

SOUTH AFRICA / JUDGMENT

Gumbi v Minister of Police (D7156/2016)

[2022] ZAKZDHC 17 (1 April 2022)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

Lopes

CASE / FILE NUMBER

D7156/2016

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION: DURBAN

CASE NO: D7156/2016

In the matter between:

Christopher Bhekani Gumbi

Plaintiff

and

The Minister of Police

Defendant

Judgment

Lopes J

- [1] This is an action in which the plaintiff, Christopher Bhekani Gumbi ('Mr Gumbi') claims damages under various head from the Minister of Police ('the Minister'), sustained as the result of the conduct of members of the South African Police Service ('the SAPS').
- [2] A summary of the background, as alleged in Mr Gumbi's particular of claims is as follows:
- (a) on the 28th November 2014, Mr Gumbi, a police officer, was seconded to the Provincial Head of Operational Response Services to take part in a rural safety operation in the Jozini Cluster;

- (b) he had already been involved in the process of gathering information, about an operation involving the rendition of foreign national persons from Mozambique, the luring and placing them in certain game parks in KwaZulu-Natal, and then killing them under the guise of those persons being suspected of being involved in rhino-horn poaching;
 - (c) the purpose of the persons involved in the rendition and the murder of foreign nationals, was to recover rewards paid to informers and recover danger allowances rendered to various members of the SAPS;
 - (d) on the 8th January 2015 and whilst in the process of finalising a claim, he was lured to a place at or near the Nkonkhone District road near Umbombo Road, and was then wrongfully arrested and detained by members of the SAPS. He was kept at the Mkhuze Police station until 4:00pm on the 9th January 2015, when he was released;
 - (e) he had been arrested and detained on charges of robbery, unlawful possession of rhino-horns, fraud and the alternative count of being in possession of a motor vehicle with a false number plate;
 - (f) the sole purpose of trapping Mr Gumbi as set out above, was to prevent him from further investigating the illegal rendition of Mozambican nationals into the game park where they were shot and killed;
 - (g) employees of the SAPS had wrongfully and unlawfully mislead the Director of Public Prosecutions into authorising a trap in terms of s 252A of the Criminal Procedure Act, 1977 ('the Act');
 - (h) the employees of the SAPS then provided information which ensured that the false charges were pursued to the extent of Mr Gumbi having to attend two different courts on 19 occasions. On the last occasion the trial proceeded and he was acquitted at the end of the State case, in terms of s 174 of the Act;
 - (i) in addition to his unlawful arrest and malicious prosecution, members of the SAPS seized two Nokia cell phones which were in his possession, and took away his appointment warrant card. After he was eventually acquitted, Mr Gumbi resigned from the SAPS.
- [3] Mr Gumbi claimed damages under the following heads:
- (a) for unlawful arrest in the sum R100 000;
 - (b) for the legal costs incurred in defending himself in two different courts and including his bail application, in the sum of R100 000;
 - (c) for a claim for 'contumelia' for 'the deprivation of freedom and discomfort suffered by the plaintiff for appearing in court as an accused', all in the sum of R570 000;
 - (d) for the value of the two cell phones and his appointment warrant card, all in the sum of R4200.

- [4] Although the headings for the damages claimed may be somewhat misleading, read as they are in the particulars of claim, the matter proceeded, and was argued, on the basis that the claim for R570 000, was, in addition to the above, a claim for contumelia for suffering in the course of the malicious prosecution, originated and instigated by members of the SAPS.
- [5] At the outset of the trial, I was informed by Mr Pillay who appeared for Mr Gumbi, that the parties had agreed that the State bore the onus of proving that the arrest was lawful, and that it had accepted the duty to begin.
- [6] Mr Khuzwayo who appeared for the Minister, placed on record that he had subpoenaed a witness from Cape Town, and a further witness had been requested to attend from Mpumalanga. They were both ex-members of the SAPS and neither of them were present at court. He was, thus, not in a position to start the trial.
- [7] The matter stood down, and after much discussion between the parties, and an attempt to settle the action, Mr Khuzwayo informed me that the Minister conceded the merits of the matter, and that the only issues left would be the quantum of damages suffered by Mr Gumbi, in so far as they related to unlawful arrest in the sum of R100 000, and the claim for what he referred to as 'the malicious prosecution' in the sum of R570 000.
- [8] Mr Khuzwayo recorded that the Minister conceded the claim for legal costs involved in defending the malicious prosecution proceedings of R100 000, and the claim for the Nokia phones and the appointment warrant card in the sum of R4 200.
- [9] I raised with Mr Khuzwayo, the consequences of conceding liability and the acceptance of the plaintiff's case as it appeared on the pleadings, particularly with regard to the facts alleged. Both legal practitioners agreed that the only two issues remaining were the computation of Mr Gumbi's damages for unlawful arrest and the contumelia suffered by him as the result of the malicious prosecution. Mr Pillay then led the evidence of Mr Gumbi in respect of the damages which he sustained.
- [10] Mr Gumbi told the court that:
- (a) when he was arrested, he was 49 years of age, and married with two adult children;
 - (b) he was a Warrant Officer in the SAPS force and had been working as a Crime Intelligence officer in the areas of Mkhuze, Hlulhuwe, Ubombo and St Lucia. He was respected and well trusted in his community, and persons in his community felt that they could approach him with problems, and he would give them advice;
 - (c) he was arrested on a public road by Colonel Edward Van Ransburg and Warrant Officer Van Zyl-Roux together with a certain game ranger, whom Mr Gumbi suspected had been involved in the rendition of persons from Mozambique. He had felt, as he put it, 'exploited' and embarrassed, because this had taken place on a public road. He was then taken to the Mkhuze police station where he was brought into the charge office in hand-cuffs, with the additional indignity of his wife being present. When she tried to speak to the police officers,

they shouted at her and chased her out of the police station;

- (d) Mr Gumbi's embarrassment was compounded by the fact that his fingerprints were taken in the presence of other senior and junior officers, all of whom he knew well;
- (e) he was then placed in a cell with other inmates who harassed him because they knew that he was a Warrant Officer in the SAPS;
- (f) after his arrest and attendances at court, the community no longer trusted him, and no longer approached him for advice. He felt that they all regarded him as a criminal. This even extended to members of his church congregation, who had lost respect for him and viewed him as a criminal;
- (g) Mr Gumbi maintains that matters have never returned to what they were before, and his status is forever damaged by the false and malicious charges levied against him by the members of the SAPS;
- (h) in addition, and particularly upsetting for him, are the constant reminders to him of his experience, which were contained on the internet, and which had never been taken down;
- (i) a few days after his arrest, on the 13th January 2015, an article containing a photograph of Mr Gumbi was published in the Isolezwe Newspaper. What was acutely upsetting

for Mr Gumbi was that the photograph used was one which was taken by a member of the police force at the time of his arrest. The original photographs from the police file together with the article were produced as evidence previously, and there is no doubt that it is the same photograph that was used. The article quotes a spokesman for the SAPS as saying 'we have been looking for this police officer for months as he was being investigated for his involvement in rhino poaching as well as the smuggling of rhino horns';

- (j) significantly, Mr Gumbi emphasised that that the whole experience had been very painful to him, because he has lost the dignity with which his wife viewed him. After his arrest she had viewed him as a criminal;
- (k) Mr Gumbi felt that since his acquittal, he was no longer able to work for the police force because of the stigma attached to him, having been prosecuted, and he resigned. He now runs a business selling fish and chips under the name Adonai Fish and Chips. He had intended to retire at the age of 60 or at any other appropriate pensionable age, which he is no longer able to do.

He has lost the comfort of knowing that he had the prospect of a retirement to which he could look forward. In addition, he felt that people still spoke about the incident and judged him accordingly.

- [11] During his evidence Mr Gumbi confirmed having paid legal fees to his attorneys in the sum of R115 000, and a receipt for that amount was produced in evidence. This claim had, however, already been agreed in the sum of R100 000.

[12] Mr Pillay drew my attention to the statement by Steyn J in *Solomon v Visser and Another* 1972 (2) SA 327 (CBD) at 345B-E, where the learned judge stated:

‘I must also have regard to the plaintiff’s personal circumstances and the impact which first defendant’s conduct had upon him. He appears to be an honourable person of some standing. He is, moreover, someone who would, very obviously, be adversely affected by the fact of detention in police cells, a Court appearance and the consequent publicity. These latter facts would have been readily discernible by any reasonably responsible Police official.

It is true that the Police have many onerous duties and that the Court must not make it difficult for them to perform their functions. If the Court were to do so the public could be deprived of the full measure of the protection to which it is entitled. On the other hand the Police have considerable powers, and should they exceed or abuse their powers and they injure the individual, the Court must, in my view, not hesitate to compensate the citizen in full measure for any humiliation, indignity and harm which results.’

Mr Pillay submitted that the claim for unlawful arrest should be awarded in the full amount of R100 000.

[13] Mr Pillay submitted that I should start with the values I awarded in *Van Alphen v Minister of Safety and Security* (8245/07)

[2011] ZAKZDHC 25 (31 May 2011) of R15 000 per day. This was based upon events which took place in 2007. An additional R50 000 should be added (as I did in *van Alphen*) for the contumelia suffered by Mr Gumbi as the result of the publication of his photograph, and the malicious article, (the information in respect of which clearly emanated from the SAPS), resulting in an amount of R 335 000 (in 2015 values). Comparing the indices with today’s values, that figure rises to R 556 100.

[14] Mr Khuzwayo referred me to the matter of *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26 where Bosiello AJ stated:

‘In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph & Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) ([2009]

ZASCA 39) paras 26 - 29).’

[15] Mr Khuzwayo drew my attention to the following cases:

(a) *Minister of Police v Page* (CA 231/2019) [2021] ZAECHGHC 22 (23 February 2021), where the court a quo had awarded the plaintiff damages of R100 000, in circumstances where he had been arrested and detained for a day. The next day he was then taken to court, where he was detained for an hour, and he then appeared, and the charges against him were withdrawn. On appeal, the award was reduced to R30 000, together with interest calculated from 14 days after the 30th October 2018 (presumably the service of the summons – it is not clear why the date used was chosen) and costs.

(b) *Nel v Minister of Police* (CA62/2017)

[2018] ZAECHGHC 1 (23 January 2018), where Mrs Nel was unlawfully arrested for possession of dagga, and detained (with her baby) for approximately 20 hours. She was then released without appearing in court. On appeal, she was awarded R35 000, together with interest from the date of service of her summons and costs.

(c) *Madyibi v Minister of Police* (4132/17) [2020] ZAECHMHC 11; 2020

(2) SACR 243 (ECM) (17 March 2020), where an adult male was unlawfully arrested and kept overnight in a dirty cell, where he had to sleep on the floor. The next day he was taken to court, where he was told to sit in the public gallery while the arresting officer spoke to the prosecutor. He was then told that he was free to leave. He appears to have been reasonably stoic about his experience, and

told the court that although he had suffered no physical injuries, he was ‘heartsore’ at being arrested. On appeal the court awarded him R40 000 together with interest (to run from 30 days after the award, and costs).

[16] Mr Khuzwayo submitted that, based on the above authorities, and the evidence of Mr Gumbi, an appropriate award for wrongful arrest would be R35 000. For the contumelia suffered by Mr Gumbi in repeatedly having to appear in court, and having to defend himself in the trial, he should be awarded R10 000 per day. These calculations would total R225 000.

[17] In assessing Mr Gumbi’s damages, I accept the evidence he has given, because it has not been contradicted in cross-examination, or by the production of any documents which indicate that what he has told the court is not true. In addition, his evidence is probable. He appeared to me to be an honest and forthright witness, who was deeply embarrassed and humiliated by his experience. With regard to what happened to him, I accept that the SAPS members involved with the issuing of the s 252A entrapment warrant behaved dishonestly, they unlawfully and maliciously arrested him, detained him, and acted with malicious intent in pursuing the fruitless prosecution of Mr Gumbi. Their clear intention was to see Mr Gumbi, an officer of 25 years’ standing, imprisoned for offences of which he was not guilty.

[18] I am mindful of the various cautions laid down in the cases on assessing an appropriate quantum of damages, particularly the use of awards in previous cases. Almost all cases are, in one way or another, different on their facts. Attempting to juggle the

differences between them, and making adjustments accordingly, can easily lead to an over or under compensation in the case in which the award is being made.

[19] I am satisfied that an award of R100 000 for the unlawful arrest of Mr Gumbi is established. He was arrested on grounds which were deliberately falsely manufactured by the very persons who are there to protect society, the SAPS. He was further humiliated at the police station in front of his wife and junior ranking colleagues, and then placed in a police cell with criminal elements who knew who he was – a most unpleasant experience for any police official.

[20] Then Mr Gumbi was submitted to the humiliation of the newspaper article – again clearly instigated by the same individuals who arrested him. To compound it all, false charges were laid against him, resulting in 19 court appearances, at the end of which, he was discharged at the end of the State case without even being required to place his defence on record. All the while, he suffered the public humiliation of society turning its back on him, believing him to be a common criminal. In addition, his arrest, etc is recorded on the internet, and has not been removed. No award of damages could really compensate him for these damages. I believe the computation of the amount claimed for contumelia for his detention in appearing 19 times in the sum of R570 000, is reasonable and appropriate, based on the approach adopted by Mr Pillay. It is unfortunate that rogue elements of the SAPS should cause such harm and financial loss to the State, but unless and until the SAPS is able to root out such elements, these tragic circumstances will recur.

[21] With regard to costs, the costs of the action, including the two days of the hearing, must be paid by the Minister. I am also conscious of the manner in which this case was conducted. In the initial plea, save for a special plea of prescription (not persisted with), an admission of the name of Mr Gumbi, and the identification of the Minister and a police informer, every other allegation was denied. Three and a half years' later, an amended plea was delivered, alleging that the SAPS had been entitled to arrest Mr Gumbi because he was reasonably suspected of having committed the crimes of armed robbery, the illegal possession of rhino horn and defeating the ends of justice. At the hearing before me, inadequate excuses were made for the absence of witnesses, in circumstances where it was clear that no proper arrangements were made for their attendance at court. It is difficult to accept that any proper effort was made in dealing with this matter by the State.

[22] I make the following order:

- (a) The defendant is directed to pay to the plaintiff the sum of R774 200 (R100 000 for unlawful arrest, R100 000 for the agreed costs of defending the malicious prosecution, R570 000 for malicious prosecution, including contumelia, and R4 200 for the agreed values of the cell phones and appointment card);
- (b) the defendant is directed to pay to the plaintiff interest on the sum of R774 200 at the rate of 10.5% per annum, calculated from the date of service of the summons, the 10th August 2016, to date of payment;
- (c) the defendant is directed to pay the plaintiff's costs of suit.

Lopes J.

Date of hearing:

21st-22nd February 2022.

Date of judgment:

1st April 2022.

For the plaintiff:

Mr LM Pillay of Logan Pillay & K Padayachee.

For the defendant:

Mr Khuzwayo of the State Attorney, KwaZulu-Natal.

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