REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 7179/2014

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

20/09/2019
DATE

SIGNATURE

In the matter between:

JOSEPH MASINDI — 1st Plaintiff

JIMMY BAMBELA — 2nd Plaintiff

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — Defendant

JUDGMENT

PHAHLANE, AJ

[1] These are claims for damages arising from malicious prosecution brought by the first and second plaintiff against the National Director of Public Prosecutions.

[2] In the beginning of the trial, Advocate Swart on behalf of the plaintiffs informed the court that the merits have been finalised, as it also appears on the judgment delivered on 26th January 2018 that the defendant is liable for 100% of the plaintiffs proven damages. Counsel further informed me that the plaintiffs will give *viva voce* evidence in support of their case.

[3] This matter comes before me for a determination of *quantum* only.

[4] In paragraph 37 of the amended particulars of claim, (which appears on page 47 of "Index to Pleadings – Bundle A), the first plaintiff claim damages in the amount of R 4 912 000.00 (Four Million Nine Hundred and Twelve Thousand Rand) which is made up as follows:

37.1 injury to his *corpus*	R 300 000.00
37.2 injury to his *dignitas*	R 500 000.00
37.3 injury to his *fama*	R 300 000.00
37.4 *contumelia*	R 500 000.00
37.5 loss of amenities of life	R 200 000.00
37.6 a change of personality for the worse	R 200 000.00
37.7 post-traumatic stress disorder	R 1 000 000.00
37.8 paranoid and avoidance traits	R 100 000.00
37.9 becoming emotionally blunt	R 100 000.00
37.10 deterioration of his work performance	R 100 000.00
37.11 general pain and suffering	R 200 000.00
37.12 past medical expenses	R 12 000.00
TOTAL PERMANENT DAMAGES SUFFERED	R 3 512 000.00

In paragraph 38, the following is claimed

38.1 future medication	R 300 000.00
38.2 future psychiatric treatment	R 500 000.00
38.3 future occupational therapy	R 300 000.00
38.4 future hospitalisation	R 300 000.00

TOTAL FUTURE DAMAGES SUFFERED	R 1 400 000.00
TOTAL DAMAGES SUFFERED	**R 4 912 000.00**

[5] In paragraph 38 of the amended particulars of claim, (which appears on page 89 of Index to Pleadings – Bundle A), the second plaintiff claim damages in the amount of R 5 812 000.00 (Five Million Eight Hundred and Twelve Thousand Rand) which is made up as follows:

38.1 injury to his *corpus*	R 500 000.00
38.2 injury to his *dignitas*	R 500 000.00
38.3 injury to his *fama*	R 300 000.00
38.4 *contumelia*	R 500 000.00
38.5 loss of amenities of life	R 200 000.00
38.6 a change of personality for the worse	R 400 000.00
38.7 post-traumatic stress disorder	R 1 000 000.00
38.8 paranoid and avoidance traits	R 200 000.00
38.9 becoming emotionally blunt	R 300 000.00
38.10 deterioration of his work performance	R 200 000.00
38.11 general pain and suffering	R 300 000.00
38.12 past medical expenses	R 12 000.00
TOTAL PERMANENT DAMAGES SUFFERED	R 4 412 000.00

In paragraph 39, the following is claimed

39.1 future medication	R 300 000.00
39.2 future psychiatric treatment	R 500 000.00
39.3 future occupational therapy	R 300 000.00
39.4 future hospitalisation	R 300 000.00
TOTAL FUTURE DAMAGES SUFFERED	R 1 400 000.00
TOTAL DAMAGES SUFFERED	**R 5 812 000.00**

[6] The first plaintiff, Mr Madzine Joseph Masindi (Masindi) testified that he was arrested on 29th July 2011 on a rape and robbery charge in the Musina case, with CAS number 09/07/2011. He explained that he does not know the grounds upon which his

arrest was based but he was informed by the police that he was being arrested on the allegations made by the community. He testified that he was taken together with the second plaintiff to a container holding cell at Musina police station. Blood samples were taken on the day of their arrest and the case was postponed several times before it was withdrawn on 3 July 2012.

[7] He was placed in a 3x10 metre container cell which is situated or placed in the premises of the police station. It has a small window with burglar bars and there is only one toilet which is at the corner. Masindi testified that there were more than twenty arrested people inside this container and there was no privacy in relation to when a person had to use the toilet. He did not have a good reception from his cellmates because upon hearing of the reasons for his arrest, he, together with the second plaintiff were treated as follows:

i. They were made to sleep on the wet floor next to the toilet
ii. They were made to clean the mess in the toilet and urine on the floor with their own T-shirts and those of other inmates;
iii. One of the inmates was assaulted and was bleeding – his blood spilt on the floor and the two plaintiffs were made to lick the blood with their tongues as a form of punishment;
iv. They were also forced to masturbate and to perform same to other inmates on their private parts.

[8] Masindi said even though some police officers [whom he called the elders of the police station] came to check if any of the inmates had complains, they were nevertheless assisted and were made to stand against the wall. One of the inmates who tried to complain was moved to another cell and was assaulted by the police for lodging a complaint. He could therefore not raise his concerns as he was afraid that he will receive the same treatment. He does not know if the blood he was licking was contaminated or not. He said he was previously convicted for rape in 2001 but after his release, he was reintegrated back into the community. He held two piece-jobs doing gardening from people's homes and earned R400 per yard which came up to R4900 per month. However, he cannot work anymore because community members

say he will rape their children. The impact on his family life is such that the mother of his child deserted him and took their child to his mother and disappeared. He said he explained to the community that the charges were dropped because he could not be linked to the commission of the offence, but he is still not accepted by the community. According to him, the community is currently trying to get him rearrested because they are not aware of the outcome of the court case.

[9] Under cross-examination, he admitted that he has an extensive criminal record. It was put to him that, with his criminal record, it cannot be said that he was negatively affected by not being wanted by the community. Masindi was referred to page 67 of Bundle F, where it is stated by the police that he is unemployed. This information was apparently given to the police by Masindi himself when he was charged. It was further put to him that his evidence that he was employed was a fabrication and further that he did not aver in the pleadings that he was employed. Masindi disputed that, saying that he was arrested at his work place.

[10] Tntshengedzeni Jimmy Bambela (Bambela) who is the second plaintiff, testified that on the 29th July 2011, it was the first time in his life to be arrested. His evidence is similar in content to that of the first plaintiff with regards to having been arrested on the 29th of July 2011 and the treatment they received while being kept in police custody – meaning that his evidence corroborates that of Masindi. He also corroborates Masindi regarding their case being postponed several times before it was finally withdrawn on 3 July 2012. Explaining the effect of the arrest and the treatment he received after the arrest, Bambela said he was humiliated. He confirmed the evidence of Masindi that they were detained in the container cell which was overcrowded. He was given a sponge and a blanket by one of the inmates to sleep on. The toilet was overflowing and there was blood of an injured inmate which spilt on the floor after being assaulted. One of the inmates who appeared to have been the leader of the people in the cell instructed him and the first plaintiff to lick the blood on the floor and clean the overflowing toilet and the floor.

[11] He testified that one morning the police came to search the cell and they were forced to strip naked and that was humiliating to him. The police commissioner came the following morning and he (Bambela) requested to be moved to the other cell

because of the treatment he received in the cell in which he was kept, but he could not get assistance from the commissioner. While kept in custody, his father passed away and he could therefore not attend his funeral. His wife was also not allowed to see or visit him and she was told that he (Bambela) was arrested for a passport and will be taken to the soldier's quarters which is about 10 kilometres from the police holding cells. His arrest had a negative impact on his family because one day when one of his children came back from school, she asked him if he is a rapist. His blind mother whom he was staying with before his arrest, is afraid of him and she had to move out of the house to go and stay with the plaintiff's elder brother. Even though he explained to the family that the court found no evidence against him, there is still a problem because the family does not trust him. His relationship with his wife is also strained because his wife is no longer interested in him and she keep reminding him of the rape charge. Bambela said he was self-employed doing garden maintenance at people's residences and would be earning about R1200.00 per week if he worked in five homes for example. However, he is currently struggling because he can no longer get the piece-jobs because no one allows him in their yards. His relationship with the community is also strained because his friends do not want to associate with him. He is now scared every time he sees a police van.

[12] Under cross-examination, he testified that he was responsible for the maintenance of his family, but since no one wants to hire him anymore for garden services, he lives off on the grants which his children receive from the government. That concluded the evidence of this witness and the plaintiffs closed their case. The defendant had no witnesses to call.

[13] Both plaintiffs claim damages relating to, among other things, the injury to their *corpus; fama and dignitas.* Malicious prosecution, along with wrongful arrest and unlawful detention, is one of the foundational common law causes of action that defends breaches of the right to personal liberty and human dignity.

[14] In ***Rahim and 14 others v The Minister of Home Affairs 2015 (7K6) QOD 191 (SCA),*** at para 27, it was held that:

"[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages 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 liberty 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 liberty took place;

27.2 the conduct of the defendants; and

27.3 the nature and duration of the deprivation.

[15] In ***Olgar v The Minister of Safety and Security 2008 JDR 1582 (E)*** at para 16 the court stated 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 it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the "horn of the plenty", at the expense of the defendant.'

[16] Dealing with quantum in ***Minister of Safety and Security v Seymour 2007 (1) ALL SA 558 (SCA)*** *at para 14*, Nugent JA held that:

> *"The real import of the Constitution has not been to enhance the inherent value of liberty, which has been constant, albeit that it was systematically undermined, but rather to ensure that those incursions upon it will not recur."*

[17] Masindi indicated that blood samples were taken on the day of their arrest, and that they also attended an identity parade but were not pointed out. This appear on paragraph 10 of the judgment on merits by MPHAHLELE J, where it is stated that:

> *".....On 03 July 2012 they were advised that results of the DNA tests did not implicate them in the commission of the offences they were charged with and they were released".*

And on paragraph 17 that:

> *"It appears that there was no other evidence other than the DNA results. The inscription made in the SAPS investigation diary as early as on 08 August 2011 read: "All the witnesses say they failed to identify the suspects because they were wearing [wore] masks, kindly establish how the two accused were arrested and who identified them".*

And on paragraph 21 the court held that:

> *"It is clear that the defendant acted without reasonable and probable cause and with malice when it initiated the prosecution being fully aware that none of the witnesses could identify the plaintiffs as perpetrators of the robbery and rape. The defendant was malicious in persisting with numerous futile postponements whilst being aware that DNA evidence failed to link the plaintiffs to the crime".*

[18] It is on this basis that Advocate Swart on behalf of the plaintiffs argued that as a result of this unlawful arrest and detention, and malicious prosecution, the plaintiffs were subjected to dehumanised treatment where they were forced to lick someone's blood and masturbate. He insists that the defendant, having known from the beginning that it had no case against the plaintiffs, there was no reason to keep them in custody for longer than is necessary, and as such, both the plaintiffs should be compensated for the humiliation and traumatic experience they went through while in detention at the instance of the defendant. He submitted that even if the first plaintiff had a criminal record, there was no reason why he had to be kept in custody for sixteen (16) days without a case.

[19] There is no indication as to whether the Magistrate in the lower court was informed of the treatment the plaintiffs received while in custody before they were granted bail on the 16th of August 2011. Neither does it appear in the judgment on the merits by MPHAHLELE J, that the court was informed of these circumstances. Nevertheless, nothing can compare to the degrading and appalling conditions which the plaintiffs had testified about.

[20] No amount of money can equate to the humiliation which these plaintiffs went through. Both of the plaintiffs explained the strain put on their families and the effect thereof as a result of their arrest and detention. They both testified that they can no longer find employment within the community where they were working before their detention.

[21] Advocate Williams on behalf of the defendant argued that there is no proof of loss of earnings and that this aspect is confirmed by a document (on page 67 of Bundle F) which the first plaintiff was referred to under cross-examination that he informed the police that he was unemployed. She insists and submitted that with no evidence to support his allegation of employment, the first plaintiff should not be compensated for loss of income. She however conceded that the second plaintiff was never challenged with regards to his loss of income.

[22] A perusal of the original particulars of claim for both the plaintiffs indicate that they had claimed for loss of income, though not specified as to the amount which

has been lost. The amended particulars of claim as they appear in paragraphs 4 and 5 above, loss of income is not averred and neither is there an indication of the amount lost.

[23] I therefore agree with the submission made by the defendant that no proof of loss of such income has been provided. It is trite law that a party who alleges must proof, and in this case, the onus rested on the plaintiffs to proof loss and this was not done. I am of the view that both plaintiffs have failed to prove loss of income and as such, no compensation will be made in that regard.

[24] The general principles governing the assessment of damages is that the court has a wide discretion in determining a fair and reasonable compensation to an injured person

[25] This court will reiterate on what was said in ***Sithole v Min of Police and NDPP, Case 63897/2011*** *at paragraph 24* (this Division), where MALI J said the following:

> *"When determining the quantum of damages to be awarded for unlawful deprivation of liberty, courts are essentially being asked to balance the interests of the litigant and those of the public purse. There is nothing unusual in courts playing this role. What is notable, however, in my opinion, is that courts often lean heavily in favour of protecting the public purse and thereby fail to pay sufficient attention to the constitutional rights of the litigant before court. This would seem to emanate from the obiter dictum of Holmes J in* ***Pitt v Economic Insurance Co. Ltd 1957 (3) SA 284 (D) at 287E-F,*** *where the judge, in relation to the assessment of damages, opined: "I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense".*

[26] In ***Minister of Safety and Security v Seymour*** *(supra)* at paragraph 20 the Court said:

> *"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."*

[27] In assessing quantum to be awarded to the plaintiff, the court in ***Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA),*** *at para 26* stated that:

> *"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 make 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 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".*

[28] Advocate Swart submitted that the plaintiffs, having been subjected to the inhuman conditions and treatment while in detention, they were evaluated or

examined by a psychiatrist. Advocate Williams on the other hand argued, and rightly so, that the plaintiffs did not testify about having consulted a psychiatrist and further that there is no record from the psychiatrist to prove that the plaintiffs have been evaluated. She therefore submitted that in the absence of such records, the court should reject the submissions made on behalf of the plaintiffs. It appears from page 88 at paragraph 32 of Bundle A that: *"according to the psychiatrist who examined the plaintiff after his release from police detention and as a direct result of his ordeal, the plaintiff has suffered severe and chronic post-traumatic stress disorder as well as major depression. His condition will probably never improve as his prognosis to recover in future was assessed as poor"*. The above quote relates to the second plaintiff, Mr Bambela.

[29] It is true that no such evidence was led by the plaintiffs and no records were presented to court to prove this allegation. Neither was the psychiatrist called to give evidence in that regard. The onus rested with the plaintiffs to prove the damages in relation to past and future medical expenses. It is important to note that counsel was asked by the court if the plaintiffs will present proof of any of the claims made in relation to what appears from the averments made, as far as medical expenses are concerned, and reference was made to a paragraph relating to '*post-traumatic stress disorder*, as an example.

[30] Having said this, counsel on behalf of the plaintiffs conceded that there are no records from the psychiatrist to prove that the plaintiffs have undergone treatment. It therefore follows that in the absence of such expert or medical evidence provided in that regard, no award can be made in regards to any medical expenses. To be specific, with regards to the first plaintiff, the items listed on paragraphs 38.5 to 38.9; 38.11; as well as the items listed on paragraphs 39.1 to 39.4 will be disregarded by the court. With regards to the second plaintiff, the items listed on paragraphs 37.6 to 37.10; 37.12; as well as the items listed on paragraphs 38.1 to 38.4 will be disregarded by the court.

[31] Advocate Williams submitted that in making an award for the first plaintiff, the court should take into consideration that he has an extensive criminal record and

should not be enriched by being awarded a large amount. Advocate Swart on the other hand submitted that the rights of the plaintiffs have to be protected, and that this can be done by awarding general damages for loss of earnings and medication. He further submitted that the first plaintiff can receive a lesser amount due to his criminal record.

[32] I have already ruled that past and future medical expenses, as well as loss of income, will not be considered and awarded by this court, as the plaintiffs have failed to prove such.

[33] Both counsels referred me to various authorities regarding the appropriate amount to be awarded to the plaintiffs. However, it should be noted that comparable cases, when available, should rather be used to afford some guidance. This was also reiterated by Nugent JA in ***Minister of Safety and Security v Seymour*** (*supra*) that: "*caution should be exercised in comparing awards because each case must of necessity be decided on its own facts*".

[34] Both parties are in agreement that the plaintiffs spent sixteen days in custody and I am also bound by the decision of MPHAHLELE J, in so far it relates to the number of days the plaintiffs spend in detention at the instance of the defendant, which is sixteen days.

[35] Having assessed all the circumstances of this case; the duration of detention relevant for consideration; the emotional effect thereof, I am of the view that it would be fair and appropriate to award damages in the amount of R20 000.00 (Twenty Thousand Rand) per day on behalf of the first plaintiff and R40 000.00 (Forty Thousand Rand) per day on behalf of the second plaintiff.
In so far as costs are concerned, it should follow the result and be awarded in favour of the plaintiffs.

Consequently, the following order is made:

1. The defendant is ordered to pay the sum of R 320 000.00 (Three Hundred and Twenty Thousand Rand) to the first plaintiff, as damages.

2. The defendant is ordered to pay the sum of R 640 000.00 (Six Hundred and Forty Thousand Rand) to the second plaintiff, as damages.

3. The defendant is ordered to pay interest, in respect of the aforesaid amounts at the prescribed rate from date of judgment until date of final payment.

4. The defendant is ordered to pay the costs of suit on a party-and party basis

P. D PHAHLANE

Acting Judge of the Gauteng Division, Pretoria

Heard on	: 29 August 2019
For the Plaintiff	: Adv N. Swart
Instructed by	: ERWEE ATTORNEYS
For the Defendant	: Adv T. Williams
Instructed by	: STATE ATTORNEY
Date of Judgment	26 September 2019