

SOUTH AFRICA / JUDGMENT

Phefadu v Minister of Police (65249/2012) [2017] ZAGPPHC 583 (12 September 2017) [2017] ZAGPPHC 583

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

65249/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH-GAUTENG

DIVISION

PRETORIA

CASE

NUMBER: 65249/2012

DATE: 12/09/2017
In

the matter between: KUTLWANO
PHEFADU
PLAINTIFF
and
THE
MINISTER OF
POLICE
DEFENDANT

JUDGMENT

Coram: RABIE J

1. This trial concerned the quantum portion of a claim instituted by the plaintiff against the defendant resulting from his unlawful arrest and detention and assault by members of the defendant. The trial in respect of liability came before Baqwa J on 24 April 2014. The court found in favour of the plaintiff and ordered the defendant to compensate the plaintiff in respect of the unlawful arrest, detention and assault. The issue of compensation came before this court.
2. The background facts are briefly the following. The plaintiff, a taxi driver by profession, was arrested on 2 September 2012 near Morula Sun, Limpopo Province, by approximately four members of the South African Police Services. The plaintiff was detained from approximately 02:00 2 September 2012 until 10:00 on 3 September 2012 at the Mabopane police station. On the morning of 2 September 2012 the plaintiff was taken to hospital for treatment under SAPS guard and thereafter taken back to the police station. On 3 September 2012 at the local Magistrate's Court, the plaintiff was released after the charges against him were dropped.
3. Apart from his arrest and detention, the plaintiff was severely assaulted by members of the police and he suffered, inter alia, the following injuries: an injury to the left eye; severe bruising to the left eye; severe bruising, abrasions and lacerations to the face, a ligamentous injury to the left arm and shoulder; bruising and muscular injuries to the left arm and shoulder; a deep laceration to the left shoulder, a concussive type head injury and emotional shock and trauma.
4. The plaintiff's claim related, inter alia, to an alleged loss of earnings as well as future loss of earnings and general damages. It was the case of the plaintiff that he suffers from serious psychological problems which affect his capacity to earn an income.
5. The plaintiff presented the evidence of the following expert witnesses: Mr Franco Visser a Clinical Psychologist, Mr Graham Schultz an Occupational Therapist and Mr Cornel Schoombee an Industrial Psychologist. The opinions of the experts were disputed, but not the facts upon which the opinions were based.
6. By agreement between the parties, the following issues were to be determined by this court:
 - 6.1. Whether there was a causal link between the unlawful arrest and detention, and assault, and the psychological problems which the plaintiff presents with.
 - 6.2. Depending on the finding of the court on whether there was a causal link between the unlawful arrest and detention, and assault, and the psychological problems which the plaintiff presents with, whether the plaintiff suffered any patrimonial loss as a result of psychological problems.

6.3. Again, depending on the finding of the court on whether there was a causal link between the unlawful arrest and detention, and assault, and the psychological problems which the plaintiff presents with, the extent to which the psychological problems impact upon the general damages to be awarded to the plaintiff .

7. In summary, the main issues that stood to be determined by the Court were the following:

7.1. Did the plaintiff develop severe personality pathology, and severe clinical syndromes, as a result of the arrest, detention, and assault?

7.2. Would the psychological factors:

7.2.1. impact on the plaintiff's chances of securing alternate work in future;

7.2.2. cause the plaintiff to be classified as a vulnerable employee with limited job security;

7.2.3. negatively impact on the plaintiff's ability to earn an income, resulting in loss of earnings.

7.3. Is the plaintiff unemployable as a taxi driver, based on the psychological factors referred to above?

8. The plaintiff called four witnesses, the aforementioned three experts and the plaintiff's mother. The defendant did not call any witnesses. The Clinical Psychologist testified about the plaintiff's emotional and psychological status and the causes thereof and whether there is a nexus between that status and the arrest, detention and assault of the plaintiff. The bulk of the other expert evidence dealt with the loss of earnings allegedly suffered by the plaintiff .

9. Based on the evidence of the expert witnesses, and more specifically the Clinical Psychologist, the court cannot make a finding that the plaintiff developed severe personality pathology, and severe clinical syndromes, as a result of the arrest, detention, or assault. This fact was accepted on behalf of the plaintiff during the argument before this court and consequently I do not deem it necessary to refer in this judgement to the evidence leading to this finding.

10. In light of the aforesaid finding it is not necessary for the court to make findings in respect of the other issues for determination mentioned above.

11. The fact that the plaintiff does suffer from severe personality pathology and clinical syndromes is in no way innocuous and these factors do play a role in the adjudication of any general damages to be awarded to the plaintiff.

12. The emotional effects of the violent and egregious assault on the plaintiff are both acute and far-reaching. The immediate effect of assault was bruises and cuts, but the long-term effects were drastic. Moreover, the effects of the incident were felt by the plaintiff's loved ones. The psychological effects of the assault should not be underestimated. The short-term effects of the assault were typically obvious and treatable but unfortunately, some of the longest-lasting and most debilitating effects of the assault are psychological in nature. This is more

pronounced in a vulnerable individual such as the plaintiff.

13. The plaintiff should be compensated for the effect of the unlawful arrest and detention, and the assault, through an appropriate award for general damages.
14. In considering an appropriate award the court considered the following cases and authorities:

14.1. Thandani v Minister of Law and Order 1991 (1) SA 702 (E) at 7076:

"In considering quantum, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of man in a free society, which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual. "

14.2. Visser and Potgieter, Law of Damages, 2nd Edition at page 475:

"The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or malice on the part of the defendant; the harsh

conduct of the defendants; the duration and nature (e.g. solitary confinement) of the deprivation of liberty; the status, age and health of the plaintiff; the extent of publicity given to the deprivation of Liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant/ awards in previous

"cases!.."

14.3. Bosielo AJA (as he was then) held as follows in Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at 93d-f:

"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 damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the award they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation is viewed in our law ... Although it is 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. "

14.4. Olgar v Minister of Safety and Security [ECD 18 December 2008 (Case 608/07) at para [16]] as follows:

"In modern South Africa a just reward of damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These

considerations should be tempered with restraint and a proper regard to the value of money; to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty; at the expense of the defendant "

15. The proper approach to assess damages include the evaluation of personal circumstances of the plaintiff, the circumstances surrounding the arrest as well as the nature and duration of the detention *Colin Nelson v Minister of Police* (unreported SGHC case) Case No 41403/11 at para [6].
16. Although previous awards may have a persuasive effect, the exercise involves the exercise of a discretion by the trial court, and previous awards should not interfere with the court's general discretion. As Holmes JA put it in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287:

"However, no better system of 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 out largesse from the horn of plenty at the defendant's expense. "

17. As Nugent JA put it in *Minister of Safety and Security v Seymour* the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty.
18. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. In assessing the circumstances of this matter in considering what the appropriate solatium should be, one of the most outstanding features is the fact that the plaintiff was an already compromised individual and that the drastic invasion of his liberty and right to physical

integrity and dignity had a profound effect upon him.

19. Consequently and having regard to all the factors relevant in this case, I am of the view that the plaintiff is entitled to compensation for general damages in the amount of R350'000.00.
20. As far as costs are concerned it is clear that costs should follow the event.

The parties presented me with a draft order which includes the costs order which would be appropriate in this case. I agree with the parties in respect thereof.

21. In the result the following order is made:

1. The Defendant is to pay the Plaintiff in total an amount of R350'000.00 (Three Hundred and Fifty Thousand Rand) in respect of all damages suffered, which amount shall be paid into the trust account of Gildenhuis Malatji Incorporated, ABSA Bank, Brooklyn Branch, Account Number [4...], Branch Code 335345 under Reference: [G...].

2. The capital amount shall be paid into the above-mentioned trust account of Gildenhuys Malatji Incorporated within 31 (Thirty One) days from the date of this order.
3. The Defendant is ordered to pay all Plaintiff's attorney's cost of suit, in respect of quantum, on the High Court scale up to date hereof, which costs include (but not be limited to):
 - 3.1. The costs of travelling, accommodation and attending to the examinations and the costs incurred in obtaining all the medico-legal,-
and actuarial reports, addendum reports and any joint minutes / reports, as well as the qualifying- and reservation fees and the entire duration of court attendances of specifically (but not limited to) the following experts:
 - 3.1.1. Any and all radiological reports requested by the below-mentioned experts;
 - 3.1.2. Mr Franco Visser, Clinical Psychologist;
 - 3.1.3. Mr Graham Schultz, Occupational Therapist;
 - 3.1.4. Dr L Fine, Psychiatrist;
 - 3.1.5. Mr C Schoombee, Industrial Psychologist along with his addendum report;
 - 3.1.6. All the actuarial calculations on the matter;
 - 3.2. The costs of the preparation of 6 trial bundles as per the Practise Directive and as agreed upon in the Pre-Trial Minutes;
 - 3.3. The full day fee of attorney and counsel for 8 September 2015 up to 9 September 2015, 16 November 2015 up to 20 November 2015 as well as 11 September 2017 up to 12 September 2017;
 - 3.4. The full fees of attorney and costs of attorneys, which includes travelling costs attendances to court, costs for preparing for Pre-Trial Conferences and formulation of Pre-Trial Minutes and costs for actual attendances to Pre-Trial Conferences;
 - 3.5. The costs of all travel and accommodation expenses incurred in respect of all the medico-legal attendances;
 - 3.6. The costs for preparation for trial for attorney; and
 - 3.7. The reasonable costs of consultation with counsel and experts for trial purposes;
 - 3.8. The Plaintiff is declared a necessary witness for trial purposes and is entitled to his reasonable travelling expenses inclusive to attend to trial; and
 - 3.9. The costs of all subpoena'd witnesses in attending to trial.

4. Should the Defendant fail to pay the Plaintiff's party & party costs as taxed or agreed with 14 (fourteen) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at a rate of 10.25% per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.
5. The Defendant shall pay the agreed or taxed party & party costs, within the period of 30 (thirty) days from taxation along with all interest incurred, into the trust account of the Plaintiff's Attorneys of Record, Messrs Gildenhuis Malatji Inc, ABSA Bank, Brooklyn Branch, Account Number [4...], Branch Code 335345 under Reference: [G...]
6. There is a normal fee agreement between the Plaintiff and the Plaintiff's Attorneys and Plaintiff's Attorney will be rendering a normal A&C Fee bill of cost at conclusion of the matter.

C.P. RABIE J

Counsel obo Plaintiff: Adv. Adrian Vaster (082 922 0537) - Gildenhuis Malatji Inc.

Counsel obo Defendant: Adv. Dolf Mosoma (082 075 6296) - State Attorney, Pretoria.

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