

SOUTH AFRICA / JUDGMENT

# Steenbergen and Others v Minister of Safety and Security (1071/2003, 1072/2003) [2011] ZAFSHC 132 (21 July 2011)

[2011] ZAFSHC 132

## COURT

Free State High Court, Bloemfontein

## BEFORE

P.U. Fischer

## CASE / FILE NUMBER

1071/2003, 1072/2003

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 1071/2003

1072/2003

In the matter between:

H W STEENBERGEN .....First Plaintiff

Z J CILLIERS .....Second Plaintiff

J J A HILLS .....Third Plaintiff

G J DE BEER .....Fourth Plaintiff

N F VAN ZIJL .....Fifth Plaintiff

J N MEYER .....Sixth Plaintiff

M A MYBURGH .....Seventh Plaintiff

and

THE MINISTER OF SAFETY &amp; SECURITY .....Defendant

**JUDGMENT:**

FISCHER, AJ

HEARD ON: 31 JANUARY, 1,2,3,4,8,9,10,11 FEBRUARY and 5 MAY 2011

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DELIVERED ON: 21 JULY 2011

- [1] The plaintiffs, in two separate actions, claimed damages from the Minister of Safety and Security, arising out of their alleged unlawful arrest, detention, malicious prosecution and defamation. The two actions were subsequently consolidated and an order made in terms of High Court Rule 33(4) to the effect that all proceedings relating to the determination of quantum be stayed until the question of liability had been disposed of.
- [2] The trial then proceeded before Kruger, J who, after hearing evidence over a five day period, dismissed the plaintiff's claims for malicious prosecution and defamation but found in favour of the plaintiffs as regards the unlawful arrest and detention and made the following order:

*"1. The arrest and detention of all the plaintiffs was unlawful.*

The plaintiff's claims for malicious prosecution and defamation are dismissed.

Defendant is ordered to pay the plaintiffs' costs to date."

- [3] For reasons that are irrelevant for purposes hereof, Kruger J played no further role in the proceedings and the remaining question relating to the determination of damages was finally dealt with before me some five years later. The inordinate delay in the finalisation of the case resulted from postponements which I will deal with later as they have cost implications which need to be addressed.
- [4] The damages claimed by the seven plaintiffs arising out of the unlawful arrest and detention vary from R1 250 000,00 to R2 000,00. As I see it, the correct approach to the assessment of damages for unlawful arrest and detention is to have regard to all the relevant facts and circumstances of the case and then to determine the quantum of damages with reference to such facts and circumstances which will include, inter alia, the age, sex, status, culture and life style of a particular plaintiff, the plaintiff's social and professional standing as well as the circumstances, nature and duration of the arrest and detention and the publicity given thereto. This however must not be regarded as an exhaustive list of relevant facts and circumstances as such will differ from case to case. (See MINISTER OF SAFETY AND SECURITY v SEYMOUR 2006 (6) SA 320 (SCA) at 325 para 17; RUDOLPH ROELOF AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009 (5) SA 94 (SCA) at 102 – 103, para [26] – [29]; MINISTER OF SAFETY AND SECURITY v TYULU 2009 (5) SA 85 (SCA) at 93, par [26]; RAMAKULUKUSHA v COMMANDER, VENDA NATIONAL FORCE 1989 (2) SA 813 (VSC) at 847, par G – H.
- [5] Practical considerations dictate that each of the seven plaintiffs be dealt with individually but that where facts and circumstances overlap they be dealt with jointly for ease of reference.

[6] The relevant facts of the case are by no means complex and by and large not in dispute. With the exception of the late G J de Beer (he passed away pursuant to which the executrix in his deceased estate was substituted as plaintiff in his place and stead), the other six plaintiffs were all members of the South African Police Services stationed at Frankfort in the Free State Province at the time of their unlawful arrest and detention. Superintendent Steenbergen (Steenbergen) was the Station Commander at Frankfort Police Station, Captain Van Zyl (Van Zyl) the second in command and the head of the detective branch at Frankfort Police Station whilst Cilliers, Myburgh and Hills were Inspectors and Meyer a Sergeant stationed at the Frankfort Police Station. The late De Beer (De Beer) was at the time in the employ of the Mafube Municipality in Frankfort.

[7] Kruger J found that early in April 2002 all the plaintiffs were arrested by employees of the defendant acting in the course and scope of their employment with the defendant. All the arrests were made without warrants. The plaintiffs were arrested on the following dates:

Steenbergen, Cilliers and De Beer on 3 April 2002;

Hills, Meyer and Myburgh on 5 April 2002; and

Van Zyl on 8 April 2002.

Steenbergen, Cilliers and De Beer appeared in the Magistrate's Court in Frankfort on 4 April 2002 where the Magistrate issued a detention order pending their bail application on 9 April 2002. Hills, Myburgh and Meyer appeared in the same Magistrate's Court before the same Magistrate on 8 April 2002 where a similar detention order was issued. All the plaintiffs, except Cilliers, were released on bail on 9 April 2002. Cilliers was finally released on bail on 17 April 2002 following a bail appeal to the High Court in Bloemfontein.

[8] The undisputed facts and circumstances as well as those not seriously challenged by Mr Notshe, who appeared on behalf of the defendant, may be summarised as follows with regards to each plaintiff:

Cilliers: He was a 33-year-old Superintendant stationed at Frankfort Police Station when he was arrested at his home at approximately 7:45 on the morning of 3 April 2002 by several heavily armed members of the South African Police Services, carrying R5 assault rifles, shotguns and pistols. The manner in which he was arrested at his home caused pandemonium as his mother-in-law not only became involved in a confrontation with members of the police services but in addition thereto, his small children shouted hysterically all the while. His hands were tightly hand-cuffed behind his back and he was taken in a convoy of police vehicles to the Frankfort Police Station. Steenbergen had already been arrested and accompanied him in one of the other police vehicles. At the Frankfort Police Station, he was taken out of the police vehicle and made to stand on the pavement for several minutes in full view of many onlookers and local residents whom he knew. Shortly thereafter the convoy left Frankfort and drove to Phuthaditjhaba (by this stage De Beer had also been arrested and accompanied Cilliers and Steenbergen in separate vehicles in the same convoy).

- [9] At Phuthaditjhaba, some 180km from Frankfort, Cilliers was initially held in a holding cell at the Phuthaditjhaba Police Station, which can only be described as a cage consisting of horizontal and vertical iron bars, in full view of all persons entering and leaving the charge office. He was thereafter stripped of his belt and shoe-laces and taken to a cell holding approximately 20 other detained and awaiting trial prisoners. He described the other cellmates as hardened criminals who all the while smoked dagga and were frequently supplied with more thereof by members of the police services stationed at the police station. He suffers from asthma and at all times had great difficulty breathing because of the dagga smoke, which irritated his lungs. Soon after his arrival in the cell he was forced by the other cellmates to strip naked whereupon his clothing was searched for money and other valuables. The cell was described as unhygienic, dirty and stinking with an open toilet wherein inmates relieved themselves from time to time in full view of others using a blanket in the process, as there was no toilet paper. Cilliers was unable to physically relieve himself because of the atrocious conditions and later on unable to sleep, as no mattresses were available whilst a limited number of filthy smelly blankets were provided.
- [10] He identified three individuals in the cell as clearly occupying leadership positions and they proceeded to interrogate him as to the reasons for his detention. He consequently and throughout his detention in the cell feared for his life and was unable either to eat or sleep. The following morning he was advised that he would be taken to court whereupon several of the other cellmates proceeded to “groom” him by combing his hair with a communal comb and obliging him to brush his teeth with a communal toothbrush. He felt obliged to play along with the charade, as he all times feared that he would be assaulted if he did not do so. There was only cold water in the cell and he was unable to shower. During the morning of 4 April 2002 he was eventually removed from the cell and placed in an overloaded police vehicle full of other detainees and awaiting trial prisoners, one of whom was obliged to sit on his lap during the trip. He was taken to the Phuthaditjhaba court cells where he was once again detained in the company of several dagga smoking cellmates for a number of hours. Toward midday on 4 April 2002 he was eventually taken from the Phuthaditjhaba court cells and returned to the Phuthaditjhaba Police Station shortly whereafter he, in the company of Steenbergen and De Beer was brought in a convoy of police vehicles to Frankfort. He does not know, nor was he ever advised as to the reason for his removal to the Phuthaditjhaba court cells for several hours earlier in the morning. He, Steenbergen and De Beer were thereafter brought before the Magistrate just after 14:00 who, approximately one hour later, issued a detention order in terms of section 50(1) of the Criminal Procedure Act, 51 of 1977, pending their bail application, which had in the interim been scheduled for 9 April 2002. The three were thereafter taken to the Tweeling Police Station where they were held in similar appalling conditions with another detainee whose arrest and detention Cilliers had been instrumental in procuring several days earlier. On 9 April 2002 Cilliers was refused bail and ordered by the Magistrate to remain in custody as a result of which he suffered a nervous breakdown and, following upon the intervention of a medical doctor, taken to a clinic in Frankfort where he was held under police guard. On Friday, 12 April 2002 the

Magistrate in Frankfort ordered that Cilliers be transferred for observation to a hospital in Klerksdorp, but in contravention of the order, he was held over the weekend at Kroonstad Prison, once again in appalling circumstances. He was eventually taken to Klerksdorp on Monday, 15 April 2002 where he was detained overnight in the Klerksdorp Prison in circumstances where he was exposed to assaults including sodomy by certain cellmates on others. In the early hours of Tuesday, 16 April 2002 he was instructed by cellmates to polish the cell floor and verbally abused and insulted in the process. He was finally taken to the Klerksdorp Hospital on Tuesday, 16 April 2002 where he for the first time saw his wife and children and was released on bail on 17 April 2002 following upon a successful bail application.

- [11] Mr Van der Merwe, who appeared on behalf of all the plaintiffs, sought throughout the proceedings to canvas, in detail, evidence as to the circumstances in which especially Cilliers, and to a lesser extent Steenberg and De Beer were detained after the Magistrate in Frankfort had issued the further detention orders during the afternoon of 4 April 2002. A significant amount of court time was taken up with evidence relating to the state of their personal relationships, their subsequent dismissal from the South African Police Services and the present state of their mental health, in an obvious attempt to attribute all this to the unlawful arrest and detention. Although it is common cause that none of the plaintiffs are still members of the South African Police Services and that all of them, except Cilliers, were dismissed following subsequent internal disciplinary hearings relating to the criminal charges in which they were all implicated, there is no factual basis on which I am able to find that the unlawful arrest and detention as such led to their dismissal from the South African Police Services. From the evidence, as corroborated by exhibit "A", being a bundle containing copies of newspaper clippings and exhibit "C" dealing with recordings of TV broadcasts, both of which were agreed upon between the parties and handed in as exhibits, it is clear that the arrests and detention not to mention the subsequent bail applications and later criminal proceedings, attracted wide local and national news coverage. These facts will not be lost sight of during the assessment of damages.
- [12] Cilliers, as well as the other plaintiffs, were all, some several years after the unlawful arrest and detention, subjected to psychiatric evaluation by a Dr J P Grobler who was called to testify as an expert on behalf of the plaintiffs. He conceded during his testimony that it would be very difficult if not impossible to prove and accept that the psychiatric conditions which presently manifest themselves were caused solely by the unlawful arrest and unlawful period of detention and not by the subsequent stressful and traumatic events and circumstances. Halfway through his cross-examination by Mr Notshe, on behalf of the defendant, the matter was adjourned whereafter exhibit "F" was, by agreement between the parties, handed into court containing a summary of the psychiatric evidence which was no longer in dispute. In short exhibit "F" recorded that it had been agreed between the parties that all the plaintiffs had sustained "significant distress including distressed emotions as a result of the arrest and detention". The exhibit furthermore recorded that the individual plaintiffs presented with conditions ranging from

mood disorder and major depressive disorder through to alcohol abuse and anti-social personality disorder traits. Of importance is one of the concluding paragraphs which records that:

*“3. The arrest and detention is not the sole cause of the present conditions of the plaintiffs.”*

[13] Cilliers was diagnosed as suffering from “mood disorder not otherwise specified and alcohol abuse” and I have no doubt whatsoever that he, like the other plaintiffs, not only experienced what can only be described as excruciating stress, anxiety, humiliation and embarrassment, but was furthermore severely traumatised by the arrest and detention. He, like the other plaintiffs, is in the final analysis however only entitled to compensation for the unlawful arrest and detention. In the case of Cilliers, as with Steenberg and the late De Beer, this unlawful act on the part of members of the South African Police Services in the employ of the defendant, endured from approximately 7:30 on 3 April 2002 to approximately 15:00 on 4 April 2002, that is some 32 (thirty two) hours. Their further detention at the behest of the Magistrate can not in the circumstances be deemed to be unlawful (see *ISAACS v MINISTER VAN WET EN ORDE* 1996 (1) SASV 314 (A) at 322, par [C] to 324, par [C]). Considering the further obvious stress, anxiety and trauma suffered by Cilliers after his further lawful detention at the behest of the Magistrate as from 4 April 2002 at approximately 15:00 and until his eventual release on bail on 17 April 2002, I am not convinced that his present ongoing mood disorder and alcohol abuse can be attributed solely, alternatively in any mathematically acceptable proportion to the period of unlawful arrest and detention.

(See *MINISTER OF SAFETY AND SECURITY v SEYMOUR* 2006 (6) SA 320 (SCA) at 326 par [21]). Dr Grobler conceded as much and I will approach the assessment of the damages on the basis of such concession, especially insofar as it relates to Cilliers, Steenberg and De Beer.

[14] Steenberg: At the time of his arrest and detention, Steenberg was the Station Commander in Frankfort, approximate 45-years-of-age and on leave at his residence. At approximately 7:30 he saw his wife off to work shortly whereafter he was confronted at his front door by two senior police officers, several heavily armed policemen and a convoy of police vehicles outside his front gate. He was advised that he was being arrested on suspicion of murder and that he was to dress warmly, whereupon he was escorted to his bedroom and obliged to dress in view of several police officers who refused to give him any privacy. He hands were tightly handcuffed behind his back and upon exiting his front door he noticed that several members of the South African Police Services were lying in the classic shooting position at strategic points under the shrubbery around his front garden with firearms pointed in his direction. He was taken with Cilliers to the Frankfort Police Station where he established that his wife was in the process of procuring the services of an attorney. Upon hearing of the possible involvement of an attorney, the police convoy spread off in the direction of Phuthaditjhaba where he was held for a short period of time in a similar cage-type cell to which Cilliers had referred to earlier. Shortly thereafter, he was taken to another police station at Tsetseng approximately 40km further away and locked in a

cell with 12 other detainees and awaiting trial persons. At all times he was most concerned about the possibility that the other cellmates might find out that he was a senior policeman and, in order to protect himself, told the cellmates that he was a well-to-do farmer. He, throughout his period of detention, feared for his life should his true identity be revealed. He too, like Cilliers, established that the cell in which he was being held was controlled by an identifiable leadership of detainees whose word was law. He was obliged to sleep on the floor with cellmates pressed tightly against him on both sides and, like Cilliers experienced a cold, stressful

and most anxious night fearing all the while that he would be sodomised. He together with Cilliers and De Beer, was taken back to Frankfort in a police convoy early in the afternoon of 4 April 2002 and at approximately 15:00 ordered to be detained at the behest of the Magistrate pending the bail application on 9 April 2002. I will accept for purposes hereof that the manner in which he was arrested and subsequently detained for approximately 32 hours must have inevitably caused him serious embarrassment and humiliation. I will furthermore accept that the arrest and detention caused him severe shock, mental anguish, stress and a subsequent degree of mood disorder referred to by Dr Grobler. These facts and circumstances were not seriously challenged by Mr Notshe on behalf of the defendant.

[15] De Beer: The late De Beer was employed at the Mafube Municipality at the time of his arrest and detention at approximately 7:30 on the morning of 3 April 2002. In the absence of any serious challenge from Mr Notshe, I will accept for purposes of this judgment that De Beer was detained in similar circumstances and conditions as those referred to by Cilliers and Steenberg. He too was brought to court at Frankfort during the afternoon of 4 April 2002 and subsequently detained at the behest of the Magistrate at approximately 15:00 until 9 April 2002 on which date he was released on bail. Mr Notshe did not challenge the evidence by Cilliers that De Beer had advised him that he too had been taken to another Police Station in Phuthaditjhaba where he was detained in a cell with several other detainees and awaiting trial prisoners and that this caused him extreme anxiety. According to Cilliers he blamed his subsequent divorce on the arrest and detention as his wife, who was employed as a senior state prosecutor at the Magistrates Court in Heilbron, was, in the circumstances, not prepared to continue with the marriage. There is no doubt in my mind that the experience was throughout the period of unlawful arrest and detention most traumatic for De Beer and caused him a high level of stress. I will accept for purposes hereof that the late De Beer must have suffered embarrassment, serious shock and concomitant mental anguish which remained with him for some period thereafter. I will furthermore accept that he was detained for approximately 32 hours.

[16] Hills: At the time of his arrest and detention at approximately 20H00 on 5 April 2002, Hills was a 29-year-old Inspector stationed at the Frankfort Police Station. He was phoned by one of the Investigating Officers and subsequently accompanied by his attorney to the Tweeling Police Station where he was formally arrested and detained. He was held alone in a cold, uncomfortable and dirty cell at the Tweeling Police Station where he was offered food which

he says, he had difficulty eating. Later during the weekend he was joined by one of the other plaintiff's Meyer and on Sunday, 7 April 2002 they were both allowed to visit Cilliers, Steenberg and De Beer who were at that stage being held in a cell close-by at the same Police Station. He testified that he was, shortly before his arrest, instrumental in the arrest of an armed robbery suspect who was at that stage also being held at the Tweeling Police Station in an adjoining cell. During the week-end he established that this armed robbery suspect knew of his presence in the police cells and that at some stage during Sunday the suspect shouted to the police officers in attendance to afford him access to Hills as he wished to sodomise him. On Monday, 8 April 2002 at approximately 11H00 he, Myburgh and Meyer were taken to the Frankfort Magistrate's Court where they too were formally detained at the behest of the Magistrate until the bail application

the following day, being the 9 April 2002. He was subsequently released on bail.

[17] For purposes of this judgment, and having regard to the clear distinction to be drawn between unlawful and lawful arrest and detention (see ISAACS-case supra at page 321, par e and further) I will accept that Hills was unlawfully detained from approximately 20H00 on 5 April 2002 until approximately 11H00 on 8 April 2002, being approximately 63 hours. I will furthermore accept that Hills was most severely traumatised and stressed by the whole experience and that the arrest and detention caused him shock, embarrassment, mental anguish and a degree of subsequent depressive disorder as referred to by Dr Grobler.

[18] Myburgh: At the time of his arrest, Myburgh was a 30-year-old Inspector stationed at the Frankfort Police Station. He was arrested at his home at approximately 19H00 on 5 April 2002 whilst in the process of entertaining friends and family with a barbeque. The arrest took place in full view of his friends and family, including his 3-year-old daughter. He was taken to the Frankfort Police Station and shortly thereafter transferred to a holding cell in Bethlehem where he was detained with several other detainees and awaiting trial prisoners, many of whom were clearly intoxicated. He was subsequently placed in a cell with approximately 30 other detainees

where he established that a gang known as "the dogs of war" controlled all the detainees in the cell. The policemen who placed him in the cell went so far as to inform the other cellmates that Myburgh was a policeman which made him fear for his life throughout his time spent in the cell. He was held at the Bethlehem Police Station for the entire week-end where he constantly feared for his well-being and life as the apparent gang leaders in the cell initiated assaults and sodomy on certain other cellmates from time to time throughout his period of detention. Early during the morning of 8 April 2002 he was taken from Bethlehem to Tweeling Police Station where he subsequently joined up with Hills and Meyer. At approximately 11H00 on 8 April 2002 he was ordered by the Magistrate of Frankfort to be detained pending the bail application scheduled for 9 April 2002. I will accept for purposes of this judgment that he was not only detained for approximately 64 hours but furthermore that the experience was, throughout the period of unlawful attention, most traumatic and distressing and it cannot be doubted that the arrest and detention caused him serious shock, embarrassment, mental anguish, as well as a degree of what

has been identified as an anti-social personality disorder and alcohol abuse as testified to by Dr Grobler.

[19] Meyer: At the time of his arrest, Meyer was a 30-year-old Sergeant stationed the Frankfort Police Station. At approximately 20H00 on 5 April 2002 he was contacted by his brother, who was also a police officer, and advised that he had been tasked to arrest him by the Investigating Officer in the criminal case. He was shortly thereafter arrested by his brother in the presence of his elderly parents, his wife and his small children whereupon he was taken by his brother to the Frankfort Police Station. Shortly thereafter he was taken by another police officer to the Tweeling Police Station where he was initially locked up alone in the cell and subsequently joined by Hills.

[20] He testified that the conditions he experienced were as bad as those testified to by the other plaintiffs. This evidence was not seriously challenged by Mr Notshe on behalf of the defendant. On Monday, 8 April 2002 at approximately 11H00 he, together with Myburgh and Hills was ordered to be detained at the behest of the Magistrate pending the bail hearing on 9 April 2002. For purposes of this judgment I will accept that he was arrested and subsequently unlawfully detained for approximately 63 hours in circumstances which must not only have been traumatic and stressful but furthermore must have caused him serious shock, embarrassment, mental anguish and, as testified to by Dr Grobler, a degree of subsequent major depressive disorder and alcohol abuse.

[21] Van Zyl: At the time of his arrest and detention, Van Zyl was a Captain stationed at the Frankfort Police Station and served in such capacity

as the commander of the detective branch. Before his arrest he was on holiday in the Kruger National Park where he received information as to what was transpiring back home in Frankfort. He was requested by a senior Superintendent to cut short his holiday and return to Frankfort as soon as possible, which he did. He was shortly after his arrival arrested at the Frankfort Police Station at approximately

7:30 on the morning of 8 April 2002 in the presence of several of his colleagues. He was in the past rewarded by the South African Police Services for outstanding police service and frequently praised in the past for his investigative skills. He holds a tertiary degree and specialised in policing and accounting responsibilities, was clearly very ambitious and by and large regarded as having a very bright future in the police services. He too, like all the other plaintiffs, accept Cilliers, was released on bail at approximately 15H00 on 9 April 2002 and I will accept for purposes hereof that he was unlawfully detained for approximately 31 hours. I will furthermore accept that the arrest must have caused him serious shock, embarrassment, trauma, mental anguish and disappointment and, as testified to by Dr Grobler a degree of subsequent depressive disorder. All the criminal charges giving rise to the unlawful arrest and detention were subsequently withdrawn against him before the criminal trial proceeded.

- [22] I am mindful of the fact that the assessment of awards for general damages with reference to awards made in earlier cases is “fraught with difficulty” as each case falls to be analysed with reference to its own particular facts and circumstances, which seldom, if at all, compare directly with those in another case. Earlier cases are regarded as a useful guide as to what has been considered to be appropriate in the past, but such earlier cases quite clearly serve no greater purpose than that. (See the SEYMOUR-case supra at page 325, par [17]).
- [23] It goes without saying that a simple mathematical extrapolation from the award in an earlier case to the present one with reference to the period of unlawful detention would be inappropriate as the conditions of unlawful detention vary from case to case and would as such have a direct bearing on the assessment of the quantum. (See VAN RENSBURG v THE CITY OF JOHANNESBURG 2009 (2) SA 101 (WLD) at 110H – I.)
- [24] In addition to the facts and circumstances which are relevant to this case I am furthermore guided by two further overriding principles namely:
- (1) The need to insure that the awards reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed;
  - (2) The need not to be extravagant in compensating the loss (See MINISTER OF SAFETY AND SECURITY v TYULU 2009 (5) SA 85 (SCA) at 93, par [26] and SEYMOUR-case supra at 325, par [17], and OLIVIER v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009 (3) SA 434 (WLD) at 446D – E.)
- [25] In considering all the relevant facts and circumstances, Mr Van der Merwe, on behalf of the plaintiffs, argued that I should furthermore take into account the following:
- (a) The fact that there was an “ulterior motive” on the part of the arresting officers when arresting the plaintiffs which amounted as such to “malicious” detention; and
  - (b) The deep emotional and psychological scars left on the plaintiffs almost ten years later.

It is common cause that not only were the criminal charges giving rise to the unlawful arrest and detention withdrawn against one of the plaintiffs (Van Zyl), but in addition thereto that all the other plaintiffs were acquitted at the close of the state’s case in the criminal prosecution which initiated their original unlawful arrest and detention. Kruger, J in his judgment on the merits found that the detention “shows that there was an ulterior motive with the arrest” (see the unreported judgement, case number 1071/2003 and 1072/2003 at page 41, par [100]). Unlawful arrest and malicious prosecution fall to be distinguished as both have their own set of requirements (See RELYANT TRADING PTY LTD v SHONGWE AND ANOTHER [2002] 1 ALL SA 375 (SCA) at 377, par [4] – 378, par [6]). Kruger J dismissed the claim for malicious prosecution and in the context thereof, and in the absence of any facts and evidence to the contrary, I am unable to find that the arrests and detention were as such malicious. I will accept for purposes of the assessment of damages that an ulterior motive prevailed but that it cannot be taken any further than that. As regards the deep emotional and psychological scars which to this day (some 10 years

later) still manifest themselves, Mr Van der Merwe conceded that the expert Dr Grobler was unable to claim with any degree of conviction that the sole cause of the present manifestation could be attributed to the unlawful arrest and detention (See paragraph 3 of exhibit “F” referred to earlier).

- [26] Nugent JA dealt in detail with earlier awards and the extent to which such could be used as a useful guideline in the present case. What is clear is that earlier cases should be approached with caution (See the SEYMOUR-case supra at page 325 para [18] – 326 para [19].)
- [27] Having given due consideration to all the relevant facts which have been canvassed above, the nature and periods of unlawful detention and awards made in earlier cases (see SEYMOUR-case supra at 326, par [19], VAN RENSBURG-case supra at 110H – J, OLIVIER-case supra at 445H – 446F, the TYULU-case supra at 92, par [24] – 93, par
- [27] and the RUDOLPH-case supra at 102, par [26] – 103, par [29]) and, mindful of the need to jealously guard against the incursions upon and loss of personal liberty whilst at the same time not being extravagant in compensating such loss, I believe that the following amounts would be fair to both the plaintiffs as well as the defendant. It is however necessary to distinguish Cilliers, Steenberg, De Beer and Myburgh from the other plaintiffs as they were detained in appalling circumstances and, but for De Beer, contrary to police standing orders. They were not held alone but with other detained and awaiting trial persons and in the circumstances and in addition to the degradation that was inherent in having been arrested and detained, these four plaintiffs also feared for their

lives throughout their respective periods of detention. I am of the view that the extreme incursions upon their personal liberty, as compared to the other plaintiffs, need to be reflected in the respective awards (See SEYMOUR-case supra at 325I – 326A):

- (1) Cilliers, Steenberg and De Beer who were detained for approximately 1½ days, but in appalling circumstances – R120 000,00 each;
  - (2) Hills and Meyer who were detained for approximately 2½ days but alone – R160 000,00 each.
  - (3) Myburgh who was also detained for 2½, days but in appalling circumstances – R180 000,00.
  - (4) Van Zijl who was detained for approximately 1½ days, but alone – R90 000,00.
- [28] I am furthermore in agreement with Mr Van der Merwe that this court should have regard to section 2(A) of the Prescribed Rate of Interest Act, 55 of 1975, which was introduced on 5 April 1997 and relates to the recovery of interest on unliquidated debts. As I see it the court has a discretion in fixing the date from which interest is to run so as to give effect to its own view on what is just and equitable in all the circumstances and furthermore that the whole question of onus plays no role in such exercise (See ADEL BUILDERS PTY LTD v THOMPSON 2000 (4) SA 1027 (SCA) at 1032, para [14] and [15]). The inordinate delay in finalising the whole matter, bearing in mind that Kruger J’s judgment on the merits was delivered on 20 July 2006, was to my mind brought about by two factors, namely:

- (a) The unsuccessful attempts by the defendant to firstly apply for leave to appeal Kruger J's judgment and thereafter to petition the Supreme Court of Appeal; and
- (b) The failure of the defendant to be fully prepared for trial on no less than 2 previous occasions when the matter had been enrolled for trial.

[29] Following upon the unsuccessful attempt by the defendant to petition the Supreme Court of Appeal regarding Kruger J's judgment, this case was initially enrolled for trial for a 5-day period as from 27 January

2009. On 27 January 2009 the matter was postponed sinne die and the defendant ordered to pay the wasted costs on the scale as between attorney and client, which costs included the costs attendant

upon the obtaining of the services of expert witnesses. It is common cause that the defendant's problem in January 2009 was that it had failed to adequately deal with and/or prepare for trial especially insofar as it related to the envisaged expert testimony to be presented on behalf of the plaintiffs. The matter was once again enrolled for trial more than a year later and for a 10-day period as from 8 March 2010. As late as 18 January 2010 a notice was served by the legal representatives of the defendant on plaintiff's legal representatives in terms of High Court Rule 36, requiring the plaintiffs to submit themselves for a medical examination which

*"...shall take place on 10 February 2010 to 16 February 2010 at Care Cure Clinic ... at 17H00."*

A notice in terms of High Court Rule 36(3) was filed on behalf of the plaintiffs wherein defendant's notice in terms of High Court Rule 36 was objected to on various grounds, inter alia that the notice was vague, that it failed to provide any detail concerning the proposed medical examination and that it failed to provide and specify the nature of the proposed examination. It is common cause that all the plaintiffs, except the late De Beer, arrived for the medical examination under the impression that they would be examined on a daily basis over a 6-day period as from 17H00 each day and that they were completely unprepared to be booked into the clinic for the six day period as was envisaged on behalf of the defendant. As a result of this reality, the defendant realised that it would not be ready for trial some one month later, having regard to the time constraints relating to the filing of expert notices and summaries, and the matter was once again postponed with an order to the effect that costs stand over for later deliberation. The undisputed facts were fully canvassed before me with reference to exhibit "E" being a bundle of correspondence between the attorneys of record dealing with the whole problem and what is quite clear there from is that the defendant's legal representatives simply failed, for more than a year, to apply their minds to the whole question of the expert testimony, which plaintiffs' legal representatives intended canvassing. The summary of expert testimony that the defendant sought to rely on clearly shows that such was only prepared after the postponement in March 2010, which, per se, supports Mr. Van der Merwe's contention that I should seriously consider a punitive costs order relating to such postponement. I am guided in this regard not only by the leading case of *NEL v WATERBERG LANDBOUWERS KO-OPERATIEWE VEREENIGING 1946 AD*

397, but in addition thereto the following two factors, namely:

The defendant was to blame for both the 2009 and 2010 postponements; and

In 2009 the court saw fit to make a punitive costs order.

In the circumstances, I am of the opinion that interest on the damages awarded is to run from the date of service of the summons on the defendant.

I furthermore find that the defendant is to be held liable for the wasted costs occasioned by the postponement in March 2010 on the scale as between attorney and client.

[30] Mr. Van der Merwe requested the court to consider a further punitive costs order relating to the wasted costs of the first day of trial being 31 January 2011 on the basis that the trial could not proceed as a result of the unavailability of an interpreter whom Mr. Notshe, on behalf of the defendant, required so as to assist him with the interpretation of the plaintiffs' testimony, which was to a large extent delivered in the Afrikaans vernacular. I am mindful of the provisions of High Court Rule 61 and the distinction to be drawn between sub-rules (1) and (3) thereof. I have given serious consideration to Mr. Van der Merwe's suggestion in this regard, but have decided, in view of the sorry and unacceptable state in which the court file was presented to me, that the matter was in any event not "ripe" for trial on 31 January 2010 for which the plaintiffs as dominus litis are to blame (See Rule 4 of the Free State High Court Rules of Practice applicable as from 1 August 2007). I find that both parties are to blame for the wasted day and in the circumstances I make no costs order as regards the wasted costs of 31 January 2010. On 5 May 2011 counsel for the parties requested that further written heads be filed by the end of May 2011 and this was acceded to hence the delay in making the order.

[31] I accordingly make the following order:

1.1 The plaintiffs Cilliers, Steenberg and the estate of the late De Beer are awarded damages in the sum of R120 000,00 each;

1.2 The plaintiffs Hills and Meyer are awarded damages in the sum of R160 000,00 each.

1.3 The plaintiff Myburgh is awarded damages in the sum of R180 000,00.

1.4 The plaintiff Van Zijl is awarded damages in the sum of R90 000,00.

2. The defendant is to pay interest on the aforementioned amounts at the rate of 15,5% per annum calculated as from 28 March 2003 (being the date of service of both the summonses).

3. The defendant is ordered to pay the following costs:

3.1 The costs occasioned by the postponement of the matter during March 2010 on the scale as between attorney and client.

3.2 The costs of suite – excluding the costs of 31 January 2011.

4. The defendant is ordered to pay the costs of the experts employed by the plaintiffs being Drs. Louw, Meiring and Grobler, including their qualifying and preparation fees.

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P.U. FISCHER, AJ

On behalf of plaintiffs: Adv. M.P. van der Merwe

Instructed by:

Lovius Block Attorneys

BLOEMFONTEIN

On behalf of defendant: Adv. S.V. Notshe SC

State Attorney

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