IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

Case No: 1112/2012

In the matter between:

NKULULEKO MSONGELWA Plaintiff

and

THE MINISTER OF POLICE Defendant

JUDGMENT

TOKOTA J:

[1] The plaintiff was arrested and detained on 7 August 2011 by members of the police services acting within the course and scope of their employment with the defendant. The defendant is therefore sued in

terms of the State Liability Act No. 20 of 1957 in his official capacity as the responsible Minister who is vicariously liable for the wrongdoings of the police. The plaintiff remained in custody for a period of158 days, until he was released on 12 January 2012 without being charged with any offence.

[2] After his release the plaintiff instituted an action claiming R6,3 million for damages for the assault, which was perpetrated on him (claim A) and R5,280 million for unlawful arrest and detention (claim B). In respect of claim A, on 7 February 2020 this court made an order, by agreement of the parties, that the defendant pay to the plaintiff the sum of R2,5 million with costs including costs of two Counsel, as well as costs of about 8 experts. The merits of the claim for unlawful arrest and detention were conceded by the defendant. What remains to be determined is the quantum thereof.

[3] The plaintiff was the only witness who testified in court. He testified that on 7 August 2011he was arrested at a tavern where they were enjoying themselves with liquor together with his girlfriend and other friends. The police arrived and ordered them to face the wall with their hands up. They were bodily searched and he was told that he was under

arrest, but was not told of the reason for the arrest. He resisted and there was a struggle. In the process they shot him on his ankle. Thereafter, he was handcuffed and thrown on the back of a police van. He sustained a fractured ankle.

[4] From there he was transported to Mandela hospital where he was detained under armed police guard. He was there chained to the bed by means of handcuffs. He was handcuffed throughout the night and the handcuffs would only be removed when going to the toilet. He was thereafter transferred to Bedford hospital and also detained under police guard. That is where he spent some time. His friends and relatives were allowed to visit him in the presence of the police. He testified that being guarded by two or three armed police men gave the impression to other people that he was a 'thug'. He was discharged on 19 August 2011 and was taken to Mqanduli police station where he was detained in the police cell. His ankle was in a plaster of paris.

[5] At the police cells in Mqanduli, he was detained from the 19th to 23rd of August 2011 when he was taken to court. He testified that the cell was small, it being 4x4 meters. They were made to lie on very thin mattresses. The inmates ill-treated him. They were made to frog-jump

and if you refused you would be clapped. The toilet blocked and the water over-flowed. He was made to clean the stinking toilet. Because of the blockage, the toilet had to be covered with a blanket. The food was stamp mealies, which was not properly cooked. Other inmates were stinking as they were not washing. During the period he was in the cell he was at times taken to the clinic.

[6] At his court appearance on 23 August 2011, he was remanded in custody to Wellington prison. There he was admitted to prison hospital. There were about three patients that died whilst he was detained there. He remained there for two months or so. He was thereafter transferred to the general cell. The cells were clean but the inmates were bullying him. He was made to clean the cell and they would take his ‘things’ by force. He was at times referred to Bedford hospital under the guard of armed prison warders.

[7] He appeared in court on several occasions and the matter was always remanded in custody. Finally, on 12 January 2012 the case was withdrawn against him. When he came out of prison there were many questions about him from the community thinking that he was a ‘thug’. Others understood the situation and had no problem with him.

[8] The evidence of the plaintiff was not disputed by the defendant. The defendant closed its case without leading any evidence.

[9] Mr Dugmore SC who, together with Mr Mdeyide, appeared for the plaintiff, submitted that the police were guilty of gross misconduct in this matter. Regard being had to the remarks recorded by the prosecutor in the docket, it is clear that the investigating officer, if ever there was one, had no interest whatsoever in the matter from the beginning to the end. The following adverse remarks (dated 11-10-11) appeared to have been recorded by the prosecutor in the docket against the investigating officer:

"I/O I am disappointed, this case is remanded 5 times for FBI and you don't avail yourself all the time. You have also not done bail form up till now!!! You have also not done anything since the 23/8/11. Why???"

Another entry of 12 -9-18 reads thus:.

> *"This case had been neglected corrective measures must be taken against IO's for failing to comply with instructions dd 11.10.11 for bail application and carry on with investigation. Feed back to me on or before 12.9.18. Capt. Vakala attend."*

[10] Mr Dugmore SC, in his helpful argument, referred me to a number of cases of this and other divisions and furnished me with copies thereof

in an endeavour to assist me for the guidance on quantum. I am indebted to him. I single out two of them without saying that others were not considered. The first one is that of **Wayne Noel Staude v The Minister of Safety and Security**. There the plaintiff was detained for approximately 17 hours. He was awarded R150 000 as damages. The second one is that of **De Klerk v Minister of Police [2019] ZACC 32**. In this case the Constitutional court awarded R300 000 for 8 days.

[11] It has often been said that a comparable table of cases in awarding damages serves as a useful guideline. However, in **Seymour**[1] it was said:

> *"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.*
>
> The Learned Judge of Appeal went on and said: *"The dangers of relying excessively on earlier awards are well illustrated by comparing the award in* ***May***[2] *to the award that was made in* ***Maphalala v Minister of and Order Law.***[3] *In* ***Maphalala*** *the plaintiff was arrested on 23 June 1992 and released in*

[1]Minister of Safety & Security v Seymour 2006 (6) SA 320 (SCA) ([2007] 1 All SA 558) para.17
[2]May v Union Government 1954 (3) SA 120 (N):
[3]Maphalala v Minister of Law and Order (WLD, case No 29537/93, 10 February 1995):

consequence of an order of court on 16 September 1992. He was immediately arrested again and released only on 19 November 1992. During the period that he was detained the plaintiff was held in solitary confinement, mostly incommunicado, for 150 days. While in detention he was also tortured. In a comprehensive and closely reasoned judgment, and after referring to the decisions in ***Ramakulukusha v Commander, Venda National Force,*** *and* ***Minister of Justice v Hofmeyr*** *(both of which the Court considered to be less serious), Coetzee J awarded the plaintiff R145 000 (R300 000)for his unlawful arrest and detention. (He was awarded an additional R35 000 for assault.) Needless to say, the circumstances in that case were gross compared to those in* ***May****. Whether the award in* ***May*** *was excessive, or the award in* ***Maphalala*** *was niggardly, is beside the point. I use them only to illustrate that the gross disparity of the facts in each case is not reflected in the respective awards, and neither is in those circumstances a safe guide to what is appropriate."*

[12] In **Tyulu**[4] it was said: '*(i)n 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'.* These remarks also help to bear in mind that here we are dealing with the public purse. The court has to be careful not to overrate the compensatory award in

[4]Minister of Safety & Security v Tyulu 2009 (5) SA 85 (SCA) para.26

favour of burdening the public purse that is already beset with other legitimate claims than it can possibly meet.

[13] The prayers in the plaintiff's summons is for an award of R5 280 000 and Mr Dugmore asked for an order for R6 million. When I questioned him about the pleadings he moved for an amendment to replace R5, 280 million with R6 million. This was not opposed by Mr Mnqandi, an attorney representing the defendant. I granted the amendment.

[14] Mr Dugmore argued further that the conduct of the police in this matter deserves censure from the court and that the court should show its displeasure by awarding a punitive cost order on the scale as between attorney and client scale. Mr Mnqandi conceded that the conduct of the police was despicable and did not oppose such cost order.

[15] Since this is another leg of the plaintiff's claim, the other leg (assault claim) having been finalised, I asked Mr Dugmore if such cost order was made in the assault claim. He conceded that the cost order

was not on a punitive scale, but on a party and party scale. I posed another question regarding the pleadings since there is no prayer for a punitive cost order. Mr Dugmore immediately applied for an amendment of the prayer to read ‘costs on a scale as between attorney and client’. Mr Mnqandi again had no objection. I granted the amendment.

[16] In my view, the conduct of the arresting officer described above is a matter to be taken account of in assessing the degree of humiliation to which the plaintiff was subjected. I don’t think such conduct, on the basis of evidence that was led, constituted a separate act of wrongful conduct. The shooting which constituted an assault for which the plaintiff has been compensated was a chain of misconduct on the part of the police.

[17] It is clear to me that the conduct of the police in the whole matter was reprehensible. The question of the award of damages as solatium for sentimental damages is intended to neutralise the wounded feelings of the plaintiff who has suffered the wrongful acts in the hands of the police. The high price thereof depends on the facts and circumstances of each case. I recognise in this case the lengthy period of detention of the plaintiff. Be that as it may, one must not lose sight of the fact that the injury inflicted on the plaintiff consequent to the assault contributed to

the extended period in custody in that he had to be detained in hospitals. This is not like cases where the detention was continuously in the police or prison cells.

[18] Accordingly, in my view one cannot completely separate the incidents of assault (claim A) from the present claim, as they are inextricably linked to each other. In my opinion, I consider an award of R5million as reasonable compensation in the circumstances of this case.

[19] With regard to the issue of costs, notwithstanding the granting of the amendment, I do not consider myself bound to award costs on a punitive scale. Costs are not awarded merely for the sake of asking. The court has to exercise its discretion judiciously taking into account all the circumstances of the case. In my view the award of damages takes care of the despicable conduct of the police in this matter. I do not see the logic of giving different scales of costs in the same action. The plaintiff has been awarded costs on a party and party scale in claim A. The conduct that was perpetrated in the first claim links up with the second claim. I see no rationale in treating the second claim differently from the first claim. Consequently, I am not persuaded that a different cost order is warranted to the claim of unlawful arrest and detention.

[20] In the result I make the following order:

1. The defendant is ordered to pay to the plaintiff the sum of R5million as and damages in respect of the claim for unlawful arrest and detention such sum to be paid within 30 days from the date of this order

2. The defendant is directed to pay interest on the amount of R5million at the prescribed legal rate to be calculated from the date of the expiry of 30 days within which the amount due should have been paid.

3. The defendant is ordered to pay the costs of suit, including costs consequent upon the employment of two Counsel.

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B R TOKOTA
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: A G DUGMORE SC

	A MDEYIDE
Instructed by	Sakhela Inc. Mthatha
For the Defendant:	Attorney W T Mnqandi
Instructed by	Of W T Mnqandi& Associates Mthatha
Date Heard:	9-10 March 2020:
Date delivered:	17 March 2020.