

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. 1766/2019

In the matter between:

DELORES CECILIA DONATIE

Applicant / Plaintiff

and

THE MINISTER OF POLICE

Respondent / Defendant

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

Rugunanan J

[1] This is an application for leave to appeal against that portion of my judgment and order delivered on 2 August 2022 relevant to both quantum and the scale of costs.

[2] I shall continue to refer to the parties as 'plaintiff' and 'defendant'.

[3] The plaintiff's claim was for damages arising from an assault by a police officer/s pursuant to which she sustained physical injuries as well as a psychological injury described as an 'adjustment disorder'. My determination on costs was that they be awarded to the plaintiff on the magistrates' court scale. I have dealt with the reasons for my order in the trial judgment. I do not intend to traverse those reasons for my findings as I have done so in some detail in the judgment. In short, I made an order that I considered was fair and reasonable in the circumstances.

[4] My award for general damages was a globular amount of R160 000 and included *contumelia* as a component thereof. The plaintiff submits that there is a reasonable prospect that a court of appeal will find that I was mistaken; firstly, in my assessment of the amount awarded for general damages; and secondly, in failing to have made a separate award for *contumelia*.

[5] As to costs, it was submitted that I failed to exercise my discretion in a judicial manner and ought to have awarded these on the high court scale where the defendant had not only agreed that it was unnecessary for the action to be transferred to a lower court but obliged the plaintiff to run the trial by putting her to the proof of every aspect of her claim relevant to both liability and quantum.

[6] To begin with, it may be convenient to refer to section 17(1) of the Superior Courts Act¹ ('the Act'). The section deals with the circumstances upon which leave to appeal may be granted.

[7] In summary, 'leave to appeal may only be given where the [court is] of the opinion that':

(a) the appeal would have a reasonable prospect of success (section 17(1)(a)(i));
or

(b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration (section 17(1)(a)(ii));

(c) the decision sought on appeal does not fall within the ambit of section 16(2)(a) (section 17(1)(b)); and

¹ Act 10 of 2013.

(d) where the decision sought to be appealed does not dispose of all issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties(section 17(1)(c)).

[8] The previously applied test was whether there were reasonable prospects that another court ‘may’ come to a different conclusion². Section 17(1) provides that leave may ‘only’ be granted in the circumstances set out in the section.

[9] Regarding the word ‘would’ as it appears in section17(1)(a), in *Valley of the Kings Thaba Motswere (Pty) Ltd and another v A L Mayya International*³ Smith J aptly put it thus:

‘[4] There can be little doubt that the use of the word ‘would’ in section 17(1)(a)(i) of the Superior Courts Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the ‘measure of certainty’ standard propounded by the learned judge in *Mont Chevaux Trust* may be placing the bar too high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a judge – who invariably would have provided extensive reasons for his or her findings and conclusions – that there is a ‘measure of certainty’ that another court will upset those findings. It seems to me that a contextual construction of the phrase ‘reasonable prospect of success’ still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party. . .’

² Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B.

³*Valley of the Kings Thaba Motswere (Pty) Ltd and another v A L Mayya International* [2016] ZAECHC 137; Also see *MEC for Health, Eastern Cape v Neliswa Mbola obo Asavela Mbola* [2019] ZAECHC 21, where, with reference to the Supreme Court of Appeal judgment in *MEC for Health, Eastern Cape v Mkitha* [2016] ZASCA 176 at para 17, it was held: ‘. . . an applicant for leave to appeal must convince the court on proper grounds that there is a “reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case, or one that is not hopeless, is not enough. There must be a sound basis to conclude that there is a reasonable prospect of success on appeal.’

[10] Evident from the above is that the legislated test set out in section 17(1)(a), is a higher test than the test previously applied.

[11] Unreservedly, I agree therewith in principle.

[12] The plaintiff's approach is grounded in the contention that her appeal would have a reasonable prospect of success should leave be granted and that the usual test in section 17(1)(a)(i) is applicable.

[13] I disagree.

[14] For reasons to follow, the appropriate test lies in employing a different approach, regard being had to the facts of this case.

[15] To a large extent the plaintiff's grounds of appeal are factual in nature. That being so, a court of appeal will not lightly interfere with the factual findings of a trial court unless there is a demonstrable and material misdirection and/or a finding that is clearly wrong.⁴ The principles giving guidance to an appeal court in dealing with an appeal purely on factual issues have been set out extensively in *R v Dhlumayo and Another*⁵.

General Damages and *contumelia*

[16] My award is criticised on the basis that I paid 'lip service' to the evidence relevant to quantum by failing to take into account the evidence of the entirety of plaintiff's physical injuries documented in a J88 report as also evidence that she underwent a CT scan as well as several features of the uncontested evidence by her expert witness Professor Young. In detailing those features in paragraphs 1 to 6 of the plaintiff's application for leave to appeal⁶ her counsel contends that same were not reflected in my assessment of her damages and had that been done I ought to have properly made an assessment in the sum of R300 000 in recognition of the 'lifelong after effects of her injury'.

⁴ *Mashongwa v PRASA* 2016 (3) SA 528 (CC) para 45.

⁵ 1948 (2) SA 677 (A) at 705-706

⁶ And in heads of argument submitted for the application for leave to appeal.

[17] An assessment of an award for general damages is discretionary and the degree of emphasis of any relevant fact is ordinarily a matter of discretion. There must of course be evidence to support an assessment and the question will always be one of sufficiency, and where the evidence a court considers relevant permits a reasonable estimate then an award should and will be made. In my trial judgment at paragraphs 28 to 42, I gave consideration to the evidence and the legal principles that influenced my assessment. *Dhlumayo* proclaims that no judgment can ever be all-embracing or perfect and it does not necessarily follow that because something has not been mentioned it has not been considered.⁷ In my view this is particularly apposite if one considers that money can never be more than a crude *solatium* for the deprivation of what in truth can never be restored. – there is no empirical measure for loss and a court should not be extravagant in compensating the loss.

[18] The application for leave to appeal is supported by heads of argument which includes reference to several awards featuring in Corbett & Honey's Quantum of Damages. I am criticised for failing 'to take into account the plethora of decided and reported cases' included therein. The fallacy in this argument is that none of these cases (or any other material) were referred to during closing argument at the conclusion of the trial. With respect, had the material now referred to been brought to my attention the result might have been different. The introduction of the material at the appropriate time ought to have been considered critical to assisting the court in its task of producing a just result.⁸

[19] My impression of the present application is that it is misguided – the material placed before me goes beyond what was argued at the conclusion of the trial. This soaks through the entirety of the notice of application for leave to appeal.⁹

[20] An application for leave to appeal is not intended to afford a party the opportunity of arguing its case afresh on matter which ought properly and dutifully to have been placed before the court of first instance. The amount claimed for general

⁷ *R v Dhlumayo and Another* supra at 678.

⁸ Compare *Saloman and Others v S* [2013] ZAWCHC 111 paras 17 and 18.

⁹ Borrowing the phraseology used by De Villiers AJ in *Van Zyl v Steyn* [2022] ZAGPPHC 302 para 26.

damages as reflected in the particulars of claim ought to have been properly substantiated in argument. A court is entitled to accept that practitioners are aware or ought to be, of what can reasonably be claimed with due regard to the facts and circumstances of a particular case¹⁰ and that they are equipped with the necessary resource material to justify what is claimed.

[21] The reasoning in my judgment for having assessed R160 000 (inflation adjusted) is detailed. The reach of the amount exceeds the updated range in all the cases to which I have had regard with the much appreciated assistance of defendant's counsel. It is not suggested that I was wrong in my approach. Nor is plaintiff able to point to any respect in which the evidence was in tension with or failed to support the reach ultimately assessed. What is argued is that I neglected features of the evidence and critically underestimated plaintiff's damages and was wrong in failing to have regard to the material that is now placed before me.

[22] Case law distinguishes between satisfaction for *contumelia* and compensation for physical pain and suffering but sometimes courts prefer making a single globular award in which *contumelia* is factored as a component of general damages. My approach was guided by considering that the plaintiff's damages are the consequence of the same wrongful act.¹¹ I considered it pragmatic to adopt a holistic process in terms of which a single award for damages is made to avoid overcompensation. The reach of my assessment went beyond the updated inflation adjusted range of the cases to which I had regard. In my view this gave adequate recognition to the *contumelia* component.

[23] Earlier in this judgment I dealt in some length with the test the plaintiff advocates for seeking leave to appeal. To repeat, leave to appeal may only be granted where the court concerned is of the opinion that the appeal would have a reasonable prospect of success. While I remain unpersuaded that there are prospects of success, I take cognisance of the pronouncement by the Supreme Court of Appeal in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*¹² where it is

¹⁰ *Diljan v Minister of Police* [2022] ZASCA103 (23 June 2022) at para 20.

¹¹ Compare *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 283.

¹² [2020] ZASCA 17; 2020 (5) SA 35 (SCA) para 2.

indicated that if a court is unpersuaded that there are prospects of success, it must still enquire into whether as to the provisions of section 17(1)(a)(ii) of the Act there is a compelling reason to entertain the appeal. Compelling reason would include an important question of law or a discrete issue of public importance that will have an effect on future disputes. But here, the merits as well, remain vitally important and are often decisive.¹³

[24] Where I deal with the question of costs, and for reasons to follow I consider that there is 'compelling reason' to grant leave. I do so on the basis essentially set out in this judgment – but do not limit such leave exclusively to the costs issue as I consider that it will be unjust to preclude interference on appeal with the award for damages if it is found that my assessment – on the material as dealt with in my trial judgment – is obviously wrong.

Costs

[25] In argument I was referred to the judgment of the full court of this division in *Rieger v van der Westhuizen*¹⁴. I concurred in that judgment. The broad injury sustained by the respondent in the course of an assault was that pepper spray had been discharged into his face. He suffered ocular discomfort and went a few hours later to the clinic for modest treatment and received an injection for a panic attack. There was no physical contact between the parties to the assault, it was not an instance of gender-based violence (though racially motivated) and no *sequelae* followed. At the conclusion of the trial the respondent was awarded a quantum of R60 000, comprising of R50 000 for *iniuria* and R10 000 for assault plus costs on the high court scale.

[26] It was submitted further that I erred in failing to take into account that the essence of the plaintiff's action centred around an incident of gender-based violence, the abuse of human rights and a clear act of collusion between multiple police officers who lied under oath.

¹³ *Caratco ibid* para 2; also *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

¹⁴ Unreported ECD Case No. CA 129/2019 delivered 21 July 2020.

[27] Leave to appeal was also motivated by the submission that¹⁵:

‘[O]ur precedent law requires that there must be some balance between the qualities of judgments otherwise [legal representatives] simply do not know what to advise their clients ... [and] ... It is not acceptable that a woman, who has endured lifelong chronic serious sequelae as part of a serious physical assault upon her, could be awarded the same as a man who had one night of ocular discomfort only.’

[28] Reference was further made to a rule 37 minute concluded between the parties wherein they agreed that it was not appropriate to have the trial of the matter transferred to another court, hence the litigation in the high court was cast in stone and my decision to award costs as I did was inappropriate and should be revisited. In support of the binding nature of a rule 37 minute plaintiff relied on the decision in *MEC for Economic Affairs v Kruizenga*¹⁶.

[29] Although I consider the facts in *Rieger* to be distinguishable from the plaintiff’s case, its reference, I presume, was intended to demonstrate that I departed from applying a decision to which I am bound. Put otherwise, where quantum falls below the jurisdictional ceiling of the magistrates’ courts, I ought to have awarded costs on the high court scale. In heads of argument plaintiff makes reference to a plethora of awards in arrest and detention cases where damages substantially less than R100 000 attracted high court costs. I recognise that courts have granted costs on the high court scale despite low awards in the cases to which reference has been made. The analogy, though intriguing, loses sight of the established principle that applies when costs are awarded (see below).

[30] *Kruizenga*, on the other hand, was referred in support of the argument substantiating the binding nature of a rule 37 minute. As I understood the argument, it was impermissible for me to have gone beyond the consensus between the parties by having made a costs order suited to a forum in which they chose not to litigate or to transfer the matter.

¹⁵ Heads of argument, para 1.3.3.

¹⁶ 2010 (4) SA 122 (SCA) at 126E.

[31] These arguments, if indeed they were intended to achieve the purpose as I understood them, lose sight of the fact that a costs award reflects the exercising of a true discretion. That has and remains the position in our law. It is immutable – no hard and fast rules can be laid down to bind a court, and that is certainly not what *Rieger* intended to achieve, nor did *Kruizenga*. A contention to the contrary is insupportable and loses sight of the immutable legal position.

[32] In argument emphasis was laid on the fact that this matter involved the violation of important constitutional rights and rights of privacy and personal integrity of the plaintiff. This case also bears a public interest element as, *inter alia*, it relates to unlawful conduct by the police and the protection of the rights of a citizen. An attack on the rights of the individual is an attack on the community and the rasping of the rights of an individual erodes the rights of the community as a whole. Therefore in this type of case the impact is not limited to the affected individual but extends to the community of which they form part. This underscores the importance of the matter.

[33] Having considered the argument, I am persuaded that I awarded costs based merely on the quantum of damages and by doing so I misdirected myself. I accept that the consequence of a failure to align myself with these considerations was a failure to have exercised my discretion judicially.

[34] I think that it is also right to grant leave to appeal for two further reasons: The first is that the hearing was unnecessarily prolonged and extended by a full day by reason of the failure of the defendant's witnesses, Sergeant Patosi and Sergeant Johaar, to attend court on 23 May 2022. The second and perhaps more weighty reason is that I was faced with the contradictory testimony of several policemen who may have conspired to put up a false version of what occurred.

[35] I acknowledge the weight of judicial authority to the effect that a court of appeal would be slow to interfere with a judgment on costs,¹⁷ the impact of which is that leave to appeal based solely against costs orders, is rare.¹⁸

[36] I am furthermore cognisant of the provisions of section 16(2)(a) of the Act which requires that exceptional circumstances must be established for the applicant to succeed in an application for leave to appeal on costs. 'Very substantial' costs (in this case incurred over a period of 5 days for running the trial) could be a ground for finding exceptional circumstances.¹⁹

[37] In the final analysis it seems to me that the prospects of demonstrating that I failed to exercise my discretion on costs judiciously brings one closer to finding exceptional circumstances.

[38] In the result, the following order is made:

1. The plaintiff is granted leave to appeal to the full court of this division against that portion of the judgment and order delivered on 2 August 2022 relevant to both quantum and the scale of costs.
2. The costs of this application shall be costs in the appeal.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant/Plaintiff:	S. Cole SC Instructed by Lionel Trichardt & Associates c/o Wheeldon Rushmere & Cole 119 High Street
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¹⁷ *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) paras 25 and 28. See also *Van Zyl v Steyn* [2022] ZAGPPHC 322 relevant to an application for leave to appeal against a costs order.

¹⁸ *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* [2015] ZACC 4 para 13.

¹⁹ *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* 2018 (4) SA 433 (SCA) para 8.

Makhanda
(Ref: SA/Farenchia)
Tel: 046-622 7005

For the Respondent/Defendant:	J. Bester
Instructed by	The Office of the State Attorney c/o Yokwana Attorneys 87 High Street Makhanda (Ref: N. Yokwana) Tel: 046-622 9928

Date heard:	07 November 2022.
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Date delivered:	06 February 2023.
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