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

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 3058/2019

In the matter between:

M[…] I[…] **Plaintiff**

and

MINISTER OF POLICE **Defendant**

DATE OF HEARING : 13 MAY 2024

DATE OF JUDGMENT : 21 JUNE 2024

FOR THE PLAINITFF : ADV. MAREE

FOR THE DEFENDANT : ADV. MAGONGWA

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 21 June 2024.

ORDER

Resultantly, the following order is made:

1. **The defendant is ordered to pay to the plaintiff an amount of R100 000.00 (one hundred thousand rands) for assault.**

2. **The defendant is ordered to pay to the plaintiff an amount of R60 000.00 (sixty thousand rands) for the unlawful arrest and detention of the plaintiff.**

3. **The defendant is ordered to pay interest at the prescribed rate *a tempore morae* from the date of summons, being 23 October 2019, until date of final payment.**

4. **The defendant is ordered to pay the costs of suit including the reserved costs on a party-and-party basis, on the High Court Scale B in terms of Rule 67 A of the Uniform Rules of Court, to be taxed.**

JUDGMENT

HENDRICKS JP

[1] This is an action for damages resulting from the assault, arrest and detention of the plaintiff, **Mr. M[…] I[…],** on 17 November 2018 at approximately 08H00, at Vryburg Police Station, in the North West Province, by members of the South African Police Services (SAPS) acting within the course and scope of their employment with the Minister of Police, the defendant. Summons was issued on 23 October 2019, and duly delivered. A notice of intention to defend dated 4 June 2020 was delivered with the Office of the Registrar, on 5 June 2020. A notice of intention to defend was delivered on 6 June 2020. No plea was delivered.

[2] A notice of bar was delivered on 9 July 2020. No application was made for the upliftment of the bar. On 20 July 2020 the defendant delivered a notice in terms of Rule 47 (1) of the Uniform Rules of Court, demanding that the plaintiff furnish security for costs in the amount of three hundred thousand rand (R300 000.00), as there is a likelihood that he will be unable to satisfy a potential costs order in the event that the defendant is successful, as the action instituted is not *bona fide* but vexatious, reckless and hopeless. The plaintiff is also a *peregrinus*.

[3] On 5 August 2022, the plaintiff's attorneys delivered a notice of an irregular step in terms of Rule 30 (2) (b) of the Uniform Rules of Court, stating that the Rule 47 (1) notice filed by the defendant was irregular, as the defendant was *ipso facto* under bar since 17 July 2020. The defendant was afforded

ten (10) days to remove the cause of complaint. On 4 February 2021, this Court granted an order in the following terms:

"It is ordered:

That : The Applicant/Plaintiff's non-compliance with the provisions of Rule 30 (2) (c) be and is hereby condoned;

That: The Respondent/Defendant's notice in terms of Rule 47 (1) dated the 15th day of July 2020 be and is hereby declared to be an irregular step and set aside;

That: The Respondent/Defendant pay the costs of this application."

[4] Pre-trials were held *inter alia* on 3 November 2020, 15 March 2021, and on 13 September 2021. On 13 September 2021, it was certified that the matter is trial ready and that the trial should proceed on both merits (liability) and *quantum* on 18 and 19 April 2022. A sequence of events than followed. Amongst others, the defendant intimated that an application in terms of Rule 27 of the Uniform Rules of Court for condonation for the late delivery of its plea and/or uplifting of the bar, as well as condonation for the late filing of the upliftment of the bar will be made.

[5] The matter was on the motion court roll of 19 April 2022, when Snyman J (as she then was – now Reid J) granted an order in the following terms:

"It is ordered:

1. That: The matter be and is hereby removed from the roll;

2: That: *Application to uplift the bar should be brought within (10) days (Court days) from today;*

3: That: *Defendant is ordered to pay the Plaintiff's costs occasion by the removal on a scale as between attorney and own client."*

Needless to say, there was no application made for the upliftment of the bar, even though it was contemplated by the defendant and the indulgence granted by the Court, as per the court order of 19 April 2022. On 25 August 2022 a notice of set down delivered, setting the matter down on the roll for 11 November 2022.

[6] On 11 November 2022, the application by the defendant for the upliftment of bar and condonation for the late filing of the plea was dismissed with costs by Mfenyana AJ (as she then was). It is definitely not that default judgment was granted against the defendant on the merits and an application for recission of the judgment was dismissed on 11 November 2022, as stated in the document entitled 'Re-Application For The Application of A Date-Quantum', filed and served on 23 March 2023. An application was made for a trial date. The date of 14 June 2023 was allocated. No notice of set down was delivered. Petersen J in an order stated: '*No appearance, no notice of set down*'. Another application for a trial date was delivered on 18 September 2023. The date of 23 April 2024 was allocated. The matter was properly set down, which notice of set down is dated 29 November 2023.

[7] On 23 April 2024 Mr. Maree appeared on behalf of the plaintiff and Ms. Magongwa appeared on behalf of the defendant. The fact that there is no plea filed by the defendant was emphasized by Mr. Maree. Attempts were made by Ms. Magongwa to present some argument even in the absence of a plea being filed. She argued that the plaintiff was illegal in the country and therefore cannot enjoy the protection of the law. Furthermore, that his temporary asylum permit had expired. This contention that because he is a foreigner, he cannot enjoy the protection of the law, does not hold any water.

[8] The plaintiff testified under oath with regard to both the merits (liability) and quantum, as no separation was ordered by this Court in terms of Rule 33 (4) of the Uniform Rules of Court. His evidence can be succinctly summarized as follows. He is thirty-four (34) years of age and is currently residing in Upington, in the Northern Cape. He was previously residing, and in particular on the date of the incident, in S[…] Street, Vryburg, in the North West Province. With regard to the incident, he testified that on Saturday, 17 November 2018, at approximately 08h00, he was about to take his girlfriend home, when he was confronted by a group of people, whom he identified as members belonging to the Zion Christian Church (ZCC). They asked him about a plasma television (TV) set.

[9] He denied any knowledge of the T.V, whereupon the police was summoned. Four (4) police officers arrived. One of the police officers, Seargent Ratsoma, handcuffed his hands behind his back. He then took

the plaintiff to his room. The plaintiff was assaulted, and strangled until he lost consciousness. He was thrown with water and he regained consciousness, but he was still lying down. The assaults continued despite the fact that he was crying. He was kicked and trampled upon. He testified that he was tortured to the extent that he fainted again. When he once again regain his consciousness, he was on the bed. At some stage his pants was even removed.

[10] The police officers searched his room but nothing was found. He was then loaded into a combi and transported to the police station at Vryburg. He was assaulted also inside the combi. He was instructed to alight whereupon he was taken to a car park. The interrogation about the plasma TV continued. Seargeant Ratsoma requested a plastic bag. Being afraid that the ill-treatment and assaults would continue, he ran around in the car park. He was instructed to stop or else he would be shot. He complied. The plastic bag was then placed over his head by the police officers, in order for him to suffocate. He managed to bite a hole in the plastic bag through which he could breathe. Another plastic bag was obtained and he was choked with it. He was once again thrown with water, this time not to regain his consciousness but to wash-off the blood.

[11] He was thereafter transported to Huhudi Police Station. A statement was written and he was instructed to sign it. He was placed in the cell at Huhudi Police Station. The cell has a toilet but there is no privacy when one uses it. He slept on the floor without a mattress or a blanket. He was in pain,

especially on his ribs. He received no medical attention. On Sunday, he was taken out of the cell by the investigating officer and charged. He was given a court date and he was released. He overnight in the cell. He was detained for twenty-eight (28) hours.

[12] This ordeal affected him emotionally. He doesn't feel safe. He was traumatized and terrified because of what he endured at the hands of the police. Whenever he sees a police officer or hear police motor vehicle sirens, he gets heart palpitations.

[13] A bundle of photo’s depicting the injuries sustained by the plaintiff, which was duly discovered in terms of Rule 36(10), was handed in as an exhibit. The photo’s were taken by himself. Ms. Magongwa objected to the handing in of the photographs. As alluded to earlier, these are photographs taken by the plaintiff himself, which was properly discovered and it served as corroboration for his evidence about the assaults perpetrated on him. The objection could not be sustained. Ms. Magongwa further contended that there was no medical records presented about the injuries sustained to serve as corroboration for the injuries depicted on the photographs. It may well have been ideal for medical records to be presented, but that is in no way a bar for having these photographs admitted as evidence. Especially, in view of the fact that no case is made out or pleaded by the defendant. Whilst Ms. Magongwa admitted that the defendant is in default for failing to file a plea and to proceed with the trial, she contended in her objection that the plaintiff ought to have applied for default judgment. This contention, so I

understand it, is that in failing to apply for default judgment, the plaintiff cannot proceed with the trial. I, with due respect, fail to understand this. After the testimony of the plaintiff, his case was closed. That was the only evidence presented which was uncontaverted and this Court must accept it.

[14] To reiterate, no plea was delivered for and on behalf of the defendant. The defendant was strictly speaking not before court, as no version of the defendant was placed before court. No version could therefore be put to the plaintiff during cross-examination. Ms. Magongwa even tried to take it further during an attempt to cross-examine. She said the plaintiff is illegally in this country, as his asylum permit has expired. As such, according to her as alluded to earlier, he is not entitled to the protection of the law.

[15] An arrest and consequent detention is *prima facie* wrongful and unlawful. It is an infringement of a person right to liberty, which is constitutionally entrenched, unless there is justification based on statutory authority. Once an arrest and subsequent detention is proven, the onus to prove the lawfulness thereof rest on the defendant. This is trite. In the absence of proof of the lawfulness of the arrest and subsequent detention, as in the case, the arrest and detention is unlawful.

See: **Minister of Law and Order v Hurley** 1986 (3) SA 568 A;

Zonela v Minister of Police (3306/2018) [2020] ZAECMHC 45 (17 September 2020).

[16] Similarly, an assault is an infringement upon and violation of the bodily integrity of a person. It is trite that an infringement of the bodily integrity of a person is *prima facie* unlawful, unless there are grounds of justification. The onus is on the infringer to prove such grounds of justification. In this case, the onus rest on the defendant. In the absence of any proof of justification like in this case, the assault is an unlawful and wrongful interference with the bodily integrity of the plaintiff.

See: **Mabaso v Felix** 1981 (3) SA 865 A;

Moghamat v Centre Guards CC [2004] 1 All SA 221 (C);

Taylor v Minister of Safety and Security (5356/10) [2016] ZAWCHC 37 (17 February 2016).

[17] Insofar as quantum is concerned, this Court has an unfettered discretion to award an amount as *solatium* that is just, fair and reasonable, having regard to all the relevant circumstances of this case. The aim is not to enrich the plaintiff but to compensate for the unlawful deprivation of his liberty, good name and reputation, as well as the violation of his bodily integrity. There is no exact mathematical formula that can be and should be applied by this Court. Previous cases in which certain amounts of compensation were awarded is but a guide and nothing more. This is a carefully balancing act to be exercised by this Court who, must on one hand compensate the plaintiff adequately for the damages suffered, whilst on the other hand not over-compensate him as though it appears that this Court would proverbially ‘pour from the horn of plenty!’ The slavish following and applying of awards awarded in other cases are fraught with

difficulty. Each case must be decided on its own facts and circumstances, which is trite, to determine an appropriate amount to be awarded as damages.

See: **Minister of Safety and Security v Tyulu** 2009 (5) SA 85 (SCA);
Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA);
Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP)

To borrow from the Seymore case, *supra*:

> *"[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no lighter value than that."*

[18] The particular facts and circumstances of this case is outlined earlier on in this judgment, in paragraphs [8] to [12]. Amongst the facts to be considered *inter alia* are: the plaintiff is 34 years old and unmarried. He has one child who resides with the mother. He was brutally assaulted until he passed out. This happened on two occasions. He was later placed in a cell. The cell was small. The cell had a toilet without a door. The plaintiff had to sleep on the floor without a blanket or mattress. The plaintiff could not sleep because he was in pain. He received no medication or any medical treatment. The next day, 18 November 2018, the plaintiff was taken to the Huhudi police station by the Investigating Officer, Mr Jacobs, where he was charged,

given a court date, and released at around 13h00. The conduct of the police, namely the unlawful arrest, detention and assault, negatively affected him. The plaintiff is scared of police and testified that when seeing police his heart rate increases. He has no trust in the police. He suffers from chest pains. Since this ordeal, he cannot "hold relationships". He was frightened, traumatized and "much scared". He still experiences this even upon only hearing police sirens.

[19] Counsel for the plaintiff Mr. Maree referred in his heads of argument for and on behalf of the plaintiff to different case law, in which different amounts were awarded for different time periods of detention under different circumstances and with different facts in each of the cases referred to. In the recent case of **Motladile v Minister of Police** 2023 (2) SACR 274 (SCA), an amount of R200 000.00 was awarded by the Supreme Court o Appeal (SCA) for unlawful arrest and detention for four (4) days. In this case the plaintiff was unlawfully arrested and detained for 28 hours, just more than one (1) day compared to the Motladile case. The contention is that if regard is had to the manner in which the plaintiff was beaten and tortured and the effect it had on him, an amount of R250 000.00 will be fair and reasonable. I do not agree. No evidence was presented about any psychological evaluation been conducted on the plaintiff, to determine whether the plaintiff will suffer any lasting psychological effects as a result of this incident. This Court however do not loose sight of the plaintiff’s testimony about how he feel. In my respectful view an amount of R100 000.00 will be a fair and just compensation for the assault.

[20] Insofar as the assault is concerned, it was severe. He had to endure pain over a considerable period of time. The pain was so unbearable that he fainted (passed-out) on two (2) occasions. The assault on the plaintiff and the excruciating pain he had to endure goes almost without saying. No evidence was led for loss of past or future medical expenses. No psychological evaluation was done to determine whether the plaintiff will suffer any lasting psychological effects of this ordeal in the future.

[21] Having considered all the facts and circumstances for the determining of a just, fair and equitable award, an amount of R60 000.00 for unlawful arrest and detention should be awarded. A multiplicity of caselaw was referred to by counsel. To reiterate, each case must be decided on its own merits and circumstances. Having considered all the facts and circumstances of this case, I am of the considered view that an amount justifying compensation for the brutal, inhumane and extreme violence perpetrated on the body of the plaintiff must be awarded. To reiterate, an amount of R100 000.00 will be an appropriate amount of *solatium* for the unlawful assault on the plaintiff.

[22] Insofar as costs are concerned, this Court is once again bound to follow the *ratio decidendi* based on the principle of *stare decisiis* in the Motladile matter, *supra,* and will award costs on the High Court scale as between party-and-party, as it concerns the unlawful deprivation of liberty. In terms of the amended Rule 67 A of the Uniform Rules of Court, various factors

need now to be taken into account in the awarding of an appropriate costs order, to wit, *inter alia*, the complexity of the case and the amount involved.

[23] Insofar as interest is concerned, the contention on behalf of the plaintiff is that he is entitled to an order in terms of which interest be granted in his favour, either from the date of demand or the date on which summons was issued. Section 2A(2)(a) of the Prescribed Rate of Interest Act, 55 of 1975, states that:

> *"2A. Interest on unliquidated debts (1)....(2)(a)Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier."*

In the Motladile matter, the Supreme Court of Appeal (SCA) awarded the plaintiff interest from the date of summons. Having regard to the defendant's conduct as set out in the procedural history herein above, it was submitted that it will be fair in the circumstances, if the plaintiff is awarded interest from the date of summons. Concerning the scale on which costs in matters such as this should be given, the SCA in the Motladile matter stated that *"although the total quantum award...is far below the jurisdiction of the high court, the appellant was justified in approaching the high court because the matter concerned the unlawful deprivation of his liberty... ".*

[24] Likewise, this matter also concerns the unlawful arrest and detention of the plaintiff and as such the deprivation of his liberty. Needless to say, this matter also concerns the infringement of the plaintiffs' constitutional rights. Because of this, the plaintiff seeks an order that the defendant pays the costs of the action including the costs of counsel, on Scale B in terms of Rule 67 A of the Uniform Rules of Court. In my view, this is justified.

[25] In conclusion, something needs to be said about the failure on the part of the State Attorney, Mmabatho to diligently represent its client, the Minister of Police and his department. The chronological sequence as to how the trial preparation was conducted is telling. It goes without saying that a legal practitioner (advocate or attorney) must represent his client (or client department in this case, the State Attorney) professionally, and with due diligence. This is trite. However, it is lacking, to say the least, in this case. Needless to say, this comes at a huge expense to the public purse (Treasury) and it is a waste of taxpayers' money. Something, that can be ill-afford in the tough economic climate currently experienced in this country.

Order

[26] **Resultantly, the following order is made:**

1. **The defendant is ordered to pay to the plaintiff an amount of R100 000.00 (one hundred thousand rands) for assault.**

2. **The defendant is ordered to pay to the plaintiff an amount of R60 000.00 (sixty thousand rands) for the unlawful arrest and detention of the plaintiff.**

3. **The defendant is ordered to pay interest at the prescribed rate *a tempore morae* from the date of summons, being 23 October 2019, until date of final payment.**

4. **The defendant is ordered to pay the costs of suit including the reserved costs on a party-and-party basis, on the High Court Scale B in terms of Rule 67 A of the Uniform Rules of Court, to be taxed.**

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