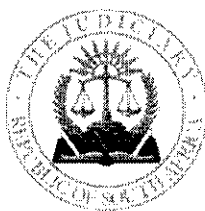


IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)  
REPUBLIC OF SOUTH AFRICA



Case Number: 17447/2008

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

DATE: 5.4.2017

SIGNATURE: 

5/4/2017

In the matter between 

ISHMAEL MBONISWA MBANJWA

Plaintiff

And

MINISTER OF POLICE

Defendant

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JUDGMENT

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JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff claims damages from the defendant, which damages emanate from his alleged unlawful arrest and detention by Colonel Thlapi, who at the time, acted within the course and scope of his employment with the defendant.
- [2] At the inception of the trial, I ordered that the merits and quantum of the plaintiff's claim be separated.
- [3] Upon conclusion of the merits portion, I gave an *ex tempore* judgment and ordered that the defendant be held liable for the damages the plaintiff suffered as a result of his unlawful arrest and detention.
- [4] The evidence presented during the merits portion of the trial that bears relevance to the determination of the *quantum* of the plaintiff's claim will be summarised *infra*.

## FACTS

- [5] In the early hours of the morning of 4 November 2005, a gang of armed robbers stormed into the Carousel Casino. The plaintiff was on duty as a shift manager. A large amount of money was robbed and during the robbery the plaintiff had to open several safes whilst held at gunpoint.
- [6] A police investigation ensued and several statements were obtained from the employees involved in the robbery. CCTV video and audio footage were,

furthermore, analysed and a comprehensive report in respect of the progress of the robbery was submitted to the police. I pause to mention, that neither the CCTV footage nor the audio recordings implicated the plaintiff in the commissioning of the crime. To the contrary and having regard to the detailed report in respect of the footage and recording, the plaintiff was clearly a victim of the crime.

- [7] On or about 4 December 2005, Colonel Thlapi became the investigating officer in the matter. According to his evidence, he received information that the plaintiff was involved in the robbery. During cross-examination, Colonel Thlapi could, with reference to the docket, not point to a single shred of evidence that implicated the plaintiff in the commissioning of the offence.
- [8] Notwithstanding the detailed report referred to *supra* and the lack of any evidence implicating the plaintiff in the commissioning of the crime, Colonel Thlapi proceeded to arrest the plaintiff in the early hours of the morning of 27 January 2006 at his place of employment in full view of his co-workers. The plaintiff was handcuffed in public and taken to his apartment where his wife was asleep.
- [9] The plaintiff's wife was woken up and their apartment was searched. They had to explain where and with what money they had bought their furniture. In a nutshell, the plaintiff and his wife were treated as criminals.

- [10] The arrest took place in the early hours of Saturday and the plaintiff was detained in police cells until his appearance in court on Monday, 29 January 2006.
- [11] Bail was opposed by the State and in a formal bail application, Colonel Thlapi, *inter alia*, informed the court that the State had a strong case against the plaintiff. As alluded to earlier, there was no evidence in the docket implicating the plaintiff in the commissioning of the offence.
- [12] As a result, the plaintiff spent five months in prison and was only released on bail on 27 June 2006. Upon his return to work, the plaintiff was informed that his employment was terminated due to the fact that the Gambling Board had revoked his license to operate in a casino.

## QUANTUM

### Evidence

- [13] Save for the evidence of the plaintiff, three expert reports were introduced into evidence by agreement between the parties. The report of Christa du Toit, an industrial and counselling psychologist, that of Lebo Ledwaba, an occupational therapist and lastly the report of Alet Mattheus, an educational psychologist.

[14] Mr Hussain SC, gave a handy summary of the plaintiff's evidence in his heads of argument and save for a few exceptions, I repeat the summary herein:

*"5. Plaintiff was a young man, 29 years old at the time of his arrest. He matriculated and thereafter attended the Tshwane Technikon where he obtained a National Diploma in Cost and Management Accounting. He obtained employment with Sun International as a cashier, first at the Carnival Casino and thereafter at the Carousel Casino.*

*6. ...*

*7. He had a young family, married with one child. He lived on the premises in an apartment provided by his employer.*

*8. In order to work within the casino industry, plaintiff had to be registered and licensed by the Gambling Board. He had no previous convictions or any other run in with the law and was therefore given clearance to work in a casino. After his arrest, the Gambling Board withdrew his clearance, his license and his employer was prevented from allowing him to resume his duties. ....*

*9. Of significant importance is that this young man, living a comfortable life with his family was suddenly faced with the trauma of violent crime; but worse was to happen; he found himself being arrested and handcuffed in front of his colleagues, a most humiliating experience for a person held in respect and a manager.*

10. Thereafter ..... he was locked up in a filthy and stinking police cell, with criminals, for the whole weekend. He described the experience and the court will accept that this was a most traumatic experience for him.

11. Plaintiff was then subjected to the criminal justice system. He suffered further humiliation by his first appearance in court where he had to stand in a dock with dangerous criminals. He also had to suffer the company of these criminals in the cells. In court the humiliation continued with family and friends having to see him being accused of serious offences and remanded in custody.

12. .... From court he was removed to a notorious prison. There he spent 5 months in what must have been living hell for him. He had to share a cell with 50 inmates. They used a single toilet which was inside the same cell. He had to barter his food and air time for his personal safety. He was allowed only one hour per week for exercise. He spent the whole five months fearing for his life and being forced to live in appalling conditions.

.....

13. Plaintiff, having enjoyed a comfortable living, now found himself unemployed and financially distressed. He and his family lost their home and had to rely on the generosity of family and relatives. In desperation he even tried hawking in the township. One can imagine how demeaning this must have been. Bearing in mind that, not so long ago, he was a manager. Now he found himself unemployed and blacklisted.

14. Plaintiff also suffered the ignominy of having his furniture repossessed.

*15. When he found permanent employment at Liberty Life, this too became conditional upon him clearing his poor credit record (also caused as a direct result of the unlawful arrest) and obtaining police clearance. He managed to do this in 2013 and was fortunate to hold on to his job. However the stigma remained, his employer and colleagues were aware of his recent history. This caused damage to his self-respect and confidence. As a direct result of the arrest, plaintiff's career took a setback."*

[15] The plaintiff was unemployed from August 2006 until June 2008. During 2007 the plaintiff successfully completed an accounting course, which led to his employment from June 2008 until November 2011. During 2012 the plaintiff was unemployed until he secured his present employment with Liberty Life in January 2013.

[16] The reports of the experts mainly deal with the emotional trauma the plaintiff suffered and still suffers due to his ordeal. It appears that the plaintiff is constantly irritated and angry. He becomes aggressive and quarrels with his wife. He is not the same person that he was prior to the incident.

#### **Heads of damages**

##### **i. Future medical expenses**

[17] According to the recommendations contained in the expert reports, the plaintiff and his family will need to undergo therapy in future to enable them

to come to terms with the trauma caused by the incident. The amount in respect of such therapy is R 64 100, 00.

ii. Loss of income

[18] The plaintiff claims loss of income for the periods that he was unemployed, to wit from August 2006 until June 2008 and for 2012.

[19] Mr Coetzee, counsel for the defendant, quite correctly, pointed out that the plaintiff's claim in this regard is a claim for pure economic loss and falls to be determined in terms of the principles applicable to Aquilian actions.

[20] The employment contract between the plaintiff and Carousel Entertainment Centre was subject to the plaintiff being registered with the Gambling Board. As a direct result of the plaintiff's arrest, the Gambling Board revoked his registration and consequently his employment contract with Carousel was terminated.

[21] The Supreme Court of Appeal in *Minister of Safety and Security v Scott and another* 2014 (6) SA 1 SCA considered the interference with a contractual relationship and with reference to *Visser Law of Delict*, described the applicable principle as follows at 11 B:

*"Interference with a contractual relationship is present where a third party's conduct is such that a contracting party does not obtain the performance to*

*which he is entitled ex contractu, or where a contracting party's contractual obligations are increased."*

[22] In the present instance, the conduct of the police did interfere with the contractual relationship between the plaintiff and his employer. Mr Coetzee with reference to the *Scott* – matter, *supra* submitted that the interference was not intentional and consequently the defendant cannot be held liable for any damages the plaintiff suffered as a result thereof.

[23] In the *Scott* matter the court did, however, consider the negligent interference with a contractual relationship as a cause of action, but found that the defendant was in the circumstances of that matter, not negligent. [*Scott supra* at 12 B] I pause to mention that the facts in the *Scott* matter are distinguishable from the facts *in casu*.

[24] In order to determine whether the defendant is liable for the negligent interference with the contractual relationship between the plaintiff and the Carousel, it is incisive to revisit the test for negligence. The test was formulated in *Kruger v Coetzee* 1966 (2) SA 428 A at 430E-F as follows:

*"For the purpose of liability culpa arises if-*

*(a) a diligens paterfamilias in the position of the defendant-*

*(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*

(ii) *would take reasonable steps to guard against such occurrence;*

*and*

(b) *the defendant failed to take such steps."*

[25] Colonel Thlapi arrested the plaintiff for an armed robbery that occurred at his place of employment. He, furthermore, stringently opposed bail on the grounds that there was a strong case against the plaintiff. In the circumstances, a *diligens paterfamilias* in the position of the Colonel Thlapi would have foreseen that there is a reasonable possibility that the plaintiff's employment could be terminated which would cause the plaintiff patrimonial loss.

[26] Colonel Thlapi could have prevented the loss by making sure, prior to the plaintiff's arrest, that there was sufficient evidence to arrest the plaintiff on a charge of armed robbery.

[27] From the evidence it is patently evident that he failed to do so.

[28] In the premises, the defendant is liable for the loss of income the plaintiff suffered as a result of his unlawful arrest and detention.

[29] This liability, however, only pertains to the period directly following the termination of his employment, to wit August 2006 until June 2008. I am not convinced that the defendant could have foreseen that the plaintiff would

also be unemployed in 2012. Awarding damages to the plaintiff for the period 2102, will be casting the net too wide.

- [30] The parties agreed that, should the plaintiff succeed under this head of damages, his loss will amount to R 477 215, 00.

iii. General damages

- [31] The plaintiff came across as an educated person who was proud of the progress he has made in his employment career. He worked hard and diligently to achieve his goals in life.
- [32] The unlawful arrest and detention shuttered the plaintiff's entire universe. Not only was he humiliated in the presence of his colleagues and wife during the arrest, but he also had to endure the unhygienic conditions of the police cells. His wife and family saw him in the criminal court, being arraigned on a most heinous crime.
- [33] Thereafter, he spent five months in jail where he had to fend for himself to the best of his ability.
- [34] The plaintiff's true ordeal, however, started when he was released on bail. He lost his employment and was forced to vacate his accommodation. The plaintiff could no longer afford to honour his monthly financial obligations and his furniture was repossessed. His name was blacklisted which caused further embarrassment.

- [35] Being a man who held a good job and that was in a position to provide for his family, he suffered the humiliation of being unemployed. He lost his self-worth and his relationship with his wife was emotionally strained.
- [36] It is clear from the contents of the various expert reports that he still suffers from the trauma caused by the unlawful arrest and detention.
- [37] Mr Hussain SC, with reference to various reported cases submitted that an amount of R 918 000, 00 in general damages would adequately compensate the plaintiff for the loss he suffered in this regard. Mr Hussain SC arrived at the amount by multiplying the 153 days the plaintiff was in detention with R 6 000, 00 per day.
- [38] Mr Coetzee, in turn and also with reference to various reported cases, submitted that R 1 700, 00 would be a valid daily amount. In the premises, he submitted that an amount of R 260 100, 00 would adequately compensate the plaintiff.
- [39] The Supreme Court of Appeal has, however, warned that a process of comparison should not be a meticulous examination of awards that interferes with the court's general discretion in awarding a fair amount of damages.  
[See: *Minister of Safety and Security v Seymour* 2006 (6) SA 320 SCA.]
- [40] An award should adequately compensate a claimant for the deprivation of personal liberty and freedom and the attendant mental anguish and distress.  
[See: *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 SCA.]

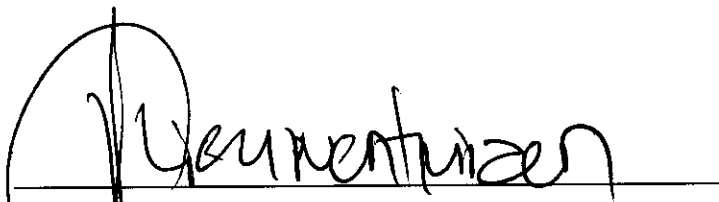
[41] The award should, however, also be fair to the defendant and should not be the product of an overly emotional response by the court. No amount of money will compensate the plaintiff for what he has lost.

[42] Having had regard to the facts *in casu*, I am of the view that an amount of R 500 000, 00 would be just and fair to both parties.

#### ORDER

[43] In the premises, the defendant is ordered to pay to the plaintiff:

1. An amount of R 1 041 315,00;
2. Interest on the aforesaid amount at a rate of 10,25% per annum calculated from date of judgment to date of payment;
3. Costs of suit, which include the costs of Senior Counsel.

A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. The signature is stylized with a large loop at the beginning.

N JANSE VAN NIEUWENHUIZEN J  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

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*Instructed by:*

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Advocate S.J. Coetzee (082 4103 188)

*Instructed by:*

State Attorney's Office

Ref: No: BM/EB897/2008/2642/Z59

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