There has been a general acknowledgment by the courts that the right to liberty is one of the most important rights afforded to a person. This has been the case since long before the 1996 Constitution, which guarantees certain individual rights. As long ago as 1879, De Villiers CJ in In re Willem Kok and Nathaniel Balle (1879) 9 Buch 45 pronounced, at 64, that courts were duty bound to protect personal liberty when it was illegally infringed on. This acknowledgment continued in cases such as Ochse v King William's Town Municipality 1990 (2) SA 855, in which it was held at 860F - G:

'The right of an individual to personal freedom is a right which has always been jealously guarded by our courts, and our law has always regarded the deprivation of personal liberty as a serious injury. The unlawful arrest and detention of the plaintiff amounted to a serious invasion of this right.'

Similarly, in Mthimkhulu and Another v Minister of Law and Order 1993 (3) SA 432 at 440D, it was held: 'The deprivation of personal liberty has consistently been regarded by our courts as a serious injury.'

After the advent of constitutional democracy, courts continued to reaffirm the view that a right to personal liberty was important. In Theobald v Minister of Safety and Security and Others 2011 (1) SACR 379 (GSJ), at 389F, the court stated:

'It has long been settled law that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful.'

In line with this general acknowledgment, the courts have held that interference with a person’s liberty can take place only under restrained conditions because in a constitutional democracy personal freedom is highly prized (see Zealand v Minister of Justice and Constitutional Development and Another 2008 (2) SACR 1 (CC) at para 12).

With the advent of the Constitution, the already jealously guarded right to personal freedom was afforded constitutional protection in, among others, ss 10 and 12(1). It cannot be disputed that an unlawful interference with an individual’s right to personal freedom amounts to a violation of that person’s dignity. On this point, Clive Plasket has, in my view correctly, opined that: '[A] person’s right to human dignity will be infringed by his or her arrest. That was the case at common law and remains so under the Constitution even if, practically speaking, the right merely serves as a “forensic reinforcement” to a claim based on a breach of the right to freedom' (Clive Plasket ‘Controlling the discretion to arrest without a warrant through the Constitution’ 11 South African Journal of Criminal Justice (1998) at 179).

It therefore follows that, in the current constitutional dispensation, an unlawful interference with a person’s right to liberty is not only a common law issue, but is also a constitutional infringement. The effect of constitutionally entrenching rights, in the words of Vivier ADP in Van Eeden v Minister of Safety and Security [2002] 4 All SA 346 (SCA) at para 12, is that '[t]he entrenchment of fundamental rights and values in the Bill of Rights ... enhances their protection and affords them a higher status ...'.

The actio iniuriarum for unlawful arrests and detention

It is a well-established principle in South African law that the basis for the protection of individual liberty is the actio iniuriarum (see the Theobald case, for example). The primary purpose of this action where it is used to vindicate infringed rights to liberty is to give the aggrieved party compensation in the form of money. It stands to reason that where a right is said to be jealously guarded and has been afforded constitutional protection, one would expect that an unlawful infringement of that right is not only frowned on, but proper measures are employed to correct the infringement and ensure that future infringements do not occur.

Once the litigant has alleged an arrest that cannot be justified by the arrestor, the inquiry shifts to the determination of an appropriate quantum of damages to be awarded to the litigant. This is because it is trite law that an arrest is prima facie wrongful and unlawful (see Ralekwa v Minister of Safety
Determined an appropriate quantum of damages

There is no fixed formula for the determination of the quantum of damages obtainable through the *actio iniuriarum*. Such determination is in the discretion of the judge, who must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair (J Neethling, JM Potgieter & PJ Visser _Neethling’s Law of Personality_ 2ed (Durban: LexisNexis 2005) at 60). It should follow that where a right is said to be so important that it has been afforded constitutional protection, any quantum of damages would reflect that importance. In _Thandani v Minister of Law and Order_ 1991 (1) SA 702 at 707A – B, for example, it was held:

‘In considering quantum, right must not be lost of the fact that 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 courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual.’

In my view, awards made by the courts in respect of deprivation of liberty cases reveal a disparity between what courts say about the protection of a person’s right to liberty and what they do when that right is infringed. This state of affairs was noted as far back as 1989 in _Ramakulukusha v Commander, Venda National Force_ 1989 (2) SA 813 at 847B – C, in which it was noted:

‘When researching the case law on the quantum of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in southern African courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values.’

In awarding insignificant awards, the courts have stated that, when assessing damages for unlawful arrest and detention, courts are not extravagant in compensating the loss as there are many legitimate calls on the public purse to ensure that other rights that are no less important also receive protection (see _Minister of Safety and Security v Seymour_ 2006 (6) SA 320 (SCA) at 326E).

Elsewhere, it has been held that it is important to bear in mind that the primary purpose when assessing damages is not to enrich the aggrieved party but to offer him some much-needed solatium for his injured feelings (see _Minister of Safety and Security v Tyalu_ 2009 (5) SA 85 (SCA) at 93C – D).

What about the Bill of Rights?

Decisions handed down post the interim and final Constitutions have emphasised the importance of the rights of freedom and dignity and how an arrest and subsequent detention constitute a drastic invasion of rights (see _Theobald_ at para 389E). Unfortunately, however, the awards are not commensurate with the infringed constitutional rights. In realisation of this, Willis J in _Seymour v Minister of Safety and Security_ 2006 (5) SA 493 (W), at 499H – I, reasoned as follows:

‘It seems to me that the courts must move, however glacially, to reflect in their awards for damages in cases of this nature the changes in values which have occurred not only in society as a whole, but which we as judges are expected to apply.’

Willis J’s clarion call to make the quantum of damages awarded in unlawful deprivation of liberty cases commensurate with the importance of the right to liberty was cautiously followed in _Olgan v The Minister of Safety and Security_ 2008 (JDR 15821E) at para 16, where the judge held that:

‘In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the “horn of the plenty”, at the expense of the defendant.’

In my view, it is one thing to say there is a high premium placed on an individual’s right to personal liberty, but it is meaningless if, by the same token, that high premium is not reflected in the award where this right is infringed.

Kriegler J, in my view correctly, held in _Fose v Minister of Safety and Security_ 1997 (3) SA 786 (CC) at para 95 that:

‘[T]he harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violations are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise.’

It follows from the premise that the right to liberty is a highly guarded right both at common law and in the Bill of Rights that the quantum of damages where this right has been infringed must, as a matter of course, reflect the importance afforded to it. If the quantum of damages does not reflect this, then unfortunately, I submit, the courts are doing no more than paying lip service to the Constitution and the rights entrenched therein.

Benchmarking the quantum of damages

Innes CJ, in a slightly different context, held in _Botha v Pretoria Printing Works Ltd and Others_ 1906 TS 710 at 714:

‘If courts of law do not intervene effectively in cases of this kind, then one of two results will follow – either one man will avenge himself for an insult to himself by insulting the other, or else he will take the law into his own hands. I do not think that the principle of minimising damages in actions of *iniuria*...’

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is sound. Where the injury is clear, substantial damages ought as a general rule to be given.'

When determining the quantum of damages to be awarded for unlawful deprivation of liberty, courts are essentially being asked to balance the interests of the litigant and those of the public purse. There is nothing unusual in courts playing this role. What is notable, however, in my opinion, is that courts often lean heavily in favour of protecting the public purse and thereby fail to pay sufficient attention to the constitutional rights of the litigant before court. This would seem to emanate from the *obiter dictum* of Holmes J in *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (D) at 287E – F, where the judge, in relation to the assessment of damages, opined:

'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.'

Similar sentiments were repeated by Ackermann J in the *Fose* case at paras 71 – 72, where the judge reasoned that there was nothing to suggest that substantial awards in the form of constitutional damages would have any deterrent or preventative effect against individual or systemic repetition of the infringement of the constitutional rights.

If this is the position courts take when protecting the public purse, I submit that it is inconsistent with the high premium that is said to be placed on personal liberty.

In the *Tyulu* case at 93D – F Bosielo AJA, in my view correctly, held as follows with regard to assessing quantum:

'It is therefore crucial that serious attempts be made to ensure that 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 *iniuria* with any kind of mathematical accuracy. ... 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.'

If the quantum of damages in unlawful deprivation of liberty cases is to be benchmarked in such a way that the constitutional imperatives of the rights normally infringed by the deprivation are taken into account, then this will be in line with the basic principles that laws must be uniform, certain and easily ascertainable in that, from there onwards, there will be certainty and uniformity on how courts view arbitrary infringements of constitutional rights. An injury is never clearer than when it impacts on constitutionally entrenched rights. The full measure of the protection of constitutional rights means that the Constitution is not only mentioned, but that the awards given reflect the significance of their content.

**Conclusion**

The current state of awards for deprivation of liberty is not in sync with the pronouncement both at common law and under the Constitution that an individual's right to liberty is to be jealously guarded. Under the constitutional dispensation, where the challenge is to make the Bill of Rights work for its beneficiaries, this approach is to be rejected. When determining an appropriate award for damages, courts are called on to consider the fact that in unlawful arrest and detention cases, the rights infringed are not of such a nature as to warrant the trivial awards that are currently being made.

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