

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 1077/2023

In the matter between:

SETHABA EDWIN TONY

Plaintiff

and

THE MINISTER OF POLICE

Defendant

DATE OF HEARING

: 06 May 2024

DATE OF JUDGMENT

: 20 June 2024

FOR THE PLAINTIFF

: ADV. GOBETZ

FOR THE DEFENDANT

: NO APPEARANCE

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 20 June 2024.

ORDER

Resultantly, the following order is made:

- (i) That judgment is granted in favour of the plaintiff for unlawful arrest and detention.
- (ii) The defendant is ordered to pay to the plaintiff an amount of R 60 000.00 for unlawful arrest and detention.
- (iii) The defendant is ordered to pay interest at the prescribed applicable rate from date of summons, being 26 May 2023, until date of final payment.
- (iv) The defendant is ordered to pay the costs of suit on a party – and – party basis on the High Court Scale “B”, to be taxed.

JUDGMENT

HENDRICKS JP

Introduction

[1] The Plaintiff, Mr Edwin Tony Sethaba, instituted an action for damages based on unlawful arrest and detention against the Minister

of Police. He claims R 50 000.00 for unlawful arrest and R100 000.00 for unlawful detention, plus interest and costs of suit. The summons was served on 26 May 2023. A notice of intention to defend was served on 23 June 2023. No plea was filed or served. On 25 July 2023 the plaintiff filed a notice in terms of Rule 26 and the defendant was *ipso facto* barred. The trial was set down for 06 May 2024. There was no appearance for or on behalf of the defendant, the Minister of Police, by the State Attorney, Mmabatho.

[2] The plaintiff testified with regard to his arrest. He said that on 19 December 2022, at approximately 9:30 am, he was with six (6) friends, standing under a tree, when members of the Community Police Forum (CPF) arrived. They asked them questions and wanted to search them. He and his friends resisted saying that the CPF members are not police officers. The police was summoned.

[3] The police arrived at the scene, and searched them as well as the motor vehicle of the plaintiff, without permission or a search warrant. In the motor vehicle small pieces of glass were found. The plaintiff was informed that he should drive his motor vehicle to the police station, accompanied by one of the police officers, which he did. A 'Notice of Rights' document was completed and handed to him, which he signed, although the contents thereof was never read to him nor explained. The charge is for possession of illicit diamonds

and the time is reflected at 12:50 pm. He was then detained in a small police cell with sixteen (16) other men.

[4] There were only blankets in the cell and no mattresses to sleep on. The blankets were filthy and smelly and full of lice. The toilet emitted a sewerage smell in the cell, which was unbearable. He is claustrophobic and a non-smoker. The cell as well as the blankets were smelling of smoke, which affected his lungs. He was not provided with food or anything to drink.

[5] The following morning at around 7:30 am he was taken out of the cell. He signed a warning statement and was released at about 8:00 am. He never appeared in court for the alleged offence. The time of arrest and detention is more or less from 10:00 am to 8:00 am (22 hours).

[6] He is 43 years of age and self-employed as a taxi ("Uber") driver. He felt humiliated when he was arrested in the presence of his friends and other people. When he was released, he had to burn his clothes and the blankets at home, because of the lice. His experience in the cell was unpleasant. He was a motivational speaker for the youth, but his self-esteem is lowered as people gossip about him and calling him a prisoner. He has lost his self-confidence. His reputation is affected. The plaintiff was the only witness that testified. To reiterate, there was no legal practitioner who appeared for or on behalf of the

defendant, the Minister of Police. The evidence of the plaintiff is uncontested.

- [7] It is trite law that an arrest without a warrant of arrest is *prima facie* unlawful, unless there are jurisdictional factors present that justify the arrest, on the basis of statutory authority. The onus to prove that the arrest is lawful rests on the defendant.

See: **Minister of Law and Order and Another vs Dempsey** 1998 (3) SA 19 (A).

Minister of Law and Order vs Matshoba 1990 (1) SA 280 (A)

In the absence of any defence of justification, or like in this case the absence of any defence of the matter whatsoever, the uncontested evidence of the plaintiff must be accepted by this Court.

- [8] The deprivation of liberty, is a serious infringement and violation of a person's constitutional rights, as enshrined in the Bill of Rights and the Constitution of the Republic of South Africa Act 108 of 1996. Interference with a person's liberty can only take place under restrained conditions in a constitutional democracy as in South Africa. Personal freedom is highly valued.

See: **Zealand vs Minister of Justice and Constitutional Development and Another** 2008 (2) SACR 1 (CC).

Motladile vs Minister of Police 2023 (2) SACR 274 (SCA);

Minister of Safety and Security vs Tyulu 2009 (5) SA 85
(SCA);

Minister of Safety and Security vs Seymore 2006 (6) SA 320
(SCA);

Rudolph vs Minister of Safety and Security 2009 (5) SA 94
(SCA)

[9] This court has a discretion as to the amount to be awarded as damages for the unlawful arrest and detention of the plaintiff. The amounts awarded as damages in previous cases may well be a guide, but their value is no more than that. Each case must be decided on its own facts and merits. The amount of damages must be fair and just, taking into consideration all the relevant facts and factors that plays a role in the determination of the amount of damages to be awarded. The period of detention, although not the only most important and decisive factor to be considered, must be taken into account. As alluded to, the plaintiff was detained over – night for a period of approximately 22 hours, under circumstances that is less than favourable. No evidence whatsoever was presented for and on behalf of the defendant (State), to dispute this. The only evidence is the *viva voce* evidence of the plaintiff as well as the documentary evidence that was discovered.

[10] Sight should not be lost of the fact that the plaintiff was arrested in the presence of his friends and other people. This was a huge

embarrassment and he felt humiliated. He was detained in a cell under circumstances that was less than favourable over-night for 22 hours. This Court was referred in the heads of argument filed on behalf of the plaintiff, to a multiplicity of case law as examples of amounts of damages awarded in those case. The facts and circumstances differs. This case is distinguishable from those cases, and must be decided on its own facts and merits. In the recent case of **Motladile v Minister of Police** 2023 (2) SACR 274 (SCA) an amount of R 200 000.00 was awarded by the Supreme Court of Appeal (SCA), where the plaintiff was detained for four (4) days. In this case the plaintiff was detained for twenty-two (22) hours, less than one (1) full day. The amount claimed in the summons in this case is R150 000.00, being R50 000.00 for unlawful arrest and R100 000.00 for unlawful detention. In the heads of argument filed on behalf of the plaintiff an amount of R95 000.00 is prayed for, both for unlawful arrest and detention. This court carefully considered all the cases referred to by Adv. Gobetz in the comprehensive heads of argument filed. It will be fair and just that an amount of R60 000.00 be awarded to the plaintiff for the unlawful arrest and detention that he endured. It should however be emphasized that this Court is not applying a mechanical approach.

See: **Motladi vs Minister of Police**, *supra*, at paragraph [17].

[11] In as far as costs are concerned, it should follow the result and be awarded in favour of the plaintiff. The plaintiff prays for costs on the punitive scale of attorney-and-client. It was submitted that the

defendant defended this case by filing a notice of intention defend, but never filed a plea. The contention is and I quote “ *One stands to wonder whether there was any defence to put forward in the first place or was defence noted in order to delay the process.*” Furthermore, that the plaintiff cannot be expected to be out of pocket to protect his constitutional rights that have been infringed upon by the defendant. That the constitutional right to freedom and liberty had been infringed is a fact, as previous stated in this judgment. However, I am unconvinced that a punitive costs order on an attorney – and - client scale is justified.

[12] Although the amount that will be awarded falls within the civil jurisdiction of the District court, just as the amount stated in the summons too, Adv Gobetz submitted that the scale of the costs should be on the High Court scale, to be taxed. The Constitutional Court (CC) has not as yet delivered a judgment with regard to the civil jurisdiction of the different courts. That the plaintiff could approach the High Court and that this Court is duty bound to adjudicate this matter, is beyond question. However, I am unpersuaded that this matter is complex. That it involves the freedom of liberty of the plaintiff and the infringement of his constitutional rights is indeed correct. Furthermore, the conduct of the defendant with specific reference to the manner in which the litigation was conducted, leaves much to be desired. This is one of those cases where costs on the High Court scale is justified.

Order

[13] Resultantly, the following order is made:

- (i) That judgment is granted in favour of the plaintiff for unlawful arrest and detention.
- (ii) The defendant is ordered to pay an amount of R 60 000.00 for unlawful arrest and detention.
- (iii) The defendant is ordered to pay interest at the prescribed applicable rate from date of summons being 26 May 2023, until date of final payment.
- (iv) The defendant is ordered to pay the costs of suit on a party – and – party basis on the High Court Scale ‘B’, to be taxed.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG