IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 25783/2010

In the matter between:

Bongani Dangaphele	**First Plaintiff**
Natalia Sifunga	**Second Plaintiff**

And

The Minister of Police	**First Respondent**
Constable Booi	**Second Respondent**

JUDGMENT DELIVERED ON 12 DECEMBER 2018

BAARTMAN,J

[1] On 16 January 2014, this court found in favour of the plaintiffs in respect of the merits of their action for damages for unlawful arrest and malicious prosecution. I deal with the quantum of their general damages in this judgment.

[2] Each plaintiff claimed R380 000 for unlawful arrest and detention – and R118 000 for malicious prosecution – (R498 000) each. It was common cause that the plaintiffs were arrested at Kraaifontein police

station on 25 September 2009. They appeared in court on 28 September 2009 and remained in custody until 19 October 2009 when the charges were withdrawn. The facts appear from the merits judgment to be as follows:

(a) The Crime Intelligence Gathering Unit of the South African Police Services (**SAPS**) received information that vendors were selling suspected stolen clothes in a parking area behind Shoprite in Kraaifontein. On 25 September 2009, the police arrested several vendors at the parking area. The plaintiffs were not on the scene, however, the police had information that the owner of goods had left before the police arrived in a purple Peugeot. The plaintiffs arrived at Kraaifontein police station in a purple Peugeot. The second defendant arrested them. He '*conceded that when he arrested the plaintiffs, he did not know the identity of the persons who had given the vendors the goods to sell.'*

The trial court found that the defendants had not discharged the burden '*of showing that the arrest of the plaintiffs was lawful*.'

(b) In respect of the prosecution, the trial court found:

'…(2) the facts show that objectively, the defendants had no reasonable ground for the prosecution. Indeed, they have admitted that the evidence to sustain a conviction was lacking. …The plaintiffs have thus established liability of the defendants for malicious prosecution.'

[3] In these proceedings, the plaintiffs have described their ordeal following their arrest as follows:

(a) The first plaintiff said that he was wearing a T-shirt at the time of his arrest which took place in front of a large crowd. He was detained in a single cell with 20 unknown persons. The cell was cold and the blankets insufficient. He suffers from an asthmatic condition which was aggravated by people smoking in the cell.

He therefore requested police on duty to move him but this request was ignored.

(b) However, the next day an officer enquired whether he was on chronic medication. He was not and was also not moved to another cell. After his first court appearance, he was detained at Pollsmoor prison. The journey to the prison exposed him to a confrontation with gangsters. He took a seat in the van, apparently reserved for senior gang members. He was ordered off the seat. A fellow prisoner in the van motioned to him to comply. He did and came to no harm.

(c) On arrival at the prison, he was subjected to a body search which he found demeaning. Inside the cell, he experienced a shortage of adequate facilities such as blankets and privacy. His complaints about the cell conditions, which aggravated his asthmatic condition, were ignored once prison officials had established that he was not on any medication.

(d) At the time of his arrest, the first plaintiff had a contract to oversee examinations as a chief invigilator for the 2009 final and mid-year 2010 exams. Despite, the contract he was not called to invigilate in June 2009. He earned R320 per invigilation session.

(e) The second plaintiff found the circumstances of her arrest embarrassing – it took place in full view of several members of the public. She was detained with several young girls. The available beds and blankets were inadequate for the number of persons in the cell. In addition, the only toilet facility was filthy. The second plaintiff was menstruating and despite requests was not given sanitary towels. In addition to these difficulties, she was anxious as she had left 2 young children at home, intending her absence to be short, and she had not made any supervision arrangements for them. She was also breast feeding at the time.

She was arrested on Friday and only on the Monday at court heard that neighbours had taken her children in.

(f) At Pollsmoor prison, she too was subjected to a body search which she found demeaning. In the cell, she was assaulted with soap on a rope in front of young girls from her neighbourhood. She sustained bruises to her body.

Discussion

[4] The plaintiffs had been in custody at the Kraaifontein police station for 3 days and 22 days at Pollsmoor prison. Everybody has the right 'not to be deprived of freedom arbitrarily or without just cause;[1]' Personal liberty is '*an individual's most cherished right*…[2]' The purpose of an award is to offer the deprived individual some compensation for the injury to dignity and feelings not to enrich. Nugent AJ confirmed the position as follows[3]:

'[33] …It has been said before that while '(m)oney can never be more than a crude solatium for the deprivation of [liberty]… and there is no empirical measure for loss', nonetheless *'our courts are not extravagant in compensating the loss.'*

[5] Therefore, awards in pervious matters are only a guide as each matter should be evaluated on its peculiar facts. The impact of the deprivation of liberty on an individual is not determined by her/his social status; instead, one must evaluate the actual effect on the individual.

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[1] Section 12 (a) of the Constitution of South Africa, 1996.
[2] *Mandleni v Minister of Police* 2011 (2) SACR 262 (SCA).
[3] *Minister of Home Affairs v Rahim* 2016 (3) SA 218.

[6] In awarding R500 000 Swain JA, said the following[4]:

> *'[38] In Minister of Safety and Security v Seymour 2006 (6) All SA 558) para 20, this court, having reviewed a number of previous awards for unlawful detention, concluded that there was no discernible pattern other than that the courts were not extravagant in compensating the loss. It was pointed out in para 17 that the award of general damages with reference to awards made in previous cases was fraught with difficulty. The facts of a particular case needed to be looked at as a whole and few cases were directly comparable.*
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> *[39] In Seymour the respondent was detained for five days at a police station, during which time he had free access to his family and medical advisor. He suffered no degradation beyond that which was inherent in being arrested and detained. After the first period of 24 hours the remainder of the detention was in a hospital bed at the Rand Clinic. This court reduced the award of damages from R500 000 to R90 000.*
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> *[40] Mr Woji described what can only be regarded as appalling conditions he was forced to endure whilst in detention. Cells were overcrowded, dirty and with insufficient beds to sleep on. He was subject to the control of a gang, whom he said sodomised other prisoners. As a result, he suffered the appalling, humiliating and traumatic indignity of being raped on two occasions, which he did not report to the prison authorities, because he feared retaliation from gang members. As a consequence, he has difficulty in enjoying sexual relations with his girlfriend. He also witnessed another prisoner being stabbed, which made him fearful for his safety. After eight months he was allocated a single cell. His situation then*

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[4] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA).

improved, because he had a bed to sleep on but he was isolated and lonely.

[41] Mr Woji's description of his experiences and the conditions he endured whilst in detention were not disputed by the minister's legal representative when he was cross-examined. No evidence was led by the minister to contradict any of his allegations. Mr Woji was detained for 13 months and suffered humiliating and degrading experiences. A suitable award of damages is the sum of R500 000.'

[7] I have considered the personal circumstances of each plaintiff in this matter, the length of imprisonment and the effect on their lives among others. The second plaintiff said that the police went to her home while she was in custody. On her release, she was ostracised by her neighbours. The second plaintiff said that he was still traumatised by the ordeal.

[8] Mr Oliver, the defendants' counsel, relied on the Rudolf[5] matter for the submission that:

'[in Rudolf] the plaintiffs were arrested at 17h00 on a Friday and released on bail at 12h00 on the next Tuesday, and the court ordered that they each be compensated in the amount of R100 000.00 on that claim.

In the present case, Plaintiffs were arrested at around 10:00 on the morning of Friday, 25 September 2009 and remanded in custody at no later than 12:00 on the Monday, 28 September 2009, a period of 15 hours less than in the Rudolf case.

It is submitted that on the basis of the Rudolf case, an award of no more than R75 000.00 each would be appropriate in the present case.

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[5] *Rudolf and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA).

…adjusted for inflation at a rate of 5.5% per annum, the amount …should be adjusted to R112 125.00 for each Plaintiff.'

[9] However, for the 22 days detention at Pollsmoor prison, he submitted that an award of R18 500.00 was sufficient, relying on the Rahim matter[6]: The submission went as follows:

'[the SCA] ordered an amount of R14 000.00 for 20 days detention and an amount of R16 000.00 for 23 days detention.

In this matter, the detention for 22 days, after the Plaintiffs' first court appearance should warrant an award of R15 000.00 each, to be adjusted for inflation since 2014, at 5.5% per annum. That should increase to about R18 500.00 each. …

The total amount due to each Plaintiff for unlawful arrest and malicious prosecution should therefore …R130 650.00'

[10] The defendants' reliance on the Rahim award is an indication that previous awards are only a guide and that each matter should be determined on its own merits. The appellants in Rahim were foreign nationals who had unsuccessfully applied for asylum in South Africa. Pending deportation, they were detained unlawfully as the director-general had not made a determination in respect of the facility in which they were to be detained[7]. Navsa JA bemoaned the paucity of information concerning the conditions under which the appellants were detained as follows:

'[25] …the appellants had failed to present evidence concerning the conditions under which they were held and furthermore had failed to testify about the personal impact of detention...

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[6] *Rahim and Others v Minister of Home Affairs and Others* 2015 (4) SA 433 (SCA).
[7] Section 34(1) of the Immigration Act 13 of 2002.

[26] …the limited information referred to earlier in this and the preceding paragraph is the sparse basis upon which we are called upon to make a determination concerning quantum.'

[11] Fortunately, I do have information upon which to make a determination. It follows that the Rahim awards cannot assist in this matter. The defendants sought to distinguish the facts in this matter from those in the Rudolf matter. The circumstances in the latter were: the police arrested the appellants for a contravention of the Gatherings Act. It was common cause that 8 persons partook in the gathering. However, a gathering for purposes of the Gatherings Act '*means any assembly, concourse or procession of more than 15 persons*.' The court found that there was 'no evidence of a 'gathering', no offence had been committed...[8]' Therefore, the court awarded R50 000 in respect of malicious prosecution. The circumstances of the Rudolf matter are distinguishable, so the submission went, from the facts in this matter. There are also similarities, as indicated above; the plaintiffs were arrested because they were in a purple Peugeot. The trial found at para 22:

'Purple is an unusual colour for a car. If indeed the plaintiffs had used the purple Peugeot to deliver the goods to the flea market as alleged, why would they knowingly have exposed themselves to arrest and prosecution by going to the police station with the car? ... the defendants … [did not] even raise a suspicion that the plaintiffs were the persons who gave the goods to the vendors.'

[12] I intend to heed the call to avoid extravagance without undermining the seriousness of the violation. I am persuaded to give costs on the High Court scale despite the award. I have considered the right violated and am persuaded that the plaintiffs have not been

[8] See para 14 of the Rudolf matter.

unreasonable in the amount claimed. The plaintiffs' assessment of the amount that will give them '*much needed solatium'* must compete with the call to avoid extravagance. I, for the reasons stated above make the following order, against the defendants jointly and severally, the one paying the other to be absolved:

(a) In respect of the unlawful arrest and detention – 25 September to 28 September – each plaintiff is awarded R70 000.

(b) In respect of the malicious prosecution – 22 days detained in Pollsmoor prison – each plaintiff is awarded R130 000.

Total – R200 000 per plaintiff.

(c) Each plaintiff is awarded costs of the action on the High Court scale.

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BAARTMAN J