

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: EAST LONDON**

CASE NO. EL 573/2017

ECD 1473/2017

REPORTABLE

In the matter between:

ABDULLAH KHALIFA JUMA

Plaintiff

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Defendant

JUDGMENT

GRIFFITHS, J.

[1] The plaintiff in this matter has sued the defendant (Minister of Justice and Constitutional Development) for damages arising from the alleged negligent conduct of the defendant's employees in failing to keep a complete and proper record of the

proceedings at his criminal trial, which resulted in his being incarcerated for an unduly lengthy period. As a consequence of this he has sued the defendant for damages in the amount of R5 million. The defendant has denied that he is liable for such damages on the basis that the failure to obtain the record timeously or at all was due largely to the negligent conduct of the plaintiff's own erstwhile attorney, and indeed the plaintiff himself.

[2] The background to this matter may be stated fairly briefly as has emerged both from the three appeal court judgments which have been placed before me together with the evidence of the plaintiff himself, who was the sole witness to testify in his case. The plaintiff was convicted on 30 September 2010 by the Regional Magistrate, East London, of contravening section 5(b) of the Drugs and Drugs Trafficking Act (140 of 1992) and was sentenced to a period of 15 years imprisonment of which 3 years imprisonment was suspended for a period of 5 years. He was granted leave to appeal against both conviction and sentence and the matter initially came before Alkema J (sitting with Roberson J) during November 2012. Apparently there was no proper record before the appeal court. According to the judgment of Alkema J, substantial parts of the record were missing which were “...*prima facie... material to a proper adjudication of the appeal*”. Accordingly, the matter was unable to proceed before that court and it was removed from the roll together with an order, in effect, that the Clerk of the Regional Court, East London, was to obtain the necessary tapes and to ensure that the full record was transcribed. In the event that such tapes were missing, a full report was to be placed before the court setting out in detail all the steps taken to trace them. Again, failing this, the court ruled that the Clerk of the Regional Court was to, in conjunction with the plaintiff's legal representative and the State, approach the presiding magistrate to obtain the necessary notes and to, jointly, reconstruct the record.

[3] It appears that very little was done in this respect and the matter again served before the appeal court resulting in the appeal being struck from the roll. Hartle J thereafter proceeded to give lengthy directions as to how the record was to be reconstructed making the point that very little had been done in this regard

particularly by the plaintiff's erstwhile legal representative. After the granting of this order it seems that, once again, not very much was done particularly by the plaintiff's attorney (a matter which the plaintiff himself agreed to under cross-examination) to source the necessary materials in order to either complete the record or to reconstruct it. The matter ultimately once again served before the appeal court on 21 September 2016. On this day, the appeal came before Lowe J (sitting with Bacela AJ) who stated that despite the lengthy directives given by Hartle J during 2013, *"... what has been placed before us now is just a series of documents and affidavits which, to cut a long story short, disclosed that in essence no progress has been made, the recordings cannot be resurrected, there is no possibility of reconstructing the record from the notes of either the prosecution or the defence, let alone the magistrate and the State now accepts that it is impossible to reconstruct this record in any form that would admit of the proper hearing of an appeal..."* That court accordingly upheld the appeal and dismissed the plaintiff's conviction and sentence.

[4] Based on these facts, the plaintiff has claimed that he remained incarcerated unlawfully due to the negligence of the defendant's employees. In this regard, he has alleged in his particulars of claim that:

"4. Defendant's employees (machine operator/stenographer) whilst acting in the course and scope of their employment failed to ensure that:

14.1 She/he maintained control of every recording at each court session during which evidence is mechanically recorded.

14.2 Kept a running legend of what was happening from moment to moment as the proceedings unfold, usually noted on a brown envelope so that the transcription of the proceedings at the relevant time can be produced in due course. A written record would therefore exist indicating who the relevant operators were on the contentious dates (these being 27 May 2008, 16 July 2008, 18 February 2009, 22 October 2009 and an undisclosed date on which

accused number 3 testified), and what their input was respectively.

14.3 The recordings were downloaded and stored”

[5] In addition to testifying to these facts, the plaintiff testified as to the fact that he had attempted to rectify the situation by writing to various entities such as the Law Society, the National Director of Public Prosecutions and the Public Protector. All of these proved unsuccessful. His own erstwhile attorney, on his evidence, was thoroughly unhelpful and stopped contacting him during or about 2013. He also testified extensively as to the harshness of the conditions whilst he was in custody.

[6] Upon the closing of the plaintiff’s case, I invited the defendant to apply for absolution from the instance based on the fact that, *inter alia*, the plaintiff had not established a causal connection between any negligence which may have been attributable to the employees of the defendant, and the damages he suffered as a consequence of his incarceration. In this regard, Mr Mageleni (who appeared on behalf of the plaintiff) sought to argue that this case was on equal footing with that of ***Alves v LOM Business Solutions (PTY) LTD and Another***¹. In that case, Willis J (as he then was) awarded damages to the plaintiff as against the second defendant in that matter (The Minister of Justice and Constitutional Development) due to an unduly lengthy period of incarceration resulting from the fact that there had been a delay on the part of the defendant’s employees in producing the necessary transcript on appeal. It was indeed conceded in that matter that the second defendant owed a duty to the plaintiff to ensure that records were prepared for the hearing of an appeal within a reasonable time. When, ultimately, the record was finally produced, it served before the appeal court and the appeal was upheld, the conviction and sentence being set aside.

[7] It will immediately be seen that the facts in the *Alves* matter are entirely distinguishable from the present. In that matter, the record was indeed produced and

¹ 2012 (1) SA 399 (GSJ)

it established that the trial court was incorrect in convicting the plaintiff and that such conviction and sentence stood to be set aside on appeal. In the present matter, up to this day, the full and proper transcription of the trial in the Regional Court has never surfaced.

[8] As I have indicated, the paramount question to be decided in assessing whether or not the application for absolution from the instance should be granted is whether the plaintiff has established, or whether it could ever be established, that there is a causal connection between the damages suffered by the plaintiff (by way of his lengthy incarceration) and the failure on the part of the defendant's employees (insofar as they were indeed employees of the defendant – another matter which has not as yet been established) to keep a true and proper recording of the trial in the lower court.

[9] The manner in which a court is to assess causation in a delictual setting was addressed by Corbett CJ in the matter of *International Shipping Company Limited v Bentley*² as follows:

“As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the

² 1990 (1) SA 680 (A) at 700E – 701A; *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at para 35.

wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'. (See generally *Minister of Police v Skosana* [1977 \(1\) SA 31 \(A\)](#) at 34E - 35A, 43E - 44B; *Standard Bank of South Africa Ltd v Coetsee* [1981 \(1\) SA 1131 \(A\)](#) at 1138H - 1139C; *S v Daniëls en 'n Ander* [1983 \(3\) SA 275 \(A\)](#) at 331B - 332A; *J Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888A at 914F – 915H ...”

[10] The difficulty I have in this matter is with regard to the question of factual causation. As spelt out in the passage to which I have referred, in order to apply the test for factual causation one must make a hypothetical inquiry as to what probably would have happened but for the wrongful conduct of the defendant. In this matter, it is clear as to what this is. The court must mentally eliminate the alleged wrongful conduct (the alleged failure on the part of the defendant's employees to properly record and retain the record) and consider the position had this not occurred i.e. by substituting the lawful conduct of the production of the full and complete record of the lower court criminal proceedings. If the court can conclude on the evidence that has been placed before it by the plaintiff that, on a balance of probabilities, had the transcribed record of the proceedings in the lower court been placed before the appeal court, the appeal court would have upheld the appeal, then any proven negligence on the part of the defendant's employees would have been a *causa causans* of the plaintiff's ensuing damages for his incarceration whilst the appeal court waited for the transcribed record. If on the other hand the court cannot conclude on a balance of probabilities that had the transcribed record been placed before the appeal court it would have upheld the appeal, then indeed it has not been established that the alleged wrongful act was a *causa sine qua non* of the plaintiff's loss.

[11] On the evidence before me, it took two successive appeal courts, with stringent court orders, to try to rectify the record. This was never done. As appears from the judgment of Lowe J, it appears that for whatever reason the record has been lost and cannot be retrieved, or reconstructed. Indeed, he may well not have granted the relief he did had it been obtainable. In the circumstances, the plaintiff in this matter can never establish that, had the proceedings in the lower court been properly recorded and properly transcribed, the appeal court would have found that the conviction and sentence were improper, for whatever reason, and would have set them aside in the plaintiff's favour. The only vague evidence before the court is a brief statement by the plaintiff during evidence that he was innocent, which takes the matter nowhere. This being so, in my view the plaintiff has not established a causal connection between the alleged negligence of the defendant's employees and the loss suffered by the plaintiff.

[12] When this was pointed out to him, Mr Mageleni sought to avoid the consequences by submitting that, should he be given an opportunity to cross-examine the defendant's witnesses, the picture would change. He submitted in the alternative that the plaintiff should be given an opportunity to amend his particulars of claim. In my view neither of these avenues, if I were to accede to them, would assist the plaintiff. Cross-examination of any of the defendant's witnesses cannot result in the production of the record. Likewise, an amendment to the particulars of claim can never rectify this deficiency.

[13] As to the question of costs, it seems that the defendant is clearly the successful party. Whilst there might be some question mark as against the defendant's employees' conduct in not properly recording the proceedings and/or not retaining such record in its digital form or otherwise, this has not been established. Indeed, in my view the plaintiff's action was stillborn from the start and he ought to have been advised in this regard before incurring the costs of a defended action, including putting the defendant to the costs of an action which was taken all the way to trial.

[14] In the circumstances,

The defendant is granted absolution from the instance with costs.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF : Mr Mageleni

INSTRUCTED BY : M.O. Mageleni Attorneys

COUNSEL FOR DEFENDANT : Mrs Mtshizana-Canca

INSTRUCTED BY : The State Attorney

HEARD ON : 06 MAY 2019

DELIVERED ON : 07 MAY 2019