IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 2022-045803

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED/ NO.

[redacted]

SIGNATURE

13 June 2024

DATE

In the matter between:

TAL KATS **Plaintiff**

And

MINISTER OF POLICE **Defendant**

JUDGMENT

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload onto Caselines. The date and time for hand-down is deemed to be **10:00** on **13 June 2024**.

MNISI AJ

Introduction

[1] In this matter one Mr. Tal Kats *("Mr. Kats/the Applicant")*, an adult male, instituted an action in this court against the Minister of Police *("the Respondent")*. The matter was before me on a default basis in that the respondent failed to file any opposing papers. As set out in his combined summons the applicant, at the commencement of his action, claimed delictual damages from the respondent for unlawful arrest and detention.

[2] The only issue for determination before this court is whether or not the arrest of the applicant by members of the South African Police Services ("SAPS") and the subsequent detention thereafter was unlawful and, if so, the determination of the applicant's damages as a result thereof.

The Applicant's Case

[3] According to the particulars of claim, on 19 November 2019 the applicant was arrested by members of the SAPS whose names and ranks are unknown to him at his place of residence without a warrant of arrest on allegations of dealing in dagga. He was thereafter detained at Wierdaburg Police Station for a period of 3 (three) days.

[4] The applicant further claims that his arrest was made without any reasonable suspicion and/or grounds that he has committed a schedule 1 offence and/or any other offence. He also avers that he did not commit any offence in the presence of members of the SAPS and that there was no objective evidence to justify his arrest. Accordingly, Mr. Kats claims that as a result of his arrest,

sustained severe psychological shock and trauma and subsequently suffered damages which damages were foreseeable by members of the SAPS.

[5] The applicant further contends that because of his unlawful and wrongful arrest by the SAPS members, acting within the course and scope of the respondent, and the *sequalae* thereof, he suffered damages in the amount of R500 000.00 comprising of contumelia, deprivation of freedom, discomfort, suffering, loss of amenities of life, emotional shock and psychological trauma.

The Jurisdictional Prerequisites in terms of s 40 of the Criminal Procedure Act

[6] In terms of Subsection 40(1)(b) of the Act[1] ("the Act"):-

> *"A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody."*

[7] In Heimstra's *Criminal Procedure*,[2] the learned author, with reference to the *Sekhoto* case[3] summarises the law pertaining to arrest without warrant as follows:-

1. The jurisdictional prerequisites for subsection 40(1)(b) must be present;

2. The arrestor must be aware that he or she has a discretion to arrest;

3. The arrestor must exercise that discretion with reference to the facts;

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1 Criminal Procedure Act 51 of 1977.

2 *Page 5-8.*

3 *Minister of Safety and Security v Sekhoto* (131/10) **[2010] ZASCA 141** (19 November 2010).

4. There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[8] It is fairly trite that these grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.[4] The arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an ***initial*** suspicion, steps have to be taken to have it confirmed in order to make it a ***reasonable*** suspicion before the peace officer arrests. Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order.*[5]

[9] In the matter of *Olivier v Minister of Safety and Security and Another,*[6] the court held that:

> *"When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own facts."*

[10] The onus rests upon the arrestor to prove that the arrest was objectively lawful.[7]

[11] If the arrest is unlawful, it follows that the subsequent detention must also be unlawful.[8]

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4 *R v Van Heerden* **1958 (3) SA 150** *(TPD); Duncan v Minister of Law and Order* **1986 (2) SA 805** *(AD) at 814D.*

5 **1993 (1) SACR 434** *(TPD); Heimstra (supra) at 5-8.*

6 *2009 (3) SA 434 (WLD).*

7 *See Minister of Law and Order and Others v Hurley and Another* **1986 (3) SA 568** *(AD) at 589 E-F, Mabasa v Felix* **1981 (3) SA 865** *(AD) and Minister of Law and Order v Matshoba* **1990 (1) SA 280** *(AD) at 284.*

8 *Minister of Safety and Security v Tyokwana* **2015 (1) SACR 597** *(SCA) at 600G.*

Discussion

[12] In advancing the applicant's claim, counsel for the applicant argued that the applicant suffers from major depression, PTSD, severe stress and had to suffer from torture and embarrassment. The applicant ought to be compensated for the loss of his livelihood by the respondent, as it was the respondent and/or its agents who caused all the abovementioned issues.

[13] Counsel for the applicant further submitted in his heads of argument that this court should exercise favourable discretion regarding the general damages claimed and should accept the recommendations of the experts for the calculations of the medical bills, and he loss of earnings and loss of earning capacity. I shall deal with difficulties regarding acceptance of expert reports later in this judgment.

Was the arrest of the Applicant lawful in terms of subsection 40(1)(b) of the Act?

[14] Although the applicant chose not to testify, the matter was nevertheless conducted with the common understanding that the onus of proving that the arrest and detention were lawful rested on the respondent. It is the respectful opinion of this Court that the above should not be interpreted or applied to the detriment of the prevailing jurisprudence and entrenched legal principles.

[15] As alluded above, the respondent chose not to file any opposing papers. In light of the aforegoing, this Court finds that the respondent has failed to discharge the onus incumbent upon it to prove, on a balance of probabilities, that the arrest of the Plaintiff was lawful in terms of subsection 40(1)(b) of the Act.

[16] I turn now to assess the damages for which the respondent is liable to the applicant.

Quantum of Damages for Unlawful Arrest and Detention

[17] It was submitted on behalf of the applicant that the respondent should be ordered to pay to the applicant the sum of R8 963 128.00 (in terms of the amended particulars of claim) made up as follows: R168 642.00 for past medical, hospital and psychological expenses; R147 050.00 for future medical and psychological expenses; R8 147 736.00 for past and future loss of earnings and earning capacity as well as R500 000.00 for general damages. Regrettably, no evidence, save for general damages, was led in support of the above and no authorities were provided to this Court's as guidance to assist in determining the applicant's damages.

[18] In assessing the quantum of the applicant's damages, the Court has had regard to the following authorities: In the matter of *Mahlangu*[9] the Constitutional Court noted that it is trite that damages are awarded to deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place. The court then cited, with approval, the decision of the SCA in the matter of *Seymour*[10] where it was held:-

> "*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.*"

[19] Moreover, in the matter of *Tyulu*[11] the SCA held the following:-

> "*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*

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9 *Mahlangu and Another v Minister of Police* **[2021] ZACC 10** at paragraph 50.

10 *Seymour v Minister of Safety and Security* ***2006 (6) SA 320*** *(SCA) at paragraph 20.*

11 *Minister of Safety and Security v Tyulu* **2009 (5) SA 85** *(SCA) at paragraph 26.*

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."

[20] Further, in paragraph [54] of *Mahlangu* it was held:-

> *"In De Klerk this court took into account the fact that the applicant was detained from 20 December 2012 to 28 December 2012. It also took into account the fact that the applicant had provided precedent for the quantum of the general damages he sought, and the fact that the respondent did not put up a serious fight in that respect. It awarded damages in the amount of R300 000 for the eight days' deprivation of freedom."*

[21] The relevant factors in the present matter have already been set out in this judgment when dealing with the applicant's particulars of claim. Nevertheless, those factors which are relevant to the assessment of the applicant's damages will be highlighted in the discussion below.

[22] On the one hand the circumstances surrounding the arrest were (putting aside that the very fact of being arrested must, in itself, be a traumatic event) not as traumatic or appeared to have had such a humiliating effect upon the applicant as has unfortunately been the case in so many similar matters dealt with by our courts. For example, there is no evidence before this court that the applicant was subjected to any torture. Nor does it appear that he was arrested in front of his peers or any other members of the community.

[23] What is often frequent in this Court in matters of this nature (and sadly there are simply too many in number) is the general failure, on the part of plaintiffs,

to place before the courts which are tasked to assess their damages, expert medical evidence pertaining to same.

[24] In general, the Court refers to evidence of a medico-legal nature by relevant experts in support of various heads of delictual damages. Even if those experts are not subpoenaed to give oral evidence, surely there are rules which make provision for the admissibility of their reports before the Court of law.

[25] Counsel for the applicant in advancing the applicant's claim for emotional suffering and other related *sequelae* sought to place relies on certain medico-legal reports compiled by various experts. Regrettably, these reports are not properly before court. It is my considered view that reliance on reports which are not properly before Court would be tantamount to speculation.

[26] It is trite that expert reports are filed in terms of Rule 36(9)(a) and (b) of the Uniform Rules of this Court. In this case for instance, the report of the Actuary, AC Strydom was filed without such notice. Moreover, there is no application before this Court that any evidence be given by way of affidavits as contemplated by section 34(2) of the Civil Proceedings Evidence Act 25 of 1965 read with Uniform Rule 38(2). Similarly, and as alluded above, this court has difficulty in accepting the evidence of both the Clinical Psychologist and Industrial Psychologist's reports that are not properly before this Court.

[27] Moreover, very little information was provided regarding the applicant's personal circumstances, save that for the factors as alluded above. No admissible evidence was presented whatsoever in support of a claim for loss of income and business opportunities. This court is limited to the facts as alluded to by the applicant and therefore I have taken into account the manner of the arrest as described followed by the detention wherein the applicant suffered indignity.

[28] Despite this limited information, I am duty bound to consider and apply fairness demanded of me when considering all circumstances relevant to quantify the harm caused by the violation of one's constitutional rights. I am mindful that

the period of time for which a person is detained after an arrest cannot only be the factor to be considered when determining the extent of the damage suffered. All prevailing circumstances should be considered cumulatively.

[29] I turn now to assess the period of unlawful detention for which the respondent is liable to the applicant.

[30] The Supreme Court of Appeal held in *Isaacs v Minister van Wet en Orde*[12] that the competence afforded by **s 50(1)** of the **Criminal Procedure Act 51 of 1977**, is not dependent on the prior arrest being lawful. Theron J explained in *De Klerk v Minister of Police*[13] that the Appellate Division in *Isaacs* found that:

> 'a detainee's continued detention pursuant to an order of court remanding him in custody in terms of **section 50(1)** of the **Criminal Procedure Act may** be lawful even though the detention followed from an unlawful arrest.'

[31] Theron J[14] highlighted that the mere existence of a remand order is not enough to break the chain of causation, and the proposition that remand pursuant to an unlawful arrest will necessarily be lawful is not supported by *Isaacs*. She explained that in determining liability for subsequent detention, a plaintiff needs to prove that the unlawful, wrongful conduct of the police factually and legally caused the harm, the post-court hearing deprivation of liberty.

[32] It was contended on behalf of Mr Kats that pursuant to his arrest on 19 November 2019 he was detained for a period of 3 days at Wierdaburg Police Station until his date of first appearance at the Pretoria Magistrate's Court on 21 November 2019. On the same day he was denied bail which led to a further detention of 7 days due to the fact that his bail was opposed by the

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12 **1996 (1) SACR 314** (SCA).

13 2020 (1) SACR 1 (CC).

14 At par [45].

respondent. He was subsequently granted bail on 2 December 2019, which means Mr Kats spend a period of 14 days in custody.

[33] Now that I have accepted that the arrest was unlawful, it is my considered view that a reasonable arresting officer in the circumstances should have foreseen the possibility that, pursuant to an unlawful arrest, Mr. Kats would be remanded in custody because of the seriousness of the charges. These circumstances, and in the absence of any evidence to the contrary, it is reasonable and fair to hold the defendant liable for the harm suffered by Mr. Kats for the whole period 14 days during which he was detained.

[34] In *Motladile v Minister of Police* 2023 (2) SACR 274 *(SCA)* the Supreme Court of Appeal (SCA), on appeal from this Division, criticised the impression created that unlawful arrest matters can be uniformly quantified by calculation of an amount of approximately Fifteen Thousand Rand (R15,000.00) per day. The SCA unanimously found that any attempt to "unify" calculation of *quantum* through a process that the SCA dubbed as a *"one size fits all approach"* is not in the interest of justice.

[35] In the lack of detail to the circumstances of the arrest, as well as events that took place thereafter, I take guidance from the matter of ***Olivier v Minister of Safety and Security and Another*** **2009 (3) SA 434***(W)* in which it is eloquently stated in relation to the right of freedom that:

> *"Any infringement on this basic right is a serious inroad into an individual's liberty and will be open to censure. The censure in this matter is by way of solatium awarded to the plaintiff for his injury."*

[36] Further in the ***Olivier*** matter it is expressed that the plaintiff's damages will ultimately be forthcoming from the State coffers to which the citizens of this country contribute. Some restraint is called for when awarding damages where the *fiscus* is the source thereof. On the basis of the above, as well as with guidance to the applicable legal principles stipulated in ***Oliver*** that it has to be kept in mind that the compensation originates from the fiscus (i.e the public

purse), I am of the view that the submissions as made by the applicant's counsel on an amount representing just and fair *quantum,* are extremely too high.

[37] I hold the view that an amount between R450,000.00 (Four Hundred and Fifty Thousand Rands) and R500,000.00 (Five Hundred Thousand Rands) would suffice as fair and just compensation for the damages proven by the applicant. The aggregate between these two (2) amounts is the amount of R475,000.00 (Four Hundred and Seventy Five Thousand Rands), which is the basis on which I calculate compensation to the applicant to be a just and fair amount in the circumstances.

[38] Having taken all of the aforegoing factors into account, it is the opinion of this Court that a suitable amount for general damages to be paid by the respondent to the applicant is the sum of R475,000.00 (Four Hundred and Seventy Five Thousand Rands).

Order

[39] The Court makes the following order, namely:-

1. The respondent (The Minister of Police) is to pay to the applicant (Mr. Kats) the sum of R475 000.00 (Four Hundred and Seventy Five Thousand Rands);

2. Interest thereon at the prescribed rate of interest from the date of judgment to date of final payment;

3. Costs of suit.

[redacted]

J Mnisi

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the plaintiff:	Adv X Van Niekerk
Instructed by:	ML Schoeman Attorneys
For the defendant:	Unknown
Date of the hearing:	2 February 2024
Date of judgment:	13 June 2024