



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	<u>YES</u> /NO

Case number: A139/2022

In the matter between:

NTJANYANA DANIEL MASITENG

Appellant

And

THE MINISTER OF POLICE

Respondent

CORAM: DANISO, J *et* RANTHO, AJ

JUDGMENT BY: RANTHO, AJ

HEARD ON: 30 JANUARY 2023

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 12 May 2023 at 15h30.

Introduction

- [1] The appellant (plaintiff in the court a quo) was arrested for charges relating to assault by members of the respondent (defendant in the court a quo) on 29 September 2019 at approximately 22h00 at Verkykersdorp. He was subsequently detained at police cells in Warden pending his court appearance.
- [2] He was taken to court on the morning of 01 October 2019 and subsequently released from police custody at 16H00 without appearing in court, following the withdrawal of the charges levelled against him. The appellant spent a period of 42 hours in detention.
- [3] On 16 March 2020 the appellant instituted action proceedings against the defendant on the basis of a claim founded on unlawful arrest and detention. He claimed damages in the amount of R 210 000.00 (two hundred and ten thousand rand) for deprivation of freedom; *contumelia*; discomfort, emotional stress and embarrassment.
- [4] Defendant conceded to the merits of the case at the commencement of the trial, leaving the court *a quo* with only having to determine the issue of quantum in relation to the damages suffered by the appellant as a result thereof.

Findings by the court a quo

[5] The court *a quo* noted that the plaintiff did not adduce evidence suggesting that his good name was tarnished as a result of the arrest as well as the extent of the emotional stress and psychological trauma he suffered during his arrest and detention.¹ In arriving at this conclusion, the court *a quo* considered the following evidence adduced by the plaintiff during trial:²

- (a) That he was arrested in front of his wife and children;
- (b) Whilst been transported to the police cells after his arrest, he was seated at the back of the police van and thereafter transported to court in the enclosed together with other detainees;
- (c) On being asked frequently about what impact did the arrest and detention had on his emotional state, he expressed a feeling of being hurt as a result of having been falsely accused of something he did not do (i.e. assault);
- (d) He was detained in a cell with water running on the floor and forced to share a blanket with other detainees on a small mat and was provided two meals a day.

[6] The court *a quo* further considered the circumstances under which the plaintiff lived and the conduct of the defendant's officials at the time of his arrest and detention so as to establish the extent of damages suffered as result thereof.³

[7] In conclusion, the court *a quo* held that that the plaintiff's constitutional right to liberty had been infringed for which he was entitled to relief. It

¹ Volume 1 pages 72 to 73: para 13 of the judgment.

² Volume 1 pages 31 to 50: record of proceedings.

³ Volume 1 pages 59 to 60: record of proceedings.

further concluded that the plaintiff proved his case, albeit to a very limited extent, in respect of a claim founded on *contumelia*.⁴

[8] In exercising its discretion as to what it deemed appropriate to award the appellant for damages in the circumstances, the court *a quo* ordered the defendant to pay to the plaintiff the amount of R 30 000.00 (thirty thousand rand with interest plus costs.⁵

[9] It needs to be pointed out that the court *a quo* expressed its displeasure on the fact that the plaintiff instituted his claim in the Regional Court whereas same could have been competently dealt with by the District Court and awarded the costs of suit on a Magistrate Court scale.⁶

Grounds of appeal

[10] The appellant launched an appeal against the judgment of the court *a quo* on the following grounds:

- (a) The court materially erred and misdirected itself by awarding the amount of R30 000.00 in damages suffered by the appellant for unlawful arrest and detention for a period of 42 hours;
- (b) The court materially erred and misdirected itself in assessing the quantum, alternatively, the court did not exercise its discretion judicially and had been influenced by applying the wrong principles and thus ignored / negated the principles and case law relied upon by the appellant;

⁴ Volume 1 page 73: para 14 of the judgment.

⁵ Volume 1 page 75: para 19 of the judgment.

⁶ Volume 1 pages 73 to 74: paras 15 to 18 of the judgment.

- (c) The court erred and misdirected itself by not applying the *stare decisis* rule and subsequently erred in its judgment and further negated the applicable law argued on behalf of the appellant;
- (d) The court ignored the principles laid down in previous cases, that suggest, that the law always regard the deprivation of liberty as a serious injury;
- (e) The court did not consider the previous awards handed down in case law relied upon by the appellant;
- (f) There is striking disparity in the award granted by court *a quo* and awards granted in the previous High Court and Supreme Court of Appeal matters relied upon by the appellant; and
- (g) The amount of R30 000.00 with reference to previously pointed out case law and the merits of the matter, is inappropriate and does not reflect the importance of the right to liberty.

[11] It is therefore apparent from the appellant's notice of appeal that the appeal is mainly directed at the amount awarded by the court *a quo* in respect of the quantum only.

Issues

[12] This court is required to determine as to whether, the amount awarded to the appellant by the court *a quo* in compensation for the damages suffered as a result of unlawful arrest and detention was just, taking into account all the relevant facts and evidence presented before it.

Legal principles relating to deprivation of liberty

[13] The deprivation of liberty is indeed deemed a serious matter in our constitutional democracy. In cases of non-patrimonial loss where

damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. The plaintiff is required to adduce evidence which will enable a court to make an appropriate and fair award.⁷

[14] In making determination as to the amount awarded in damages arising from deprivation of liberty, the court should consider the following relevant factors:⁸

- i. circumstances under which the deprivation of liberty took place.
- ii. the conduct of the defendants; and
- iii. the nature and duration of the deprivation.

[15] 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.⁹

Whether to interfere with the court a quo's decision?

[16] It is trite that a court of appeal may interfere with the decision of the lower court only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the

⁷ *Rahim v Minister of Home Affairs* [2015] ZASCA 92; 2015 (4) SA 433 (SCA); [2015] 3 All SA 425 (SCA) (29 May 2015) at para 27.

⁸ *Rahim v Minister of Home Affairs*(supra).

⁹ *Minister of Safety and Security v Seymour* [2006] ZASCA 71; [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA) (30 May 2006) para 17; See also *Rudolph and others v Minister of Safety and Security and Another* [2009] ZASCA 39; 2009 (5) SA 94 (SCA); 2009 (2) SACR 271 (SCA); [2009] 3 All SA 323 (SCA) (31 March 2009) at paras 26-29.

result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.¹⁰

- [17] In *S v Francis* **1991 (1) SACR 198** (A), Smalberger JA summarised the approach of an appeal court to findings of fact by a trial court, at 198i-199a:

“The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court’s conclusion, including its acceptance of a witness’ evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness’ evidence- a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court’s evaluation of oral testimony.”

- [18] The Supreme Court of Appeal (“SCA”) held as follows in *Ngubane v South African Transport Services* **1991 (1) SA 756** (A) at 786H:

“On appeal this court is loath to substitute, in the absence of any misdirection or irregularity, its estimate of compensation for general damages unless there is a marked disparity between its assessment and the award of the trial court... This reluctance is in part due to the fact that a judge of first instance is immersed in the atmosphere of the trial and is best able to gauge the extent of a plaintiff’s disability, loss of amenities and capacity to endure hardship, pain and suffering.”

¹⁰ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* **(CCT10/99) [1999] ZACC 17**; **2000 (2) SA 1**; **2000 (1) BCLR 39** (2 December 1999) at para 11; See also *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another* **(CCT198/14) [2015] ZACC 22**; **2015 (5) SA 245** (CC); **2015 (10) BCLR 1199** (CC) (26 June 2015) at para 88.

Application to the facts

[19] The appellant's argument is mainly that:

- (a) The award made by the court *a quo* is not reflective of the importance of the right to liberty;
- (b) In assessing the damages suffered by the appellant, the court *a quo* misdirected itself and/or failed to exercise its discretion judicially; and
- (c) The court *a quo* failed to apply the *stare decisis* rule in that there was a striking disparity in the amount awarded by the court *a quo* in comparison with the previously decided cases of similar nature by the higher courts.

[20] In *Minister of Safety and Security v Seymour*¹¹, Nugent JA relied on the earlier decision by the Appellate Division and said:

"As pointed out by Potgieter JA in Protea Assurance Co Ltd v Lamb,¹² Potgieter JA said the following in relation to general damages for bodily injury (the principles apply equally to a case like the present one) which was repeated more recently by this court in Road Accident Fund v Marunga¹³:"

'It is settled law that the trial Judge has a large discretion to award what he in the circumstances considers to be a fair and adequate compensation to the injured party for these sequelae of his injuries. Further, this Court will not interfere unless there is a "substantial variation" or as it is sometimes called a "striking disparity" between what the trial Court awards and what this Court considers ought to have been awarded.'

¹¹ See footnote 9 *supra* at para 11.

¹² **1971 (1) SA 530** (A) at 534H-535H.

¹³ **2003 (5) SA 164** SCA.

- [21] In the judgment penned by Bosielo AJA in *Minister of Safety and Security v Tyulu*¹⁴ the SCA held that:

“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.”

- [22] In dealing with the *stare decisis* rule, Nugent JA quoted from Potgieter JA in *Protea Assurance* wherein it was held that:¹⁵

‘...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.’

- [23] The SCA also cautioned in *Seymour* that 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

¹⁴ [2009] ZASCA 55; 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) (27 May 2009) at para 26.

¹⁵ See footnote 12 *supra* at 535H – 536B.

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.¹⁶

[24] The appellant argued that the court *a quo* failed to consider the evidence presented by the appellant as a whole and that same stood uncontested.¹⁷ This argument by the appellant is not correct because the court *a quo* took liberty of detailing all the relevant factors, including evidence, it took into consideration in arriving at the amount awarded to the appellant for damages suffered.¹⁸

[25] It was further submitted by the appellant's counsel in argument that the court *a quo*, in assessing the conduct of the defendant, failed to consider the fact that the appellant was not informed of his constitutional right at the time of his arrest.¹⁹ I fail to understand the relevance of the appellant's argument in this regard because the unlawfulness of the arrest was conceded by the defendant at the beginning of trial. Moreover, this point was in any event abandoned by the appellant's counsel during the argument before the court *a quo*.²⁰

[26] With regard to the factors that were taken into consideration by the court *a quo* in assessing the amount to be awarded, the appellant submitted that the court *a quo*'s was wrongly influenced by the appellant's standard of living.²¹ I do not agree with this argument by the appellant based on the fact that the records presented before this court point to the fact the appellant's standard of living was considered by the court *a quo* in light of

¹⁶ *Ibid.*

¹⁷ Index page 17: para 9.2 of appellant's heads of argument.

¹⁸ Volume 1 pages 31 to 50; 59 – 60: record of proceedings.

¹⁹ Index page 10: para 12.3 of appellant's heads of argument.

²⁰ Volume 1 page 36: record of proceedings.

²¹ Index page 19: para 13.1 of the appellant's heads of argument.

his own evidence relating to, among other things, the size of the cell he was detained in, the type of food he was served while in custody (i.e. bread and tea for breakfast and bread with soup in the afternoon) and his earnings as a shepherd.²²

[27] Having considered the facts and evidence that were placed before the court *a quo* in the circumstances of the present case, I am of the view that this court should restrain itself from interfering with the amount awarded by the court *a quo*.

[28] In the result the successful party is entitled to the costs.

[29] In the light of the above I propose the following order:

Order

1. The appeal is dismissed with costs.

AJ

I concur

M.R. RANTHO,

N.S DANISO, J

APPEARANCES:

Counsel on behalf of Appellant:

Adv. A.C. Gobetz

Instructed by:

Loubser van Wyk Inc.

C/O Jacobs Fourie Inc.

²² Volume 1 pages 37 to 60: record of proceedings.

BLOEMFONTEIN

Counsel on behalf of Respondent:

Adv P.G. Chaka

Instructed by:

State Attorney

BLOEMFONTEIN