REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 60082/2012

29/3/2017

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

..... 29.3.2017
SIGNATURE **DATE**

In the matter between:

MINISTER OF POLICE	1st Applicant
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2nd Applicant
and	
JAN HENDRIK WOLMARANS	Respondent

J U D G M E N T

MSIMEKI J,

INTRODUCTION

[1] The applicants brought an application for leave to appeal against my whole judgment and order, including the order as to costs which I handed down on 23 September 2016. The appeal, according to the application, is directed to the Supreme Court of Appeal of South Africa alternatively, the Full Court of the Division.

[2] Mr D, Mtsweni, who represented the defendants when the matter was heard and argued, again represented them when the application for leave to appeal was heard and argued. The Plaintiff who was represented by Mr J. P. Nel when the matter was heard and argued was represented by Mr P. W. T Lourens when the application was heard and argued.

[3] The grounds on which the application is based are the following:

"1. The learned Judge erred in finding that the Plaintiff's pre-existing problem with substance abuse, was exacerbated by his unlawful arrest and detention. The Learned Judge should have found that the Plaintiff's a (sic) pre-existing problem with substance abuse was exacerbated by his failure to seek help.

2. *The Learned Judge should have further found that Prof. Scholt's report, it is palpably clear that the Plaintiff's problem with substance abuse was the sole cause of his condition. The Learned Judge furthermore ought to have found that because of his failure to seek assistance in respect of his problem with substance abuse, the Plaintiff contributed to his current condition.*

4. *The Learned Judge erred, in absence of any evidence to suggest and quantifying the Plaintiff cost of future medical expenses, by awarding an amount of R100 000.00. The Learned Judge should have found that in absence of any evidence to the effect that the Plaintiff will require an amount of R100 000.00 towards his future medical expenses, declined to award such amount.*

5. *The Learned Judge furthermore erred in awarding the Plaintiff an amount of R2 700 000.00 in respect of his arrest and detention. The Learned Judge should have found that regard being heard (sic) to the circumstances of this matter together with the comparable authorities, that the amount of R2 700 000.00 was excessive alternatively unreasonable in the circumstances".*

[4] The paragraphs in the notice of application for leave to appeal have not been properly numbered. Paragraph 3 has been omitted resulting in the following numbering: 1, 2, 4 and 5. I shall follow the applicant's sequence of numbering.

[5] Simultaneously with the application for leave to appeal, the applicants brought an application seeking an order in the following terms:

"1. That the late filing of the Applicant's application for leave to appeal be and is hereby condoned and the time periods be and are hereby extended accordingly;

2. That the costs of this application be costs in the cause alternative (sic) that the Respondent be and is hereby directed to pay the costs of this application, only in the event of opposition;

3. That the above Honourable Court grants further and/or alternative relief as it may in the circumstances deem meet".

CONDONATION

[6] At the outset, Mr Mtsweni informed the Court that the respondent was neither opposing the application for condonation nor consenting thereto. This was confirmed by Mr Lourens when he started arguing his case.

[7] The notice of application for condonation was accompanied by an affidavit in support of the condonation application deposed to by Mr Maxwell Thozamile Matubatuba, a Senior Assistant State Attorney practicing as such in the employ of the State Attorney at NO. 316 Thabo Sehume Street, Pretoria.

[8] Mr Matubatuba, in the affidavit, fully explains why the application for leave to appeal was filed late. The decision that I later arrive at regarding the application for leave to appeal makes it unnecessary to consider the issue of condonation. The granting or not of the application for condonation was left in the hands of the Court by Mr Lourens who, nevertheless, later argued that the application ought to be dismissed if the application for leave to appeal was unsuccessful.

[9] The application for leave to appeal, according to Mr Mtsweni, has prospects of success. He submitted that another Court could come to the conclusion different to the conclusion that I arrived at when I gave my judgment.

[10] Mr Mtsweni raised two issues in support of his submissions and these are:

10.1 That the amount of R100 000.00 that the Court awarded the plaintiff in respect of the plaintiff's cost of future medical expenses was excessive and unreasonable.

10.2 That the amount of R2 700 000.00 that the Court awarded the plaintiff in respect of his arrest and detention was unreasonable alternatively excessive.

THE LAW

[11] **Section 17(1)(a)(i)** and **(ii)** of the **Superior Courts Act 10 of 2013** deals with the issue of leave to appeal. The section reads:

"17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are pf the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

[12] In **Protea Assurance Co. Ltd v Lamb 1971 (1) SA 530 (A) at 535 H-536B** Potgieter JA said:

"The above quoted passages from decisions of this Court indicate that, the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. 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 any 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." (my emphasis).

[13] In **Minister of Safety and Security v Seymour 2006 (6) SA 320(SCA) [17] at 325B**, Nugent JA said:

"[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 higher value than that." (my emphasis).

[14] McKerron in his Law of Delict, 7th ed., at page 124 said:

"*The interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure than by allowing the wrongdoer to benefit by the fact that some other person has discharged his liability. Moreover, the effect of refusing to allow the recovery in full would be to deprive the third party of the possibility of obtaining reimbursement from the injured party..."* (my emphasis).

The "compensation is not punishment" principle was affirmed by Rumpff, JA (as he then was) when he delivered the majority judgment in the matter of **Santam Versekeringsmaatskappy Bpk v Bylveldt 1973**

(2) SA 146 (A) at 153C-D. (See also **Alves v LOM Business Solutions (Pty) Ltd and Another 2012 (1) SA 399 (GSJ) at 411G-412A**).

[15] Mr Mtsweni submitted that there are cases where the plaintiffs were detained for periods of as long as 15 months and still received less amounts in respect of general damages. He referred, *inter alia,* to the case of **Alves v LOM business Solutions (Pty) Ltd and Another** (***supra***) where the period of detention was 15 months yet an amount less than the amount that the respondent was awarded in this case was awarded in respect of general damages. The facts of the case, in my view, are distinguishable from the facts of this case. There, Willis J at **412D-E** said:

"...The approach to quantum should be different, in a case such as this, from the situation where there has been an unlawful arrest and/or detention". He was of the view that the amounts awarded in cases *"should not be derisory, showing contempt or indifference to the loss of freedom".* I agree. (my emphasis).

[16] While it may well be so that cases in the past have shown that smaller awards were made where people were detained for longer periods, sight should not be lost of the fact that facts of cases differ from one case to the other. The question whether there was unlawful arrest and detention is also cardinal. In the **Alves case** (***supra***) the arrest appears to have been lawful and the detention at some point appears to have been

unwarranted. The facts of this case are different. The arrest and the detention were unlawful. The applicants conceded this.

[17] The issue in this case involves quantum only, namely future medical expenses and general damages. Regard must be had to the fact that the arrest and detention of the plaintiff (respondent) were unlawful and conceded.

[18] Mr Mtsweni submitted that the trend appears to be that the longer one remained in detention the smaller and lesser the award became. He attributed this to cases where people were detained for a few days yet, awarded higher amounts. I do not think that the submission has substance. The question to be answered is simple. Have the arrest and detention been unlawful from the outset? If the answer is yes, then the case will be distinguishable from the case of **Alves** (***supra***) that Mr Mtsweni relied on.

[19] Mr Lourens referred the Court to a number of cases from which it is clear that Courts always regard deprivation of one's liberty as a serious matter. Courts are enjoined to look at the facts of each case in their entirety in assessing general damages. The assessment of damages is pre-eminently a matter for the discretion of the trial Court. A superior Court only interferes where the discretion has not been judicially or properly exercised. (**See Minister of Safety and Security v Scott and Another 2014 (6) SA 1 at 15G-H**).

[20] The Court, clearly, has a discretion to award fair, reasonable and adequate damages. Having regard to previous cases in the assessment of general damages has been seen as a useful guideline. I also agree.

[21] Mr Lourens referred to cases such as **Langa v Minister of Police 2016 JDR 0921 (GP)** where the Court awarded damages in the amount of R120 000.00 for wrongful arrest and detention. The plaintiff was in custody for approximately 9-10 days.

[22] In **Minister of Safety and Security and Another v Ndlovu 2013 SACR 339 (SCA) an** amount of R230 000.00 was awarded where the detention was for 9 days.

[23] In **Minister of Safety and Security v Zwane 2016 JDR 1330 (GP)** the Court had awarded the plaintiff R180 000.00 where the detention was for 3 days. The Court, in an application for leave to appeal, found that there was no prospect of success and dismissed the application with costs.

[24] In **Kenneth v Minister of Police 2011 JDR 1754 (GNP)** the detention was for 40 days. An amount of R500 000.00 for general damages for wrongful arrest and detention was awarded.

[25] In **Mabitsela v Minister of Safety and Security 2015 JDR 2643 (GP)** the Court awarded R800 000.00 for unlawful detention as damages for a 3 day period.

[26] In **Madze v Minister of Police 2015 JDR 2680 (ECG)** the Court awarded R120 000.00 as damages for approximately 6-7 days of unlawful arrest and detention.

[27] In **Nel v Minister of Police 2016 JDR 1361 (ECGEL)** the Court awarded R140 000.00 in damages where the arrest and detention lasted for approximately 4 days.

[28] In **Hendricks v Minister of Safety and Security 2015 JDR 1057 (ECG)** the unlawful arrest and detention had been for 3-4 days. On appeal an amount of R30 000.00 that had been awarded was increased to R100 000.00.

[29] In **Minister of Safety and Security v Van Der Westhuizen 2015 JDR 0713 (GJ)**, the award for damages in the amount of R400 000.00 was, on appeal, reduced to R200 000.00. The respondent had been in detention for 32 hours (according to the respondent) and 28½ hours (according to the appellants).

[30] In **Van der Merwe v The Minister of Safety and Security 2011 JDR 0029 (ECG)** the plaintiff had been arrested and detained for 3 days. The Court awarded R120 000.00 in respect of unlawful arrest and detention.

[31] In **The Minister of Police and Another v Du Plesses (Supreme Court of Appeal: 666/2012)** the Court confirmed the awards of R100 000.00 against the first defendant (Minister of Police) and R120 000.00 against the NDPP (the second defendant) for unlawful detention. The total period was close to 10 days.

[32] In **Dolamo v Minister for Safety and Security (North Gauteng High Court, Pretoria: Case Number: 5617/2011)** the detention was for 4 days. The plaintiff was awarded damages for unlawful arrest and detention in the amount of R100 000.00.

[33] The pre-trial minute reveals that the parties would argue the issue of quantum on the medico-legal report of Professor J. G. Scholtz.

[34] Mr Lourens submitted that it was common cause that the parties had introduced Professor J. G. Scholtz's report as their basis in the determination of the issue of quantum. Mr Lourens, therefore, argued that the case was akin to a stated case and that the grounds of the applicants appeal were inconsistent with the common cause aspect as the parties were confined to Professor J. G. Scholtz's report. Mr Lourens

regarded the contents of the report central in respect of the grounds of appeal.

THE FIRST GROUND OF APPEAL

[35] Mr Mtsweni submitted that the Court should have found that the plaintiff's "pre-existing problem, with substance abuse was exacerbated by his failure to seek help". Mr Lourens's counter argument was that the Professor's report which is the basis of the plaintiff's case, does not say that. Indeed, what the report says is that the plaintiff's arrest and consequent detention in August 2010 was a traumatic experience for him and that this "*abuse of and possible dependence on substances was a pre-existing problem which has merely been exacerbated by the incident*".

[36] The Professor clearly describes the plaintiff prior to the incident and post the incident. After the accident, according to the Professor, the plaintiff's functioning *"has deteriorated since the incident"*. He observed that the arrest was completely unexpected and violent and that the detention was strange. His report lists a number of psychological disturbing aspects of the plaintiff's arrest and detention which the plaintiff had to contend with. These are also in my judgement. The Professor reveals that the plaintiff *"was robbed of his freedom and his dignity compromised"*. His self-esteem has suffered and his sense of direction and purpose affected.

SECOND GROUND OF APPEAL

[37] What I say above disposes of the second ground of appeal as well.

FOURTH GROUND OF APPEAL WHICH SHOULD HAVE BEEN THE THIRD GROUND OF APPEAL

[38] Mr Mtsweni submitted that in the absence of supporting evidence, the Court should have declined making an award of R100 000.00 in respect of future medical expenses. The professor's report deals with this aspect. Paragraph [15] of my judgment addresses Mr Mtsweni's concern. The Professor has dealt with cases such as this. Paragraphs [6] and [8] of my judgment properly and adequately addresses Mr Mtsweni's concern.

THE FIFTH GROUND OF APPEAL WHICH SHOULD HAVE BEEN THE FOURTH

[39] In this ground, Mr Mtsweni argued that the Court should have found *"that regard being heard (sic) to the circumstances of this matter together with the comparable authorities, that the amount of R2 700 000.00 was excessive alternatively unreasonable in the circumstances"*. I have adequately dealt with and referred to comparable cases dealing with general damages.

[40] Mr Lourens submitted that regard being had to comparable cases the plaintiff's case is the best example of a case where the plaintiff should have been awarded a far higher amount for general damages. Having regard to the Professor's report, I must agree.

[41] I have carefully considered the submissions of both Counsel, the Professor's report, the authorities and the comparable cases and my finding is that there is no merit in the application which, in my view, has no prospect of success. Another Court, in my view, will not arrive at a conclusion different to mine. The application should fail.

ORDER

[42] **I, in the result, make the following order:**

The application is dismissed with costs.

M. W. MSIMEKI
JUDGE OF THE HIGH COURT OFSOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA