IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 12200/2005

In the matter between:

NGWAKO HADLEY MAMADI	**FIRST PLAINTIFF**
WILSON RAMOTOPO	**SECOND PALINTIFF**
AND	
METRORIAL	**DEFENDANT**

JUDGMENT

MAVUNDLA, J.,

[1] The First plaintiff is an adult male who has been in the employ of the defendant as an administration official for 19 years prior to the event leading to this matter. I shall further refer to the cause of action in casu very soon.

[2] The Second plaintiff is an adult male who has been in the employ of the defendant as an administration official for 28 years prior to the event leading to this matter.

[3] Both plaintiffs were arrested at their respective places on the 19 September 2002. The arrest was effected by members of the South African Safety and Security Services who were in the company of members of the defendant. They were eventually released on bail on the 19 November 2002, when they were informed that the charges against them were withdrawn. Their employer, who is the defendant, instructed them to return to work and they are still in the employ of the defendant.

[4] Both plaintiffs are claiming from the defendant payment of general damages they allegedly suffered in the amount of R350, 000 and for special damages in the amount of R1200, 00 being in respect of the expenses they incurred to secure their release on bail from custody.

[5] The general damages claimed severally and individually have been are in respect of

(a) Contumela	R50, 000, 00
(b) Unlawful arrest	R50, 000, 00;
(c) Unlawful detention	R50, 000, 00;
(d) Defamation of reputation	R100, 000, 00; and
(e) Injury honour	R100, 000, 00.
TOTAL	R350, 000,00 (each)

[6] The defendant in its plea raise a special plea of prescription alleging that the plaintiff's cause of action, *ex facie,* the particulars of claim, the cause of action arose on or about 15

September 2002, upon which date the plaintiffs were entitled to institute action for the alleged unlawful arrest, but they only issued the summons against the defendant on 10 October 2002 and served same on the defendant on 9 November 2005. In respect of the rest of the other allegations, save for admitting the date on which the plaintiffs were arrested, the defendant has made the standard denial and placing the plaintiffs to proof thereof.

[7] The defendant was on the 6 November 2008 ordered by Webster J to file its discovery affidavit in terms of Rule 35 within 5 days of service of the order, and to pay the costs of the application. The relevant order was served on the defendant's attorneys of record on 10 November 2008. Counsel for the plaintiffs advised me that the defendant failed to react to the aforesaid order. He then sought leave to lead evidence and apply for the damages as prayed for in the summons. He pointed out that the notice of set down of this matter was served on 13 March 2007. Indeed at paginated pages 27 and 28 it is clear that the notice of set down was indeed served as contended on behalf of the plaintiffs. I accordingly granted leave to the plaintiffs to lead evidence. The defendant was not represented.

[8] Both plaintiffs testified under oath. Their respective evidence reveals that on the early hours of 19 September 2002 they were woken up by the police who were traveling in at least two police

motor vehicles with blue lights and whaling sirens. The first plaintiff testified that he did not count the number of the police were there. The police were in the company of the defendant's personnel who were also traveling in their own motor vehicles belonging to the defendant. The police knocked loudly at his front door and back door as well as on the windows. He opened the doors whilst he was still under his underwear, so too was his wife scantly dressed at the time as they stood outside the house inquiring the reason for this ungodly and impolite visitation. The police accused of having stolen defendant's money. At the time of some of the neighbors were milling around, and within hearing distance, curious of what was happening. He further testified that he was taken into the police motor vehicle still in his underwear, without being afforded an opportunity of dressing properly.

[9] From the second plaintiff's place the contingency of the police and members of the defendant proceeded to the first plaintiff's place where the latter was arrested. The first plaintiff also testified that he too was awoken by loud knocks at his front and back doors and whaling sirens. He too was arrested and placed in the police motor vehicles and taken together with the second plaintiff to the Rietgat police station and from there to Moot police station where they locked in the holding cells.

[10] Both the plaintiffs testified that after their arrest on 11 September 2002, they were informed that they could only apply for bail after 48 hours. They say as the result they incurred expenses in the amount of R1, 200, 00 each to engage the services of an attorney who brought bail application on their behalf.

[11] They say that the reason proffered for their arrest is that it was alleged that they had stolen moneys they had received in respect of the tickets that they sold on behalf of the defendant at Mabopane railway station. They says that these allegations were devoid of ant truth. They say that there were selling tickets from cubicle 17 and 18. During that period, dissatisfied commuters had set the Mabopane railway station on fire. This resulted in some of the computers they were using in the their cubicles being partially destroyed. This resulted in the technicians of the defendant tacking some of the computer parts from cubicle 18 and using these to repair the computer in cubicle 17. This resulted in the computer misprinting the tickets sold to reflect that they had also sold tickets from cubicle 18 whereas they only sold tickets from cubicle 17. The defendant's personnel then accused him of having stolen the amount reflected as the result of the misprint. They say that had the technicians conducted a proper investigation they would have realized that the computer was malfunctioning and their arrest would have been averted.

[12] They further testified that after their arrest they were held in custody at the Pretoria Local Prison. They were held in cells occupied by between 40 to 60 people. The cells were overcrowded and had only one open toilet which had no door and as the result had no privacy. They had to share sleeping facility, either two persons or some times three persons at a time. They had to use a bucket with cold water to wash. They say that they were bullied in the cells. Some of the bullies would take their blankets and sometimes their food. The conditions in the cells were intolerable because the were over smoking of all sorts of things and they had to endure these conditions.

[13] They testified that they felt deeply humiliated; not only by the accusations, but by the manner the arrest was effected as well as the conditions they were subjected to in prison. The second plaintiff testified that one particular Saturday after his release from prison, one person from the neighborhood said to him that the second plaintiff must share with him the money they had stolen. He was deeply humiliated and hurt by the whole incident. They say that they have since lost the respect they enjoyed in their neighborhood.

[14] Mr. Van Den Bergen has submitted that in so far as the plea of prescription, the plaintiffs could not institute an action against the defendant until their criminal case had been disposed off.

[15] The relevant provisions of the Prescription Act 68 of 1969 provide as follows:

'10 Extinction of debts by prescription

(1) Subject to the provisions of this chapter and of chp IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

. . .

12 When prescription begins to run

(1) Subject to the provisions of ss (2), (3), and (4), as prescription shall commence o run as soon as the debt is due.

(2) If the debtor wilfu8lly prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

(4) (Not relevant for purposes of this case).

. . .

15 Judicial interruption of prescription

(1) The running of prescription shall, subject to the provisions of ss (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

[16] The summons *in casu* were only issued on 10 October 2005 and served on 9 November 2005. In the matter of *Ntame v Mec Social Development, Eastern Cape*[1] the Court in dealing with the word "debt" said:

> "2 Prescription Act s 11(d). The word "debt" is not defined in the Act. Saner 'Prescription' in Joubert (ed) The Law of South Africa vol 21 (1st re-issue) para 142, p41 says: 'In the absence of a definition of the term 'debt", the courts have held that it must be given a wide and general meaning. So, for the purposes of s12(1) of the Prescription Act 1969, the word "debt" includes any liability arising from and being due (debitum) or owing under a contract, but obviously includes delictual debts. Consequently, in its broadest sense, the idea of a "debt' in relation to the Act refers to an obligation to do something, whether by payment or by delivery of goods and service, or not to do something. The concept of a debt has proprietary character.' See further *GCU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) ([2003] 2 ALL SA 597) in para [6]." Vide also *Pohl v Prinsloo* 1980 (3) SA 365 (TPA) at 370 H-371A.

[1] 2005 (6) SA 248 at 255 footnote 2

[17] I have been further referred to the matter of *Unilever Bestfoods Robertsons (PTY) Ltd v Soomar* 2007(2) SA 346 (SCA) at 357F-G where Farlam JA said:

> "With us also there can be no question of a delict having been committed unless the conduct of the defendant of which the plaintiff complains has caused damage and then all damages resulting from the conduct, whether "already realized or… merely prospective', can be claimed (see *Oslo Land Co Ltd v Union Governement* 1938 AD 584 at 590), unless an essential element of the delict complained of such as the termination of proceedings in plaintiff's favour in the case of malicious prosecution, see *Lemme v Zwaatrbooi* (*supra*)) has not yet occurred. Where the delict complained of is continuing one the plaintiff will have a series of rights of action arising from moment' (*Oslo* case at 589)."

[18] The question of prescription, in casu has to be determined on the facts of this case. The charges against the plaintiffs were withdrawn on 19 November 2002. In my view, the question of the lawfulness or otherwise of the arrest of the plaintiffs, could only be ascertained with certainty by the plaintiffs once the charges were withdrawn on the 19 November 2002. In the premises, in my view, the running of prescription commenced running as from 20 November 2002. The plaintiffs issued summons on 10 October 2005, and served these upon the defendant on the 9th November 2005, which was within the period of three years. In the result the special plea, cannot

succeed, even if the defendant had been represented during the trial.

[19] It is trite that the defendant is liable for any delictual claim caused by its employees; vide *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 774; vide also *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 130D-131G; vide also *Minister of Safety and Security v Japmoco BK* 2002 (5) SA 649 (SCA) where Nienaber JA stated that the test in such matters is as stated by the majority judgment in the matter of *Minister of Police v Rabie* (supra) at 134D-E in the following terms:

> 'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some inference is to made to servant's intention (cf Estate Van der Byl v Swanepoel 1927 AD 141 at 150).The test is in this regard subjective. On the other hand, if there is nevertheless a sufficient close link between the servant's acts for his own interest and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the Salmond test (cited by Greenberg JA in Feldman (Pty) Ltd v Mall 1945 AD 733 at 774):
>
> 'a master… is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes- although improper modes- of doing them..'"

[20] From the evidence of the plaintiffs, it is clear that their arrest was instigated by the members of the defendant. It is also clear from their evidence that the members of the defendant also

accompanied the police when the arrest of the plaintiffs was effected[2]. I am satisfied that the plaintiffs have discharged the onus resting upon them to show that the defendant instigated their arrest[3].

[21] From the evidence of the plaintiffs it is clear that the accusations of theft that were leveled against them were without reasonable and probable cause. I can only infer that the actions of the defendant, through its functionaries was actuated by malice[4]. This must be seen in the light of the fact that the arrest was effected at an ungodly hour, accompanied with much fan fair, as I have already indicated herein above. I am

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[2] Vide Lederman v Moharal Investments (Pty (Ltd) 1969 (1) SA 190 (A) at 197A-B Jansen JA cited the following passage from Amerasinghe, Aspects of Actio Injuriarum in Roman-Dutch law, as recognizing that "the problem is essentially one of causation" and suggests at (p.20):

"The principle is that where a person acts in such a way that a reasonable person would conclude that he" (i.e. the defendant) 'is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, that person is responsible for the prosecution."

[3] Waterhouse v Shields, 1924 CPD at 155 at 160 (cited in the Lederman v Moharal Investment (Pty) Ltd matter supra) it was stated that:

"…Where a person merely gives a fair statement of the facts to the police, and leaves it to the latter to take such steps thereon as they deem fit, and does nothing more to identify himself with the prosecution, he is not responsible, in an action for malicious prosecution, to a person whom the police may chare. But if he goes further, and actively assists and identifies himself with the prosecution, he may be liable." Vide footnote 4 herein below.

[4] Vide Lederman v Moharal Investments (Pty (Ltd) (supra) at 197C-F Jansen JA referred to the matter of Waterhouse v Shields, 1924 CPD at 155 at 160 where Gardiner J cited Bristowe J in Baker v Christiane, 1920 WLD 155 at 14 as saying that the "'Test is whether the defendant did more than tell the detective the facts and leave him to act on his own judgment.'" "'when an informer makes a statement to the police which is wilfully false in a material particular, but for which false information no prosecution would have been undertaken, such an informer 'instigates' a prosecution'."

accordingly of the view that the defendant is liable to the plaintiffs for the consequential damages they have suffered as the result of the malicious prosecution, subject to what follows herein below.

[22] In the matter of *Pohl v Prinsloo*[5] Van Dyk J, (as he then was) cited from the matter of *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908H:

"As was stated by WATERMEYER JA in *Oslo Land Co Ltd v Union Government* 1938 AD 584 at 590 with regard to claim for delictual damages. ". . . it is an action for damages for negligence . . . and the right of action in such a case is complete as soon as damage is caused to the plaintiff by reason of the defendant's negligent act . . . By the word damage is meant not the injury to the property injured. But the *damnum,* that is loss suffered by the plaintiff by reason of the negligent act."

Earlier in Coetzee v SAR & H 1933 CPD 565 the same learned Judge said (at 370-I):

" . . . there is no cause of action until everything has happened which would entitle the plaintiff to judgment. Now in delict a wrongful act or omission does not always of itself entitle a person complaining of it to judgment. There are cases where it does, ie where *contumelia* is involved but there are many cases where the wrongful act does not give the plaintiff a right to judgment unless damage has been ascertained and the damages need not be contemporaneous with the wrongful act. There may be a wrong without at the time any damage and after an interval damage may be for the first time result.'

[5] (1980 (3) SA 365 (TPA) at 370 H-371F-H

See too *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330C.

'The authorities I have just cited relate to actions arising from delict. However, there can be no difference in case of a claim for damages arising from breach of contract…'"

[23] Having regard to the fact that the question of liability in so far as the claim of *contumelia* is concerned, the plaintiffs' damages arose at the very moment they were arrested. This action was not dependant on the outcome of the prosecution. In my view, the plaintiffs' right to claim arose on the date of arrest which was on the 15 September 2002 and terminated three years after, on 14 September 2005. The summons were only issued on 10 October 2005. I am alive to the fact that a Court cannot *mero motu* shall not of its own motion take notice of prescription[6]. However, although in casu the defendant was unrepresented during trial, it had nonetheless filed its special plea raising the issue of prescription. I am therefore obliged to take note of the plead and same cannot be ignored simply because of the defendant's default. Accordingly, I find that the plaintiffs' claim for *contumelia* has prescribed and consequently this claim is dismissed with cost.

[6] Section 17 of Prescription Act 68 of 1969 provides that:
"(1.) A court shall not of its own motion take notice of prescription.
(2.) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raise at any stage of the proceedings."

[24] In so far as the remaining claims of the plaintiffs under the first claim as well as under the second claim, I am of the view that liability only arose once the prosecution against the defendant was withdrawn during November 2004[7].

[25] The determination of quantum is the most difficult aspect in matters of this nature[8], save where there are actually pecuniary damages sustained. The rest of the plaintiffs' claims, essentially relate to *solatio*, save claim two which relates to the damages they incurred in having to engage the services of an attorney in respect of the criminal case. *Solatio* compensation, is in my view, merely a balsam to the emotional hurt the plaintiffs have suffered in any particular set of circumstances. There is no measure of pain suffered by an aggrieved person as the result of the humiliation he is subjected to because of the unlawful prosecution. The same applies to deprivation of liberty, if there

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[7] Vide *Unilever Bestfoods Robertsons (PTY) Ltd v Soomar* (*supra)* at paragraph [17] herein above.

[8] Vide the unreported judgment in Charles Mogale and Othes v Ephraim Seima case No. 575/04 (SCA) at para [8] where Harms JA said: ""The determination of quantum in respect of sentimental damages is inherently difficult and requires the exercise of a discretion, more properly called a value judgment, by the judicial officer concerned. Right-minded persons can fairly disagree on what the correct measure in any given case is…" At paragraph [18] the Supreme Court says that "…the general trend of awards in recent times and the fact that our courts have not been generous in their awards of *solatia* (Argus Printing & and publishing Co Ltd v Inkathat Freedom Party 1992 (3) SA 579 (A) at 590, a practice that is to be commended,…"

is no claim for loss of income. Neither can it be said that a particular amount is sufficient to remove the emotional hurt suffered by an aggrieved person. The Court, at the end of the day is called upon to make a thumb sucking, to determine, what would be an appropriate amount, to be awarded to act as a balsam to the injured feelings of the plaintiffs. The Courts must also be careful, not to award too little nor too much. At the end of the day, an award in casu is essentially purely a value and discretionary call on the presiding officer.

[25] I must also have regard to the duration of the infraction and whether there are mitigating circumstances. In casu, the defendant, save for calling the plaintiffs back to their work, a step for which it needs to be commended, failed to even apologize to the plaintiffs[9].

[26] I have, respectfully taken note of what Willis J said in the matter of Seymour v Minister of Safety and Security[10] the comparable study he made in regard to the awards made in previous cases an in particular the case of *May v Union Government* 1954 (3) SA 120 (N). In the *May* case an advocate who was unlawfully arrested and detained for few

[9] In Buthelezi v Poorter 1975 (4) SA 608 at 615H-616A) Williamson AJ**,** stated:

'I would have expected that anyone with any sense of decency who discover that he had wrongfully cast so grave and hurtful a slur would make haste to apologize or at the very least to explain that he had acted in good faith.'

[10] 2006 (5) SA 495 (WLD) at 499A-500.

hours, was awarded an amount of £1 000, which in today's currency is R350 000 to R400 000. He proceeded to look at the matter of *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 at 847B-C where the Judge "expressed his surprise at 'the comparatively low and insignificant awards made in Southern African Courts for infringements of personal safety, dignity, honour, self-esteem and reputation' and expressed that he accords with the aforesaid sentiments. Mills J then proceeded to award the plaintiff, (Mr. Seymour, a 66 year old man who had been deprived of his liberty on 29 December 2000 as the result of his arrest without a warrant on charges for which a warrant for his arrest would have been required) and brought to court on 3 January 2001 and had all the charges against him withdrawn) an amount of R500 000 which he called a more than a judicial 'slap on the wrist'.

[27] What Mills J refers to as a 'slap on the wrist' is in my view, with respect, more than a 'slap on the wrist' but a 'descending with a sledge hammer'. It is instructive to have regard to an unreported judgment of *Charles Mogale and two others v Ephraim Seima* under case No. 575/04, by the Supreme Court of Appeal where it said:

"In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted it is by way of damages and it operates in two ways—as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating defendant's conduct may, of course,

serve to increase the amount awarded to the plaintiff as compensation., either to vindicate his reputation or to act as a *solatium.*

In general, a civil court, in a defamation case, awards damages to solace plaintiff's wounded feelings and not to penalize or to deter the defendant for his wrong doing nor to deter people from doing what the defendant has done. Clearly punishment and deterrence are functions of the criminal law, not the law of delict. Only a criminal court passes sentence with the object of inter alia deterring the accused, as well as other persons, from committing similar offences in future; it is not the function of a civil court to anticipate what may have been in the future or to "punish" future conduct (cf *Lynch v Agnew* 1929 TPD 974 at 978 and Burchell *The Law of Defamation in South Africa* (1985) at 293).'" I am of the view that the same holds good in matters such as the one in casu.

[28] In my view, it is incorrect and dangerous to look at what the awards were in the past, and try to award equivalent amounts by converting those amounts into present currency. This simplistic approach fails to take into reality the general economic dynamics of the current environment we leave in. Such a simplistic approach has the potential of causing financial ruin to the Government with its parastatals. In *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others*[11] the Supreme Court said:

"The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes of the

[11] 2001 (2) SA 242 (SCA) at 260F.

community. Ultimately a Court must, as best as it can, make a realistic assessment of what it considers just and fair in all circumstances."

[29] I am further of the view that, the Courts, in their zeal to grant realistic awards to placate the injured feelings of the plaintiffs in matters such as the one in casu, must not cause an irrational imbalance in the legal terrain, in matters of compensation such as in casu and those involving general damages in motor vehicle accident matters, where the victims suffer acute and untold physical pain. The awards in the latter matters are by far disproportionate to the award made by Millis J in the matter of *Soul* (*supra).*

[30] I propose to grant one composite award as compensation to cover the remaining heads under which the plaintiffs have claimed, (with the exclusion of the one of *contumelia*). In the exercise of my discretion, I am of the view that, the amount mentioned herein below should in the circumstances of this case suffice to placate the hurt suffered by the applicants[12].

[31] With regard to the costs, I am of the view that a party and party cost scale will be appropriate in this matter. I see no reason in making any distinction with regard to the costs pertaining to claim two purely on account of the proven damages. It is always preferable to have all the claims arising from the same incident adjudicated upon within one forum, as the plaintiffs

[12] In the matter of Louw v Minister Minister of Safety and Security 2006 (2) SACR 178 (T) Bertelsmann J awarded damages of R75 000, 00 each where the plaintiffs were detained for 20 hrs.

wisely decided to do before this Court. I am of the view that all the costs must be computed on the party and party scale of this Court.

[32] In the premises I make the following order:

1. That the plaintiffs' claim for *contumelia* is dismissed with costs.
2. That the defendant is ordered to pay each plaintiff in respect of:
   (a) the first claim an amount of R200 000, 00
   (TWO HUNDRED THOUSAND RAND).
   (b) the second claim an amount of R1 200, 00
   (ONE THOUSAND TWO HUNDRED RAND).
3. That the defendant pays the costs of each plaintiffs' excluding the cost referred to in order 1 herein above, which costs shall be computed on party and party scale.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 25 /11/ 2008
PLAINTIFFS' ATT : MR. GREYVENSTEIN & GRÜNDLINGH INC.
PLAINTIFFS' ADV : MR. VAN DEN BERGEN
DEFENDANT'S ATT : RAMOTHWALA LENYAI ATTORNEYS.
DEFENDANT'S ADV : NO APPEARANCE.