Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG

CASE NO: 2351/19

In the matter between:

DAVID TOMODI **PLAINTIFF**

and

MINISTER OF POLICE **DEFENDANT**

JUDGMENT

REDDY AJ

Introduction

[1] The plaintiff instituted a delictual action against the defendant, the Minister of Police, pursuant to his warrantless arrest, for his unlawful

arrest and detention from 10 January 2019 to 14 January 2019. The action was defended. By virtue of an order of court, the merits and

quantum were separated. On 9 February 2023, the following orders were made:

(i) The defendant is 100% liable for all the agreed and or proven damages of the plaintiff.

(ii) The quantum proceedings are postponed to a date to be determined by the Office of the Registrar in conjunction with the Office of the Judge President,

(iii) The defendant is ordered to the pay the costs of the suit on a party and party basis on the High Court Scale.

[2] Having been seized with the deliberation of liability, it would be prudent to provide a broad factual matrix, preceding the introduction of the evidence on quantum presented by the plaintiff and defendant.

[3] On 10 January 2019 at about 20h50, a complaint was received regarding an allegation that a crime of malicious damage to property had been allegedly committed. This resulted in the plaintiff's arrest. After the arrest of the plaintiff, he indicated that hot water had been poured on his person by Nkobeng (the complainant in the malicious damage to property case). I found that plaintiff was unlawfully arrested and detained for the period 10 January 2019 to 14 January 2019.

[4] Further thereto, I was singularly unimpressed with collective evidence of the employees of the defendant, which was accented in my judgment, on liability where the following was penned:

[24] "The collective evidence of the defendants' witnesses were of an unconvincing tenure. In the assessment of the evidence, it proved an extremely difficult task to formulate a proper mosaic of proof on which the reasonable suspicion of Mogotsi was founded. Given the two grounds that Mogotsi relied on to effect the arrest, he could not have formed a reasonable suspicion. In addition, the defendant's witnesses' evidence were littered with improbabilities coupled with a penchant for intentionally concealing material facts from ventilation. This stance would have no doubted effected the *bona fides* of a reasonable suspicion, assuming such existed...."

[5] I then proceed to justify the conclusions that were arrived at. Crucially, which is intertwined to the issue of quantum, I factually found:

"(ii) **It is indisputable that boiling water was thrown at the plaintiff. This fact as per the case of the defendant was mentioned on the scene and in a written statement made later that evening by Nkobeng...."**

Quantum

[6] The plaintiff was 31 years old, at the time of his arrest and resided at Huhudi, Vryburg. He was a bachelor, with two children, one of which had passed on. The highest level of education that he attained was Grade 10. The arrest of the plaintiff was executed in the presence of his mother. The manner of his arrest, caused him to feel that he was not part of the "world." A request for medical intervention

was declined by the police officers. The police officers retorted that **"nothing had happened to him"**

[7] At Huhudi SAPS, the plaintiff was thrown with twenty (20) litres of cold water. He was placed on a truck wherein he waited for a period. Thereafter he was transferred to the back of a police van. The police van was driven to a petrol station to purchase luxuries. From the petrol station, the plaintiff was transported to Pudimoe SAPS, which was approximately fifty (50) to sixty (60) kilometres away.

[8] At Pudimoe SAPS, the plaintiff beseeched the police officers for medical assistance. The plaintiff indicated he was "feeling the heat" from his wounds, which included blisters on his face which oozed "liquid." Regarding his detention, the plaintiff was held in a cell which was four (4) metres by three (3) metres, with six (6) other detainees. These detainees confiscated an amount of R50-00, other detainees sought cigarettes from him, but the plaintiff could not acquiesce, as his cigarettes were wet.

[9] No proper provision was made for him to sleep. There was no mattress. Resultantly the plaintiff had to sleep on the floor. A blanket had to be shared with an inmate who was described as "insane." The sleeping arrangements had a negative effect on his injuries, as the plaintiff had no clothing which covered his upper body. The covering of his upper body with a blanket caused blisters which "leaked".

[10] There was no privacy when the latrine facility was in use. The sleeping area and latrine were not separated. There was no proper access to water, no reading material nor was there any entertainment.

[11] On 14 January 2019, whilst at the holding cells at court, a police officer called colleagues from Huhudi SAPS to take the plaintiff to the clinic. The entire experience had negative effect on him.

[12] The three witnesses that the defendant called on quantum, more pertinently focussed on the date on which the plaintiff had received medical treatment. These witnesses were honest witnesses and did not attempt to amplify or embellish their evidence. In the final analysis these witnesses' evidence did not add to the dispute, given the findings on the documentary evidence on liability that the plaintiff had not been afforded medical attention on 14 January 2019.

Plaintiff's submissions

[13] Mr Maree for the plaintiff submitted that against the backdrop trite authorities, the following factors deserve emphasis:

(i) The way the plaintiff was arrested.

(ii) The conditions under which the plaintiff was detained.

(iii) The plaintiff was detained whilst suffering from excruciating burn wounds without receiving medical attention.

(iv) The plaintiff's experience whilst being detained.

(v) The inadequate and inhumane sleeping arrangements in the cells.

(vi) The negative view the community holds of the plaintiff after his arrest and detention.

(vii) All other circumstances in this matter, and

(viii) The flagrant disregard of the plaintiff's constitutional rights.

[14] Mr Maree submits:

> "an appropriate fair and reasonable award will be **R300 000.00**. In further support of this amount, we submit that if regard is had to the MOTLADILE matter, the Plaintiff was detained in a similar type of circumstances that the plaintiff therein was detained. However, in this matter before the above Honourable Court, the Plaintiff was detained whilst suffering excruciating pain and discomfort throughout the duration of his detention. This pain and discomfort, we submit, is tantamount to being tortured. Because of this, we submit, a higher quantum is justified than the MOTLADILE matter."

[15] In respect of interest, Mr Maree proposed that the plaintiff is entitled to an order in terms of which interest be granted from the date of demand or the date of summons. It was further contended that there is no basis to deviate from the usual order regarding costs:

> "15.4 However, concerning the postponement of the 6th of June 2023 and the hearing on 19 June 2023, we seek punitive costs against the Defendant. To this end:

15.4.1 the postponement on the 6th of June 2023 was unnecessary. If proper regard was had to the judgment given on the merits, the agreement between the parties concerning the status of documents and the hearing on merits, the Defendant would not have sought such a postponement. Irrespective thereof, the purpose of the postponement, to authenticate the entry in dispute was not met. The Defendant did not call the author nor attempted to authenticate the entry.

15.4.2 the witnesses called to testify on 19 June 2023 did not give any relevant evidence.

15.5 In the premises we seek a cost order against the Defendant for the 6th and 19th of June 2023 on the High Court Attorney and Client scale."

Defendant's submissions

[16] In written heads of argument, Ms Makamu for the defendant referred to the seminal authorities, in actions of this nature. The high point of the written submissions is best quoted *verbatim* to circumvent it from being misconstrued. It provides as follows:

"17. I submit that the plaintiff did not lead any evidence that the at time of the arrest he was employed, therefore consider that the court must be reminded that in awarding quantum it is simply placing the accused in a situation he would have been but for the arrest and unlawful detention.

The plaintiff's status in the community is not known and therefore he has to be awarded damages that are deserved by people of his status. It is submitted that for the reason that the plaintiff has no special status in the community therefore the Court should award a lesser amount of damages. Further to that the plaintiff was not arrested in the eyes of the community.

19.In considering that the plaintiff was arrested with injuries, the court should consider that the plaintiff had only visited the clinic twice to attend to his injuries, which according to him was for dressing purposes and the plaintiff was never

admitted to into hospital. I pose to mention that said injuries was not caused by the police officials.

20. In light of the totality of facts, previous awards, and applicable case law, I respectfully submit that R35 000.00 per day or a total of R140 000.00 is a fair and reasonable award in damages."

[17] Turning to the assertion that a punitive cost order be ordered against the defendant for the 6 June and 19 June 2023, the defendant contended that the attorney and client scale of costs is reserved for instances where it can be found that a litigant has conducted itself in a clear, indubitably, vexatious, and reprehensible manner. To reinforce this averment counsel for the defendant referred to *Du Toit NO v Thomas NO and Others* (2016) (SCA) 94.

[18] In the view of Ms Makamu, a definitive finding had not been made during the trial on liability on when the plaintiff received medical treatment, notwithstanding a suggestion put to the plaintiff that he was taken to hospital on 11 January 2019, which was predicated on the contents of a hospital file. This date was emphatically denied by the plaintiff, countering that the first date of any medical intervention was 14 January 2019. Given this discrepancy, it was obligatory on the defendant to call the author of the document to shed light on the date on which the plaintiff was medically treated.

Discussion

[19] When assessing quantum, it is important to bear in mind that the primary purpose behind fixing and awarding damages is not to enrich the aggrieved party but to award him compensation in the form of a *solatium* for his injured feelings. The amount awarded should accordingly be commensurate with the injury inflicted. See *The Minister of Safety and Security v Tyulu* 2009 (5) SA at paragraph [85]. But in assessing such compensation, the amount fixed should also reflect how important the right to personal liberty is in our nascent constitutional democracy and how jealously we protect and guard it. See *Phungula v Minister of Police* [2018] ZAKZPHC 21.

[20] In *Zealand v Minister for Justice and Constitutional Development and another* [2008] ZACC 3; 2008 (4) SA 458 (CC) para [24]

'[t]he Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause.'

[21] The determination of quantum of compensation is always a vexing issue. In the attainment of an award that is fair and reasonable each case must be considered with due regard to its own particularities and exigencies. In *Visser & Potgieter, Law of Damages, Third Edition,* on pages 545 to 548, the following factors are set out which provides guidance to the assessment of damages:

"*In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex a equo et bona. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh*

conduct of the defendants; the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function."

[22] As was held by the Supreme Court of Appeal (SCA) in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA), 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.

[23] The phrase that comparisons are odious is well known. It was first used in 1440 by the author John Lydgate: *Debate between the horse, goose, and sheep*, circa 1440 and is used to suggest that to compare two different things or persons is unhelpful or misleading. While comparisons may indeed be odious, earlier decisions may be considered as a guide to determining what is appropriate in a current matter. See *Mtolo v Minister of Police* (10144/2015) [2023] ZAKZPHC 86 at paragraph [20]

[24] The correct approach to determining an appropriate award requires that a court should have regard to all the facts of the case and to determine the quantum of damages based on such facts. See *Minister of Safety and Security v Seymour* 2006 (6) SA 320 *(SCA)* at 325 para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA); (2009) ZASCA 39 paras 26-29.

[25] This court is mindful of the circumstances of the arrest of the plaintiff and the period for which he was detained in inhumane conditions. The plaintiff was treated in subhuman and utterly degrading manner. The entire experience of the plaintiff was simply horrendous. The employees of the defendant denuded the plaintiff of basic constitutional enshrined rights. The fact that he sustained serious injuries in the form of burn wounds which did not receive any medical attention, contributed to the immense or severe suffering that the plaintiff had to endure for a period.

[26] The plaintiff no doubt suffered unwarranted inconvenience, injury to his feelings and personal humiliation. I reiterate that the unlawful deprivation of the plaintiff's liberty is, in itself, a serious injury which constituted an impermissible infringement of his constitutional rights to freedom and security of the person, and to human dignity. Afore, the release of the plaintiff no apology nor explanation was proffered by the defendants for his unlawful arrest and detention. Significantly, the defendant offered no explanation for failing to secure medical

attention for the plaintiff and for intentionally ferrying him a distance away from obvious and clear medical assistance.

[27] The conduct of the employees of the defendant offended the provisions of Section 205 of the Constitution which provides that:

" the objective of the police service officials is to prevent, combat and investigate crime, to maintain the public law, order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the rule law within the boundaries of our country."

Costs

[28] Mr Maree opined that costs be ordered on a punitive scale against the defendants for the hearings of 6 and 19 June 2023 as it was superfluous to have called the witnesses that the defendant did, given the finding on liability and the fact that the the substance of evidence of these witnesses did not take defendants opposition on quantum further. In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8 where Mogoeng CJ noted that "**[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.**"

[29] In *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2815 (LAC) at para 46, in which the Labour Appeal Court stated:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an

award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[30] An application of these trite principles does not fit within the four quarters of the defendant's conduct, in this action. Resultantly, this puts paid to this enquiry.

Order

[31] I accordingly make the following order:

(i) The defendant is to pay the plaintiff and amount of R150 000.00

(ii) Interest shall run on the aforesaid amount of R 150 000.00 from date of judgment until date of final payment.

(iii) The defendant shall pay the plaintiff's costs of suit on a party and party, to be taxed.

A REDDY
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Date of Hearing:	**6 June 2023**
Date written heads submitted by plaintiff:	**22 June 2023**
Date written heads submitted by defendant	**30 June 2023**
Date of Judgment:	**15 September 2023**
Counsel for Applicant :	**Adv Maluleka**
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