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

IN THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISON, MAHIKENG

APPEAL CASE NO: CIV/APP/MG/ 27/2023
MAGISTRATE'S CASE NO: 28/2021

In the matter between

MARIA LENOKE **APPELLANT**

And

THE MINISTER OF POLICE **RESPONDENT**

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is ***06th November 2024*** *at* ***16h00.***

ORDER

(1) The appeal is upheld.

(2) The order of the court *a quo* is set aside and substituted with the following order:

(a) the defendant is directed to pay the plaintiff the sum of R30 000.00

(b) the defendant is directed to pay to the plaintiff interest on the sum of R30 000.00 at the prescribed rate of interest, calculated from the date of judgment to the date of final payment.

(c) the defendant is to pay the plaintiff's taxed or agreed costs of the action.

APPEAL JUDGMENT

REDDY J

Introduction

[1] On 26 July 2023, Acting Magistrate Thaga, ("the court a *quo*") ordered that the respondent pays the appellant an amount of R20 000-00 as *solatium* for the unlawful arrest and detention pursuant to an incident that had occurred on 22 July 2020. The usual orders encompassing interest and costs followed.

[2] The nub of the appellant's discontentment with the order of the court a *quo* was the assertion that the court a *quo* erred in the exercise of a judicial discretion. Simply put, the court a *quo* committed a material misdirection by failing to appreciate the cumulative factors that form the award for damages.

[3] For purposes of brevity I propose to follow the appellations of the parties as cited herein. The appeal is unopposed.

Background facts

[4] In amended particulars of claim, the appellant contended that her action was predicated on the unlawful arrest, detention and the 'brutalising' of herself. To this end, the appellant's version was that on 22 July 2020 and at or near Madinonyane Village near Ganyesa, the appellant was arrested by members of the South African Police Service, ("the SAPS"). The latter acting vicariously invaded her home. She was then interrogated. A photograph of her was taken, followed by an assault. It would appear from the pleadings that the members of the SAPS left with the appellant from her abode, only to return later the day in question. No formal appearance occurred before a court.

[5] Pursuant to this, the appellant suffered grave emotional and psychological harm and contumelia in the sum of R200 000.00.

[6] The respondent, did not file a Notice of intention to defend. The action was considered in terms of Rule 32(2) of the Magistrate's

Court Rules. To prove quantum, the appellant filed two affidavits in terms of Rule 12(4) of the Magistrate's Court Rules. On 26 January 2023, the appellant deposed to the first affidavit which reads as follows:

" .....

2.

"On or about 22 July 2020 at or near Madinonyane village near Ganyesa. I was arrested by members of the South African Police Services (hereinafter " the SAPS"), whose names and ranks are unknown to me, confiscated my belongings, took pictures of me and thereafter assaulted me. I was thereafter returned to my home on the same day without appearing before a magistrate. At the time of all these aforementioned incidents I was still breastfeeding.

2.2

As a result of the above conduct. I have instituted action against the Minister of Police for damages in the sum of R 200 000.00.

APPEARANCE OF DEFENDANT OR LACK THEREOF

3.1

On **04 November 2022** my attorneys served the Defendant's attorney with a notice of set down, setting down the matter for trial on **15 November 2022** at 09:00 or soon thereafter as the matter may be heard. See attached " **Annexure ML1**". The defendant failed to appear on the set date.

3.2

In view of the above submissions, I humbly request the Honourable Court to grant the order as set out in my particulars of claim.

[7] On 13 March 2023, in a supplementary affidavit, the appellant expounds further as regards the occurrences of the day in issue:

"……

3. The purpose of this supplementary affidavit is to provide further information following queries raised by the learned magistrate pertaining to my case against the Respondent.

4. I hereby wish to elaborate to the events of my arrest on the 22nd day of July 2022 in order to justify the claims raised by myself.

5. On or about 22nd day of July 2022 I was at my home when the following transpired.

5.1. The unknown members of the South African Police Services (hereinafter " SAPS") invaded my parental home, interrogated me, confiscated my belongings, took a picture of myself and thereafter physical assaulted me with open arms taking turns.

5.2. The members of the SAPS demanded that I should come along with them and I was taken to a nearby tuck-shop where they interrogated me about my knowledge of Beauty Siamisang's murder thereafter assaulted me in the presence of an unknown Bangladesh shop owner.

5.3. Subsequent to that, they took me to the nearby bush and the four of them again took turns to assault me by slapping me on my face several times.

5.4. The members of SAPS thereafter returned me to my residential home, without detaining me and making me appear before a Magistrate or being given any document,

5.5. The above incidents lasted for about 3 hours.

6. The extent of my injuries is determined in the attached J88, see annexure marked "ML1."

[8] The court a *quo* ordered awarded an amount of R20 000.00.

The test on appeal

[9] It is trite that a court of appeal will only interfere with the wide discretion of a trial judge in determining an appropriate award if the award is 'palpably excessive and is clearly disproportionate to the circumstances of the case'. *Salzmann v Holmes* 1914 AD 471 at 480, *Sandler v Wholesale Coal Suppliers* Ltd 1941 AD 194 at 200 and *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 47. An appellate court can also interfere if it is shown that the damages were grossly extravagant or unreasonable (*Versfeld v South African Fruit Farms Ltd* 1930 AD 452 at 462) or the 'damages are so high as to be manifestly unreasonable', *Black and others v Joseph* 1931 AD 132 at 150. Innes CJ, however, in *Hulley v Cox* 1923 AD 234 at 246 stated that '[a]n appellate tribunal is naturally slow to interfere with the discretion of a trial judge in the matter of damages . . . and we are bound to intervene if we think that due effect has not been given to all the factors which properly enter into the calculation; or if the final award is in our opinion excessive'.

[10] The apex Court in *Dikoko v Mokhathla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) paras 57-60 held that:

'should an appellate court find that the trial court had misdirected itself with regard to material facts or in its approach to the assessment, or having considered all the facts and circumstances of the case, the trial court's assessment of damages is markedly different to that of the appellate court, it not only has the discretion but is obliged to substitute its own assessment for that of the trial court. In its determination, the Court considers whether the

amount of damages which the trial court had awarded was so palpably inadequate as to be out of proportion to the injury inflicted.' (references omitted).

[11] It needs to be accentuated that when assessing the quantum of damages, 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. To this end, it is pivotal 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. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the case and to determine the quantum of damages to such facts. *Mtolo v Minister of Police* [2023] ZAKZPHC 86; 2024 (1) SACR 317 (KZP) para 18 *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA); [2009] 4 All SA 38 (SCA)para 26 and reaffirmed in *Mahlangu v Minister of Police* [2021] ZACC 10; 2021 (2) SACR 595 (CC); 2021 (7) BCLR 698 (CC)para 51 (Mahlangu).

[12] Finally. in *Motladile v Minister of Police* [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) para 17, the Supreme Court of Appeal stated the following:

'[t]he assessment of the amount of damages to award a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff had spent in detention. Significantly, the duration of the detention is not the only factor that a court must consider in determining what would be fair and reasonable compensation to award. Other factors that a court must take into account would include (a) the circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff."

[13] In response to a request for reasons in terms of Rule 51(1) of the Magistrate's Court Rules, the following was posited:

"…..

REASONS FOR THE RELIEF ADVANCED

The in this application granted the Applicant an amount of R20 000 as fair and reasonable amount. The amount granted came as a result of the court, cumulatively taking into consideration, the period of the Plaintiff's arrest as well as detention, no loosing sight of the fact that he was deprived of freedom, the severe emotional stress as well as psychological trauma he may have suffered. The embarrassment suffered by him detained, the discomfort and humiliation by keeping him in the cells were all also been included in the courts determination not forgetting that there is no mathematical means upon which all these matters can be calculated, save to save the case law provided by the Plaintiff in his notice in terms of Rule 12(4) were taken into consideration.

The prescribed rate of interest changed with effect from 1 January 2022, to 7.25% per annum.The previous was 7.00%. According to the Prescribed Rate of Interest Act and that is how the court reached a conclusion that this was the interest rate to be awarded in respect of the Plaintiff's claim.

The issue of costs, it should be borne in mind that where an applicant requires "costs for suit" in such undefended applications, the court has a duty to calculate same if same has not been calculated by adding up the costs for summons issued, as well as the Sheriffs fees and the costs for the default judgment which all added up to the figure granted on the judgment, same was not done as the court applied its discretion not to calculate same.

ORDER

The default judgment was thus granted as previously stated as the amount of R20 000.00 plus interest at the rate of 7% until the date of final payment. The defendant was further ordered to pay the Plaintiff costs of suit."

[14] A reading of the court a *quo's* reasons for the award which form the facts that were found to be proven and the reasons for same irrefutably demonstrates that all factors which affect the calculation for an appropriate award were not properly weighted. What stands out is that the court a *quo* appears to have considered factors that were outside the factual matrix presented before it. Moreover, it repetitively conflated the gender of the appellant which led to a misconstruing of the facts. It would be remiss of me at this juncture not to address the issue of judicial accountability through the prism of judgments. It is unreasonable to expect that every judgment be a scholastic or reportable one. Such an expectation would countermand an efficient judicial process; however, the complexities of a matter may well call for same. In *casu*, the court a *quo* was derelict in the way in which the reasons for the order were framed.

[15] This led to the rendering of a judgment that was unhelpful. I am fully alive to the pithy facts that the appellant had placed before the court a *quo*. In my view this did not immunize the Acting Magistrate from penning an accurate structured judgment. The judgment of the Acting Magistrate in its current form placed this Court at a disadvantage in adjudicating this matter. See: *S v Van der Berg and Another* 2009 (1) SACR 661 (C).

[16] Notwithstanding the appellant being afforded two bites at the proverbial cherry, both affidavits when considered holistically, presented terse facts as to what had transpired. The same was essential to the determination of an appropriate award. 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.

[17] 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."

[18] What is discernible from the facts, was that the appellant was arrested in the sanctity of her abode. The precise circumstances surrounding her arrest and the peripheral facts relevant thereto remain unknown. Thereafter, the appellant was removed and interrogated regarding a murder. An unprovoked assault followed. The medical evidence submitted corroborates the infliction of the assault. Whilst the appellant was not detained in what can be described in a traditional detention facility, her freedom of movement was inhibited for approximately three (3) hours.

[19] The unlawful arrest and detention of the appellant was a grave violation of several constitutionally preserved rights, the most critical of which was the right to liberty. In *Thandani v Minister of Law and Order* 1991[1] SA 702 [E] at 707 the following was said:

" In considering quantum sight must not be lost of the fact that the liberty of an individual is one of the fundamental rights of a man[or woman] in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious in road into the freedom and rights of an individual."

[20] In *Masisi v Minister of Safety and Security* 2011 [2] SACR Mokgoka J, very astutely in my view, described the purpose of an award for general damages in the context of a matter such as the present as a process in which one seeks to compensate a plaintiff for deprivation of personal liberty. The following was stated at paragraph [18]

> [18] **The right to liberty is an individual's most cherished right, and one of the foundational values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundament of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection, and sparingly**. [own emphasis]

[21] The assault of the appellant was an infringement upon and violation of the bodily integrity of her person. It trespassed on several constitutional injunctions. 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).

[22] The appellant pleaded that given the unlawful conduct of the respondent, she suffered emotional, physical, psychological harm and *contumelia* in the sum of R200 000.00. These averments were unsupported by evidence. On a careful consideration of all the factors, I am of the view that an award of R 30 000.00 would be a just and equitable one.

[23] Insofar as costs are concerned, costs follow the result. It is important that our courts accord to the deprivation of a person's liberty when determining the scale on which to award costs. In *De Klerk v Minister of Police* [2018] ZASCA 45; [2018] 2 All SA 597(SCA); [2018](2) SACR 28(SCA) paras 18 &55, which also concerned an unlawful arrest and detention, the Supreme Court Appeal contended that although the total quantum awarded [R30 000] is far below the jurisdiction of the high court, the appellant was justified in approaching the high court because the matter concerned the unlawful deprivation of his liberty. See: *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023) at para 26. Accordingly, I will award costs on the High Court scale.

Order:

[24] In the premises, I make the following order:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and substituted with the following order:

   (a) the defendant is directed to pay the plaintiff the sum of R30 000.00.

   (b) the defendant is directed to pay to the plaintiff interest on the sum of R30 000.00 at the prescribed rate calculated from the date of judgment to the date of final payment.

(c) the defendant is to pay the plaintiff's taxed or agreed costs of the action.

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

I, agree

M. WESSELS
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, NORTH WEST DIVISION,
MAHIKENG

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Date of Hearing	18 October 2024
Date of Judgment:	06 November 2024