

SOUTH AFRICA / JUDGMENT

Nahour and Another v Minister of Justice and Constitutional Development (6057/2007) [2018] ZAKZPHC 65 (3 August 2018)

[2018] ZAKZPHC 65

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D Pillay

CASE / FILE NUMBER

6057/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION,

PIETERMARITZBURG

CASE NO: 6057/2007

In

the matter between:

VISHNU
NAHOUR FIRST
PLAINTIFF
NEVILLE
MICHAEL
CHARLES SECOND
PLAINTIFF
and
THE MINISTER OF
JUSTICE &
CONSTITUTIONAL
DEVELOPMENT DEFENDANT

ORDER

On

the question of liability of the State to compensate the plaintiffs
for damages arising from their convictions and imprisonment,

I find

against the plaintiffs with costs, including the costs of two counsel
and the costs reserved in the exception.

JUDGMENT

D. Pillay J:

[1] The plaintiffs, Vishnu Nahour and Neville Michael Charles, claimed compensation for damages after the Supreme Court of Appeal (SCA) found them not guilty and discharged them from prosecution. Events leading to this result occurred 25 years ago. The plaintiffs, together with three other men, were arrested on 13 February 1993. They were charged with kidnapping and rape and released on bail of R200 each on 14 February 1993. Their trial in the Durban Regional Court commenced on 24 May 1993. They denied the charges, pleading instead that they had had consensual sexual intercourse, which they had procured from the complainant who was a prostitute. On 8 April 1994 Mr T V Levitt convicted them as charged. On 6 June 1994 he sentenced them to one year's imprisonment for kidnapping to run concurrently with the sentence in the second count of rape for which he imposed five years' imprisonment, half of which was suspended conditionally for five years. They appealed against both their convictions and sentence to this division.

[2] On 19 March 1998 the full bench of this division (Booyesen and Mthiyani JJ) dismissed their appeal, confirmed the convictions and increased the sentence on the rape count so that no portion of the sentence was suspended. On 7 May 1998 the plaintiffs applied for leave to appeal to the SCA.

[3] On 29 June 2001 Hurt J with Moolla AJ concurring, granted leave to appeal to the SCA in the matter of Myendra Naidoo, one of the plaintiffs' coaccused in the regional court. The court hearing the appeal in *Myendra Naidoo v S* Case No 504/2002 dated 13 May 2003 (unreported) (Heher AJA, Zulman JA and Mlambo AJA concurring) (the SCA judgment) determined that the failure by the prosecutor to disclose to the defence the existence of statements from the complainant and the investigating officer that the complainant was a 'practising prostitute', which was at variance with her evidence in the trial, was an irregularity. The SCA found that the prosecutor's withholding of these discrepancies from the defence was a gross breach because:

'crossexamination of the complainant by an attorney so armed could, to put it no higher have resulted in an adverse effect on the assessment of her credibility and reliability by the trial court.'[1] (my emphasis)

It found that the irregularity affected the evidence and the credibility findings that resulted in proving the guilt of the plaintiffs beyond reasonable doubt. In its discretion, the court opined that leaving out the evidence of the complainant, substantially a single witness, 'effectually cuts the feet from under the State case'.

[4] However, the court considered the alternative relief of remitting the case to trial for hearing the evidence of the investigating officer and further crossexamination of the complainant because there was:

‘some independent support for her version in that she was heard crying for help just before she ran from the park and that she fled stark naked, those facts are equally consistent with consent but a subsequent change of mind. But whether the change occurred before or after consensual intercourse with the accused (or some of them) remains speculation.’[2]

- [5] Ms Watt, whose name appeared on the police docket as the public prosecutor overseeing though not appearing in the trial, represented the State in the SCA. She conceded the irregularity but ‘expressly disavowed any recourse to the remittal of the case’.[3] In these circumstances the SCA had little option but to dispose of the appeal on its merits on the evidence before it. After excluding the complainant’s testimony, the SCA could not find from the remaining evidence and credibility findings that the prosecution had proved its case beyond reasonable doubt.[4]
- [6] On 13 May 2003 the SCA set aside the convictions and sentence of the regional court, and entered a verdict of ‘not guilty and discharged’ in the appeal of Mayendra Naidoo.[5] It also requested the Director of Public Prosecutions to bring the contents of its judgment to the attention of the plaintiffs to enable them to seek legal advice as they deemed fit. On 15 December 2003 the full bench (Booyesen and Levinsohn JJ) granted the plaintiffs leave to appeal to the SCA. On 21 September 2004 the SCA (Heher JA and Erasmus and Patel AJJA) without hearing the parties simply issued an order setting aside the convictions and sentence imposed by the magistrate and replaced the verdict with ‘not guilty and discharged’.
- [7] In this action the plaintiffs sued the Minister of Justice and Constitutional Development for damages arising from their alleged wrongful convictions and imprisonment. Their claims arise from their imprisonment from 19 March 1998 until 23 November 2001 in the case of the first plaintiff, and 28 September 2002 in the case of the second plaintiff; their stringent bail conditions restricting their rights and freedoms pending their appeals; their loss of earnings arising from their incarceration; their loss of amenities of life; their loss of freedom of movement; the loss of opportunities to interact with family and friends and, the depression from which they continue to suffer. Both plaintiffs claimed R1 million in general damages and R88 000 in the case of the first plaintiff and R129 000 in the case of the second plaintiff for past loss of earnings.
- [8] The defendant raised a special plea in terms of s 11 of the Prescription Act 68 of 1969 on the basis that the plaintiffs relied on conduct that occurred during 1994 and that summons was only served on the defendant on 21 August 2007. For the rest, the defendant’s plea was, unhelpfully, a bare denial.
- [9] The plaintiffs excepted to the defendant’s special plea on the ground that it failed to set out a defence in law. The special plea was heard on 21 April 2009. On 23 August 2011 the court (Van Zyl J) opined that the final decision on the special plea would only be taken at the trial after evidence was heard to clarify certain outstanding issues. He dismissed the exception and reserved costs for determination by this court.

[10] In this court, plaintiffs' counsel opened with a request that the matter stand down until the following morning to enable the defendant's counsel to take instructions that might shorten the proceedings. I refused the adjournment. As the matter had been set down for trial to commence that day the litigants were expected to be prepared. The incident had occurred 25 years

earlier. The cause of this action arose in September 2004. Summons had been issued on 24 July 2007. Pleadings had closed by April 2008. If after such a lengthy passage of time and three pretrial conferences the parties were unable to be trial ready, then standing down for 24 hours was unlikely to serve any useful purpose.

[11] Disquietingly, counsel for the defendant was apologetic throughout the proceedings as he had only recently been briefed; the State attorneys' files had gone missing and the matter had over the years passed through many hands in that office. Effectively, the State was on the back foot. None of this information inspired any confidence that the trial would be conducted efficiently. Considering plaintiffs' counsel's enthusiasm for delaying the proceedings by a day, I could not exclude the possibility that 'stand down until tomorrow to take instructions' was a proxy for capitulation by the State at the expense of the public purse. Consequently, I directed that the trial should commence without further delay.

[12] This ruling was not made lightly. Litigation is the process in which opposing litigants adduce evidence and argument before an independent

and impartial judge whose responsibility is to deliver a reasoned judgment. When any side fails to participate competently, litigation

as an institution is at risk.[6] Litigation under such conditions jeopardises the proper development of jurisprudence. Illconsidered settlements conceded in haste strain the public purse. Adjudicating in these circumstances is also unduly burdensome on the court. Managing the tension between executing its broad constitutional obligation to take account of the interests of justice[7] on the one hand and deference to the separation of powers principle on the other hand, is a struggle. The court cannot make up for deficits in a litigant's capabilities without jeopardising its own adjudicative function. In this case the State made little effort to reconstruct its files. Relevant documents had not been discovered and could therefore not be used in cross examination. With little help from the State the court had to navigate through the lengthy record and legal materials in search of a just outcome. This is both a description of the conditions under which this judgment evolved and an explanation for any shortcomings in it.

[13] The defendant abandoned its special plea of prescription and the trial proceeded on the issue of liability only. The plaintiffs testified briefly. The defendant closed its case without calling witnesses.

[14] The plaintiffs' claims rested not merely on the irregularity perpetrated by the prosecutrix, which would have been simply

procedural if it did not result in substantive unfairness. Significantly, their case was also not that they should never have been prosecuted. Nor was it that they were wrongly prosecuted for kidnapping and rape instead of for having unlawful carnal intercourse

or committing acts of indecency for reward in violation of s 20(1)(aA) of the Sexual Offences Act 23 of 1957 (the SOA), considering that their brazen defence of having had consensual sex for reward exposed them to such a charge.[8] Instead, they adopted the stance that the SCA overturning the verdict automatically rendered their convictions unlawful.

[15] In the criminal proceedings the State bore the onus of proving every element of the crime beyond reasonable doubt. The plaintiffs bore no onus then. However, in this action they now bear the onus of proving all the requirements for delict on a balance of probabilities. They have to prove the act, wrongfulness, fault, causation and damages. As for the first two requirements, there was no dispute in the light of the SCA's judgment in their coaccused's case. At the time of the plaintiffs' criminal trial disclosure of the statements was not compelled under s 35 of the Constitution of the Republic of South Africa, 1996 as it subsequently came to be. Nevertheless the SCA found that the prosecutrix, Ms Holtzen, had an ethical duty arising from the culture and practice of criminal law to disclose the statements. Her duty to act positively rested on the State's obligation to prevent the harm of subjecting the plaintiffs to an unfair criminal trial.[9] The nondisclosure by the prosecutrix was, according to the findings of the SCA, a material irregularity and therefore wrongful.

[16] As for proving fault, neither party attempted to secure the prosecutrix's evidence either by subpoenaing her or arranging

for her testimony to be adduced by agreement or in some manner acceptable to the court. The prosecutrix was a relevant witness.

Counsel for the State explained that she had relocated to Australia. Considering that the SCA had already pronounced upon the wrongfulness

of her nondisclosure either party could have called her to testify.[10] The plaintiffs who bore the onus of proving fault needed her evidence to show that she had acted intentionally or negligently. The State needed her evidence because it bore the onus to establish justification, if any, for her nondisclosure.[11]

[17] In her absence the court had no explanation as to why she did not disclose the statements to the defence; whether privilege informed her decision; whether she had considered the rule that the police docket should be disclosed to accused persons, which had not been constitutionally enforced at the time; whether her nondisclosure was deliberate or inadvertent; why she conceded on the record that the complainant might be a sex worker; whether she had considered her concession to be sufficient disclosure; what discussions she had had with the defence on the issue; whether she reasonably foresaw that her omission would cause harm, and, whether she took steps to prevent such harm by, for instance, making the concession. Without answers to questions such as these the court is

unable to assess whether there were any grounds for justification for the nondisclosure. But no adverse inference can be drawn against the plaintiffs. Once wrongfulness was established the prosecutrix's conduct had to be either intentional (*dolus*) or negligent (*culpa*). Whichever it was is immaterial for the purposes of this judgment on liability. The same cannot be said of the State's failure to secure her evidence. Its failure to prove any grounds for justification results in the plaintiffs proving fault on the part of the State.

- [18] All that was left for the plaintiffs to prove then was causation and damage. This court has to determine whether there was a cause or nexus between the omission to disclose the statements and the damages the plaintiffs allegedly suffered as a result of their convictions and sentence to imprisonment.[12] Establishing nexus is a question of fact answered in the light of all the available evidence.[13] My starting point is the SCA judgment.
- [19] The SCA 'put it no higher' that the effect of the irregularity would have been on cross examining the complainant as to her credibility and reliability. Only her credibility was in doubt because the SCA and the full bench before it found other State witnesses to be reliable and supportive of her version. However, other witnesses were not present during the kidnapping and the rapes. The SCA deduced from the corroborating evidence that the complainant had withdrawn her consent (if she had given it in the first place) but that there was no reliable evidence as to whether she had done so before intercourse. Faced with resistance from the State's counsel, Ms Watt, to remitting the matter for fresh evidence, the SCA considered the merits of the appeal on the evidence before it. Because the test in a criminal prosecution was proof beyond a reasonable doubt, the SCA opined that without the complainant's evidence that threshold was not met.
- [20] This was the reasoning of the SCA in discharging the plaintiffs from prosecution. The SCA made no findings of fact to suggest that the plaintiffs had not committed the crimes for which they were convicted; it merely found that the State had not proved the charges beyond a reasonable doubt. In other words, the plaintiffs were not exonerated of wrongdoing. Furthermore the mere fact that the SCA contemplated the alternative remedy of referring the matter for rehearing of evidence implied that it had found that the plaintiffs had a case to answer. Anticipating a rehearing implied that their innocence and acquittal were not foregone conclusions dispositive of evidence to prove their delictual claims.
- [21] Considering that the senior Judge Heher J who was also the presiding judge in *Mayendra Naidoo v S* constituted the panel in this instance, in the exercise of their discretion they unsurprisingly elected to uphold the appeal and discharge the plaintiffs. A differently constituted panel in the exercise of their discretion might justifiably have come to the opposite conclusion. Another panel might, for instance, have found from all the circumstances sufficient corroboration for the complainant's version that she had not consented; that the prosecutrix's nondisclosure was immaterial because the trial court was aware that she might have been a sex worker; or that the defence had failed to crossexamine her effectively and pertinently about a vital point in their defence, namely that she was a sex worker. The record of the trial lays the foundation for such an alternative outcome. As

findings of fact and credibility are matters for determination by the trial court, another panel might justifiably have deferred to the trial court.

[22] A point that neither counsel brought to the attention of the court was the following observation of the magistrate as early as in the third paragraph of his judgment:

‘Arguing for the conviction of all five as charged on count one on the basis of common purpose, and of accused No 2 to No 5 on count two, also as charged, the prosecutrix seemed to think that the probabilities favoured the finding that the complainant was indeed a prostitute, a fact she [complainant]

vehemently denied, but pointed out that even if this was so no significant damage to the prosecution case would inevitably follow.’[14]

[23] As the complainant would have rendered herself vulnerable to prosecution if she admitted to being a sex worker, her denial was predictable and the prosecutrix’s concession, insightful. The magistrate was aware that the complainant might have been a prostitute and that if she denied this she might be lying. He would also have been aware of possible reasons for her lying namely, to protect herself from prosecution for exchanging sex for reward and incurring the disapproval by society and the bench. A witness who is untruthful about something is not necessarily untruthful about everything.[15]

[24] Furthermore, once the magistrate had factored in the probability that she was a prostitute the issue was no longer of great importance; the magistrate had already disbelieved her on this issue. That he did factor this probability into his reasoning is evident from his comments when sentencing the plaintiffs:

‘There have been allegations that the complainant was a lady of illrepute and of course you would have the court believe, as you have throughout this trial that she had offered herself to you for reward. Even if that be the case she is still entitled to the protection of the law.’[16]

[25] The defence had urged the magistrate to find that the plaintiffs had made ‘a good impression’.[17] Instead, the magistrate, after considering ‘the evidence of each accused separately and individually’, in the light of *S v Mgedezi & others*[18] found that on ‘an unfragmented assessment of the evidence, the true picture... in line with all the probabilities... goes to show beyond a reasonable doubt the falsity of the defence version...’[19]

The magistrate made this adverse credibility finding against the plaintiffs after the prosecutor had alerted him to the probabilities

of the complainant being a prostitute.

[26] In assessing credibility the magistrate’s observation of the witnesses did not assist the plaintiffs in their assertion that they should never have been convicted. Of the plaintiffs, the magistrate observed that:

‘solidarity of their version was not unexpected and could almost be said to have been rehearsed... The defence made little headway in crossexamination neither of the police witnesses nor for that matter in crossexamination of Msomi and Hadebe.’[20]

[27] In contrast, his observation of the complainant was as follows:

‘The complainant subjected to a lengthy and repetitive questioning on three appearances held up well, exhibiting natural and expected moments of tearfulness from time to time.’

And of the other State witnesses:

‘The court can find no suggestion of untruthfulness in the unified version of Msomi and Hadebe, both independent witnesses, that their attention was drawn by the plaintive cry for help which sounded to have emanated from the complainant.’[21]

[28] Despite finding contradictions in the evidence of the complainant, the police witnesses and the first plaintiff, the magistrate preferred the evidence for the State. In sentencing the accused he had this to say:

‘You have committed serious crimes. The crime of kidnapping itself is one which is not treated lightly. The crime of rape is particularly

serious and more so under the circumstances in which it was perpetrated here. It was accompanied by acts of indecency upon the

complainant.’[22]

So it was not the lack of consent alone that had rendered their conduct reprehensible but also the way in which they had treated the complainant.

[29] Despite knowing that the complainant might have been a sex worker and that she might have been committing crimes under the SOA, the magistrate’s empathies lay with the complainant as evident in the following extract:

‘Although it was late at night when she was accosted and removed from where she was walking, one should not lose site of the fact that it should be perfectly safe for anyone, in particular a lady, to walk around at any time of the night or day, and that no blame can be laid at the door of the complainant for being where she was at that particular time.’[23]

[30] Helpfully, the magistrate recorded his observations of the complainant of how she not only withstood protracted crossexamination but also how she composed herself over time:

‘The effect of this incident on the complainant has not been determined with any degree of accuracy. . . During the complainant’s

testimony you will recall that she broke down from time to time and had to compose herself. . . .As time went on and the complainant was called back to the stand the court noted an improvement in her composure and she was able to withstand questioning to a better

degree. She did not fortunately suffer any serious injuries and in your favour the Court will find that although the memories of this night will always scar her mind, that it is something from which she has been able to physically recover.’[24]

[31] Then there were the following pieces of evidence that conflicted with the defence’s version that sexual intercourse was consensual:

- (a) The complainant suffered abrasions on her left knee.[25] The first plaintiff testified that the complainant had sexual intercourse when she was either lying on her back or was seated; he could not explain how she came to have abrasions on her knees.[26] He had no response to the question as to why the complainant would fabricate a rape charge if the plaintiffs had paid her.[27] He owed an explanation considering his evidence that he had negotiated a price of R30 per client but nothing close to R30 let alone R120 was found on or within the vicinity of the complainant.
- (b) Only one of the complainant’s shoes was found in the first plaintiff’s motor vehicle along with other items of her clothing.
- (c) Constable Michael Msomi testified that the complainant was ‘crying excessively when she reported that she had been raped by five men’.[28] She was half naked.
- (d) Constable Thompson found a ‘hysterical complainant’.[29]
- (e) Witness Sipho Hadebe found the complainant hiding in the shrubbery with a woman who comforted her.[30]

[32] Furthermore, there was the evidence of independent State witnesses regarding the conduct of the plaintiffs at the scene. The plaintiffs, amongst other accused, prevented Constable Msomi from grabbing hold of accused one even though he produced his appointment certificate to identify himself as a policeman. The second plaintiff hit him in the face with a t shirt before fleeing. They returned and on seeing their demeanour and the position of their arms, Constable Msomi fled. The second plaintiff and another person gave chase. Constable Msomi managed to contact his charge office. Reinforcements arrived just as the first plaintiff’s vehicle was reversing to leave.[31] Mr Hadebe testified that the occupants of the first plaintiff’s vehicle struck and stabbed him on his head, cheek and left kidney. He recovered in hospital.[32]

[33] On 1 April 1993 Ms Watt wrote a note to the investigating officer informing him of the trial date from 21 to 24 May 1993 and requested that subpoenas be served on all the witnesses. Having studied the docket she remarked:

‘This is an excellent case and merits an adequate opportunity to trace the complainant. Should she be traced please find a statement from her sister and warn her for court provided of course the complainant knows her whereabouts.’[33]

[34] In this action, notwithstanding the evidence of the proceedings in the criminal prosecution summarised above, the plaintiffs contended that but for the irregularity by the prosecutrix, they would never have been convicted because they had consensual sex with a prostitute. In other words, the irregularity alone was instrumental in their convictions. However, to pass the ‘but for’ test they had to prove that, discounting the irregularity, the State’s case was so unmeritorious that they would never have been convicted. In other words if they had been convicted on any basis, they would have had a civil claim for damages.

[35] In my view, against the weight of the evidence on record, excluding the complainant’s testimony, the plaintiffs had a compelling case to answer. They have failed to discharge the onus of proving that but for the irregularity of the prosecutrix’s nondisclosure of the statements, they would not have been convicted. Disclosure might not have affected their convictions at all considering that the trial magistrate was aware that the complainant might have lied; a differently constituted panel of judges at the SCA might have dismissed the appeal or insisted that it be referred for fresh evidence. As pointed out above their acquittal by the SCA was not proof of their innocence but the inadequacy of the evidence for the State, which in the opinion of the particular panel that constituted SCA bench did not satisfy the threshold of proof beyond reasonable doubt. Considering that in this world and especially in litigation nothing can be said to be certain, except death and taxes, the plaintiffs’ confidence in their acquittal is breathtakingly audacious.

[36] This finding that the plaintiffs failed to discharge the onus of proving causation is dispositive of the action. For completeness, I turn to the final leg of the enquiry: the plaintiffs’ entitlement to damages.

[37] The plaintiffs’ defence of having procured sexual intercourse to avoid a conviction of rape amounted to an admission to committing

another crime, namely that of having unlawful carnal intercourse, or committing an act of indecency with another person for reward.[34] The State did not raise the plaintiffs’ defence in the criminal case as a cause or contributory cause of the damages they claimed. Counsel for the plaintiffs submitted that as it had not been pleaded it was not an issue before court. I indicated to the parties that I intended to consider the plaintiffs’ defence in their prosecution to determine the issue of liability and gave both the witnesses and counsel an opportunity to address my concerns.

[38] My concern was that while they were entitled to raise their defence in the criminal proceedings, should they be allowed to profit from their criminal conduct in a civil claim for damages? Assuming that fault on the part of the prosecutrix caused or contributed to the losses or harms suffered by the plaintiffs, were they entitled to compensation despite their conduct constituting crimes that violated both legal and moral rules? Did the maxim ex turpi

causa non oritur actio (a claim cannot be founded on a wrong committed by the claimant) apply?

- [39] Counsel for the plaintiffs submitted that their defence in their criminal prosecution was irrelevant to their claim for delictual damage in their civil action. He cited as an example that a person who was injured in a motor collision would be allowed compensation even if she were transporting marijuana illegally.
- [40] The question whether the plaintiffs' admitted crime should entitle them to damages elicits intuitively a moral response to a socially repugnant proposition. But this is not enough to deny the plaintiffs compensation. What follows is a brief account of the application of the ex turpi principle, the court's powers to raise the principle of its own accord and the implications of the application of the principle for the doctrine of legality and the rule of law. An exhaustive exposition of each these three headings is for another time; for now an overview will have to do.
- [41] The common law position was that anything done illegally was considered a nullity. Several exceptions to this general rule emerged. The rationale for the exceptions was that 'greater inconveniences and greater impropriety would follow on the actual rescission of the things done, than attend the actual thing done contrary to the laws'.^[35] Difficulties in unravelling an illegal contract illustrates the purpose of the exceptions.^[36]
- [42] The use of the doctrine of ex turpi causa to prevent abuse and misuse of the judicial process is well established in contract law and insurance law, where it provokes less controversy than in delict. The general approach was that courts should be allowed to bar recovery in delict on the ground of the claimant's immoral or illegal conduct only in very limited circumstances because such claims are for compensation for personal injury or loss.^[37]
- [43] I have not found any South African cases in which the ex turpi principle has applied to a civil claim for damages (iniuria) in which the turpitude was a crime committed by the claimant. For the first time in 1993, the Canadian Supreme Court considered the principle in a civil claim for damages arising from a motor collision in which both litigants acted unlawfully and contributed to their own and each other's damages. It was typically a case in which the ex turpi defence applied. Usually the defence required joint illegal conduct by the parties. If a claimant's conduct resulted in its injury, it may well be found guilty of contributory negligence or of being the author of its own misfortune. However, being a wrongdoer did not automatically disqualify it from receiving remedies at law for harm done to it.^[38]
- [44] A broad application of the ex turpi principle was open to debate. Whatever the controversy was about the application of the ex turpi principle to claims for damages, evidenced for instance in the split decision in the Canadian court, when the turpitude was the commission

of a crime there was little debate.[39] A narrow expression generally endorsed the position that people should not be able to benefit from a crime they have committed.[40] The Canadian court held that criminal conduct on the part of an injured claimant negated any reasonable expectation of compensation

for such injuries.[41] Underlying the principle is the law of illegality that applied to claims arising from acts that were against the public law of the State and engaged the public interest.[42]

[45] As a rule of law, the illegality defence is not a matter of mere discretion and balancing of the respective merits; it is a matter of public policy.[43] Therefore because ‘the public has its own interest in conduct giving rise to the illegality defence. . .the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation.’ Consequently, the State’s failure to plead the illegality was no bar to this court taking the point of its own accord.

[46] Raising the illegality of the plaintiffs’ conduct went both to the heart of the consistency of the jurisprudence and to upholding the dignity of the court. The United Kingdom Supreme Court summarised the position thus:

‘But in general, although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act ... the courts withhold judicial remedies, leaving the loss to lie where it falls ... The *ex turpi causa* principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority

of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act ...

this rule of abstention was sometimes expressed as a principle protecting the innocence or dignity of the court against defilement.’[44]

[47] Jurisprudentially, the rationale for the rule of abstention is this:

‘It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which contract, tort, the criminal law must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web"...We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.’[45] (Footnotes omitted)

[48] Compensatory damages for injuries or harms suffered are more easily distinguishable from damages as profit from an unlawful act that amounts to a crime. This is so because it can be inferred more easily that the claimant is the sole cause of its injuries and the law owes it no duty of care or protection for harms it brought upon itself.[46]

[49] Two questions help to clarify the application of the ex turpi principle for claims in delict:

- (a) Does the act constitute turpitude?
- (b) What is the connection between the turpitude and the claim?[47]

If the turpitude is instrumental to the claim, compensation should be disallowed.

[50] In this instance, the plaintiffs' illegal and immoral act of having sex with a prostitute constituted turpitude. Legislation that declared sex for reward to be unlawful is a coalescence of society's expression of its moral repugnance for prostitution. Their turpitude led to their conviction and imprisonment for rape, which are now the cause of their claim for damages. The basis of the plaintiffs' civil claim in this case was distinguishable from counsel's example above. To avert a conviction, the plaintiffs had to prove that they had committed the crime of paying for sexual intercourse. To succeed in this action they have to prove that their admitted commission of the crime would have succeeded in averting their convictions for rape. Their crime

was therefore instrumental to their victory in both proceedings. In contrast, the turpitude of transporting marijuana was immaterial,

unconnected and incidental to the claim for compensation. Such compensation is damages for personal physical and mental injuries and not profit for the illegal or immoral act of transporting marijuana. To say that but for transporting the marijuana the claimant would not have been injured in the collision is a test so far removed that most claims would fail. The marijuana example is distinguishable because the crime in that instance is not instrumental to the claim for damages is the crimes of the plaintiffs was.

[51] Whether the plaintiffs knew that they were committing a crime is irrelevant. It was an offence for which strict liability applied. A 'customer who engages in sex for a reward commits an offence at common law and in terms of the provisions of the Riotous Assemblies Act'. The 'practice of the police and the prosecutors ... to target the "merchants" and not the "customers"' pointed to 'a flaw in the application of the law ...'[48] Criminalising and stigmatising the conduct of prostitutes as the recipient of reward was 'a social attitude and not the result

of the law'.[49] Irrespective of whether unfairness originated in the practice, social attitudes or the law it was discrimination against prostitutes, most of those targeted being women.

[52] This case classically epitomised how the application of the law entrenched the unfair discrimination grounded in sex, gender and socioeconomic status in the psyche of the litigants. The complainant had to deny that she was a prostitute to avoid prosecution but the plaintiffs could brazenly raise their participation in the crime as a defence to a charge of rape without the risk of being prosecuted for procuring sex.

[53] In my view the plaintiffs' turpitude was compounded by their attempt at snatching an advantage from a discriminatory practice

through this action. If they had not known in 1993 that they had committed an offence then they certainly should have known by 2002 when *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amici Curiae)* had been published.[50] If neither they nor the SCA judges who set aside their convictions were aware of Jordan at the time, then they ought to have known about it when they instituted this action.

[54] In these circumstances, if the court were to recognise a right to compensation for their convictions and consequential harms it would be vindicating their crime and their opportunism in snatching an advantage from the unfair application of the law. This would be antithetical to all our constitutional values.

[55] This action oozes with cynicism for our constitutional values. In times gone by it might have been considered 'scandalous and impertinent'. [51] Contingency fee arrangements are meant to help indigent litigants to exercise their rights to access to justice; it was not meant to convert the hallowed halls of the courts into gambling dens in which unmeritorious cases are ventilated on a whim and a hope that the plaintiffs and their representatives might 'strike it lucky'. Commoditising litigants comes with risks. Unsuccessful litigants who have contingency fee arrangements may not have to pay legal fees to their lawyers but they cannot avoid the risk of paying the other side's costs.

[56] Accordingly, on the question of liability of the State to compensate the plaintiffs for damages arising from their convictions and imprisonment, I find against the plaintiffs with costs, including the costs of two counsel and the costs reserved in the exception.

D Pillay

Judge of the High Court of KwaZuluNatal

APPEARANCES

Counsel for the plaintiff: L. Pillay SC

Instructed by: Justice Reichlin Ramsamy Attorneys

c/o Surendra Singh & Associates

Ref: RN/mm/N1491

Tel:

(033) 345 6719

Counsel for the respondent: C.A.S Jennings

Instructed by: State Attorneys (KZN)

c/o Cajee Setsubi Chetty Inc.

Ref: 166/000688/05/N/P18

Date of Hearing: 18 June 2018, 21 June 2018

Date of Judgment: 3 August 2018

[1] Mayendra Naidoo v S case no 504/2002 delivered 13 May 2003 (the SCA judgment).

[2] SCA judgment para 15.

[3] SCA judgment para 16.

[4] SCA judgment para 15.

[5] Case number 504/2002, heard 5 May 2003, delivered 13 May 2003.

[6] LL Fuller and KI Winston 'The Forms and Limits of Adjudication'

(1978) 92(2) Harv. L. Rev. 353 at 357 <http://www.jstor.org/stable/1340368> (accessed on 13/09/2010);
R Bone 'Lon Fuller's Theory of Adjudication and the

False Dichotomy between Dispute Resolution and Public Law Models of Litigation' (1995) 75
Boston U. L.J.1272 at 1276.

[7] Section 173 of the Constitution of the Republic of South Africa, 1996.

[8] S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amici
Curiae)

[2002] ZACC 22; 2002 (6) SA 642 (CC) para 14.

[9] J Neethling and JM Potgieter Neethling Potgieter Visser Law of Delict 6 ed (2010) at 57;
Shabalala v AttorneyGeneral of Transvaal & another

[1995] ZACC 12; 1995 (2) SACR 761 (CC) paras 4446; see also Van Breda v Media 24 Ltd & others
2017 (5) SA 533 (SCA) paras 54–55.

[10] Hoffman and Zefferdt The South African Law of Evidence 4 ed at 604; Elgin Fireclays Limited
v Webb 1947 (4) SA 744 (A) at 749750.

[11] Neethling and Potgieter fn9 at 83.

[12] Neethling and Potgieter fn9 at 175177.

[13] Neethling and Potgieter fn9 at 175177.

[14] Levitt's judgment record at 513.

[15] R v Kumalo 1916 AD 480 at 484.

[16] Levitt's judgment record at 572 L24.

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- [17] Levitt's judgment record at 513512.
- [18] S v Mgedezi & others 1989
- (1) SA 687 (A) at 703EF.
- [19] Levitt's judgment record at 526.
- [20] Levitt's judgment record at 524 L6.
- [21] Levitt's judgment record at 524
- [22] Levitt's judgment record at 572.
- [23] Levitt's judgment record at 572 L15.
- [24] Levitt's judgment record at 572573.
- [25] Record at 518.
- [26] Record at 371.
- [27] Record at 372.
- [28] Record at 518.
- [29] Record at 522.
- [30] Record at 520.
- [31] Record at 519.
- [32] Record at 519520.
- [33] Record at 736.
- [34] Section 20(1)(aA) of the Sexual Offences Act 23 of 1957.
- [35] Voet Commentarius as translated by Gane 1 3 16 at 44 and 46.
- [36] Eg Kylie v CCMA & others 2010 JOL 25578 (LAC); 2010 (7) BLLR 705 (LAC); 2010 (4) SA 383 (LAC); 9 Lawsa 3 ed paras 334 and 338.
- [37] Hall v Hebert [1993] 2 S.C.R. 159 at 168169 (see the majority judgment of McLachlin J with which La Forest, L'HeurexDubé and Iacobucci JJ concurred); R (on the application of Best) v Chief Land Registrar (Secretary of State for Justice, interested party) [2015] 4 All ER 495 para 43 (see Sales LJ's judgment).
- [38] Hall v Hebert fn37.
- [39] Hall v Hebert fn37; Les Laboratoires Servier & another v Apotex Inc & others [2015] 1 All ER 671 paras 14 and 23; R v Chief Land Registrar fn37 paras 43, 54, 58.
- [40] R v Chief Land Registrar fn37 para 43; Les Laboratoires Servier fn39 para 13.

[41] Hall v Hebert fn37.

[42] R v Chief Land Registrar fn37 para 57.

[43] R v Chief Land Registrar fn37 para 57; Les Laboratoires Servier fn39 para 23.

[44] Les Laboratoires Servier fn39 paras 2324.

[45] Hall v Hebert

(1993) 101 DLR (4th) 129 at 165 (or fn37 at 175176); cited with approval in Les Laboratoires Servier fn39 para 24.

[46] Hall v Hebert fn37 at 170171.

[47] Les Laboratoires Servier fn39 para 22.

[48] S v Jordan fn8 para 19.

[49] S v Jordan fn8 para 16.

[50] S v Jordan fn8.

[51] Laboratoires Servier fn39 para 24 citing Everet v Williams (1725) (noted at (1893) 9 LQR 197).

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