REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 5056/11

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

8/3/2013
DATE

SIGNATURE

In the matter between:

STEVEN MOTHOA Plaintiff

and

MINISTER OF POLICE Defendant

J U D G M E N T

HUTTON AJ:

[1] This matter comes before me as a special case in accordance with the provisions of Rule 33(1) of the Uniform Rules of Court. A statement of facts and questions in dispute, as contemplated in Rule 33(2)(a), was prepared on behalf of the parties and submitted to me.

[2] The question in dispute between the parties relates to the appropriate award of damages that should be made in favour of the plaintiff arising from his arrest and subsequent detention at the hands of police officers.

[3] I quote in full the statement of agreed facts:

> "**[a] Facts agreed upon regarding the plaintiff's arrest:**
>
> 1. The arrest was unlawful.
>
> 2. The arrest was without a warrant.
>
> 3. The plaintiff was arrested by three police officials ("the police officials") while acting within the course and scope of their employ with the defendant.
>
> 4. The plaintiff was arrested at approximately 16:00 on 10 August 2010 as he was walking through Fordsburg on his way home after work.
>
> 5. While effecting the arrest, the police officials –
>
> 5.1 did not identify themselves to the plaintiff;
>
> 5.2 assaulted the plaintiff by aggressively grabbing him and forcefully pushing him

against a wall, despite the plaintiff submitting to custody;

5.3 body-searched the plaintiff without a warrant;

5.4 did not inform the plaintiff that he was being arrested;

5.5 refused to inform the plaintiff of the cause of his arrest;

5.6 did not explain to the plaintiff his rights in terms of the Constitution; and

5.7 made the plaintiff to (sic) stand on the pavement for several minutes in full view of many onlookers.

[b] Facts agreed upon regarding the plaintiff's detention:

6. The detention was unlawful.

7. The plaintiff was detained in a holding cell at the Johannesburg Central police station.

8. The plaintiff was detained for approximately 22 hours until 14:00 on 11 August 2010.

9. During his detention the plaintiff-

9.1 was only given food and water after 14 hours;

9.2 was locked up with many other inmates in an unhygienic, dirty, stinking holding cell with only one open toilet that did not work, but in which inmates relieved themselves in full view of others; and

9.3 had to sleep on a cold cement floor without a mattress and only one filthy smelling blanket.

10. The plaintiff was never taken to Court or required to appear in Court.

11. At 14:00 on 11 August 2010, police officials opened the holding cell where the plaintiff was

> being detained and simply told him to go home."

[4] The stark, harsh facts set out above make it clear that the police officials involved in the arrest and detention of the plaintiff conducted themselves in an egregious manner. First, they arrested the plaintiff in circumstances where there was no conceivable reason for arresting him. Section 39(2) of the Criminal Procedure Act[1] provides, *inter alia*, as follows:

> "The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest ..."

The provision in the Act is there for good reason. It seeks to prevent police officials from making arbitrary arrests. If a police official cannot articulate the reason why he is arresting a person then it is difficult to see what lawful reason to arrest might exist. In the present case, the police officials did not inform the plaintiff why he had been arrested and there is nothing before me to suggest that they had any lawful reason whatsoever for arresting him. That is fully supported by the fact that he was later released without being charged with any crime.

[5] Second, the police officials, in effecting the arrest of the plaintiff, acted in flagrant violation of section 39(1) of the Criminal Procedure Act. That section provides that:

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[1] Act 51 of 1977

> "An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body."

According to the agreed facts, the plaintiff submitted to custody. There was accordingly no basis for the police officials to touch the plaintiff in order to effect his arrest, far less to use any force when arresting him. Despite this, the police officers assaulted the plaintiff by "*aggressively grabbing him and forcefully pushing him against a wall*".

[6] Not only did the police officials act unlawfully in the sense that they breached the provisions of section 39(1) of the Criminal Procedure Act, but in assaulting the plaintiff in this manner, they made themselves guilty of a gross abuse of the power entrusted to them.

[7] Third, the police officials acted in violation of their duties by not informing the plaintiff that he was being arrested, nor explaining to him his rights in terms of the Constitution as a person under arrest. They did not even take the basic step of identifying themselves.

[8] Fourth, the police officials subjected the plaintiff to the indignity of being held on the pavement for several minutes in full view of the public at large, after unlawfully arresting him in the circumstances described above.

[9] The circumstances in which the plaintiff was thereafter detained are, in

my view, appalling. First, the plaintiff was forced to endure a detention lasting for twenty two hours where there was no cause whatsoever for him to be detained. The disgraceful manner in which the police officials treated the plaintiff is exemplified by the fact that after causing him to endure a twenty two hour depravation of his right to liberty, he was simply told to leave the police cell without further ado. This, to my mind, demonstrates that there was never any intention to bring charges of any nature against the plaintiff and that he was being subjected to some form of unlawful punishment by police officials for some unknown reason.

[10] Then, there are the physical conditions in which the plaintiff was detained. Section 35 of the Constitution[2] provides as follows:

> "(2) Everyone who is detained, including every sentenced prisoner, has the right:
>
> ...
>
> (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;
>
> ..."

The conditions to which the plaintiff was subjected in the holding cells of the Johannesburg Central police station, as described in the agreed facts of this matter, are entirely inconsistent with the rights guaranteed by section 35(2)(e)

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[2] Constitution of the Republic of South Africa, 1996

of the Constitution. In argument before me Mr Higa, appearing for the defendant, contended that section 35(2)(e) of the Constitution is not applicable to arrested persons incarcerated in holding cells. I have no doubt whatsoever that the content of the basic human rights guaranteed by section 35(2)(e) apply to all detained persons, including those detained after arrest until they are taken to court. It is inconceivable that the drafters of our Constitution - a Constitution based on the fundamental notions of human dignity and equality - could have intended that arrested persons could be subjected to the indignity to which the plaintiff has been subjected, whilst other detainees are entitled to enjoy the markedly more humane conditions described in section 35(2)(e). Mr Higa commented in argument that arrested persons are not entitled to be put up in a hotel. I find the comment distasteful and unbecoming of counsel representing a minister of state. The state is obliged to take its constitutional duties seriously and those representing the state in litigation are required to act in accordance with that duty.

[11] Mr Du Bruyn, appearing for the plaintiff, argued that an award of general damages in the sum of R150 000 would be a suitable solatium for the plaintiff. In support of his argument he relied upon the recent decision of **Tlhaganyane v Minister of Safety and Security**[3] in which Landman J made an award of R140 000 in favour of a plaintiff who had been unlawfully arrested for an alleged traffic violation. Landman J gave the following reasons for coming to his award:

> "[54] The plaintiff is the son of a Methodist minister.

[3] Unreported case number 1661/2009 in the North-West High Court – SAFLII reference [2013] ZANWHC 12 (14 February 2013]

> He himself had completed a theology diploma at the Rynfield Christian College and was a lay-preacher. He had been involved in community affairs. He was married to a social worker and they had three children. Clearly he was deeply aggrieved by his arrest and detention.
>
> [55] The plaintiff was deprived of his freedom for about 19 hours and deliberately inconvenienced. He was kept in the Korster police station cells. He was not informed why he was detained. He was not read his rights. He was not informed of his right to bail. He was arrested in front of his workplace subordinates. He was a chief production planner at the mine reporting to the mine captain.
>
> [56] I do not take into account the evidence that his arrest and detention may have led to his retrenchment nor that it may have caused his failure to be elected to a council. I come to this conclusion because the causal link is too tenuous. I also do not take into account any remarks made by the provincial traffic officers prior to the arrest."

[12] In reaching his award, Landman J placed considerable stress on the social status of the plaintiff and the fact that he had been humiliated in front of his subordinates by his arrest. Although the present plaintiff was not humiliated in front of his subordinates, he was certainly publicly humiliated. Furthermore, in my view, the social status of the victim of an unlawful arrest is not a relevant consideration when assessing the damage that has been done to the victim's dignity and the value to be placed on the deprivation of his liberty.

[13] Mr Du Bruyn argued there are a number of aggravating features in the matter before me which were absent in the **Tlhaganyane** matter. These aggravating features include the assault on the plaintiff at the time of his arrest, the inhumane conditions in which the plaintiff was held in detention and

the fact that he was simply released without being charged at all. Mr Du Bruyn accordingly argued that the award in the present matter would justifiably be set at an amount higher than that awarded in **Tlhaganyane**.

[14] Mr Higa argued that an appropriate award in the present circumstances would be between R40 000 and R45 000. I have already dealt above with one of the arguments put to me by defendant's counsel, to the effect that section 35(2)(e) of the Constitution has no application to holding cells. I have set out above my reasons for holding that the argument is devoid of merit.

[15] Mr Higa also argued that there was no reason to find that the police officials had acted with an improper motive or with malice in the present circumstances. I disagree. I am entitled to draw reasonable inferences from the facts that are before me and I believe that I can properly infer, given the totality of the circumstances, that the police officials involved were indeed actuated by an improper motive and malice toward the plaintiff. They did not arrest and detain him to serve any legitimate purpose and I must conclude that they did so to harass him. I regard this as an aggravating factor in the present matter.

[16] Mr Higa argued that the upper limit of the award that I should make ought to be informed by a recent decision of the Supreme Court of Appeal in **Minister of Safety and Security and Others v Ndlovu**[4] where the Supreme Court of Appeal, *per* Petse JA confirmed an award of damages in the sum of

[4] Unreported appeal number 788/11 – SAFFLI reference [2012] ZASCA 189 (30 November 2012]

R55 000 for an unlawful arrest of a plaintiff who was detained for 48 hours before being taken to court. There is nothing in that judgment that describes anything remotely of the nature of the egregious circumstances of the present case. In the circumstances I do not believe that the award in the **Ndlovu** case is of assistance in reaching a decision on the correct amount to be awarded in the present matter. Mr Higa readily conceded that each case falls to be determined upon its own facts. On the present facts I can see no reason why the plaintiff should be compensated in an amount less than that awarded to the plaintiff in **Tlhaganyane**. Indeed the present case is a more serious one and the award that I make ought to reflect that.

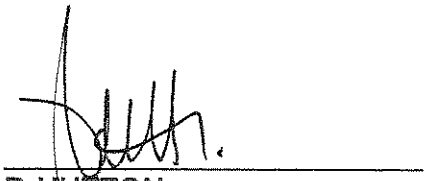
[17] In all the circumstances, I have come to the conclusion that it would be appropriate to award the plaintiff the sum of R150 000 as compensation for the harm done to him as a result of his unlawful arrest and detention.

[18] In the circumstances, the defendant is ordered to pay:

1. the amount of R150 000 to the plaintiff as damages for his unlawful arrest on 10 August 2010 and his subsequent unlawful detention on 10 until 11 August 2010;

2. interest on the aforesaid amount at the rate of 15.5% per annum from date of judgment to date of payment;

3. the plaintiff's costs of suit.



R HUTTON
Acting Judge of the High Court

APPEARANCES:

For the plaintiff:

Mr LJ du Bruyn, instructed by Bessinger Attorneys

For the defendant:

Mr T Higa, instructed by the State Attorney, Johannesburg

DATE OF HEARING

6 March 2013

DATE OF JUDGMENT

8 March 2013