



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: 2115/2022

In the matter between:

COLLET SIMON MHANGA

PLAINTIFF

AND

MINISTER OF POLICE

1st RESPONDENT

PROVINCIAL COMMISSIONER SAPS, NW

2nd RESPONDENT

Heard: 15 MAY 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **06 JUNE 2024**

ORDER

I make the following order:

1. The defendants are held 100% liable for the proven damages suffered by the plaintiff for the unlawful arrest and detention,

2. The defendants are ordered to pay an amount of R545 000.00 for the unlawful arrest and detention of the plaintiff jointly and severally the one paying the other to be absolved,
3. The defendants are ordered to pay interest on the amount of R545 000.00 at the prescribed rate of 7,5% per annum from the date of judgement to date of final payment;
4. The defendants are ordered to pay costs jointly and severally the one paying the other to be absolved on scale B.

JUDGMENT

DJAJE DJP

- [1] This is an action for damages against the defendants for unlawful arrest and detention of the plaintiff. An appearance to defend was entered on behalf of the defendants by the office of the State Attorney however due to failure to file discovery, the defendants' defence was struck out. The matter proceeded undefended with only the plaintiff testifying on merits and quantum.
- [2] The plaintiff was arrested by members of the South African Police Service on **30 September 2021** at Ottoshoop near Mahikeng in the North West Province. He was arrested without a warrant of arrest. On arrest he was informed that he transported illegal immigrants from Zimbabwe in a vehicle. At that time the plaintiff was hitch hiking and not driving any vehicle. After arrest he was detained at Ottoshoop police station and was released on **19**

October 2021 having paid bail in the amount of five hundred rand (R500.00). The charges against him appear on the charge sheet as:

“That the accused is guilty of the crime of contravening the provisions of section 42(10(a) of Immigration Act 13 of 2002. In that upon or about the 30th of September 2021 and at or near Ottoshoop in the District / regional Division of Mahikeng, the accused did unlawfully and intentionally aiding”.

On **17 May 2022** the charges against the plaintiff were withdrawn.

[3] Plaintiff testified that the conditions of his detention at Ottoshoop police station were unpleasant. He was detained in a cell with dirty blankets and water was leaking inside the cell. There was a terrible smell from the toilet, and he could not eat. As a result of his arrest, he lost his employment as a painter, and he is no longer respected in his community.

[4] Section 40 (1) provides that:

“40 Arrest by peace officer without warrant

(1) *A peace officer may without warrant arrest any person-*

- (a) *who commits or attempts to commit any offence in his presence;*
- (b) *whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;*
- (c) *who has escaped or who attempts to escape from lawful custody;*
- (d) *who has in his possession any implement of housebreaking or car breaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for*

such possession to the satisfaction of the peace officer; [Para. (d) substituted by s. 41 of Act 129 of 1993.]

- (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;*
- (f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;*
- (g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;*
- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;*
- (i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;*
- (j) who wilfully obstructs him in the execution of his duty;*
- (k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;*
- (l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;*

- (m) *who is reasonably suspected of being a deserter from the South African National Defence Force;*
- (n) *who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;*
- (o) *who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;*
- (p) *who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;*
- (q) *who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.”*

[5] It is trite that the onus rests on a defendant to justify an arrest. In **Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)** Rabie AJ explained:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

[6] In **Zealand v Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (CC)** par 24, the court stated that:

“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. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained.

This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

- [7] In this matter it is not before court why the plaintiff was arrested and whether such an arrest was in terms of section 40(1) of the Criminal Procedure Act or not. When the plaintiff appeared in court the charge, he was facing was vague and not clear what it referred to. It requires no argument that the arresting officers in arresting the plaintiff acted unreasonably and hence the charges could not be formulated for the plaintiff to understand why he was arrested. In assessing the plaintiff's evidence, the arresting officers acted unreasonably, and the arrest and detention of the Plaintiff was unlawful. Therefore, the defendants are found to be liable for 100% of the plaintiffs proven damages resulting from his arrest and detention.

Quantum

- [8] The submissions on behalf of the plaintiff are that at the time of arrest he was fifty-one (51) years old, married with children. He was detained for nineteen (19) days under unpleasant conditions in the police cells. The charge against him was not clear and hence he was not prosecuted. As a result of his arrest and detention he lost his employment. He suffered emotionally and financially because of the unlawful arrest and detention. It was submitted that looking at the circumstances of the plaintiff and the arrest, the appropriate amount to be awarded for damages is five hundred and forty-five thousand rand (R545 000.00) instead of the

eight hundred and eighty thousand rand (R880 000.00) claimed in the particulars of claim.

- [9] In support of its submissions, counsel for the plaintiff referred to case law dealing with the different awards in unlawful arrest and detention cases. The Supreme Court of Appeal in **Motladile v Minister of Police 2023 (2) SACR 274 (SCA)** awarded an amount of two hundred thousand rand (R200 000.00) for four days of detention. The other case referred to were as follows:

“16. It is apposite to refer to cases herein stated:

*16.1 In the matter of Richard Moses v Minister of Safety and Security (unreported decision of the Gauteng local division under Case no 698/13, decided on **20 February 2015**). The court awarded amount of **R100 000.00** for unlawful detention which lasted for two **(2)** days.*

*16.2 In Modisaotsile Alfred Ntwagae and another v Minister of Safety and Security 201 Zanche 7 (**27 March 2013**) the court awarded amount of **R170 000.00**, to each of elderly Plaintiff's who had been unlawfully arrested and detained for a period of approximately two and a half days.*

*16.3 In Nado Matsietsa v Minister of Police (A 3103/2015) (2017) ZAGPJHC 29 (**20 February 2017**), the learned Judge Legodi, awarded the Plaintiff **R100 000.00**, for each day of incarceration consequently the sum of **R200 000.00** was awarded for Two **(2)** days spent in detention.*

*16.4 In Van Rensburg v City of Johannesburg the Plaintiff was a 74 year old man retiree. The Plaintiff was detained in a holding cell at Johannesburg Central Prison. The Plaintiff spent about **6** hours in custody. The damages of **R75 000.00** was awarded,*

*which if adjusted by inflation, this is approximately **R120 000.00** in today's money.*

16.5 *In Pasha v Minister of Police (South Gauteng High Court case number 25524) Epstein AJ awarded general damages of **R80 000.00**, (in today's money **R120 000.00**) to the plaintiff who spent about 9 hours in custody. He was 40 years at the time of the arrest.*

16.6 *In Mothoa v Minister of Police an unreported judgement by Hutton AJ, dated **8 March 2013**. The plaintiff was forced to endure a detention lasting twenty two (22) hours in the holding cells of Johannesburg prison. The plaintiff was awarded **R150 000.00** approximately **R190 000.00** today.”*

[10] In dealing with the purpose of the award for damages the court in the matter of **Strydom v Minister of Safety and Security and Another (31353/2007) [2014] ZAFSHC 73 (28 May 2014)** stated as follows:

“[12] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to 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 make 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. 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 the facts of the particular case and to determine quantum of damages on such facts.”

- [11] On the issue of mechanical precision and guidance by previous cases it is important to emphasise what was stated in the matter of **Spannenberg and Another v Minister of Police (2993/2019) [2022] ZANWHC 4 (24 February 2022)** at par[20] where the following was said:

*“[20] There is a misnomer that the High Court in the **Ngwenya** judgment set as a benchmark an amount of R15 000.00 per day as the norm for unlawful arrest and detention. This is incorrect and misplaced. Each case must be decided in its own peculiar facts and circumstances (merits). This cannot be emphasized enough. There is no benchmarking nor is there a one size (or amount) fits all practice that must be followed. This will most definitely erode the judicial discretion of presiding officers. However, there must be a balance of all the competing interests and it can never be that there be poured from the proverbial ‘horn of plenty’. A claim for damages is not a get rich quick opportunity but a **solatium** as compensation for the damages suffered.”*

- [12] In **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)** at paragraph [20] it was stated that:

“[20] Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate

calls upon the public purse to ensure that other rights that are no less important also receive protection.”

[13] The plaintiff herein was arrested whilst hitchhiking but was accused of transporting illegal immigrants. At the time of arrest, he was not driving any motor vehicle. The charge formulated against him is not clear and does not make any sense. It was for that reason that it was withdrawn. The matter was undefended and there is no version from the defendant. He was detained in unpleasant conditions and lost his employment because of the nineteen days detention. It is important to note that an award for damages must be commensurate with the injury suffered. The plaintiff was denied his freedom unnecessarily for a period of nineteen (19) days. As a result of this ordeal, he suffered emotional trauma and should be awarded damages for that.

[14] It is trite that there is no mechanical precision of calculating award for damages in these cases of unlawful arrest. Previous awards can serve as guidance in determining an appropriate award for damages. In **Diljan v Minister of Police (Case No. 764/2021) [2022] ZASCA 103** (24 June 2022) The court held that:

“[17] Thus a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required solatium, the defendant (the Minister in this instance) should not be treated as a ‘cash-cow’ with infinite resources. The compensation must be fair to both parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.”

[15] The court in **Diljan** awarded an amount of R120 000.00 for three days detention. In **Motladile v Minister of Police (414/2022) [2023] ZASCA 94; 2023(2) SACR274(SCA)** (12 June 2023) the Supreme Court of Appeal awarded R200 000.00 for unlawful arrest and detention of four nights. As stated above these cases and awards only serve as a guide but ultimately a balance must be struck between the award and the injury inflicted. Each case should be decided on its own circumstances.

[16] Having considered the circumstances of plaintiff's arrest and detention, I am of the view that the award of five hundred- and forty-five-thousand-rand (R545 000-00) as submitted on behalf of the plaintiff is appropriate for the damages suffered by the appellant for the arrest and detention of nineteen (19) days including the amount in respect of *contumelia*.

Order:

[17] Consequently, the following order is made:

1. The defendants are held 100% liable for the proven damages suffered by the plaintiff for the unlawful arrest and detention,
2. The defendants are ordered to pay an amount of R545 000.00 for the unlawful arrest and detention of the plaintiff jointly and severally the one paying the other to be absolved,

3. The defendants are ordered to pay interest on the amount of R545 000.00 at the prescribed rate of 7,5% per annum from the date of judgement to date of final payment;
4. The defendants are ordered to pay costs jointly and severally the one paying the other to be absolved on scale B.

J T DJAJE
DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT, MAHIKENG

APPEARANCES

DATE OF HEARING	: 15 MAY 2024
JUDGMENT RESERVED	: 15 MAY 2024
DATE OF JUDGMENT	: 06 JUNE 2024
COUNSEL FOR THE PLAINTIFF	: MR MORWENG
COUNSEL FOR THE DEFENDANT	: NO APPEARANCE