



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION PIETERMARITZBURG**

CASE NO: AR790/16

In the matter between:

SIYABONGA SANELE MBHELE

FIRST APPELLANT

PHILISIWE ELLINA MBHELE

SECOND APPELLANT

and

THE MINISTER OF POLICE

RESPONDENT

Date of Hearing : 20 October 2017

Date of Judgment : 03 November 2017

ORDER

The following order is granted:

The appeal is dismissed with costs.

JUDGMENT

D. Pillay J:

Introduction

[1] The first appellant is Siyabonga Sanele Mbhele (the first claimant). Philisiwe Ellina Mbhele substituted herself as the second appellant on behalf of her son Thobani Jaca (the second claimant) who has since passed away.

[2] Both claimants had been arrested and detained in police custody on 7 and 9 May 2013. After an appearance on 11 May 2013 the court ordered their further detention. Following a bail application on 6 June 2013 they were released. On the same day the prosecution withdrew the charges against the claimants due to lack of evidence.

[3] Both claimants sued for damages in the magistrates' court. The trial court found that the arrest of the first claimant was unlawful and awarded damages in the sum of R65 000 plus interest from the date of service of summons to date of payment and costs. The court dismissed the claim of the second claimant with costs but ordered that the respondent refund the sum of R6 000 with interest and costs to the second claimant. Both appellants appeal against the judgment of the magistrate. As regards the first claimant the only issue in dispute is whether the quantum of R65 000 is reasonable. As regards the second claimant the appellant challenges the dismissal of his claim with costs.

[4] After the court reserved judgment the appellants sought leave to submit further heads of argument. The court allowed this indulgence without objection from the defendant.

General principles

[5] The general rules are that first a court on appeal will not interfere with a trial court's findings unless a material misdirection has occurred.¹ Second, the assessment of quantum is a matter within the discretion of the trial court. A court on appeal will not interfere with the exercise of such discretion unless there is a striking disparity between what the trial court ordered and what the appeal court would award.²

[6] Historically an award of such damages was considered a *solatium*.³ The primary purpose of a *solatium* is not to enrich a claimant but to assuage injured feelings and dignity.⁴ Hence the damages awarded must be commensurate with the physical and mental injury inflicted.⁵ An award for an arrest and detention that is a 'traumatic experience' would take into account the subjective experience of the claimant.⁶ However, the assessment of the amount of an award for iniuria of this kind is hardly capable of calculation with 'mathematical accuracy'.⁷

[7] In assessing the amount of such award the criteria to consider would include the age of the plaintiff, the circumstances of his arrest, the nature and duration of his detention,⁸ the social and professional standing of the claimant, the motive for the arrest and past awards for similar cases.⁹ Comparing with other cases

¹ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) para 28.

² *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para 23; *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H – 535A; *Minister of Safety & Security v Seymour* 2006 (6) SA 320 (SCA) para 11.

³ *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26-27.

⁴ *Minister of Safety and Security v Tyulu* above para 26-27.

⁵ *Minister of Safety and Security v Tyulu* above para 26-27.

⁶ *Ciyane v Minister of Safety and Security and others* [2015] JOL 33938 (GJ) para 57.

⁷ *Minister of Safety and Security v Tyulu* above para 26-27.

⁸ *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) para ?; *Isaacs v minister Van Wet en Orde* 1996 (1) SACR 314 (A) (headnote).

⁹ *Minister of Safety and Security v Tyulu* para 27

may be a useful guide;¹⁰ but slavish adherence to precedent can be 'treacherous', especially if context is sacrificed in the assessment.¹¹ Judicial officers are also not required to adopt a tick-box or checklist approach in the exercise of their discretion. Pleadings and proofs guide the court in choosing criteria that go to determining quantum; if criteria are not pleaded and proved specifically then judicial officers are at large to exercise their broad discretion to determine 'just and equitable' remedies.¹²

[8] Ultimately the exercise of discretion must result in the court striking a balance between the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed on the one hand, with avoiding extravagance in compensating for loss of liberty and dignity on the other hand.¹³

The first claimant

[9] The objection to the trial court's assessment rests on two main grounds: the duration of the detention and the conditions of detention. Regarding the duration, should the assessment of his quantum be limited to the duration of his detention under s 50 of the Criminal Procedure Act, 1977 because thereafter he was detained by order of the court? Or, should the extension of his detention after his first appearance to the date of his release be included in the assessment? In its judgment the trial court did not specifically mention the duration of the first claimant's detention as a factor. As it arises specifically in this appeal this court has to deal with it.

[10] The duration of the detention featured in *Woji v Minister of Police* 2015 (1) SACR 409 (SCA). In that matter, the Supreme Court of Appeal included for the purposes of calculating quantum the period of the further detention after the first appearance because the court found that the investigating officer had a 'public law

¹⁰ *Sibaya v Minister of Safety and Security* [2008] 4 All SA 570 (N) at 572.

¹¹ *Minister of Safety and Security v Tyulu* above para 26-27; *Minister of Safety and Security v Seymour* above para 17.

¹² S 172 of the Constitution of the Republic of South Africa, 1996.

¹³ *Steenbergen & others v Minister of Safety & Security* [2011] JOL 27529 (FB) para 22.

duty not to violate [the] right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate.¹⁴ In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) para 38 the Supreme Court of Appeal pointed out that a court ordered detention after an unlawful arrest does not automatically render the detention lawful. Whether remanding an accused in custody and refusing him bail renders his subsequent detention lawful or not must be determined with due regard to all the facts.¹⁵ Therefore it is necessary to enquire into the circumstances of the arrest and detention of the first claimant.

[11] The defendant bore the onus of proving the lawfulness of the arrest and continuing detention. The arresting officer testified that he acted on instructions from another officer who did not testify. Consequently the arresting officer was unable to attest to any facts to prove that the arrest and detention of the first claimant was lawful. Furthermore his evidence in court differed from his affidavit in the docket recording the circumstances in which he arrested the first claimant. Therefore his evidence was unreliable. In the circumstances the trial court found that the arrest and detention were unlawful. Whether the court would have come to the same conclusion if it had considered the evidence at the bail hearing (which it apparently did not) is uncertain; however, the lawfulness of the arrest and detention is out of our reach as the appeal proceeds on quantum alone.

[12] The policeman testified in the bail hearing that he had 'no proof at this stage' and only 'indirect evidence' of the involvement of the claimants. However, the search for the stolen cellular phones and the firearms used in the robbery was ongoing. Furthermore, there were three suspects involved but only the two claimants had been arrested. The police opposed bail but were prepared to consent to it provided the claimants did not interfere in the investigation. The magistrate hearing the bail application was scathing about the lack of evidence and the police 'arresting them for nothing.' As soon as bail was granted the prosecutor withdrew the charges.

¹⁴ *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) para 28.

¹⁵ *Minister Of Safety And Security v Tyokwana* 2015 (1) SACR 597 (SCA) para 38.

[13] In my view if the evidence justified the release on bail and the withdrawal of the charges, the timing of these events is relevant. At the first appearance four days after the first claimant's arrest, the court would have exercised its discretion on the basis of the information proffered by the police, the prosecution and the claimant. This court is not privy to what that information was. However, it is reasonable to infer from the evidence for the state at the bail hearing that at the first appearance the investigation was at a formative stage. The police acted on a report from the community. The three suspects were three brothers, one of whom had been shot in the robbery and had not been arrested; the other was the second claimant from whom R6 000 in R200 notes allegedly stolen from the robbery was found. Thus the further detention of the first claimant at the instance of the police and the prosecution and endorsed by the court at the first appearance was justified. The withdrawal of the charges on 6 June 2013 about a month after the arrest was a prosecutorial decision. The National Director of Public Prosecutions is not cited in these proceedings; consequently there is no evidence as to whether the decision to withdraw the charges should have been taken sooner.

[14] The evidence at the bail hearing was highly relevant for determining the lawfulness of the arrest and the duration of the detention at the instance of the police in order to assess quantum. *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) raises the issue of the duration of the detention and the public duty of policemen to protect the liberty of people. Unlike in *Woji*, the evidence in this case does not suggest any negligence, misrepresentation or malice on the part of any of the public officials involved. Consequently, liability for the unlawful arrest and detention attaches only to the defendant and is limited in duration to 7 to 11 May 2013. Again I emphasise that the liability of the defendant was not a ground of appeal.

[15] Turning to the second leg of the challenge i.e. the assessment of quantum, the trial court's reasons rested on two legs: First it noted in its reasons for judgment that the first claimant had been out on bail when he was arrested. One of the grounds of appeal is that the trial court should not have considered the fact that he had been arrested before. Counsel did not submit any authority to support this ground. What inference the trial court drew from the fact that the first claimant had

been arrested before is not evident from the reasons. However, reading between the lines it seems that the trial court reasoned that the arrest and detention of a person who has never been arrested and detained before is distinguishable from the case of someone who has been; the trauma for a person undergoing the experience for the first time would be greater than for a person who has undergone such an experience. Of course, facts could disprove this inference but there were none in this case. Taking the prior arrest and detention into account is not a misdirection.

[16] Second first claimant criticised the trial court for relying on two previous cases that yielded low awards. First in *Minister of Safety and Security v Kruger* (183/10) [2011] ZASCA 7 (8 March 2011) the court reduced an award of R50 000 to R20 000. In that case the facts were that a television crew was present and broadcasted the arrest of that claimant who was from a small town; therefore his arrest received some publicity.

[17] In this case the first claimant fails to make out any case that his arrest and detention had received any publicity. He was arrested at 03h00, handcuffed and transported in the back of a police van. There is no evidence that his arrest attracted any public attention at all.

[18] Another criticism was that the trial court did not take into account the duration of the detention in *Kruger* and whether it was lawful or not. I dealt with the duration of the detention above.

[19] Second, in *Lindile Mbotya v Minister of Police* (1122/10) [2012] ZAECPHC 43 (10 July 2012) the plaintiff claimed damages in the amount of R250 000 and the court awarded R55 000 for unlawful arrest and detention for two days without an appearance in court. That case is similar to this case in which the trial court awarded R10 000 more for detention over 4 nights.

[20] The first claimant referred this court to *Minister of Police and another v Du Plessis* 2014 (1) SACR 217 (SCA) in which the Supreme Court of Appeal awarded

the plaintiff R100 000 in damages. He was detained for ten days. Therefore that case is distinguishable.

[21] It is not the first claimant's case that he made specific submissions that the trial court disregarded or rejected. If any other factors informed the trial court's assessment of quantum they do not appear in the reasons. However, captured in the main judgment is the evidence of both claimants that their conditions of detention were unsanitary and appalling. They ate, slept and waited in crowded police cells. The toilet failed to flush; consequently they suffered the constant presence and stench of faeces. Blankets were inadequate. As an asthmatic sufferer, the first claimant was exposed to smokers in the cells. Other detainees kept both claimants awake until dawn with their singing.

[22] In my view these are such inhumane conditions of detention that they are an affront to the dignity of detainees and an embarrassment to all of us as people in a constitutional democracy. As the trial court noted these conditions of detention for both claimants, it can safely be assumed that it factored them into the assessment of the first claimant's quantum, and justifiably so.

[23] In my view applying the criteria for assessing quantum summarised above the award of R65 000 falls within the range of reasonable awards. As I said above, assessing damages does not call for a checklist approach. I would not interfere with the trial court's decision.

The second claimant

[24] The second claimant passed away on 18 October 2015 after pleadings had closed. His estate is entitled to or liable for any order that the court makes.¹⁶ The question to consider here is: did the police reasonably suspect that the second

¹⁶ *Minister of Justice and others v Estate Stransham Ford* 2017 (3) SA 152 (SCA) para 19.

claimant committed an offence under Schedule 1 of the Criminal Procedure Act 51 of 1977?

[25] The common cause facts or facts not in dispute were that the police received information that the second claimant was on his way to the hospital with cash of R6 000 in denominations of R200 notes stolen during a robbery to bribe the police to release from custody his brother who had been shot in the robbery. The arresting officer had to act swiftly and did so. When he arrested the second claimant he found these notes in the possession of the second claimant who was on route to the hospital. He testified that initially the second claimant denied having any money on him. On these facts the police had a reasonable suspicion to arrest the second claimant on a charge of robbery. Bribery was an additional ground on which they could have charged him.

[26] Against these facts the grounds of appeal that the trial court erred in relying on the evidence of the arresting officer, that it should have found him to be unreliable, that it erred in relying on 'verbal information' received from an informer unsupported by an affidavit, are unsustainable.

[27] Although the trial court considered the lawfulness of the arrest from the perspective of s 40(1)(b) of the Criminal Procedure Act, 1977 only, the second claimant's possession of the R200 notes also justified an arrest without a warrant under s 40(1)(e).

[28] The second claimant's case is distinguishable on the facts from the first claimant's case in which the police witness testified that he had no information about any crime committed by the latter. It is also distinguishable from *Woji* in which the only evidence against a suspect was video footage that did not show him to be one of the robbers.¹⁷

¹⁷ *Woji v Minister of Police* above para 4.

[29] Regarding his detention the second claimant endured the same appalling conditions of detention as the first claimant. Irrespective of the reasons for the arrest and detention no human being should be subjected to such treatment that is tantamount to punishment before being convicted of any offence. As I have said elsewhere such punishment is cruel and unusual.¹⁸

[30] Whereas the conditions of detention could be factored into the award of the first claimant because the finding of unlawfulness of the arrest and detention triggered the exercise by the court of its discretion, the same cannot apply to the second complainant. The second claimant did not put on notice the defendant or any other entity responsible for the conditions of prisons (such as the Department of Public Works or private cleaning companies) that it would be claiming damages specifically for the appalling conditions of detention. Even though such conditions were proved, they were not specifically pleaded or argued. Notwithstanding permission to the appellants to deliver additional heads after reserving judgment the second claimant did not address the court on the inhumane conditions specifically. To allow the second claimant to claim compensation for such conditions would also amount to setting a precedent with polycentric implications that ramify not only into the realm of other actors involved in determining conditions of detention but also into a range of specialist fields beyond the competence of the court, including economics and psychology. Venturing in this direction without the litigants and other interested parties participating in the production of the court's decision falls beyond the remit of this appeal.

[31] In the circumstances, the findings of the trial court in respect of both claims are unassailable.

Costs

¹⁸ *Maharaj v Minister of Safety and Security* (11275/2012) [2017] ZAKZDHC 38 (5 October 2017)

[32] Regarding costs the court is mindful that dismissing the appeal with costs could work a hardship on claimants who are indigent. It could also have a chilling effect on the exercise of the right to access to the courts. On the other hand if the court deviated from the usual rule that costs should follow the result the court would be encouraging disgruntled litigants to lodge frivolous claims. The appropriate cost order is therefore to follow the general rule; it will then be left to the respondent to exercise its prerogative as to whether it recovers its costs.

Order

[33] The appeal is dismissed with costs.

D. Pillay J

I agree.

A.N Jappie J.P

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Date of Judgment	:	03 November 2017

