

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



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2045/2021

In the matter between:

LEPHUTING MARIA MADIJENG

Plaintiff

and

MINISTER OF POLICE

Defendant

DATE OF HEARING

: 13 MAY 2024

DATE OF JUDGMENT

: 06 JUNE 2024

FOR THE PLAINTIFF

: ADV. GERBER

FOR THE DEFENDANT

: NO APPEARANCE

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 06 June 2024.

ORDER

Resultantly, the following order is made:

- 1. That judgment is granted in favour of the plaintiff for unlawful arrest and detention (Claim 1).**
- 2. The defendant is ordered to pay to the plaintiff an amount of R90 000.00 in respect of Claim 1.**
- 3. That judgment is granted in favour of the plaintiff for assault (Claim 2).**
- 4. The defendant is ordered to pay to the plaintiff an amount of R80 000.00 in respect of Claim 2.**
- 5. The defendant is ordered to pay interest *a temporary morae* on the amounts mentioned in paragraphs 2 and 4, *supra*, at the prescribed rate from date of service of the summons, being 22 November 2021, until date of final payment.**
- 6. The defendant is ordered to pay the plaintiffs' costs of suit, on a party-and-party basis, on the High Court Scale "C", to be taxed.**

JUDGMENT

HENDRICKS JP

- [1] The plaintiff, Ms. Maria Madijeng Lephuting, issued summons out of this Court on 10 November 2021 for unlawful arrest, unlawful detention and assault, allegedly perpetrated by members of the South African Police Service (SAPS), acting within the course and scope of their employment with the Minister of Police, who is alleged to be vicariously liable for their actions. The detail of the incident will be described *infra*. In the particulars of claim annexed to the summons, damages are claimed as Claim 1 for unlawful arrest in the amount of R100 000.00; R200 000.00 for unlawful detention; R50 000.00 for future medical expenses; and R100 000.00 as general damages for pain and suffering, impairment of dignity and humiliation as a result of the assault, which was labelled as Claim 2. The summons was issued following the statutory notice been given to the National Commissioner of Police in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, as amended.
- [2] A notice of intention to defend dated 17 February 2022 was issued and served on 18 February 2022. The plaintiff's attorney of record filed a notice in terms of Rule 26 on 23 March 2022 and served it on the same day on the Office of the State Attorney, Mmabatho, representing the defendant (Minister of Police), requiring that the defendant file its plea within five (5) days after receipt of this notice, failing which the defendant shall be in default of failing to file such pleading, and be *ipso facto* barred. The defendants' plea dated 31 March 2022 was served on the plaintiff's attorneys of records on the same day and filed with the Office of the Registrar of this Court on 21 April 2022.

[3] With the pleadings being closed, the plaintiff's attorney on 12 April 2022 issued and filed a notice in terms of Rule 35 (1), (6), (8) and (10) of the Uniform Rules of Court, requiring discovery of all documents and/or tape recordings relating to the matter, after it has been served on the defendants' attorneys of record, the State Attorney, Mmabatho on 11 April 2022. On 11 May 2022 the defendant filed a discovery affidavit setting out the documents in its possession relating to this matter. This was followed by a request in terms of Rule 35 (3) for copies of the documents and/or inspection thereof, and for any other documents in addition thereto, which was issued and served on 25 May 2022.

[4] On 10 June 2022 an application to compel in terms of Rule 35 (3) of the notice served on 25 May 2022, was served and filed. It was set down for 14 July 2022, on the unopposed motion roll. Another notice in terms of Rule 35 (3) and (6) to request additional documents dated 6 June 2023, was served and filed on 7 June 2023. The documents were discovered on 25 October 2022 and 23 November 2022 respectively.

[5] On 14 July 2022, **Petersen J** granted an order in the following terms:

"IT IS ORDERED

1. *THAT: The Respondent/Defendant be and is hereby directed to reply to the Applicant/Plaintiff's Notice in terms of Rule 35 (3) within 10 (ten) days of service of this Court Order on the Attorneys of Record of the Respondent/Defendant;*

2. THAT: *The Respondent be and is hereby ordered to pay the cost of this Application.*"

[6] On 07 September 2022, the applicant/plaintiff launched another application in terms of Rule 35 (6) to furnish the copies against payment of the amount payable for the copies to be made of the discovered documents, which was necessary to prepare for trial. The Rule 35 (6) notice was served on 19 August 2022 and filed on 22 August 2022. It was set down for 06 October 2022 on the unopposed motion roll. On 6th October 2022, **Petersen J** granted an order in the following terms:

"IT IS ORDERED

1. THAT: *The Respondent/Defendant be and is hereby directed to reply to the Applicant/Plaintiffs Notice in terms of Rule 35 (6) and furnish the amount payable for copies for items 2 to 5 of the discovered documents and delivered the copies after payment is made within 10 (ten) days of service of this court order on the Attorneys of Record of the Respondent / Defendant;*

2. THAT: *The Respondent/Defendant be and is hereby ordered to pay the costs of this application."*

[7] On 23 June 2023 an application to compel was served and filed, compelling the Respondent/Defendant to reply to the notice in terms of Rule 35 (3) and (6) which was served on 7 June 2023. It was set down on

the unopposed motion court roll for 27 July 2023. On 27th July 2023, **Djaje DJP** granted an order in the following terms:

"IT IS ORDERED

- 1. THAT: The respondent/defendant be and is hereby directed to reply to the Applicant/Plaintiff's notice linked in terms of Rule 35(3) within 20 days of service of this Court Order on the Attorneys of Records of the Respondent/Defendant;*
- 2. THAT: The Respondent/Defendant is and be hereby directed to give full disclosure should some, alternatively all of the documents requested to be discovered not be available of all diligent steps taken to obtain such documents alternatively to ascertain it's whereabouts;*
- 3. THAT: The Respondent be and is hereby ordered to pay the cost of this Application."*

The respondent/defendant failed to comply with the court order of 27 July 2023. This prompted the launch of an application to strike out the defendant's defence.

[8] On 14 September 2023, an application to strike out the defense of the defendant was filed and served on the Office of the State Attorney, Mmabatho, set down for 19 October 2023. This notice of set down was duly served on the Office of the State Attorney, on 12 October 2023. The striking out of the defence of the defendant is premised on its failure to comply with the court order dated 27 July 2023. **Reid J** on 19 October 2023 granted an order in the following terms:

"IT IS ORDERED

1. THAT: The Respondent/Defendant be and is hereby ordered to comply with the court order dated 27th day of July 2023 within TEN (10) days from service of this order, failing which in order of cost on a punitive scale (de bonis propriis) against the office of the State Attorney, Mmabatho will be considered.

2. THAT: The Respondent/Defendant be and is hereby ordered to pay the cost of this Application on an Attorney-Client scale."

This order was duly served. This prompted the applicant to once again approach this Court for an order to strike out the defence, due to the prejudice suffered by the applicant/plaintiff. It was set down for 14 December 2023 on the unopposed motion court roll.

[9] On 14 December 2023, **Petersen J** granted an order in the following terms:

"IT IS ORDERED

1. THAT: The Defense of the Respondent/Defendant be and is hereby struck out due to their non-compliance of a Court Order dated 27th day of JULY 2023 and Court Order dated 19th day of OCTOBER 2023.

2. THAT: The Respondent/Defendant be and is hereby ordered to pay the cost of this Application on an Attorney and Client scale."

- [10] An application for a date of hearing of the matter was made, although erroneously termed as an application for default judgment, praying that merits and quantum be separated and that merits be granted at 100% in favour of the plaintiff, whilst quantum be postponed *sine die*, and costs on an attorney-and-client scale.
- [11] The Office of the Registrar allocated the date of 24 April 2024 as a trial date, although termed default judgment. A notice of set down was duly served on 31 January 2024. On 24 April 2024, at the commencement of the trial, Adv. Gerber on behalf of the plaintiff indicated that no application will be made that merits (liability) and quantum be separated, but instead that the matter should proceed on both merits and quantum. The Court did not order a separation of the merits (liability) and quantum, and the trial proceeded on both merits and quantum.
- [12] The plaintiff, **Ms. Maria Madijeng Lephuting**, testified and her evidence can be succinctly summarized as follows. She is thirty-five (35) years of age, unmarried, and the mother of two daughters aged fifteen (15) and six (6) years respectively. She is employed as a Store Assistant at Boxer Store, earning R4 900.00 per month. It was her friend's birthday on 14th August 2020, and she was with her cousin. At approximately 22H30, the police arrived and said they received information that she was selling liquor, which she denied. The police requested permission to search her place, which she refused. Instead, she asked them whether they were in possession of a search warrant. To this, the police officer did not take kind.

They responded by asking her what she knew about a search warrant accusing her of being a Lesotho national. She was asked by the police officers about her Lesotho passport, which she did not have, as she is a South African national.

[13] She was then pepper sprayed in her eyes by a female police officer. She ran into her house. The female police officer then assaulted her with open hands on her face. She managed to push the female police officer away, in an attempt to defend herself. Back-up was summoned. Other police officers arrived. The plaintiff was by then in the company of Caroline Mpembe and Otsepeng Molefe. Whilst she was inside the house, she heard two (2) sounds of a fire-arm being discharged outside the house, allegedly by a police officer. Herself, as well as Caroline and Otsepeng, were arrested. Whilst Caroline and Otsepeng were transported in the same police motor vehicle (van), she was transported in another police motor vehicle (van), being loaded in at the back. She was transported to Mogwase Police Station. Upon arrival at the police station, she was given some documents. The charges against her were not explained. She was instructed to append her signature on some documents and thereafter, at approximately 23H50 on that Friday evening, she was escorted to a police cell where she was detained.

[14] She was not alone in the police cell but was sharing it with another female detainee. She was detained until Sunday afternoon at approximately 13H00, when she was released, after an amount of bail was paid. She was

injured as a result of assaults perpetrated by the police upon her person. She sustained injuries and bruises as a result of the assaults. She consulted a doctor, one Dr. Matsebele, who examined her and who also compiled an examination report. The plaintiff identified the report which the doctor compiled. It was handed in as an exhibit. Photographs depicting her, was also handed in as exhibits. These photo's were taken by her legal representative (attorney). It depicted the injuries and bruises on her body. Her eyes were red, as a result of the pepper spray. She attended court once but did not appear physically inside a court room. Her attorney told her that she could leave and that she would be given another date to appear. This never happened. She does not know what happened to the case ever since.

[15] She did however laid a complaint with the Independent Police Investigative Directorate (IPID), but likewise she don't know what happened to that case, as she never heard anything about that case, as well. Asked about the conditions under which she was detained in the police cell, she said it was not at all conducive. As alluded to earlier, she shared the cell with another woman. She was refused toiletries as it was during the COVID-19 lockdown period and her family members were refused to visit her and to bring her toiletries. She was given two (2) blankets to sleep under and on, during the winter month of August, when it was cold. The blankets were itchy. There is a toilet in the cell but she was not able to bath. She was given bread and tea as well as porridge and green beans as food to eat. This was the first time that she was arrested and it emotionally disturbed her. She was traumatized and are fearful of the police and police sirens.

She feels intimidated by the presence of police and doesn't feel safe when she see the police.

[16] She was detained from 14 August 2020 (Friday) at 23H50 until 16 August 2020 (Sunday) at 13H00, a total of thirty-seven (37) hours and ten (10) minutes, which is less than two (2) full days. After the testimony of the plaintiff, the case for the plaintiff was closed. Adv. Gerber was afforded an opportunity to prepare heads of argument. The matter was postponed until 13 May 2024, for heads of argument to be served and filed.

[17] No evidence was presented for and on behalf of the defendant. The only evidence presented was that of the plaintiff, who testified *viva voce* as well as documentary evidence, which is uncontested. This evidence must be accepted by this Court, as there is no evidence to gainsay it. An arrest and consequent detention is *prima facie* wrongful and unlawful. It is an infringement of a person right to liberty, which is constitutionally entrenched, unless there is jurisdiction based on statutory authority. Once an arrest and subsequent detention is proven, the onus to prove the lawfulness thereof rest on the defendant. This is trite. In the absence of proof of the lawfulness of the arrest and subsequent detention such as in the case, the arrest and detention is therefore unlawful.

See: Minister of Law and Order v Hurley 1986 (3) SA 568 A;

Zonela v Minister of Police (3306/2018) [2020] ZAECMHC 45 (17 September 2020).

[18] Similarly, an assault is an infringement upon and violation of the bodily integrity of a person. It is trite that an infringement of the bodily integrity of a person is *prima facie* unlawful, unless there are grounds of justification. The onus is on the infringer to prove such grounds of justification. In this case, the onus rest on the defendant. In the absence of any proof of justification like in this case, the assault is an unlawful and wrongful interference with the bodily integrity of the plaintiff.

See: **Mabaso v Felix** 1981 (3) SA 865 A;

Moghamat v Centre Guards CC [2004] 1 All SA 221 (C);

Taylor v Minister of Safety and Security (5356/10) [2016] ZAWCHC 37 (17 February 2016).

[19] Insofar as quantum is concerned, this Court has an unfettered discretion to award an amount as *solatium* that is just, fair, equitable and reasonable, having regard to all the relevant circumstances of this case. The aim is not to enrich the plaintiff, but to compensate for the unlawful deprivation of her liberty, good name and reputation, as well as the violation of her bodily integrity. There is no exact mathematical formula that can be and should be applied by this Court. Previous cases in which certain amounts of compensation were awarded is but a guide and nothing more. This is a carefully balancing act to be exercised by this Court who must, on one hand compensate the plaintiff for the damages suffered, whilst on the other hand not over-compensate her as though it appears that this Court would proverbially 'pour from the horn of plenty!' The slavish following and applying of awards awarded in other cases are fraught with difficulty, as

each case must be decided on its own facts and circumstances, which is trite, to determine an appropriate amount to be awarded as damages.

See: **Minister of Safety and Security v Tyulu** 2009 (5) SA 85 (SCA);

Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA);

Masisi v Minister of Safety and Security 2011 (2) SACR 262 (GNP)

[20] To borrow from the Seymore case, *supra*:

"[17] 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 lighter value than that."

[21] The particular facts and circumstances of this case is outlined earlier on in this judgment. Amongst the facts to be considered *inter alia* are the age of the plaintiff, the fact that she is a woman and the mother of two minor children, the inhuman treatment she received, the xenophobic accusations at the hand of the police, she was pepper sprayed in her face and in particular her eyes, and also further physically assaulted in the presence of other people, arrested and placed at the back of a police motor vehicle (van). She was detained in a police cell for 37 hours and 10 minutes in circumstances far less than ideal or conducive. The food was also not good. It was cold and she had to endure sleeping under dirty blankets. As it

was during the period of the COVID pandemic lockdown, her family could not bring clean clothes and toiletries for her. She had to consult a medical doctor upon her release and photographs were taken of the bruises and the red eyes she sustained. According to her, she had not committed any crime and was never tried for any alleged offence in a court of law.

[22] Counsel for the plaintiff Adv. Gerber referred, in the comprehensive heads of argument he submitted for and on behalf of the plaintiff, to a multiplicity of case law, in which different amounts were awarded for different time periods of detension under different circumstances and with different facts in each of the cases referred to. To reiterate, this is indeed a useful guide but have no higher value than that. The amount to be awarded by this Court must take into account all the facts and circumstances of this case, and must exercise its discretion in the award of the amount for damages, judicially.

[23] In the recent case of **Motladile v Minister of Police** (414/2022) [2023] ZASCA 94 (12 June 2023), less than a year ago, the Supreme Court of Appeal (SCA) awarded an amount of **R200 000.00** for unlawful arrest and detention for a period of **four (4) days**. Based on the principle of *stare decisis* this case is a useful guide to be followed, although the circumstances differ as well as the period of unlawful detention, which in the case at the end equates to just more than one-and-a-half (1½) days compared to the **four (4) days**, in the **Motladile** case. It must however be

stressed that the period of detention is but one of the factors to be considered and not the only one.

[24] To reiterate, the heads of damages claimed in the particulars of claim attached to the summons are R100 000.00 for the unlawful arrest, R200 000.00 for the lawful detention, R50 000.00 for future medical expenses, and R100 000.00 for general damages, pain and suffering, dignity and humiliation. No evidence was presented for loss of future medical expenses. No psychiatric evaluation was done to determine whether the plaintiff will suffer any lasting psychological effects of this incident. This Court however do not lose sight of plaintiffs' *ipsima verba* that it was the first time that she was arrested and that she don't feel safe - she is fearful.

[25] Insofar as costs are concerned, this Court is once again bound to follow the *ratio decidendi* based on the principle of *stare decisis* in the **Motladile** matter, *supra*, and will award costs on the High Court scale as between party-and-party, as it concern the unlawful deprivation of liberty. In terms of the amended Rule 67 A of the Uniform Rules of Court, various factors need now to be taken into account in the awarding of an appropriate costs order, to wit, *inter alia*, the complexity of the case and the amount involved.

[26] With regard to the interest to be paid on the amounts to be awarded for both unlawful arrest and detention as well as assault, I find it prudent to

quote *verbatim* what is contained in **paragraph 16** of the 'Heads of Argument' on behalf of the plaintiff, which reads thus:

"16.1 To provide for the calculation of interest on a debt, in certain circumstances, at a prescribed rate; for the payment of interest on certain judgment debts; and for matters connected therewith, the PRESCRIBED RATE OF INTEREST ACT 55 OF 1975 inter alia as follows:

*"(1) **Interest on a debt to be calculated at a prescribed rate in certain circumstances.***

- (1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.*
- (2) The Minister of Justice may from time to time prescribe a rate of interest for the purposes of subsection (1) by notice in the Gazette.*
- (3) No rate of interest shall be prescribed under subsection (2) except after consultation with the Minister of Finance.*

16.2 "2A. Interest on unliquidated debts

- (1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.*
- (2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 the interest*

contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.

16.3 Cf.: Goliath v Minister of Police (CA107/2017) [2017] ZAECGHC 119 (14 November 2017)

Par 14 "In Adel Builders (Pty) Ltd v Thompson[10] Howie JA had the following to say about section 2A (2) (a) and (5): "Section 2A(2)(a) lays down what is to be the general position, namely that interest runs from date of demand or summons. If a plaintiff seeks interest from an earlier time, then the court must be urged to exercise its discretion under ss (5). To obtain a favorable discretionary decision a plaintiff must discharge the onus of establishing facts justifying such decision. "

Par 15 "As I understand it, the general rule in terms of section 2A (2) (a) is that interest accrues from the date of demand or the date of service of the summons, whichever date is the earlier. Section 2A (5) gives the court a discretion to make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run. To obtain a favorable discretionary decision, a party must discharge the onus of establishing facts justifying such favorable decision. In this case it is not open to the respondent to claim that interest should run from the date of judgment because he placed no evidence before the court to justify such an order. Absent such evidence, the general rule must apply, namely that interest shall run from the date on which the summons was served on the respondent. '

16.4 *The Prescribed Rate of Interest Act 55 of 1975 therefore empowers a court in the exercise of its discretion to award interest in respect of unliquidated debts from the date of demand.*

*Cf.: **Naidoo v Minister of Police** (20431/2014) [20151 ZASCA 152 (2 October 2015) Also see.*

***Nel v Minister of Safety and Security** A1009/2010ZAGPPHC 188 (22 August 2012)*

***GFE Blything v Minister of Police in case number 8281/2013** the unreported judgment by Ledwaba DJP on 31/08/2016 in the High Court of South Africa GAUTENG DIVISION, PRETORIA
And*

***Minister of Police v Payne** (A416/2017) [20181 ZAGPPHC 419 (19 June 2018)*

***Motladile v Minister of Police** (414/2022) [2023] ZASCA 94 (12 June 2023)*

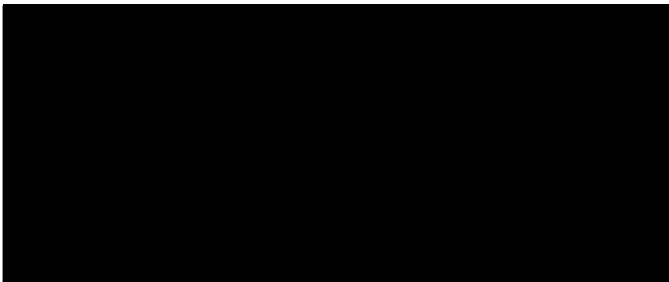
16.5 *The Plaintiffs initiated demand payment of the debt on service of the summons on the Defendant being 22 November 2021.*

Order

[27] **Resultantly, the following order is made:**

- 7. That judgment is granted in favour of the plaintiff for unlawful arrest and detention (Claim 1).**
- 8. The defendant is ordered to pay to the plaintiff an amount of R90 000.00 in respect of Claim 1.**
- 9. That judgment is granted in favour of the plaintiff for assault (Claim 2).**

10. The defendant is ordered to pay to the plaintiff an amount of R80 000.00 in respect of Claim 2.
11. The defendant is ordered to pay interest *a temporary morae* on the amounts mentioned in paragraphs 2 and 4, *supra*, at the prescribed rate from date of service of the summons, being 22 November 2021, until date of final payment.
12. The defendant is ordered to pay the plaintiffs' costs of suit, on a party-and-party basis, on the High Court Scale "C", to be taxed.



R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG