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 PROVINCIAL DIVISION, MAHIKENG

CASE NO.: **3332/2019**

& **3333/2019**

In the matter between:

CHRISTIAAN SWART	**FIRST PLAINTIFF**
THABO DAVID GABANAKGOSI	**SECOND PLAINTIFF**
and	
MINISTER OF POLICE	**DEFENDANT**

ORDER

(i) The Defendant is ordered to pay the First and Second Plaintiff, R 400 000-00 each being in respect of unlawful arrest and detention;

(ii) The Defendant is ordered to pay the First and Second Plaintiff, R 10 000-00 each, being in respect of special damages;

(iii) Interest on the amount referred to in paragraph (i) to be calculated at the prescribed rate of interest from 14 March 2024 until date of final payment;

(iv) Interest on the amount referred to in paragraph (ii), to be calculated at the prescribed rate of interest from the 17 February 2017, the date on which the notice of intention to institute action against the Defendant was served, until the date of final payment;

(v) Defendant is to pay the costs of suit on a party and party scale, Scale "B".

JUDGMENT

MASIKE AJ

INTRODUCTION

[1] On 9 May 2023, Reddy AJ (as he was then) made an order in the following terms by agreement between the parties:

"**1. THAT: The First and Second Plaintiff withdraw their claims for assault (claim 2) and wrongful infringement of the constitutional rights (claim 3) against the Defendant.**

2. THAT: **Insofar as the claims of the First and Second Plaintiff for wrongful arrest and detention (claim 1) against the Defendant are concerned;**

2.1 **the merits thereof are separated from the *quantum* thereof and the trial on the *quantum* thereof is postponed *sine die*; and**

2.2 **the Defendant will be 100% liable to the First and Second Plaintiff for the proven and / or agreed upon damages suffered by them due to their wrongful detention during the period from 14h00 on Wednesday, 28th day of DECEMBER 2016 until 17H00 on Monday 9th day of JANUARY 2017.**

3. THAT: **The Defendant has to pay the cost of suit to the First and Second Plaintiff."**

[2] The issue of *quantum* for the damages sat before this Court on 5 August 2024 for adjudication. The evidence of the First and Second Plaintiff was led and the First and Second Plaintiff were cross examined by counsel for the Defendant. At the close of the First and Second Plaintiff's case, the Defendant closed his case without calling any witnesses.

[3] Mrs. Zwiegelaar for the First and Second Plaintiff requested the matter be postponed to the filing of heads of argument by the First and Second Plaintiff. The Court was informed that the heads of argument of the First and Second Plaintiff would be filed on or before 30 August 2024. Mr. May for the Defendant informed the Court that the heads of argument for the Defendant would be filed on or before 9 September 2024.

[4] The matter was accordingly postponed to 10 September 2024, for the filing of heads of argument by the Plaintiffs and the Defendant.

[5] The Plaintiffs and the Defendant did not file their respective heads of argument within the agreed to time frames. The Plaintiffs filed their heads of argument on 3 September 2024 and the Defendant filed his heads of argument on 10 September 2024. On 10 September 2024, the Court reserved judgment in the matter.

THE CASE OF THE FIRST PLAINTIFF

[6] The First Plaintiff, Mr. Christiaan Swart is a 45 year old male person, at the time of his arrest, he was employed by Xtreme Beef as a purchasing agent. On 28 December 2016, the First Plaintiff and the Second Plaintiff went out to purchase cattle from a person known as David. David was selling 5 cattle, he told the First Plaintiff and the Second Plaintiff that the cattle were his. The First Plaintiff wrote

the ID number of David in "the book" and David signed together with the First Plaintiff.

[7] The First Plaintiff, the Second Plaintiff and David loaded the 5 cattle on the trailer of the motor vehicle that the First Plaintiff and the Second Plaintiff were travelling in. The First Plaintiff, the Second Plaintiff and David departed in the motor vehicle driven by the First Plaintiff to the feeding pen of Xtreme Beef.

[8] Whilst travelling on the public road between Lehurutshe and Zeerust, the First Plaintiff, the Second Plaintiff and David were stopped by a certain Louis Meyer ("Meyer"). Meyer had in his possession a R4 assault refile, Meyer demanded that David exit the motor vehicle that the First Plaintiff, Second Plaintiff and David were travelling in. David spoke with Meyer and returned to the motor vehicle and he informed the First and the Second Plaintiff that Meyer would allow them to leave with the 5 cattle if they paid him R 50 000-00, if not he would call the police and cause them to be arrested.

[9] The First and the Second Plaintiff were not prepared to pay Meyer the R50 000-00 for the cattle and the First Plaintiff informed Meyer that they did not steal the cattle but were purchasing them on behalf of Xtreme Beef from David. Despite the First Plaintiff having explained to Meyer how the 5 cattle came to be in his possession and showing Meyer the book, Meyer took the book from the First Plaintiff and kept it in his possession. Meyer insisted that the First, Second

Plaintiff and David had stolen the 5 cattle and he would see to it that they are arrested. Meyer then made a number of phone calls on his cellular phone.

[10] Members of the community started to gather at the scene and claimed the 5 cattle had been stolen. The members of the community became aggressive towards the First Plaintiff, Second Plaintiff and David.

[11] Members of the South African Police from the Lehurutshe Police Station arrived on the scene and told the First Plaintiff, Second Plaintiff and David to get into their vehicle for their safety. The members of the South African Police Services arrived at the scene at around 12H00 or 13H00. They drove the motor vehicle of the First Plaintiff, Second Plaintiff and David were transporting the cattle in from the scene.

[12] At Lehurutshe Police Station, the First Plaintiff, Second Plaintiff and David were kept together. They did not receive food that night. There was no bedding. There were ablution facilities but there was no running water. The First Plaintiff, Second Plaintiff and David ate the following day, 29 December 2016 at around 8H00.

[13] On 29 December 2016, the First Plaintiff, Second Plaintiff and David were taken to Groot Marico Police Station. There were 15 people in the police station cells at Groot Marico. The First Plaintiff, Second Plaintiff and David were placed in the cell at around 11H00. The statements of First Plaintiff, Second Plaintiff and David

were taken by a police officer Le Grange and another officer whose names and ranks are to the First Plaintiff unknown.

[14] The First Plaintiff, Second Plaintiff and David were taken to Court on 29 December 2016 and the matter was remanded and the First Plaintiff, Second Plaintiff and David were taken to Groot Marico Police Station.

[15] At Groot Marico Police Station, the First Plaintiff and Second Plaintiff had one blanket on the floor and another to cover themselves. The roof was leaking. Because of the number of people in the cell it was difficult to sleep. They had to sit and sleep. There was a toilet and a shower, the water was cold. The toilet was working properly. The toilet and the shower did not have a door.

[16] They were given two slices of bread and tea for breakfast, lunch consisted of bread sometimes with baked beans or peanut butter. There was one roll of toilet paper for all the people in the cell. There were people who were smoking in the cell. The First Plaintiff was allowed visitors, his employer and family came to visit him. The First Plaintiff had to get medication for his knee because of the cold cell floor and because it was wet.

[17] The First and Second Plaintiff and other persons who were in the cell were expected to clean the cell themselves. On 4 January 2017, David pleaded guilty to stock theft and on 9 January 2017 the charges were withdrawn against the First Plaintiff and the Second Plaintiff.

[18] As a result of the arrest and the detention of the First Plaintiff, this affected his relationship with his then girlfriend. The relationship did not work out, they were in the process of getting married. In the street the First Plaintiff was called a cattle thief. The arrest did not affect his employment with Xtreme Beef. The First Plaintiff found employment with another employer and is receiving a higher salary.

[19] Under cross examination it was put to the First Plaintiff that there was little rain at the time that the First Plaintiff, Second Plaintiff and David were kept at the Groot Marico Police Station cells. The First Plaintiff insisted that it rained one day.

[20] The First Plaintiff conceded that his lady friend had brought him clothes and his father brought him medication for his knee.

THE CASE OF THE SECOND PLAINTIFF

[21] The case of the Second Plaintiff on how the arrest was carried out, where the Second Plaintiff, First Plaintiff and David were kept on 28 December 2016 and being taken to Groot Marico Police Station on 29 December 2016 and the first appearance in court on 29 December 2016 is similar to that of the First Plaintiff.

[22] In addition to what the First Plaintiff told the Court, the Second Plaintiff testified that he is 35 years of age, he stays at Skuinsdrift near Groot Marico. His highest

educational qualification is grade 10. The Second Plaintiff who was at all material times in court when the First Plaintiff testified confirmed the evidence of the First Plaintiff so far as it relates to himself.

[23] The Second Plaintiff testified that the cell at Lehurutshe was small, about 2 or 3 paces. The Police cell at Groof Marico was a little bigger, about 4 x 4 paces. The Second Plaintiff had no health issues and does not have any health issues as a result of the arrest and detention. He testified that the ventilation in the cells at Groot Marico was bad and if someone went to the toilet you could smell it in the cell.

[24] The Second Plaintiff did have visitors at the Groof Marico Police Station, his mother and employer came to visit him. He was charged R 10 000-00 by Mr. Labuschagne for assisting himself and the First Plaintiff.

[25] The Second Plaintiff is still traumatized when he sees a Police Van. The Second Plaintiff has children aged 11 and 5 years with different mothers. The members of the community refer to him as a cattle thief when they see him. The Second Plaintiff left Xtreme Beef and is no longer employed. He is currently doing odd jobs. The Second Plaintiff left Xtreme Beef because members of the community wanted to burn them, and he felt he did not want to die for a job.

[26] Second Plaintiff attends church at ZCC and is an ordinary member of the church. The members of the church became aware of his arrest and they have started to

treat him differently and they would gossip about him. None of the police officers apologized to the Second Plaintiff.

[27] Under cross examination the Second Plaintiff conceded that the members of the South African Police Services protected him from members of the community who wanted to burn him.

[28] The Second Plaintiff conceded that the arrest was in summer and it was not cold. It did rain once and the roof was leaking. The R10 000-00 charged by the attorney Mr. Labuschagne was paid by the family of the Second Plaintiff.

[29] The First and Second Plaintiff closed their case without calling any other witnesses.

[30] The Defendant closed its case without calling any witnesses.

ANALYSIS

[31] In the matter of **Minister of Safety and Security v Tyulu** 2009 (5) SA (SCA) at paragraph 26, the Supreme Court of Appeal held as follows: "*In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial 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 particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour ***2006 (6) SA 320*** *(SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008)* ***[2009] ZASCA 39*** *(31 March 2009) (paras 26-29)."*

[32] In **Protea Assurance Co Ltd v Lamb** 1971 (1) SA 530 (A) at page 535G – 536B the then appellate division held as follows: *"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be*

permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration." (own underlining)

[33] In the matter of **Pitt v Economic Insurance Co Ltd** 1957 (3) SA 284 (N) at page 287E the court held as follows: "*...the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.*" (own underlining)

[34] In **Motladile v Minister of Police** (414/2022) [2023] ZASCA 94 (12 June 2023) at paragraph 17 the Supreme Court of Appeal said the following: "*The 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."

[35] In **Thandani v Minister of Law and Order** 1991 (1) SA 702 (E) at page 707A – B, Van Rensburg J said the following: "*In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man 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 constitutes a serious inroad into the freedom and the rights of an individual.*"

[36] In **Senwedi v The State** [2021] ZACC 12, the Constitutional Court per Majiedt J said the following at paragraph 16: "*Freedom of the person is of particular importance in our democratic dispensation, given the utterly reprehensible manner in which persons were deprived of their liberty at will during the abominable apartheid era.*"

[37] Majiedt J went on to say in **Senwedi v The State** *supra* at paragraph 27 "*We are therefore constrained to jealously guard the liberty of a person under our Constitution, particularly in terms of section 12 of the Bill of Rights.*"

[38] I have considered the heads of argument, and the authorities referred to by Mrs. Zwiegelaar for the First and Second Plaintiff. I have noted Mrs. Zwiegelaar is of the view that an amount of R 800 000-00 would be an equitable award for general damages. I have also considered the heads of argument, and the authorities referred to by Mr. May for the Defendant. I have noted that Mr. May is of the view that an amount of R 380 980.26 would be an equitable award for general damages.

[39] It would be remiss of me not to address a submission made in the heads of argument of the Defendant by Mr. May at paragraph 32 to 38. As Petersen ADJP (as he was then) said in **Seetseng v Minister of Police and Another** (346/2016) [2023] ZANWHC 150 (24 August 2023) at paragraph 31: "*At the outset, a misnomer in the submissions of Ms Ntsamai that this Division of the High Court has a "going rate" for awards in unlawful arrest and detention matters must be corrected.*"

[40] Hendricks DJP (as he was then) said the following in **Spannenberg and Another v Minister of Police** (2993/2019) [2022] ZANWHC 4 (24 February 2022) at paragraph 20 "*There is a misnomer that the High Court in the **Ngwenya** judgment set as a benchmark an amount of R15 000.00 per day as the norm for unlawful arrest and detention. This is incorrect and misplaced. Each case must be decided in its own peculiar facts and circumstances (merits). This cannot be emphasized enough. There is no benchmarking nor is there a one size (or amount) fits all practice that must be followed. This will most definitely erode*

the judicial discretion of presiding officers. However, there must be a balance of all the competing interests and it can never be that there be poured from the proverbial 'horn of plenty'. A claim for damages is not a get rich quick opportunity but a ***solatium*** *as compensation for the damages suffered."*

[41] There is no such thing as a "*current position*" in the North West Division of the High Court when it comes to awards for unlawful arrest and detention. There is no such thing as a "*range*" that is used by the Court. Each matter is decided on its own merits and awards are made according to the merits of the individual matters. The submission that there is a "*current position*" and "*range*" is unfortunate and should not be repeated.

[42] I have noted that Mrs. Zwiegelaar refers the Quantum Yearbook by Robert J Koch 2024 at page 72. The appellate division in **AA Onderlinge Assuransie Assosiasie Bpk v Sodoms** 1980 (3) SA 134 (A) 141G – H, warned against slavishly relying on the consumer price index in adjusting earlier awards. The court did however point out that it is useful as a general guide to the devaluation of money.

[43] In **Minister of Safety and Security v Seymour Dennis Thomas** (295/05) [2006] ZASCA 71 at paragraph 17 Nugent JA wrote as follows: "*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."

[44] Past awards from other courts of equal standing to this court or of higher standing than this court are not binding authority. They are a guide, but they have no higher value than that.

[45] In arriving at what I consider to be an appropriate award, I have considered the following factors in arriving at a just and fair *quantum* for the unlawful arrest and detention of the First and Second Plaintiff

(a) The First and Second Plaintiff cooperated with the members of the South African Police Services and their arrest was from 14H00 on 28 December 2016;

(b) The members of the South African Police Services did not explain the reason for the arrest of the First and Second Plaintiff and their detention until at around 21H30 on 28 December 2016;

(c) The First and Second Plaintiff were taken to court on 29 December 2016 and remanded in custody only to be released from custody on 9 January 2017 at around 17H00;

(d) The First and Second Plaintiff gave a reasonable explanation to the members of the South African Police Services of how they came to be in possession of the 5 cattle;

(e) The conditions of the cells from the description by the First and Second Plaintiff were inhumane and unhygienic;

(f) How the arrest and detention has affected the First and Second Plaintiff personally and the effect it has had on their relationships with members of the community and their family members;

(g) The age of the First and Second Plaintiff, their status and standing in the community at the time of their arrest;

(h) The Constitutional rights of the First and Second Plaintiff in terms of Section 12(1)(a) were willfully trampled by the members of the South African Police Services, the very people who were tasked with defending the Constitutional Rights of the First and Second Plaintiff;

[46] Having regard to the abovementioned factors, I consider an amount of R 400 000-00 to be a just and fair amount of compensation to the First and Second Plaintiff's unlawful arrest and detention suffered at the hands of the members of the South African Police Services from 28 December 2016 to 9 January 2017.

[47] The claim for special damages in the amount of R 10 000-00 for the First Plaintiff and the Second Plaintiff to defend themselves by engaging the services of an attorney has not been challenged by the Defendant and succeeds.

INTEREST

[48] Mrs. Zwiegelaar submitted that the interest on the amount awarded is to be calculated from date of service of the First and Second Plaintiff's notice of intention to institute action against the Defendant on 17 February 2017 in the alternative from the date of service of the combined summons on the Defendant.

[49] Mr. May submits that interest should only be calculated, at the earliest, from the date of the amendment of the amount regarding general damages, in Claim 1, to R 800 000.00, on 14 March 2024, alternatively from date on which judgment on the *quantum* is granted.

[50] The First and Second Plaintiff's claim against the Defendant is an unliquidated claim. A court may make such an 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. (See: **Drake Flemmar and Orsmond Inc and another v Gajjar** NO 2018 (3) SA 353 (SCA) at paragraph 67).

[51] Having noted the amount of R 800 000-00 was claimed for the first time in the notice in terms of Rule 28(1) on 13 March 2024. I accordingly am of the view it

will be just if interest is calculated on the prescribed rate of interest from 13 March 2024 until the date of final payment.

[52] In respect of the claim for special damages, I have noted that this claim formed part of the unamended particulars of claim. In exercising my discretion, I am of the view that it will be just if interest on the claim for special damages is calculated at the prescribed rate from the date of service of the First and Second Plaintiff's notice of intention to institute action against the Defendant on 17 February 2017 to date of final payment.

COSTS

[53] The general rule is the successful party is entitled to his or her costs. I have not found any reason to deviate from the rule.

[54] The issue that needs to be determined, however, is the scale in terms of Rule 69. The matter before the Court was not complex but it involved a matter of importance to the First and Second Plaintiff. The Court has noted the importance 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 at paragraph 18 the Supreme Court of Appeal said the following regarding costs "*although the quantum awarded R30 000-00 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 liberty.*"

[55] I accordingly find costs should be on a party and party scale, Scale "B".

ORDER

[56] Resultantly, the following order is made: -

(i) The Defendant is order to pay to the First and Second Plaintiff, R 400 000-00 each being in respect of unlawful arrest and detention;

(ii) The Defendant is ordered to pay to the First and Second Plaintiff, R 10 000-00 each, being in respect of special damages;

(iii) Interest on the amount referred to in paragraph (i) to be calculated at the prescribed rate of interest from 14 March 2024 until date of final payment;

(iv) Interest on the amount referred to in paragraph (ii), to be calculated at the prescribed rate of interest from the 17 February 2017, the date on which the notice of intention to institute action against the Defendant was served, until the date of final payment;

(v) Defendant is to pay the costs of suit on a party and party scale, Scale "B".

T MASIKE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE FOR HEARING	:	**5 AUGUST 2024, 10 SEPTEMBER 2024**
DATE OF JUDGMENT	:	**14 NOVEMBER 2024**
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