

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCAA01/2022

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO THE JUDGES: YES/NO
- (3) REVISED.

Signature

Date.....

In the matter between:

JOHANNES CLAASSENS
(ID NO:)

APPELLANT

and

MAROPENE FRANS NAKANA

FIRST RESPONDENT

MINISTER OF POLICE

SECOND RESPONDENT

**WARRANT OFFICER WILLIAMS –
STATIONED AT THE SOUTH AFRICAN
POLICE OFFICES, WESTERNBURG,
POLOKWANE, LIMPOPO**

THIRD RESPONDENT

JUDGMENT

MAKGOBA JP

[1] This is an appeal against the judgment and order of a single Judge of this Division (Mdhuli AJ).

Leave to appeal was granted by the Court *a quo* as regards to paragraph 6 of her order and leave to appeal was granted by the Supreme Court of Appeal as regards to paragraph 2 of the order of the Court *a quo*.

[2] The present appeal is specifically in respect of:

2.1. Paragraph 2 of the order of the Court *a quo* insofar as it relates to the amount representing general damages awarded to the Appellant for his claim of unlawful arrest and detention.

2.2. Paragraph 6 of the order of the Court *a quo* in its entirety. The Court *a quo* had dismissed the Appellant's claim 2 of malicious prosecution irrespective of the fact that the First Respondent had conceded and admitted liability at the trial.

[3] At the inception of the trial the First to Third Respondents conceded to the merits 100% in favour of the Appellant in respect of claim 1 of Unlawful Arrest and Detention. The First Respondent conceded to the merits 100% in favour of the Appellant in respect of claim 2 of Malicious Prosecution.

[4] It is clear from the above that the trial was to be proceeded with only in respect of determination of the quantum of damages for both claims 1 and 2. The Court *a quo* awarded an amount of R 40 000.00 for claim 1 (unlawful arrest and detention) and dismissed claim 2 (malicious prosecution). The claim for malicious prosecution was against the First Respondent only.

[5] The main issues on appeal are the following:

5.1. Whether or not the Court *a quo* erred in awarding the Appellant an amount of R 40 000.00 for general damages for his claim for unlawful arrest and detention.

5.2. Whether or not the Court *a quo* erred in dismissing the Appellant's claim for malicious prosecution against the First Respondent despite the fact that the First Respondent conceded to the merits 100% in favour of the Appellant.

Appellant's personal circumstances and circumstances relating to the Arrest and Detention

[6] The Appellant is a registered and professional conservationist with business address situated at Farm Wildebeesfontein, Polokwane.

He has been practicing and doing business as a professional conservationist for 45 years. At the time of the arrest he was 60 years old and he is currently 67 years old.

- [7] The Appellant was unlawfully arrested on the 1st of July 2015 at approximately 14:30pm and detained until 09:30am on the 3rd of July 2015 when he was released on bail.

On the date of his arrest, 16 Police Officers in three motor vehicles came to arrest the Appellant at his farm. The First Respondent, an ex-police officer was also present. In fact, the First Respondent is the one who laid a complaint to the Police and caused the Appellant to be arrested.

The Police were aggressive towards the Appellant and his son. His rights were never read to him when he was arrested and the police refused to listen to him. The arrest was made in the presence of the Appellant's wife, son, employees and bystanders.

- [8] The Appellant was physically dragged out of his property and shoved into the police van when he struggled to get into the van as his hands were handcuffed behind his back. During his arrest he suffered an injury to his elbow which caused tremendous pain and suffering.

On the way to the police station the police drove the police van in a reckless manner which caused the Appellant to fall from the benches inside the police van as he could not hold on.

[9] Upon arrival at the police station he was instructed to alight from the vehicle. He struggled to alight and shuffled on his buttocks to get out of the vehicle. This was funny to the 3rd Respondent, the police officer.

At the police station the Appellant was made to sign a document without any explanation. When he indicated to the 3rd Respondent that he does not know what he is signing for, the 3rd Respondent indicated to him that he should not be “hardegat” he must just sign.

He was then put in the cells. He was scared and he was searched from top to toe by two black males for money and cigarettes. He then began praying Psalm 23.

[10] The unchallenged evidence of the Appellant was that the cell was stinking of human faeces, vomit and urine. He was shown a place to sit on the wet floor next to the shower. The floor was wet from shower water and urine. It was extremely cold in the cells. The Appellant was still in his work clothes and was not wearing warm clothing. The cell was approximately 4m x 8m and there were approximately 22 other people in the cell.

[11] The Appellant did not receive any blankets but was given one by one of his inmates. The blanket was dirty and stinking of human odour. He could feel lice crawling all over his body. The cell was cold as it was in the middle of winter and the floor was cement and wet. The cell further did not have a ceiling and the roof was open. The wind blowing in had the same effect as a freezer. The Appellant could not sleep during his first night. There was no space for him to sleep. He was sitting upright the entire evening. The Appellant testified about the horror of the chanting of the inmates in the other cells and screaming of persons being assaulted. The second night the cell was cold as hell according to the Appellant. The Appellant indicated that he never before experienced pain in his life like that night.

[12] The Appellant and Mr. Kubai, his employee were cuffed to each other on the second morning, and taken to the residence of the Appellant, for a purpose unknown to the Appellant.

The Appellant broke down in tears and begged the police not to return him to the cells but to keep him in the holding cell after the visit to his farm on the 2nd of July 2015. The Appellant further indicated that he still breaks down in tears if he relives the incident.

[13] On the morning of the 3rd of July 2015, he could not get up as he was frozen due to the cold. His body was stiff. He rolled over on his knees to get up and tried to hold on to the walls but could not get up. Two other inmates helped him getting up by lifting him under his arm pits. They helped him walk as he struggled to walk. This was extremely traumatizing and humiliating to the Appellant.

When he got home, he bathed two or three times scrubbing his skin to get rid of the smell. He was bitten by ticks and fleas all over his body.

[14] It is clear from the judgment of the Court *a quo* that the Appellant more than once broke down in tears during his testimony. The Appellant was still clearly troubled about the incident even during the trial.

[15] After the incident the Appellant indicated that he went for therapy at Pastor Retief Booysen. He was extremely humiliated, became depressed, suffered from restlessness, became aggressive and could not focus or concentrate at work after the incident.

Pastor Booysen was called as a witness. Pastor Booysen confirmed he saw the Appellant twice after the incident. He further indicated that the Appellant lost his believe in the justice system and he confirmed the trauma that the Appellant suffered.

The general approach in the assessment of damages for unlawful arrest and detention.

[16] In this matter the Appellant suffered an arbitrary deprivation of personal liberty and was humiliated and traumatized by virtue of his unlawful arrest and detention.

[17] In deprivation of liberty the amount of damages is in the discretion of the Court. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or *malice* on the part of the Defendant; the harsh conduct of the Defendants; 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 the liberty; the presence or absence of an apology or satisfactory explanation of the events by the Defendant; and awards in previous comparable cases.

[18] Section 35(2)(e) of the Constitution of the Republic of South Africa provides that everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity.

Therefore other factors that play a role are the fact that in addition to physical freedom, other personality interests such as honour and good name as well as

constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the Plaintiff contributed to his or her misfortune; the effect an award may have on the public purse, and, according to some, the view that the *actio iniuriarum* also has a punitive function.

[19] The above stated factors are extracted from various case law and set out by the authors of **Visser & Potgieter: Law of Damages, Third Edition** on pages **545 – 548**.

[20] The purpose of an award of damages in the context of a matter such as the present is a process in which one seeks to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress. In ***Masisi v Minister of Safety and Security***¹ it was held that the right to liberty is an individual's most cherished right, and one of the fundamental values giving inspiration to an ethos premised on the freedom, dignity, honour and security. That its unlawful invasion therefore struck at the very fundamental of such ethos.

¹ 2011 (2) SACR 262 (GNP).

[21] The Supreme Court of appeal held as follows in ***Minister of Safety and Security v Tyulu***²:

*“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 made 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. I readily concede that 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 the quantum of damages on such facts (***Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26 – 29.***”*

² 2009 (5) SA 85 (SCA) paragraph 26 at 93 D – E.

[22] In *Minister of Safety and Security v Seymour*³ Nugent JA stated at paragraph 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 no higher value than that.”

At page 326, in paragraph 20, the learned Judge went on to express the view that when assessing damages for unlawful arrest and detention Courts are not extravagant in compensating the loss as there are many legitimate calls on the public purse to ensure that other rights that are no less important also receive protection.

[23] I do not understand the Supreme Court of Appeal to be suggesting that heavier amounts for damages should not be awarded in deserving cases, neither do I see that as encouraging infringement of human rights. The Courts will always be guided by the facts of each case and not taking its eyes off the purport and object of the protection of such rights as enshrined in the Constitution.

³ 2006 (6) SA 320 (SCA).

In *casu*, I shall be guided by the particular facts and circumstances of the case in determining the appropriate amount of damages.

[24] Claasen J held as follows in ***Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino***⁴ :

“Deprivation of one’s liberty is always a serious matter. The contention is reflected in fact that our Constitution has entrenched the freedom and security of the person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

“(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial”.”

It is important to note that in the aforementioned case, as in the present case, we are also dealing with the violation of important constitutional rights, including the Appellant’s rights to human dignity, freedom and security of the person, freedom of movement and to conditions of detention that are consistent with human dignity.

⁴ 2000 (4) SA 68 (WLD) at 86 D.

[25] Where a right is said to be so important that it has been afforded constitutional protection, any damages to be awarded should reflect that importance. In considering quantum, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society, which should be jealously guarded at all times and there is a duty on the Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual.

See: ***Thandani v Minister of Law and Order* 1991 (1) SA 701 (ECD) at 707 A.**

The present case displays a reckless disregard of the rights of the Appellant by members of the South African Police Service.

[26] The Appellant in the present case was detained without a shred of justification and detained in what was very humiliating, fearful and degrading circumstances entailing that he had to undergo a body search by other inmates in the cell, without being able to defend himself. Quite apart from the normal common law rights to personal freedom, liberty, dignity and reputation, a number of constitutional rights as outlined above were infringed. The Appellant did absolutely nothing wrong.

The conduct of the police in effecting the arrest of the Appellant in those circumstances amounts to interference with not only the Appellant's rights to his freedom but also the personal right to human dignity.

What the Appellant experienced was hurtful and most hurtful in that no attempt was made by the defendants in the Court *a quo* to provide any form of justification.

[27] It is for all the above reasons that I am of the view that the Appellant is entitled to a profound and substantial award as general damages for unlawful arrest and detention.

In the result the Court *a quo* erred in awarding such an insignificant and inadequate amount of R 40 000.00 as damages suffered by the Appellant.

Judgment of the Court *a quo*

[28] The Court *a quo* correctly referred to the case of ***Rahim and 14 Others v Minister of Home Affairs***⁵ where it was stated:

“The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages

⁵ 2015 (4) SA 433 (SCA) at paragraph 27.

cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the Court and broad general considerations play a decisive role in the process of quantification. This does not, of course absolve a plaintiff of adducing evidence which will enable a Court to make an appropriate and fair award. In cases involving deprivation of liability the amount of satisfaction is calculated by the Court ex aequo et bono. Inter alia the following factors are relevant:

27.1. circumstances under which the deprivation of liability took place;

27.2. the conduct of the defendants; and

27.3. the nature and duration of deprivation...”.”

[29] However, the Court *a quo* failed to correctly apply the above case law to the facts of this case.

[30] The Court *a quo* should have applied its mind to the principle that in modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and that it should properly take into account the facts of the case, the personal circumstances of the victim and the nature, extent and degree affront to his dignity and his sense of worth.

Comparable cases on quantum of damages

[31] Counsel for the Appellant referred to and relied on the following cases as a guide for determining the quantum of the Appellant's general damages for unlawful arrest and detention.

31.1. ***Van der Laarse v Minister of Police and Another (31378/2012) [2013]***

where Ebershon AJ awarded R 280 000.00 to the Plaintiff for 3 nights in jail. In this particular case it was common cause that the plaintiff was treated very cruelly and under horrifying circumstances from the moment of his illegal arrest, which took place in the presence of acquaintances of him, tourists and the general public by the second defendant and his subordinates. He was detained in a hopelessly overcrowded container under filthy conditions. He was arrested by the second respondent who acted as if he was power drunk and in a disgraceful display to all those who beheld what was going on.

The amount of R 280 000.00 in today's terms equals to roughly R 425 000.00 in terms of the inflation calculator.

31.2. In ***Bouwer v Minister of Safety and Security*** delivered by Judge Du Plessis on the 8th of December 2008 in North Gauteng High Court an award of R 205 000.00 (today it would be approximately R 401 815.59)

was made for a police official who was unlawfully arrested in front of his peers and detained for 3 days and 3 nights.

31.3. ***MX v Minister of Police (1329/2016) [2021] ZAECMHC 1 (12 January 2021)*** an award was made for R 340 000.00 to a Plaintiff who was unlawfully arrested and detained for 2 nights in jail. The Plaintiff in this matter was however sodomised and assaulted while he was in custody.

[32] Counsel for the Appellant submitted that taking into consideration the above authorities it is clear that the Court *a quo* erred in awarding R 40 000.00 to the Appellant for his unlawful arrest and detention for approximately 3 days. That the order of the Court *a quo* in this regard does not commensurate the injury that was inflicted to the Appellant. I agree.

[33] Counsel submitted further that in the light of the comparable and similar cases referred to above, an amount of R 400 000.00 for general damages would be just and fair under the circumstances.

[34] I have had regard to the cases referred to by Counsel and I am mindful that they only serve as a guide without losing sight of the facts of this case. The ultimate purpose of the award is to compensate the Appellant for his loss

of freedom and for his injured feelings and not to enrich him. I have to balance such interests when compensating him. I am accordingly of the view that an amount that would be commensurate with the injury sustained is an amount of R 400 000.00.

Damages for Malicious Prosecution

[35] At the trial in the Court *a quo* the First Respondent (First Defendant in the Court *a quo*) conceded and thus admitted liability for damages suffered by the Appellant arising from the malicious prosecution of the Appellant. Accordingly, the First Respondent admitted setting the law in motion and that he instigated or instituted the criminal proceedings against the Appellant. That he acted without reasonable and probable cause, acted with malice (or *animo iniurandi*) that is, with intention to injure the Appellant and that such prosecution failed. The prosecution of the Appellant was based on the same information relied upon for his unlawful arrest and detention.

[36] The Court *a quo* erred in dismissing the Appellant's claim for malicious prosecution against the First Respondent despite the concession and admission of liability made by the First Respondent at the trial.

It is common cause that the Appellant and the First Respondent agreed at the inception of the trial that the First Respondent concedes 100% to the merits of the Appellant's claim for malicious prosecution.

[37] The only issue that was left was for the trial Court to determine the quantum of damages suffered by the Appellant arising from the claim for malicious prosecution. This Court will accordingly proceed to determine the amount of damages due and payable to the Appellant.

[38] The uncontested evidence of the Appellant is that he and the First Respondent are neighbors. They have a very acrimonious relationship because the Appellant had in the past reported the First Respondent for illegal poultry farming to the authorities. The First Respondent is an ex-police officer and has previously laid false charges against the Appellant during 2012 – 2013.

[39] In the light of the above facts, I am of the view that the First Respondent abused his power and connections as an ex-police officer and laid false charges of contravention of a Protection Order and Theft against the Appellant, which eventually led to the arrest of the Appellant.

The First Respondent was present on the day when the Appellant was arrested. It is clear that the arrest was accompanied by malice and revenge. The First Respondent had a vendetta against the Appellant.

The charges against the Appellant were eventually withdrawn because of lack of prospects of success in the prosecution.

[40] Counsel for the Appellant referred us to an appropriate case of ***Joseph Buti Mahlangu v Minister of Safety and Security & Others***, case number **32531/2001** in North Gauteng High Court, Pretoria, wherein the Court awarded an amount of R 120 000.00 as general damages for a claim for malicious prosecution.

In that case the Plaintiff spent only one day in the cells. The Court took into consideration the fact that the arrest and prosecution were accompanied by malice and revenge as in the present case before us.

The amount of R 120 000.00 would equate to approximately R 370 000.00 in today's terms.

[41] The Appellant in this case spent almost three full days in the cells, under horrible conditions as set out herein above. No amount of compensation can undo the humiliation and human rights violation suffered by the Appellant when he had to be charged and prosecuted for the false charges.

Appropriate *solatium*, taking into consideration all of these factors is that the Appellant should be awarded compensation in the amount of R 250 000.00.

Order

[42] In the result the following order is made:

1. The Appeal is upheld with costs.
2. The order of the Court *a quo* in respect of paragraphs 2 and 6 thereof is set aside and substituted with the following:
 - 2.1. The Second Respondent is ordered to pay the sum of R 400 000.00 to the Appellant, being general damages for the unlawful arrest and detention;
 - 2.2. The First Respondent is ordered to pay the sum of R 200 000.00 to the Appellant, being general damages for the malicious prosecution.
3. Payment of interest at the prescribed rate from date of judgment in the Court *a quo* (21 January 2021) until date of payment, payable by the First and Second Respondent on the respective amounts awarded.

4. The First and Second Respondents are ordered to pay the cost of action jointly and severally, the one paying the other to be absolved.

E M MAKGOBA

**JUDGE PRESIDENT OF THE HIGH COURT,
LIMPOPO DIVISION**

I agree,

G C MULLER

**JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

I agree,

T C LITHOLE

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

Heard on : **12 August 2022**
Judgment delivered on : **16 August 2022**
For the Appellant : **Adv J P Morton**
Instructed by : **Charl Naude Attorneys**
For the Respondents : **No Appearance**