IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION- MTHATHA

CASE NO. : 5640/2014

In the matter between

KHAYALETHU MENE **Plaintiff**

and

MINISTER OF POLICE **Defendant**

JUDGMENT

SAMBUDLA, A.J:

Introduction

[1] Plaintiff has fashioned his cause of action on the *actio injuriarum*, to vindicate his rights to bodily integrity and liberty, following an alleged unlawful

infringement by the members of the South African Police Service (SAPS) acting within the course and scope of their employment with the Minister of Police (defendant).

[2] The defendant's initial defence as pleaded in his plea dated the 05 November 2018, alleged a justification of the arrest and subsequent detention.

[3] During the exchange of pleadings and discovery notices, the defendant was invited to discover the contents of the police docket. This was to enable the plaintiff to prepare for trial.

[4] The defendant's failure to make available the required police docket, prompted various applications, which then culminated in an application by the plaintiff, wherein an order, striking[1] out the defendant's defence in the main, was sought and granted.

[5] Thereafter, the defendant failed to afford itself the opportunity to purge its non-compliance, which if it was so minded, it could effectively do at the pain of a comprehensive and substantive application for rescission.

[6] Apart from failing to purge such non-compliance, the defendant further failed to appear in court, at the very least, to test the plaintiff's case without advancing any defence.

[7] Regardless of the defendant's defence being struck-out, and the latter being served with a notice of set-down on the 10 February 2023, there was no appearance on behalf of the defendant and the trial proceeded on such basis.

[1] An order striking out the defendants' defence was issued by the court on the 16 March 2021, by Mbenenge JP. See also page 6 and 7 of the index to court orders.

Evidence.

[8] The plaintiff, as the sole witness who testified at trial, led evidence, which was neither challenged nor gainsaid and narrated accordingly as adumbrated herein-under.

[9] On the 01 December 2019, the plaintiff whilst in the company of Maphelo Matiwane (Matiwane), who was driving and the plaintiff was a conductor (driver-assistant), they picked up two hitch-hikers on the gravel road at Mahoyana Locality, Tsolo.

9.1 The plaintiff was sitting at the front of the van and the two man, to whom they had given a lift, sat at the back of a single cab Nissan light delivery vehicle (van);

9.2 All the occupants in the white Nissan (van) were en-route to Tsolo town;

9.3 At Tsolo, next to the Municipality building, the two passengers signaled their intention to highlight from the van and it was at that stage the plaintiff noticed heavily armed SAPS members and who were pointing firearms at all the occupants of car;

9.4 About eight SAPS members, dressed in police uniform, in three marked police vehicles surrounded the van;

9.5 All the occupants in the van were at gun point instructed to highlight from the vehicle and lie on the ground;

9.6 Without any explanation/s and/or interview/s being given or held, the SAPS members effected an arrest on all the occupants of the van, which included the plaintiff;

9.7 No reason/s were proffered for the arrest and neither was a warrant of arrest produced by the SAPS members;

9.8 The plaintiff and Matiwane were severely assaulted by the SAPS members with booted feet, fists and fire-arm handles;

9.9 The assault meted to plaintiff and Matiwane was severe and sustained and curiously no such assault was extended to the other two passengers;

9.10 The SAPS members recovered a fire-arm and cash from the two males, who had been afforded a lift by Matiwane and plaintiff;

9.11 Without being prompted, the two males provided exculpatory facts to the SAPS members, in that, they must release the plaintiff and Matiwane as they were not involved in the commission of an offence;

9.12 The plaintiff and Matiwane merely provided as lift for reward to the two males;

9.13 Even though the SAPS members were so advised by the two males, this information was ignored and/or not investigated by the members;

9.14 After the arrest, which the plaintiff alleges to be unlawful and without any justification, all the occupants of the van were loaded

into SAPS marked vehicles and thereafter detained at the Tsolo Police Station at the instance of these members; and

9.15 Through this ordeal, the plaintiff managed to identify one Mbasa, who is a member of the SAPS.

[10] At Tsolo Police Station, the plaintiff and Matiwane were detained behind the counter with the other two unknown males.

[11] A while later, an unknown woman and in the company of an unknown male companion, who were travelling in a truck, arrived at the police station where the plaintiff, Matiwane and the other two unknown males had been detained.

[12] The unknown woman identified the two males in the presence of SAPS members, as the people who had committed a robbery and theft of her goods. She identified the two as suspects and made no such identification regarding plaintiff nor Matiwane.

[13] Even though the two males, now suspects, had been identified by this unknown woman, the plaintiff remained unaware about the reasons for his arrest, subsequent detention and neither was plaintiff informed by the SAPS members of the reasons thereof.

[14] Between 17H00 and 18H00, SAPS members from Qumbu arrived at the Tsolo Police Station. Firstly, they took the plaintiff and Matiwane to Dr. Malizo Mpehle Hospital for medical attention and treatment.

[15] After a brief detention for medical treatment and intervention at hospital, plaintiff and Matiwane, were transported to Qumbu Police Station and detained at the police cells.

[16] Prior to being charged, the plaintiff was interviewed by Ngcizela a member of the SAPS stationed at the Qumbu Police Station. Apart from inviting the plaintiff to inform him about what he knew, the latter Ngcizela never advised the plaintiff of the reasons and the purpose for the arrest and detention.

[17] What caught the plaintiff's attention though, was an unsolicited remark by Ngcizela to the effect that, if he was the arresting officer, he would have released the plaintiff and Matiwane without detention. The sentiments expressed by Ngcizela came to naught, as the plaintiff and Matiwane were following the interviews by Ngcizela further detained.

[18] On the 03 December 2015, at about 12H00, Ngcizela then caused the plaintiff and Matiwane to appear before the lower court.

[19] During their first appearance, the plaintiff was advised about his rights to legal representation and bail. The plaintiff elected to be legally represented at the states expense and further sought to be released on bail.

[20] A Legal Aid attorney who was present in court, promptly confirmed his intention to represent the plaintiff. When the plaintiff's attorney applied for the determination of bail, the prosecutor advised the court not to afford plaintiff bail, as the latter was facing serious charges.

[21] Acting on the information or lack thereof, received from both the public prosecutor and the SAPS members, the court refused to remit the plaintiff on bail and such refusal further necessitated a postponement of the matter to the 19 January 2016, for the determination of bail and/or bail application.

[22] Following an order issued by the court, the case was postponed to the 19 January 2016 and the plaintiff remanded in custody to be detained at the Wellington Prison.

[23] On the 19 January 2015 and without a formal bail application, the plaintiff was granted bail and was released on the 20 January 2016, after he had managed to pay a sum of R1500-00 for the fixed bail amount.

Liability.

[24] It is settled law that, an arrest and detention is *prima facie* wrongful and the defendant is saddled with the *onus* to prove the lawfulness of the arrest and the subsequent detention. See *Minister of Law and Order and Others v Hurley* 1986 (3) SA 568 (A) at 587- 589. Rabie CJ at 589, further had this to say—

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

[25] When the defendant admitted arrest and detention, as was initially pleaded[2], the defendant assumed the *onus* of justifying the lawfulness of the arrest. See *Mabaso v Felix* 1981(3) SA 865 (A) at 872H, where it was held that, the considerations of policy, practice and fairness *inter partes* may

[2] Defendant' Plea dated the 05 November 2018, at paragraphs 4.1.

require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his wrongful conduct.[3]

[26] When the matter was heard, the defendant's defence had been struck-out and the latter thus prevented[4] from advancing any form of justification for the arrest and detention. See *Leggatt and Others v Forrester* 1925 WLD 36; *Langley v Williams* 1907 TH 197.

[27] It suffices to say that, the defendant not only failed to afford itself the opportunity to purge its default, the defendant failed to appear in court during hearing. See *MEC for the Department of Public Works and Another v Ikamva Architects CC*.[5]

[28] Plaintiff not wanting to leave anything to chance, led evidence and upshot of which was not contested nor tested. For all intents and purposes, the matter was an undefended action and the allegations made in the plaintiff's particulars of claim and coupled with his evidence, were not gainsaid.

[29] In *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1(CC) at pg 43, it was held that, because an arrest and detention encroaches ones right to freedom, section 12(1)(*a*) of the Constitution does not only require the procedure to be fair, but it must be substantively fair on just cause with acceptable reasons. If the detention does

[3] See also, *Mhaga v Minister of Security and Security* [2001] 2 All SA 534 (TK).

[4] See also Herbstein & Van Winsen: The Civil Practice of Superior Courts in South Africa, 5th ed at page 824.

[5] Unreported judgment by Justice Hartle J, under Case Number: 596/2008 at page 4 paragraphs 11-12 and 28.

not meet these requirements, it becomes unlawful. This scenario, therefore, attracts liability on the defendant under the common law principle of causation on the premise that the breach of that constitutional right to freedom was predicated by the unlawful arrest.

[30] I am mindful that the defendant failed to gainsay the plaintiff's allegations in his particulars of claim and neither was plaintiff's evidence gainsaid at trial, due to the fact that, defendant's defence being struck out. The defendant's case was further not assisted by the unexplained non-appearance and on behalf of the defendant.

[31] In his evidence though, the plaintiff testified that, he was caused to appear before a magistrate within the prescribed 48 hours following his arrest and detention.

[32] Thus, I find that the principles enunciated in *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A) at 321I-322C, that the unlawfulness of the of the plaintiff's detention ceased when he first appeared for the first time in court and the magistrate issued an order for his continued detention, are distinguishable and thus find no application in *hoc casu*.

[33] In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA), it was held that, what was decided in *Isaacs* is that, the prior arrest of a person is not the prerequisite to the provision of section 50(1) of the Criminal Procedure Act coming into effect. Put differently, it was held that the fact, that the person may have been arrested unlawfully does not

preclude him or her from being remanded lawfully in terms of section 50(1) of the Criminal Procedure Act. However, what was not held in *Isaacs* is that an arrested persons' continued detention, by an order of court remanding him or her in custody in terms of section 50(1) of the Criminal Procedure Act, will automatically render such continued detention unlawful.

[34] But the facts of this case are different from *Isaacs* and *Tyokwana*, in that, the plaintiff case has not been gainsaid and in event, with the view I hold herein, I would have been inclined to follow the authority in *Tyokwana*.

[35] In the result, I find the plaintiff's arrest and subsequent detention was unlawful and without any justification and I further hold the defendant liable for the plaintiff's proven damages as result of the latter's unlawful arrest and detention as from the 02 December 2015 until the 19 January 2016. It further brooks no argument that the SAPS members involved in the arrest and detention of the plaintiff failed to investigate exculpatory evidence which was tendered by the two suspects and the unknown lady at the Tsolo Police station[6].

Damages

[36] By their very nature, general damages are not capable of being accurately measured in monetary terms, but a court has a very wide discretion to make an award in respect of non-patrimonial damage.

[37] In the exercise of such discretion, the court must determine a compensation which is fair and just in the circumstances of the case. See in this regard; *Sandler v Wholesale Coal Suppliers Ltd 1*941 AD 194 at 199.

[6] See footnote 7 below.

[38] I have had the opportunity to parley with Mr. Ntikinca who appeared for the plaintiff regarding the correctness of the mathematical approach in awarding damages for arrest and detention. The mathematical approach referred to above, would simply add the number of days for the detention and thereafter multiply with an amount/or figure keeping in line with previous awards. This approach, is in my view not keeping with the exercise of judicial discretion espoused in Sandler's above.

[39] The plaintiff's personal circumstances which he testified about during his evidence have granted the court an opportunity to asses and attempt to arrive at what I consider to be fair and reasonable. It matters not that I found the plaintiff pleasantly polite and frank when he was testifying.

[40] At the time of his arrest and detention, the plaintiff was 35 years old and a father of six children. The plaintiff was employed as conductor of a taxi and is currently unemployed. The plaintiff testified that he was a church steward and congregant.

[41] The plaintiff described the conditions in the holding cells where he was detained for a period 02 December 2015 to 19 January 2016, an effective 47 days, simply put, abhorring, in-humane and filthy. The description and conditions of the holding cells has been a subject of many previously decided and related cases and makes it somewhat common cause how unkempt, over-crowded the cells are and I need not repeat it herein[7].

[7] Nel v Minister of Police (CA 62/2017)[2018] ZAECGHC 1 (23/01/2018) at para-43.

[42] Apart from the conditions described above, I am mindful of the unprovoked and unjustified infliction of grievous bodily harm and injuries on the plaintiff.[8] The injuries inflicted on the plaintiff necessitated that, plaintiff be admitted at Malizo Mpehle Hospital for suturing of the wounds he had sustained. This evidence has not been gainsaid and neither was plaintiff's case founded on assault as stated above elsewhere in this judgment.

[43] It is further concerning how the SAPS members on more than two instances, wherein exculpatory facts were furnished unsolicited, chose not to investigate such facts and simply ignored them to the detriment of the plaintiff. The defendant's defence having been struck due to the latter's failure to discover, it remains trite that, a police officer who purports to act in terms of section 40(1)(b) of the CPA, should investigate exculpatory explanation offered by the suspect before they can form a reasonable suspicion for the purposes of a lawful arrest[9].

[44] The two suspects exonerated the plaintiff as early as the first encounter with the SAPS members near the Tsolo Municipality. And yet again, when the victim of the alleged offence/s attended the Tsolo Police Station, she never identified the plaintiff. Again, this was another opportunity which went begging to have the plaintiff released from what I have found to be an unlawful and unjustified arrest.

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[8] The plaintiff has not fashioned a cause of action on this head of damages and I thus make no finding in this regard.

[9] Louw and Another v Minister of Safety and Security and Others 2006(2) SACR 178(T), Liebenberg v Minister of Safety and Security [2009] ZAGPPHC 88(18 June 2009); Sibuqashe v Minister of Police and Another 527/11[2015]ZAECBHC 32, at par 57.

[45] What is further concerning is the clandestine approach adopted by the Ngcizela prior to detaining the plaintiff. To my mind, Ngcizela simple did not appreciate the fact that, he could still at that stage exercise his discretion and not detain the plaintiff.

[46] Ngcizela was certainly mindful of the presenting facts and hence he made utterances to the effect that, "if he was arresting officer, he would not have arrested the plaintiff" and yet found apropos to detain plaintiff.

[47] It bears mentioning that the plaintiff was exonerated twice and yet the SAPS members continued with an unlawful arrest at Tsolo.

[48] Not only was the arrest unjustified, a further infringement was effected on the plaintiff by SAPS members in form of detention firstly at Tsolo Police Station, secondly by Ngcizela at Qumbu Police Station and finally at Wellington Prison, all this having been done after the plaintiff was exonerated.

[49] It suffices to reiterate the decision of the Supreme Court of Appeal in the matter of *Minister of Police and Another v Erasmus* **(**SCA**)** unreported case no 366/2021 of 22 April 2022 at para 12, where it was held that—

> "When the police wrongfully detain a person, they may also be liable for the post-hearing detention of that person. The cases show that such liability will lie where there is proof on a balance of probability that, (a) the culpable and unlawful conduct of the police, (b) was the factual and legal cause of the post hearing detention".

[50] In *Mvu v Minister of Safety and Security and Another* 2009(6) SA 82(GSJ) Willis J held at para 10 that—

> "It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all".

[51] In *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C), King J held that, even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relation thereto and the failure by a police officer properly to do so, is unlawful

[52] The failure/s to investigate the matter prior to effecting an arrest by SAPS members, also rendered the subsequent detention/s equally unlawful as I have found above, see *Zealand and Tyokwana*, above.

[53] Certainly, the foregoing facts point indubitably to the aggravating facts and circumstances in this case, where people who were saddled with the responsibility of acting reasonable and protecting the plaintiff's rights, chose to remain supine, in instances wherein decisive action was required and warranted.

[54] The plaintiff should not have been arrested and let alone to spend a single day in detention and yet, the SAPS members were derelict and for 47 days allowed an infringement of the plaintiff's right to liberty and freedom to go unabated.

[55] I have been invited by Mr. Ntickinca, correctly, to award damages commensurate with the harm imposed and suffered by the plaintiff.

[56] On the same breath, I am disinclined to follow the mathematical approach mentioned above in the determination of what constitutes reasonable damages. Further, I was able assisted by the comprehensive heads of argument prepared by Mr. Ntikinca in this regard.

[57] In *Seria vs Minister of Safety and Security and Others* 2005 (5) SA 130 (C) at 148I-J, it was held that—

> "There is no fixed formula for the assessment of damages for non-patrimonial loss. It is recognized that a court has the power to estimate an amount *ex aequo et bono* and consequently enjoys a wide discretion, with fairness as the dominant norm.[10]

[58] In *Pitt v Economic Insurance Co Ltd* 1957(3) SA 284 (N) at 287E-F, Holmes J, stated that—

> "I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour our largesse from the horn of plenty at the defendant's expense".

[59] In *Hulley v Cox* 1923 AD 234 at 246 Innes CJ stated that, "…a comparison with other cases can never be decisive; but it is instructive."

[60] I have been referred to previously decided cases and awards issued by the various courts in past and for the purposes hereof, I have considered them. In **Nel**, *supra*, the full court, in the exercise of its discretion awarded the plaintiff an amount **R 35 000-00** for damages arising out of an arrest and subsequent detention, which lasted a day. As alluded above, I am not inclined to follow such a mathematical approach in deciding what is a reasonable and fair amount of damages to be awarded to the plaintiff in *hoc*

[10] Visser and Potgieter *Law of Damages* 2nd ed (2003) at 438, para 15.2.24 and at 448-9 para, 15.3.1

casu. As alluded above, such cases are instructive and my discretion regarding the final determination in *hoc casu,* still takes precedence.

[61] **In the result, the following order shall issue**:

a) The defendant is held liable for both the plaintiffs' unlawful arrest and subsequent detention from the 01 December 2015 until the 19 January 2016;

b) The defendant shall pay to the plaintiff a sum of **R650,000-00 (Six Hundred and Fifty Thousand Rand)** in respect of plaintiff as for damages;

c) The defendant shall pay interest on the sum of **R650,000-00 (Six Hundred and Fifty Thousand Rand)** at the prescribed rate of interest from date of judgment to date of final payment;

d) The defendant shall pay costs of suit on a High Court Scale and such costs to include:

(i) The costs consequent upon the employment of counsel;

(ii) The costs for the preparation and drawing of heads of argument;

[iii] The plaintiff's subsistence and travelling costs for purposes of trial and consultation with legal representatives; and

(iv) All the reserved costs. If any.

e) The defendant shall pay interest on such costs fourteen (14) days after the *allocator*, to date of final payment.

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L L SAMBUDLA

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF	**:**	**Mr Ntikinca**
INSTRUCTED BY	**:**	**Z. Mfiki Inc**
COUNSEL FOR THE DEFENDANT	**:**	**NO APPEARANCE**
HEARD ON	**:**	**26 APRIL 2023**
DELIVERED ON	**:**	**05 SPTEMBER 2023**