasteless. Breakfast was porridge with no sugar. The evening meal would comprise of boiled and watery samp, or stiff phutu with cabbage or a little portion of curry. He lost weight during his confinement.

[13] To ensure his physical safety after he was robbed of some of his belongings, the plaintiff had to pay a monthly fee of R500 plus 200 cigarettes and a bag of tobacco to a prison gang. Failure to do so could result in either a stabbing with a knife or an assault with a bunch of keys placed in a sock. From the confines of his cell he heard at night the sounds of inmates being stabbed or being subjected to rape. He did not suffer the safe fate but he was on occasions touched suggestively on his buttocks by other inmates.

[14] Having finally been freed, the plaintiff described his physical condition as being weak. He estimated that it took him three months to return to his normal condition. He testified that he felt rejected by society and felt that everyone viewed him as being a criminal, when he was, in truth, not. He had been employed before his arrest and resumed the same employment after his release. He explained that he avoided eye contact with his fellow employees and believed that they were 'sceptical' about him. Some employees believed that he had been convicted and sentenced to a term of imprisonment. After a while, he explained to some of them what had really happened.

[15] Mr Sibeko cross examined the plaintiff. The plaintiff generally performed well although his evidence was not entirely flawless. He testified in response to a question put to him by Mr Sibeko that he had never previously been arrested prior to being arrested for the matter before me. It ultimately transpired that he had once previously been arrested and detained for two weeks. What the offence was underpinning his arrest is not entirely clear but it appears that it might have been for contempt of court.

[16] He confirmed that he had not personally been raped or assaulted whilst detained. He was put under some pressure by Mr Sibeko about his testimony at his bail application. It was suggested to him that he had admitted to previous criminal activity when he admitted telling the court that he had a pending criminal matter. But that pending matter was the other charge that he was facing. Rather than place the plaintiff in an unfavourable light, it merely served to confirm that he had been entirely honest in disclosing everything to the court hearing his bail application. Naidu AJ later found that there was no evidence whatsoever to link the plaintiff to either charge.

[17] I was impressed by the plaintiff as a witness. I have mentioned one point of criticism concerning his evidence but I can conceive of no others. He vividly, but not sensationally, conveyed his experiences to the court. He could have embellished upon those experiences, for example, by narrating that he had in fact been assaulted. Had he done so, there would have been no way of disproving that. But he did not.

[18] When assessing quantum, it is important to bear in mind that the primary purpose behind fixing and awarding damages is not to enrich the aggrieved party but to award him compensation in the form of a solatium for his injured feelings. The amount awarded should accordingly be commensurate with the injury inflicted. But in assessing such compensation, the amount fixed should also reflect how important the right to personal liberty is in our nascent constitutional democracy and how

jealously we protect and guard it.<sup>1</sup> Our past history informs us that many citizens were unfairly deprived of their liberty by an omnipotent State. That cannot again be allowed to occur and any malicious, arbitrary deprivation of the right to personal liberty must be treated with the necessary seriousness. As was stated in *Zealand v Minister for Justice and Constitutional Development and another*:<sup>2</sup>

‘[t]he Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause.’

[19] Fixing the quantum of compensation is always a vexing issue. In *Ferdinand v The Minister of Police*,<sup>3</sup> the court remarked that:

‘In deprivation of liberty the amount of damages is in the discretion of the Court. Factors which play a role are the circumstances under which the deprivation of liberty took place; the presence of absence of improper motive or malice on the part of the Defendant; the duration and 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; and awards in previous comparable cases.’

[20] Courts often have recourse to the decisions of courts that have previously decided similar matters in an attempt to settle upon an appropriate amount to award an aggrieved party. Comparisons are made between the facts of a matter before a court and cases that have previously been decided to see if there is any similarity in the matters. The phrase that comparisons are odious is well known. It was first used in 1440 by the author John Lydgate<sup>4</sup> and is used to suggest that to compare two different things or persons is unhelpful or misleading. While comparisons may indeed be odious, earlier decisions may be considered as a guide to determining what is appropriate in a current matter. The correct approach to determining an appropriate award requires that a court should have regard to all the facts of the particular case and to determine the quantum of damages based on such facts.<sup>5</sup>

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<sup>1</sup> *Phungula v Minister of Police* [2018] ZAKZPHC 21 (8 June 2018).

<sup>2</sup> *Zealand v Minister for Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) para 24.

<sup>3</sup> *Ferdinand v The Minister of Police* [2018] ZALMPPHC 58 (7 March 2018).

<sup>4</sup> John Lydgate: *Debate between the horse, goose, and sheep*, circa 1440.

<sup>5</sup> *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA); (2009) ZASCA 39 paras 26-29.



[21] The facts of this case are troubling. Firstly, there is the length of the deprivation of liberty. Two years and eight months is a substantial period to lose from a human life. Secondly, the malice that has been found to exist is intensely upsetting and causes doubts to continue about the rectitude of the SAPS. When those that are required to protect society in fact prey upon it, then society is in trouble. It must have been a shocking and unnerving experience for the plaintiff and it appears that he was failed by those who ought to have helped him. The powerlessness of his situation must have been overwhelming. These factors must play an important part in determining the amount to be awarded to the plaintiff.

[22] Both counsel referred me to a range of cases that they submit provide a guide to what should be awarded. I have considered them, and others, overnight. Most of the matters, whilst tangentially helpful, are not really of assistance given the period of detention that they dealt with. The period over which the plaintiff was unlawfully detained was lengthy and not the run of the mill period reflected in most reported matters.

[23] In a matter decided within this division, *Buthelezi v Minister of Police and others*,<sup>6</sup> Chetty J awarded an amount of R1,6 million for detention for a period of 388 days. In *Mkhize v Minister of Justice and Constitutional Development*,<sup>7</sup> again a matter determined in this division, an award of R2 million was granted by Bezuidenhout AJ for detention for an almost identical period in this matter, namely 27 months. In *S v L and another v Minister of Police and others*,<sup>8</sup> another matter decided in this division, the court awarded R3,5 million for detention over a period of 6 years and 11 months. On the far end of the scale is the matter of *Msongelwa v Minister of Police and others*,<sup>9</sup> where the plaintiff was awarded R5 million for 5 months detention. A similar amount was also awarded in *Lebelo v Minister of Police*,<sup>10</sup> where the plaintiff was detained for 101 days.

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<sup>6</sup> *Buthelezi v Minister of Police and others* [2021] ZAKZDHC 20 (2 August 2021).

<sup>7</sup> *Mkhize v Minister of Justice and Constitutional Development* Case number 10386/2009.

<sup>8</sup> *S v L and another v Minister of Police and others* [2018] ZAKZPHC 33 (15 August 2018).

<sup>9</sup> *Msongelwa v Minister of Police and others* [2020] ZAECMHC 10 (17 March 2020).

<sup>10</sup> *Lebelo v Minister of Police* [2019] ZAGPPHC 69 (28 February 2019).

[24] In coming to a decision on quantum I do not lose sight of the words of Seegobin J in *Latha and another v Minister of Police and others*,<sup>11</sup> where the learned judge stated the following:

‘While I consider the Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom, in my view, courts should be careful not to overemphasise the right in order to punish a guilty party unduly. A delicate balance must be struck between the rights of an aggrieved party on the one hand and the guilty party on the other, in order to arrive at an assessment which is fair and reasonable in the circumstances.’

[25] There can be no doubt that this prolonged and disturbing experience to which the plaintiff was subject was both shocking and totally unnecessary. Mr Mathonsi, in an emotive and powerful oration when arguing the matter, said that the plaintiff had been treated as if he was a non-person and had no rights. There is much to be said for this argument for this is what the facts of this matter demonstrate. This country has an unfortunate history of people being treated in this fashion. The concept of ubuntu is part of the tapestry of our new dispensation but there is not a trace of its presence in the manner in which the plaintiff was treated by the SAPS. The plaintiff was deprived of his freedom for an unknown reason. Mr Mathonsi said the SAPS did what they did to the plaintiff because they had the power to do so. That is perhaps about as close as we can come to understanding why these disturbing events occurred.

[26] The plaintiff amended his particulars of claim at some stage and ultimately claimed the following amounts under the following headings:

- (a) Contumelia and deprivation of freedom due to malicious arrest and detention, alternatively unlawful detention: R5 million
- (b) Impairment of dignity, good name and reputation due to malicious prosecution: R500 000.00
- (c) Loss of earnings: R200 000.00

<sup>11</sup> *Latha and another v Minister of Police and others* 2019 (1) SACR 328 (KZP) para 8.

[27] The amendment referred to saw the amount claimed in respect of contumelia and deprivation of freedom due to malicious arrest and detention increased from R3 million to R5 million.

[28] In considering an award for contumelia and deprivation of freedom due to malicious arrest and detention, I am conscious of the fact that the plaintiff's detention after his arrest was a consequence of an order of court and not, on the face of it, at the instance of the SAPS. However, in *Mahlangu and Another v Minister of Police*,<sup>12</sup> it was held that it is only when a causal link is established between the arresting officer's conduct and the subsequent harm suffered by the plaintiff that the defendant is said to be liable for detention after first the appearance. In this instance, the SAPS arrested him without evidence and then lied at the plaintiff's bail application that he had been caught red-handed in a stolen motor vehicle, as a consequence of which the magistrate's court declined to admit the plaintiff into bail. In my view, this provides the plaintiff with a basis for holding the defendant delictually liable for the full period of detention that the plaintiff was forced to endure.

[29] In my view, the figure claimed by the plaintiff before he amended his particulars of claim, namely R3 million, is a fair and reasonable amount to award him for contumelia and deprivation of freedom due to malicious arrest and detention.

[30] As regards an award for impairment of dignity, good name and reputation due to malicious prosecution it is so, as already mentioned, that the arrest of the plaintiff took place in front of his work colleagues and must have been humiliating for him. He was thereafter required to make 37 court appearances before the charges against him crumbled. After considering the authorities to which I was referred,<sup>13</sup> in my view an award of R300 000 would be appropriate under this head.

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<sup>12</sup> *Mahlangu and Another v Minister of Police* 2021 (7) BCLR 698 (CC).

<sup>13</sup> *Rautenbach v Minister of Safety and Security and others* [2103] ZAGPPHC 387; *Sithole v Minister of Safety and Security and another* [2016] ZACPPHC 387; *Gumbi v Minister of Police* [2022] ZAKZHC 17.

[31] Turning to consider the plaintiff's claim for loss of earnings, he testified that he had been employed as an assistant boilermaker and fitter prior to his arrest. His employment was of a temporary nature and he estimated in a Rule 37 document prepared before trial that he worked on average two weeks per month at a rate of R1 050 per week in the year prior to his arrest. He presented no evidence of his earnings, other than his oral evidence. He was not seriously challenged on this aspect of his evidence. He was, however, criticised for not producing documentary evidence of his employment and his earnings. I do not share in that criticism. It would have been ideal if that form of evidence had been produced. But no evidence was led by the defendant to contradict the plaintiff's claim to having been employed at the rather humble rate of R1 050 per week.

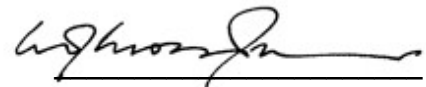
[32] The plaintiff has claimed an amount of R200 000.00 under this heading in his amended particulars of claim. How this figure is arrived at is not clear. I considered that it may have been calculated by multiplying the amount of R4 300 per month (being the monthly amount that the plaintiff now claims to have earned) by the number of months for which the plaintiff was detained, namely 32. This, however, only amounts to R137 600. Be that as it may, given the admission that the plaintiff only worked for two weeks per month at a rate of R1 050 per week in the year prior to his arrest, it appears to me that this amount should be extrapolated over the period of detention. The figure arrived at thus is R67 200. I shall make an award under this head in that amount.

[33] On the issue of costs, the court hearing the liability component of this trial granted them on the scale as between attorney and client. I see no reason to order costs on a lower scale.

[34] I accordingly grant the following order:

1. The defendant is to pay the plaintiff the amount of R3 367 200, in respect of:

- 1.1 Contumelia and deprivation of freedom arising from malicious arrest and detention: R3 million
- 1.2 Impairment of dignity, good name and reputation arising from malicious prosecution: R300 000.00
- 1.3 Loss of earnings: R67 200.00
2. Interest shall run on the aforesaid amount of R3 367 200 from date of service of the summons until date of final payment.
3. The defendant shall pay the plaintiff's costs on the scale as between attorney and client.



**MOSSOP J**

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Date of trial : 21, 22 and 23 August 2023

Date of Judgment : 23 August 2023