



IN THE HIGH COURT OF SOUTH AFRICA

(TRANSCAAL PROVINCIAL DIVISION)

Case number: 42154/2006

Date: 14 May 2009

UNREPORTABLE

In the matter between:

MOSES KUTUMELA

Plaintiff

and

**MINISTER OF CORRECTIONAL SERVICES
MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

First Defendant
Second Defendant

JUDGMENT

PRETORIUS J.

The plaintiff instituted action against the defendants on the basis that the plaintiff was unlawfully detained at the instance of the defendants.

The defendants conceded the merits and this court only has to decide the *quantum* of damages to which the plaintiff is entitled.

The plaintiff was convicted and sentenced during 2000 on a charge of robbery with aggravating circumstances. This conviction and sentence was set aside on appeal on 29 March 2004 by the High Court. The plaintiff was, however, not released on 29 March 2004, but was in custody at Zonderwater Prison until 21 June 2004.

The defendants conceded that this detention was unlawful.

The plaintiff gave evidence under oath. He testified that before he had been arrested in 2000, he had been working for his uncle earning between R200.00 to R300.00 per week. He is unmarried but has a little girl aged three years and four months. He had passed grade 12 in 1997. He is presently 32 years old and in Modderbee prison as a sentenced prisoner.

During 29 March 2004 until 21 June 2004 he was held in Zonderwater prison as a sentenced prisoner, sharing a cell of approximately 10 x 10 square metres with 31 people.

The size of the cell was such that there were bunker beds in the cell so that each person had his own bed.

He worked in the prison kitchen. They received two meals a day, which resulted in him losing weight whilst in prison. He was scared of being stabbed by gang members in prison. The prisoners in Zonderwater prison was woken up at 4h30 and locked up, for the night, at 15h00. From 15h00 until the next morning the prisoners could read and watch television. He was thus locked up for more than 13 hours per day. The plaintiff was an honest witness and did not try to paint an even bleaker picture of the circumstances under which he had been detained.

The plaintiff claims R500 000.00 for deprivation of liberty, R100 000.00 for inconvenience and discomfort and R100 000.00 for *contumelia*.

Counsel for plaintiff referred me to **Mthimkulu and Another v Minister of Law and Order 1993 (3) SA 432 ECD** where the plaintiff had been detained for 14 days and was awarded R40 000.00.

It is not clear in this instance why the plaintiff was not immediately released on 29 March 2004. There is no indication whether the first or second defendant is to blame for the gross negligence of not releasing the plaintiff on 29 March 2009. The deprivation of liberty is a serious injury, which our courts have always regarded in a serious light.

Section 12 of the Constitution sets out that a person's right to liberty and freedom is a fundamental human right which should be jealously guarded.

In **S v Martin 1996 (2) SACR 379 W**, Flemming DJP found at 385 i- 386a:

“To have freedom restricted, especially if there is confinement to a small area, is in itself a severe punishment. A long period of such restriction will to all but the most hardened increasingly border on earthly hell.”

This matter must be distinguished from **J. Zealand v Minister of Justice and Another; Case no 3968/2005** dated 29/10/2008, as in this instance, the plaintiff had no knowledge that the High Court had upheld his appeal. I have to agree that the defendants did not act with malice, as was conceded by Mr van Rooyen, for the plaintiff.

In **Seymore v Minister of Safety and Security 2006 (5) SA 483 (W)** Willis J found at p 500:

"It is trite that the primary function of awards for damages under the actio injuriarum is to compensate the victim for his or her injuriae , and is not exemplary. Lest it be thought that I have misunderstood the position, I wish to emphasise that my conclusion is this: a shift, even though it is not a so-called 'sea-change', must be manifested in the value which the Courts attach to freedom and, correspondingly, the value to be applied to a person's deprivation thereof."

In this instance the plaintiff's appeal was upheld on a technicality and his conviction and sentence were set aside. He was charged on the same charges, convicted and sentenced at a later stage. It was the first time he had been detained and before this he had been employed and living in Daveyton. Mr van Rooyen conceded that there was no publicity in this instance, apart from the family and friends who knew of his incarceration.

It is difficult to decide what amount to award in the present case. It is so that the court must have regard to case law and awards previously made, but cannot decide on a formula when deciding an award, as each case differs and each plaintiff has unique circumstances. Each case must be dealt with on its own merits.

In **Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (D)** Holmes J held at p 287:

*“However, no better system for assessing damages has yet been evolved, and the Court has to do the best it can with the material available, even if, in the result, its award might be described as an informed guess. I have **only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.**” (my emphasis)*

I have considered awards made in similar cases, as well as the facts of this particular case. I have also considered the arguments of both counsel. It is quite clear that the plaintiff is entitled to an award, having regard to all the facts. I intend awarding a sum which takes the decline in the value of money into consideration. I am awarding a lump sum which takes into consideration the deprivation of liberty, inconvenience and discomfort and *contumelia*.

I therefore make the following order:

1. Judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved for payment of:
 - a) R50 000.00;
 - b) Interest on R50 000.00 at the rate of 15.5% per annum from the date of service of the notice to defend, that is 2 March 2007;

c) Costs of suit

C Pretorius

Judge of the High Court

Case number	:	42154/2006
Heard on	:	11 May 2009
For the Applicant	:	JM van Rooyen
Instructed by	:	Wits Law Clinic
For the Respondent	:	LM Moloisane
Instructed by	:	State Attorney
Date of Judgment	:	14 May 2009