

SOUTH AFRICA / JUDGMENT

Derby-Lewis v Minister of Veiligheid en Sekuriteit (20193/2004) [2014]

ZAGPPHC 587 (14 August 2014)

[2014] ZAGPPHC 587

COURT

North Gauteng High Court, Pretoria

BEFORE

Kollapen

CASE / FILE NUMBER

20193/2004

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION. PRETORIA)

CASE NO: 20193/2004

DATE: 14 August 2014

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

IN

THE MATTER BETWEEN:

GABRIELLE

MAVOURNA

GRASER.....PLAINTIFF

DERBY-LEWIS

AND

MINISTER VAN

VEILIGHEID EN

SEKURITEIT.....DEFENDANT

JUDGMENT**KOLLAPEN J:**

1. This is the continuation of an action in which the plaintiff seeks damages arising out of her unlawful arrest and detention on the 29th of November 2002 and her subsequent malicious prosecution following her arrest.

The merits of the plaintiffs action were dealt with and disposed of in her favour before BOSMAN AJ, and in a judgement delivered on the 02nd of August 2012, he found that the arrest and detention of the plaintiff was unlawful in that it was effected without reasonable grounds and that the subsequent prosecution of the plaintiff was malicious.

What remains for determination are the damages to be awarded to the plaintiff arising out of these events and from the findings made relative to the merits of her claim.

BACKGROUND AND THE RELEVANT FACTS

2. This is largely gathered from the judgment on the merits, the evidence led in this part of the proceedings by the plaintiff and her witness, Ms Susan Puren, and the various documents submitted into evidence by agreement between the parties, including the reports prepared by Dr Eugene Viljoen and Mrs Eidge Francke, both of whom are clinical psychologists.
3. The plaintiff, fifty-three years old at the time of her arrest, lived alone at her home at 1[...] L[...] Avenue, W[...], Pretoria. In the early hours of the morning of the 29th of November 2002, a police raid on her home was organised and effected, led by one Captain Maluleke.

The plaintiff had come across the police contingent of some twelve members or so when she made her way to the gate of her property to collect newspapers which she believed were being delivered. She was dressed in her pyjamas at the time and was informed that the police were looking for fugitives. She informed them that there were no fugitives on her property but they persisted in entering at which point some of them had started to climb over the outer wall or fence of the property. She opened the gate to allow them entry and they proceeded to search her home and a storage room at the back of the property. She described the search as invasive in that her clothes and underwear drawers were searched and force was used to break down the door of the storage room which at the time was used by a friend to store artefacts and other items. She did not have the key to the storage room.

4. While she considered the search invasive and extensive, she was not badly treated by the police in their interactions with her. It is common cause that two revolvers were found during the search as well as three rifles. The revolvers belonged to the plaintiff and her son respectively, while the rifles were the property of her husband. Two of the rifles were antiques while the third was not in working condition.

5. She was arrested and taken to the Brooklyn Police station where she was held until Monday the 02nd of December 2002. She was initially held in what she described as a dark room for about thirty minutes during which time she was able to call her attorney from her cell-phone which she had in her possession. Thereafter she was placed in a cell she described as filthy and smelly. There was no furniture and the bed was a concrete bunk. The toilet and shower were visible to other detainees in the cell and was dirty and gave off a strong and unpleasant smell. She was supplied with a single blanket. She described it as being dirty and smelly.
 6. She was however not treated with any hostility and was allowed initially to keep her handbag with her and her cell-phone. She was able to consult with her lawyer and to see friends over the period of her detention and was allowed to take toiletries, a blanket and towel, cleaning materials and food from the outside. This went some way to improving the conditions under which she was held and in fact, she and her fellow detainees used the cleaning materials to clean the cell and the toilet and shower, and this caused it to be usable in her view.
 7. On the day after her arrest, Ms Puren, who described the plaintiff as appearing to be stressed and shivering, attempted to secure her release by producing the licenses for the two revolvers but Captain Maluleke was unwilling to consider releasing her, given that in his view there were more than two weapons found during the search. Ms Puren also testified that since the arrest of the plaintiff, she has seen a noticeable change in the plaintiff, who is no longer as outgoing as she was previously.
 8. The plaintiff appeared in court on Monday the 02nd of December 2002 and was granted bail of three thousand Rand. Her bail application was opposed. Her admission to bail was coupled with restrictive conditions which included the surrender of her passport and a requirement that she not leave the magisterial district without obtaining the prior consent of the investigating officer. However it does appear that despite these restrictive conditions, she was able to travel out of Pretoria and to the airport whenever it was necessary.
 9. She was thereafter prosecuted on charges of the illegal possession of firearms and ammunition in the Regional Court sitting in Pretoria and was acquitted of all the charges on the 18 of June 2003. She incurred legal costs in the sum of forty-three thousand Rand for the criminal trial and a judgment for this amount was taken against her by her erstwhile attorneys on the 19 of October
2006. It is not in dispute that given the accrual of interest on this claim, the maximum value of this claim is eighty-six thousand Rand.
10. The plaintiff testified that her arrest and detention and subsequent prosecution had a significant impact on her. Not only was it extremely traumatic but it also led to health problems such as fibromyalgia, anxiety and mood disorder. She was diagnosed with

post-traumatic stress disorder. Her interpersonal relationships were also negatively affected as she became more reclusive over time. Her evidence was that these changes began to manifest themselves in 2005. In her report, Dr Viljoen notes the plaintiff having told her that 'she is worried about her current financial position which developed as a consequence to the different trauma's she endured since 1993' (sic).

11. The reference to the 'different trauma's' is related to the past and it is common cause that the plaintiff, the wife of Mr Clive Derbv-Lewis, who is currently serving a sentence of life imprisonment, was arrested during 1993 with her husband and she spent ten days in solitary confinement. Mrs Francke's report states that according to the plaintiff, this was an extremely traumatic experience from which she never recovered. She also told Mrs Francke that she suffered numerous stressful situations caused by the negative connotation of her surname held by the general public and that she has been unfairly harassed by the police during the past twenty-one years.
12. Both clinical psychologists accept that the plaintiff suffers post-traumatic stress disorder and that her arrest and detention

during November 2002 was, at the very least, a contributing factor. On the other hand, it must be evident from these reports that the plaintiff has endured various significant and stressful situations over the past twenty years which in some or other way have also left their mark, negatively affecting her psychological profile. In this regard, Mrs Francke alludes to the 'presence of long-term Post Traumatic Stress Disorder that has not been adequately managed'.

13. It would accordingly be fair to conclude that on the available evidence, the post-traumatic stress disorder suffered by the plaintiff has origins going back some twenty-one years and it is also deeply rooted in the experiences of her arrest and incarceration and it has not been adequately managed.

APPLICABLE LEGAL PRINCIPLES

14. According to the authors Neethling, Potgieter and Visser (2010) in *The Law of Delict* 6th edition, 'the actio iniuriarum generally has the object of effecting retribution for the injustice sustained by the plaintiff and of satisfying him for the feeling of injustice, injury and suffering which he sustained as a result of the defendant's conduct.'

Given the very intangible nature of the mischief an award seeks to address, Erasmus, Gauntlett and Visser (2005) in *The Law of South Africa* volume 7 2 edition, summarise its nature as follows:

"There can be no basic formula for the assessment of damages under the actio iniurarium, the award being entirely in arbitrio iudicis. It has been

described variously as an assessment of imponderables which is so discretionary as to be almost arbitrary, and as a conjectural estimate. There are no limits beyond which damages cannot be awarded. Earlier cases of a similar nature may serve as an approximate guide, but they must be applied with circumspection.' (at page 82, paragraph 93)

15 In PROTEA ASSURANCE CO, LTD. v LAMB 1971

- (1) SA 530 AD at 535H to 536B, the Court said the following with regard to the role of previous awards in the quantification process:

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. 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. ’

16. Reference has also been made to what has been described as the fairness of an award and in PITT v ECONOMIC INSURANCE CO LTD 1957 (3) SA 284 (D & C.L.D), HOLMES J in attempting to give content to the concept of fairness said:

“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 out largesse from the horn of plenty at the defendant’s expense. ’ (at 287E)

In MINISTER OF SAFETY AND SECURITY v SEYMOUR 2006

- (6) SA 320 (SCA) (at 326E), NUGENT JA cautioned that:

‘Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection. ’

17. Guided by these principles it is evident that the arrest of any person that is unlawfully effected undermines the very values of freedom and dignity that stand at the forefront of our constitutional order. Accordingly when those values are undermined courts must act decisively in upholding them. On the other hand it is equally trite that in the human rights culture that has evolved over the past twenty years, our Courts have recognised that there is no hierarchy of rights and that they exist and that rights are interconnected.

18. There is little doubt, notwithstanding the previous experiences of trauma that the plaintiff endured and which are alluded to in the reports of the clinical psychologists, that her arrest and detention over the weekend of the 29 of November 2002 were traumatic, deeply embarrassing for her in relation to her immediate neighbours but also in respect of the world at large given the considerable publicity her arrest attracted.
19. Her experiences at the Brooklyn Police Station were also challenging given the difficult conditions she encountered there, and the uncertainty and anxiety she experienced because of not knowing what her fate would be. Her strong character and the support of friends and her legal team no doubt assisted to considerably improve what was a difficult situation, and I got the clear impression that as the weekend of her detention progressed, she and her fellow detainees were largely on account of their own effort and initiative, able to better at least the physical conditions under which they were held. Mrs Francke describes the plaintiff as an unusually resilient and driven person - characteristics that in all likelihood stood her in good stead during this experience.
20. It also warrants mention in this regard that there was no hostility or ill will displayed towards her by the personnel at the Brooklyn Police Station. As mentioned earlier she was able to use her cell-phone initially and her friends were able to supply food, towels and other items to ease her situation - all this occurring with the concurrence of the police.
21. It was contended on behalf of the plaintiff that the arrest and detention was effected with malicious intent and that this should be a factor in the computation of an appropriate award. In my view the arrest was clearly found to be wrongful and unlawful and the court which dealt with the merits of the matter did not go so far as to characterise it as malicious. On what is before me I cannot come to the conclusion that it was indeed malicious - the evidence of the plaintiff was that she was not treated with hostility either at the time of her arrest or thereafter. This militates against the suggestion that malice was a factor that motivated her arrest and detention.
22. When one has regard to the complaint in the deterioration of her health and the diagnosis of post-traumatic stress disorder, while it may well be so that her arrest and detention were contributing factors, from the evidence it is clear that other factors were operative in this regard and they include:
 - a) The previous trauma suffered by the plaintiff over the past twenty years including the arrest and conviction of her husband, the reality of his imprisonment and the need for her to become a 'pillar' for him;
 - b) The financial difficulties she experienced which triggered a panic attack in about 2005;
 - c) The failure by the plaintiff to adequately manage the long term post-traumatic stress disorder which Mrs Francke says 'became

engraved in her psychological make-up that her general quality of life and psychological wellbeing has been permanently affective (sic) in a negative manner.'

23. In this regard it is trite that a party in the position of the plaintiff has a duty to mitigate her damages and in this regard it does appear that her failure over the years to properly manage the long-term post-traumatic stress disorder has exacerbated her current condition.
24. I have, subject to the caution expressed in *PROTEA ASSURANCE CO, LTD, v LAMB* (supra) regarding previous awards, found the exposition in *SEYMOUR* (supra) at paragraph 19 to be useful:

'The following awards also provide some indication of how other courts have viewed incursions upon personal liberty (they are by no means exhaustive of the cases that have confronted the issue).

In *Solomon v Visser and Another* (1972

- (2) SA 327 (C)), a 48-year-old businessman who was detained for seven days, first in a police cell and then in a prison, was awarded R4000,

In *Areff v Minister van Polisie* (1977

- (2) SA 900 (A)), this court awarded a 41-year-old businessman who was arrested and detained for about two hours R1000.

In *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino* (2000

- (4) SA 68 (W)), a businessman who was unlawfully detained for about three hours was awarded R12 000.

In *Manase v Minister of Safety and Security and Another* (2003

- (1) SA 567 (Ck)), in which a 65-year-old businessman was unlawfully detained for 49 days, incarcerated at times with criminals, the sum of R90 000 was awarded.

In *Seria v Minister of Safety and Security and Others* (2005

- (5) SA 130 (C)), a professional man who was arrested and detained in a police cell for about 24 hours, for a time with a drug addict, was awarded R5Q 000'.

(See *MINISTER OF SAFETY AND SECURITY v SEYMOUR* 2006 (6) SA 320 (SCA) at 326B-D).

ORDER

25. In the circumstances my view is that the following represents a fair, reasonable and appropriate award, and I accordingly make the

following order:

- i. For the unlawful arrest and detention, the sum of R140 000-00 (one hundred and forty thousand Rand);

- ii. For the malicious prosecution, the sum of R40 000 (forty thousand Rand);
- iii. The sum of R86 000 (eighty six thousand Rand) in respect of the claim for legal costs;
- iv. The defendant is ordered to pay the costs of the action relative to this aspect of the plaintiffs claim.

20193/2004

HEARD ON: 12 MAY 2014

FOR THE PLAINTIFF: ADV L. BOLT

INSTRUCTED BY: MARIUS COERTZE PROKUREURS (ref: M COERTZE/ab/D138)

FOR THE DEFENDANT: ADV V. D. MTSWENI

INSTRUCTED BY: THE STATE ATTORNEY (ref: 4159/2003/Z80)

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