IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/ A3084

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

DATE: **17 February 2015**

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SPILG J MODIBA AJ

In the matter between:

MOFOKENG ZAMOKUHLE ZACHARIA First Appellant

MONOYANE THABAKGOLO ELIAS Second Appellant

And

MINISTER OF POLICE Respondent

JUDGMENT

SPILG, J:

17 February 2015

INTRODUCTION

1. The Appellants sued the Respondents for their wrongful arrest and detention on Wednesday 13 April 2011 until their release from custody two days later on Friday 15 April 2011. They each claimed damages of R100 000 with interest and costs. The arrest was without a warrant and occurred at their place of work in Kempton Park. They were detained at the Kempton Park Police Station and on the Friday at holding cells in the Kempton Park Magistrate Court.

2. The Appellants had been detained from approximately noon on the Wednesday and were released at court sometime on Friday afternoon, possibly as late as 16:00. The actual time of release from custody was initially in dispute. At the trial it was agreed that the Appellants had been detained for 48 hours, a period which included two nights spent in the police cells.

3. On 29 November 2013, the learned Acting Magistrate granted judgment in favour of the Appellants for wrongful arrest and detention, awarding damages to each in the amount of R 10 000.

4. The appeal is against the quantum of general damages ordered. The Appellants readily concede that the amount of the award is within the discretion of the trial court[1]. They however contend that the Magistrate misdirected herself as to the circumstances surrounding the arrest and the factors to be taken into account in the assessment of the awards. It is also submitted on their behalf by *Mr Johnstone* that there is a striking disparity between the usual awards in a matter of this nature and the amount actually awarded.

[1] The court exercises a judicial discretion. See *Merber v Merber* 1948 (1) SA 446 (A) at 452 to 453.

See generally *Minister for Safety and Security v Scott* 2014 (6) SA 1 (SCA) at para 82 and *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at para 23 on when an appeal court will interfere.

MAGISTRATE'S FINDINGS

5. The magistrate delivered a one page judgment on 29 November 2013. It effectively constituted the order without reasons. Subsequently reasons were provided under Rule 51(8)(a)of the Magistrates' Court Rules.

The entire judgment is less than three pages in length. No authority was cited in relation to the determination of quantum although the court said that case law had been considered to reach the figure of R10 000. The court *a quo* identified the following factors as relevant to the assessment of general damages, a term which the Magistrate understood to mean *"pain and suffering, loss of amenities, etcetera":*

a. No evidence was led regarding the psychological effects of the incident. However the court was satisfied that signs of emotional trauma would be exhibited *"due to the chain of events"* ;

b. Since the incident both Appellants "*suffer at work due to the humiliation suffered as a direct result of the incident"*;

c. The Appellants were part of a group of eight employees arrested by police. The police wore civilian clothes, although they were armed, and drove the appellants and the other suspects to the police station in unmarked vehicles;

d. The eight suspects were placed in one cell. The magistrate took into account that they were not separated and thereby avoided being placed in a cell with potentially more serious offenders;

e. The cell was uncomfortable *"with the sanitary conditions, the bedding and the food, similar to what may be expected from conditions currently in police custody cells"*

f. There was no evidence presented by the Plaintiffs regarding their pre- and post- detention quality of life and state of health.

6. It is evident from the Magistrate's reasons that she treated the claim as analogous to general damages in a bodily injury case, such as a Road Accident Fund matter; using terms such as "*loss of amenities of life"* and pre- and post- event comparisons.

7. In my view this constitutes a misdirection as the court failed to appreciate that the right invaded by unlawful arrest and detention comprises *"the invasion of a broad category of rights which may be distilled to include, the right to personal liberty, the right not to be arbitrarily arrested without lawful cause, the right to dignity and the right to one's reputation which includes the right not to be defamed."* See *Takawira v Minister of Police 2013 JOL 30554* at para 36

8. Two of the rights infringed are embodied in our Constitution; namely the right to dignity and the right not to be deprived of one's freedom without just cause[2]. The Constitutional Court has recognised a delictual claim for damages brought under section 12(1) (a) of the Constitution which is based on the unreasonable and unjustifiable infringement of an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause. See *Zeeland v Minister of Justice and Constitutional Development & Another*, 2008 (4) SA 458 (CC), at paras 24, 25 and 35. As to the common law; see generally Neethling, Potgieter and Visser in *Neethling's Law of Personality*)

[2] Sections 10 and 12(1)(a) of the Constitution

9. In *Takawira* at paras 42 and 43 I mentioned that:

> *"42. It is trite that an enquiry into unlawful detention (as with arrest) seeks to determine the extent to which the various affected rights of personality were impaired and their duration. The enquiry involves both a subjective element based on the emotional effect of the wrong committed to the plaintiff (such as the humiliation or anguish of suffering the injustice, the loss of self-esteem and self-respect) and an objective impairment based on the external effects of the wrong (such as loss of reputation in the eyes of others).*
>
> *43. Neethling, Potgieter and Visser in Delikte Reg, (2de uitgawe) at 240 to 241 indicate that in cases involving insult, the emotional reaction of the individual is of primary importance but plays a secondary role to the objective diminution of a person's standing in the community in defamation and invasion of privacy cases. See also Visser and Potgieter, The Law of Damages, (1993) at pages 87and 88….. "*

Earlier at para 35 of *Takawira* it was also mentioned that;

> *35. In Seymour Nugent JA pertinently referred in para 10 to the degree of humiliation to which the plaintiff is subjected as a factor to be taken into account when assessing quantum."*

10. The magistrate with respect also misdirected herself by comparing the cell conditions experienced by the Appellants with what she considered to be the normal conditions one would find when held in custody. At trial it was not disputed that the conditions in the cell were abysmal and inadequate. As appears later, the evidence indicates that they were treated like cattle and treated with a lack of basic human respect.

11. I however agree with the magistrate that little evidence was led regarding the effect of the arrest and detention on the Appellants. Although the magistrate incorrectly formulated the considerations to be taken into account, it is evident that the Appellants were not asked to explain or illustrate the extent of the humiliation they personally suffered. The degree of humiliation endured is an important factor to be taken into account in assessing quantum. See *Seymour* at para 10.

12. Moreover the effect on the Appellants' dignity was dealt with cursorily in evidence: For instance no direct evidence was led with regard to whether or not the individual Appellant lived with a partner or with family and what embarrassment, humiliation or loss of self-esteem was occasioned when having to explain to a partner or child why he could not come home for two nights or why he was put in the cells. While reference was made to being removed from the workplace by police and the subsequent humiliation of being looked upon as a criminal by co-workers there was no detail provided as to whether any employees other than his immediate co-workers inside the office witnessed the arrest or how he felt at that stage.

13. In cases of unlawful arrest and detention the subjective effect on the Plaintiff of the invasion of his dignity "*is a significant element in considering an appropriate award and where the penal element of contumelia is similarly based on an invasion of dignitas its weighting when considering an appropriate award and when comparing other cases ought not to be understated."* (See *Takawira* at para 43).

14. While the court can make assumptions as to the general extent of humiliation and degradation suffered by a person wrongfully arrested and detained, it should also receive evidence that deals in detail with the arrest, the subsequent detention and their actual effect on the individual claimant. This would include the extent of degradation experienced, the extent of helplessness endured and how he or she subjectively felt about others such as family, friends and work colleagues might think. See generally *Takawira* at paras 44, 45 and 48.

Practitioners should therefore not overlook the individualised aspects involved in determining an appropriate damages award in these matters. Cases such as *Sithebe v Minister of Police* [2014] ZAGPJHC 201illustrate the desirability of leading detailed evidence in regard to the personal circumstances of the plaintiff, the events surrounding the arrest as well as all relevant details concerning the detention including its nature, duration and incidents that may have occurred.

WRONGFUL ARREST AND DETENTION

15. Both Appellants briefly described the circumstances of their arrest, albeit that they were arrested in different localities on the same premises of their mutual employer. The police entered the appellants' work places at the time staff were about to take lunch. It appears that the police had approached the risk manager of the company who then pointed out certain individuals. There were several police present all of whom had firearms. Each Appellant was taken outside where more policemen carrying firearms were present. Altogether eight persons were arrested. They were handcuffed and ordered into three motor vehicles.

According to the Second Appellant the vehicle he was conveyed in was being driven recklessly and he was scared. The Appellant ended up arguing with the policemen regarding the manner of driving. The arrogance of the police officers in ignoring genuine concerns regarding the personal safety of others whose wellbeing they are responsible for is to be deplored. The police are not entitled to take unnecessary risks with the lives of those who are entrusted to their care and who are legally obliged to submit to their control.

16. At the police station a female police officer approached them after about 20 minutes. The police then argued amongst themselves as no one was prepared to sign and accept responsibility for effecting the arrests. She then

said that there was no case against those arrested. This indicates that no complaint had yet been laid.

17. The conditions in the cell were disgraceful. All eight suspects were placed in one cell. The cell had no water and the toilet was damaged and filthy. The suspects were forced to huddle together as there were insufficient blankets. There were also insufficient sponges. The Second Appellant stated that he could not eat the food and requested that the police buy food for them.

18. The Appellants were not processed on the day of their arrest nor were they brought before a court on the Thursday. They were first advised only on the Thursday that they were being arrested for phone theft. Their fingerprints were then taken. They therefore endured one and a half days and two nights in the same cells before being taken to court on the Friday.

19. As mentioned earlier, neither Appellant was asked in evidence details of any person with whom they might be residing or the possible embarrassment occasioned by not returning home from work and so forth. There was only a tangential reference that some lawyers had been appointed *"by our family members"*.

20. The information obtained from the First Appellant revealed that he was 32 years of age at the time he testified, that he lived in Katlehong although he resided in Vosloorus and that after matric he received tertiary education and obtained an engineering diploma.

21. The First Appellant claimed that his dignity was lowered, that he was humiliated, had "*lost confidence*" and that the events "*really did not make me feel good.*" He claimed that after the incident he was regarded by his work colleagues as a criminal. However he was cleared at a subsequent internal disciplinary hearing. He lost his employment at the end of 2012.

22. The Second Appellant explained that he was angry because they were not informed of the reason for their arrest or where they were being taken. He

was also angry because the motor vehicle they were conveyed in was being driven recklessly. He has a matric and had been employed with the company for some three to four years prior to the arrest. He claimed that he did not feel good about his arrest and detention and described that he suffers from sinuses which were affected by the filthy conditions in the cells. His uncontested evidence revealed that when at court they were placed in the holding cells with accused in other cases, some of whom were in leg irons which *"was not a good experience at all"*

23. The Second Appellant also related how he was called a criminal and thief when he returned to work. He too was cleared during a disciplinary hearing. He is still employed with the same company and was promoted to a supervisory position.

QUANTUM

24. In view of the misdirection it is open to consider quantum afresh.

25. Aside from misdirecting herself with regard to the considerations to be taken into account when assessing quantum in a case of wrongful arrest and detention, the Magistrate awarded damages in an amount of R10 000 to each Appellant. The quantum bears little correlation to any of the cases of the last number of years in which the detention lasted for a day or two. The case of *Minister of Safety and Security v Tyalu 2009 (5) SA 1985 (SCA)* is distinguishable because the period of unlawful arrest was very brief before the plaintiff was arrested for a second time, which on this occasion was lawful (see at paras 23 and 24).

26. *Mr Dlamini* on behalf of the Respondent submitted that no evidence was led during the trial explaining the reasons for the arrests. The Respondent simply conceded that it was wrongful. The Respondent cannot turn its failure to explain why its members thought that the arrest was lawful to its benefit. If it

considered that the circumstances of the arrest would have a mitigating effect on quantum then it should have produced the evidence.

27. However on the evidence presented to the trial court it appears that the police officers who effected the arrests were doing so at the bidding of the employer who had not filed an actual complaint. This is the only rational explanation that would account for the police officers refusing to take responsibility for the arrests and why the appellants were not brought the following day before a court. Certainly something was not done by the book, for otherwise the defence would simply have been that the police had reasonably suspected that an offence had been committed by reason of a complaint received.

28. The failure to explain the circumstances under which the Appellants and six other persons were arrested rebounds against the Respondent. This must also have an aggravating effect when considering an appropriate award. See *Takawira* at para 38

    Mr Dlamini however relied on the magistrate's comment that there had been no real evidence of the psychological effect of the arrest and incarceration and that a court has a broad discretion regarding an appropriate award in any given case, even to award a figure as low as R10 000 where the detention included incarceration for two days and two nights.

    He also contended that one cannot expect a five star treatment when detained. This can be dealt with perfunctorily. It is precisely because cell conditions deprive a person of amenities and comforts that are available at ones place of residence (however meagre they might be) and deprive one of alternative choices (however limited they might be) that the wrongful detention of an individual is immediately susceptible to an award of damages. There was a suggestion that some people's lot is so desperate or their history of prior convictions with custodial sentence so lengthy that it can hardly be contended that they sustain any damages. In *Takawira* I attempted to deal with a not altogether dissimilar argument that lack of social standing significantly reduces the damages to be award. I remain of the view that one

should not overemphasise the role of social status as a justifiable discriminating factor, rather that:

> *Status in the community has been and remains a factor to be weighed, but not the only factor nor necessarily the dominant factor which weighs positively on the overall quantum or for that matter inevitably must diminish it in any given case.* (*Takawira* at para 25)

So too with any other specific factor. Again in *Takawira* at paras 38 to 41 I attempted to explain my understanding of the interplay between the various factors affecting the determination of the award and the store we place on dignity in contrast to social status as follows;

> *38. The present case however raises a concern with regard to the store placed on certain of the factors while not fully appreciating the element of dignity, which I comprehend to include the positive entitlement to self-respect, self-esteem and self-worth as well as the right not to be degraded or humiliated. By what measure can we hold that a magistrate when arrested in front of his family suffers greater personal indignity than a dropout in similar circumstances? While reputation will concern itself with social standing, by what margin will the award increase where there was some rational, albeit inadequate, attempt to justify the arrest when compared to the case of a humble working class man who without any justification, is arrested in front of his wife and child? Can the degradation and humiliation be any less because of social status?*
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> *39. The point sought to be illustrated by reference to long established case law is that there are a multiplicity of rights invaded and care should be taken to have regard generally to both their broad extent and also their comparative weighting, as opposed to isolating as the dominant criteria the extent to which the invasion of the right affected the plaintiff's objective social status in the community.*

40. These general concerns appear to be justified by the acknowledgement that the right to dignity, under Section 10, is with the right to the life, the most prized of our constitutionally protected rights. In S v Makwanyane & Another, 1995 (3) SA 391 at para 327, Justice O'Regan stated that:

> *"The right to life was entwined with the right to dignity. The right to life was more than existence, it was a right to be treated as a human being with dignity, without dignity human life was substantially diminished, without life there could be no dignity."*

29. I have set out the rights that are infringed as a consequence of an unlawful arrest and detention and have demonstrated that some are not entirely dependent on the subjective effect the events had on the particular plaintiff concerned. I have also mentioned that our law acknowledges that a damages award for the invasion of a person's dignity has a penal element. It would therefore be incorrect to conclude that a party will only be entitled to a nominal award if he or she does not eloquently and vividly describe the effects of the arrest and detention. Moreover the court is entitled to assume that, barring any evidence to the contrary, a plaintiff will suffer a loss of self-worth, will perceive that others have a lower estimation of him, that he will suffer embarrassment, is likely to lose a degree self-confidence and will experience vulnerability, humiliation and a feeling of being impotent as a consequence of a wrongful arrest and detention.

30. Even if only these non-individualised general factors are considered then it is still difficult to appreciate how the trial court could have awarded an amount of just R10 000 if regard is had to the innumerable judgments of the Gauteng Division and Local Division that appear in the SAFLII reports.

31. The Supreme Court of Appeal has stated that: *"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.* (*Seymour* at para 20).

Although each case is dependent on its own set of facts and the individual disposition of the judicial officer as to what is fair in the circumstances[3], case law provides a broad guideline as to the usual lower limit of a suitable award where the detention has been at least over-night. While the upper parameter at present varies enormously it is difficult to comprehend any set of facts that would justify an award as low as R10 000 where the person had been detained for two days.

The court *a quo* claimed to have considered relevant cases when assessing damages at R10 000. Save for *Tyalu* which is clearly distinguishable for reasons already stated, Mr Dlamini confirmed that he could find none in recent times that awarded so little to a plaintiff who had been detained for even a day. The low end has been R40 000 while the broad range of usual awards where the detention lasts up to a few days is between R65 000 to R110 000 if no especially alleviating or egregious factors are disclosed.

In reaching this conclusion I have considered the following cases: *Seymour (SCA supra)*(R90 000 in 2006- 5 days detention but only one night in a cell); *Makgae v Minister of Safety and Security* [2014] ZAGPPHC 937 (R75 000.00); *Sobopha v Minister of Police* [2014] ZAGPJHC 189 (R60 000.00); *Baasden v Minister of Safety And Security* 2014 (2) SACR 163 (GP) (R120, 000.00) *Khanyile v Minister of Police* [2013] ZAGPJHC 234

[3] See *Sandler v Wholesale Coal Supplies* 1941 AD 194 at 199

(R110 000.00); *Lamula and Others v Minister of Police* ([2013] ZAGPJHC 130 (R100 000); *Duarte v Minister of Police* [2013] ZAGPJHC 51(R75 000 for arrest and detention only- separate award for assault) and *Phasha v Minister of Police* [2012] ZAGPJHC 261 (R80 000.00). I have also had regard to the other cases referred to in paras 202.5 and 202.6 of my brother Kgomo's judgment in *Sithebe v Minister of Police* [2014] ZAGPJHC 201

In some case much higher awards have been made. In *Sithebe* quantum was assessed at R140 000 and in Ramoshaba *v Minister of Safety and Security and Another* (41312/2011) [2014] the award was R275. 000.00. Other cases where awards have exceeded R140 000 are set out in para 202.2 to 202.4 of *Sithebe*.

The magistrate's award was therefore also strikingly disproportionate to what should be considered a fair amount.

32. The list of cases where the Respondent has been obliged to pay damages for wrongful arrest and detention is unacceptably lengthy. I have already mentioned that awards in similar cases have generally ranged from between R65 000 and R90 000 at 2011 values. However case law confirms that awards are not to be increased at a rate which matches the Consumer Price Index.

33. The present case does not appear to be one at the higher end of the scale. There are however aggravating features that must be taken into account. Firstly the Appellants were not brought to court on the following day even though they were arrested in the middle of the week and no explanation was provided to account for the delay. Secondly the State did not attempt to provide any mitigating factors surrounding the reason for the arrest which, although not excusing its unlawfulness, might provide some explanation that would amount to a mistake rather than a deliberate disregard of their responsibilities when deciding to effect the arrest.

It is also apparent that the Appellants were demeaned and treated with a callous disregard for their right to be brought expeditiously before a magistrate when there was already doubt as to the entitlement to have effected all the arrests.

34. I do not consider the fact that the police were in civilian clothes or were driving in an unmarked vehicle as mitigating. The police did not have to wear uniforms for the appellant's fellow workers and immediate superiors to know who they were; the police's actions in arresting the appellants, handcuffing them and requiring them to enter the unmarked vehicles sufficed.

35. It is also not a mitigating factor that all eight suspects were placed in the same cell and not split up with other suspects. Firstly no evidence was led that there were any persons in the other cells. Moreover if the Appellants had been placed in a cell with someone who they might have cause to fear then that would amount to an aggravating factor.

    What remains undisputed is that the facilities were inadequate for eight men to be placed in one holding cell.

36. Having regard to the numerous cases on the subject and the leading case of *Seymour*, I consider that an amount of R90 000 is justified in respect of the wrongful arrest and detention of each Appellant based on values at the time the Magistrate made his award in November 2013.

ORDER

I accordingly order the following:

1. *The appeal is upheld*
2. *The order of the Magistrates' Court of 29 November of 2013 is set aside and replaced with the following:*

a. *The Defendant is to make payment to the First Plaintiff of the sum of R90 000;*

b. *The Defendant is to make payment to the Third Plaintiff of the sum of R90 000;*

c. *The Defendant is to pay mora interest on the aforesaid amounts from 29 November 2013 to date of payment*

d. *The Defendant is to pay the costs of suit of the First and Third Plaintiffs including counsel's costs as per tariff;*

3. *The Respondent is to pay the Appellants' costs of the appeal.*

MODIBA AJ

I agree

SPILG J

It is so ordered

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SPILG, J

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MODIBA, AJ

DATE OF HEARING:	17 February 2015
DATE OF JUDGMENT:	17 February 2015
LEGAL REPRESENTATIVES:	
FOR APPELLANT:	Adv HC Johnstone
	Wits Law Clinic
FOR RESPONDENT:	Adv MW Dlamini
	The State Attorney