IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO : 09/21956

DATE:09/09/2011

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

....

In the matter between:

ANDREW ALVES Plaintiff

and

LOM BUSINESS SOLUTIONS (PTY) LIMITED First Defendant

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT Second Defendant

JUDGMENT

WILLIS J:

[1] The plaintiff has claimed damages by way of action. He has alleged that the defendants were negligent in preparing the transcript for his appeal hearing resulting in his having to spend a further, unnecessary period of incarceration. According to counsel and the attorneys for the parties this is, as far as they have been able to ascertain, the first case of its kind. I too am unaware of any claim of such a nature having been brought before. The second defendant is the Minister of Justice and Constitutional Development who has been nominally cited as the member of the National Executive with overall responsibility for the administration of justice in this country.

[2] The plaintiff, who had been indicted for murder, was convicted in the South Gauteng High Court (*per* Horn J) of attempted murder on 13 December 2005. The learned judge immediately granted leave to appeal. The appeal was directed to the "full bench" of this division. The appeal was heard on 29 February 2008. Judgment in the appeal was given on 5 March 2008. The appeal was successful. The plaintiff's conviction and sentence were set aside.

[3] The plaintiff claims that the long interval of time between the granting of the leave to appeal and the hearing thereof may be attributed to the negligence of the defendants in that they failed to ensure that an appeal record was prepared within a reasonable time. The plaintiff alleges that, as a result of the defendants' breach of their duty of care, he (the plaintiff) was incarcerated for longer than was reasonably necessary in the circumstances. This has given rise to the claim for general damages for psychological pain and suffering and loss of earnings. The plaintiff claims R3, 65 million as general damages and R153 800,00 for loss of income.

[3] The full canvas of the facts presents a complex picture. Looking at that canvas, a court does not readily feel sympathy for the plaintiff. It is common cause that

he, together with his co-accused, all white men, assaulted an innocent black man in the vicinity of 13 Krynauw Street in Boksburg during the night of Friday, 5 December 2003. These three men had left a braai at which a fair amount of liquor had been consumed in order to buy petrol. While they were away they committed the assault. They returned to the braai again and spoke to others present of their deed. The reason for the assault arises from the warped perception of the plaintiff and his co-accused as to the "collective guilt" of others. The business at which the plaintiff had been working had been robbed an armed gang of black men the previous day. The plaintiff decided that the robbery should be avenged by assaulting a black man. The plaintiff had described the robbers as "kaffirs". This is the sort of behaviour reminiscent of that of the Ku Klux Klan in the deep South of America more than 50 years ago.

[5] According to one of the plaintiff's co-accused in the criminal trial, the assault was vicious. The victim was hit with clenched fists. He was kicked with booted feet. His head was bashed against a tree trunk. Thereafter the plaintiff drove over the victim's legs with a vehicle. The plaintiff denied these details although he did admit to having assaulted a person on the night in question. The plaintiff's erstwhile girlfriend, Mariette Labuschagne had left the braai with one Hennie

Badenhorst to buy some cooldrinks. Although she did not see the actual assault, the saw the victim upon her return as well as the blood on the hands of the assailants. She also heard the plaintiff and his co-accused discuss the incident among themselves. Mariette Labuschagne was severely traumatized by the fact that the assault had taken place. She had telephoned her Aunt Daleen at 22h13 on 5 December 2003 for comfort and to seek advice. She had done so about ten to fifteen minutes after she had seen the injured victim. To do so she had used a borrowed cellular telephone. The telephone records reflect the call having been made at this time. The plaintiff was arrested on 6 December 2003. It seems that the plaintiff was arrested consequent upon a report which Mariette Labuschagne had given to the police. The plaintiff was later charged with murder. He remained in custody until the judgment in the appeal was handed down on 5 March 2008.

[6] The person whom the plaintiff is alleged to have assaulted died on 9 December 2003. Two difficulties loomed large for the State in the criminal trial: (i) was the person who died indeed the person whom the plaintiff assaulted and (ii) even if (i) was proven beyond reasonable doubt, did the deceased die as a result of his injuries? These issues relate to the chain of evidence with which all

lawyers will be familiar. The chain of evidence is of particular importance in criminal cases where the death of the victim is an element of the offence.

[7] The evidence of the State is that a severely injured man was seen by members of the Boksburg Police Services at the Boksburg charge office at 21h45 on 5 December 2003 and an ambulance summoned. According to the Boksburg Police records only one person was assaulted in the vicinity of that police station that night. The hospital records show that the person who died and whom the plaintiff is alleged to have assaulted was admitted to the Oliver Tambo Memorial at 21h40 on 5 December 2005.

[8] The State case had this insurmountable difficulty: the records at the Boksburg Police Station and the Oliver Tambo Memorial Hospital do not tally with the objective evidence as when Mariette Labuschagne made her telephone call to her aunt. The evidence points to the fact that the person whom Mariette Labuschagne had seen as the victim of the plaintiff's assault was neither the person who had been seen at the Boksburg Police Station on the night in question nor the person admitted to hospital who later died (and for whose death the plaintiff was charged with murder). The objective records at the police station and

the hospital preceded the objective evidence as to when Mariette Labuschagne saw the victim: the deceased would already have been in hospital at the time she saw the victim. Horn J said in his judgment:

> It is so that there are some discrepancies as to exactly what time the assault took place. However, it is understandable that in circumstances such as this where we have a moving situation, a situation where a lot of people have gathered to have a braai, where there were several incidents which occurred, people are not going to be accurate with the times of the events.

[9] Tshiqi J (as she then was) delivered the appeal judgment, with which judgment both Blieden and Saldulker JJ concurred. Tshiqi J pointed out that one could only begin to reconcile the different versions as to time if one could find that the hospital record of the time of the admission of the deceased person was wrong. There was no basis for doing so. Indeed, in the absence of convincing evidence that the hospital records were wrong, the principle of *omnia praesumuntur rite esse acta* (everything is presumed to have been done correctly) would apply: they must be accepted as being correct. It is true that Mariette Labuschagne and Hennie Badenhorst were taken to the Tambo Memorial Hospital to identify the victim on 7 December but, as Tshiqi J pointed out in her judgment, they would have had a fraction of time to observe the victim on 5 December 2003, in very

poor light indeed, Badenhorst contradicted himself in material respects as to what he had observed and the police had been highly suggestive that they were being taken to see and identify the victim.

[10] The State's difficulties were compounded by the fact that the evidence shows that the deceased contracted pneumonia after his admission to hospital and died as a result thereof. The assault may have contributed to the onset of the pneumonia but, according to the evidence, this cannot be certain. The hospital records show that after his admission, the deceased's condition improved quite dramatically. Suddenly, his condition took a turn for the worse. There is no record of the treatment he received after contracting pneumonia. It is thus not possible to rule out that the deceased had died as a result of a *novus causus interveniens*, the negligent treatment which he received at hospital. By reason of the difficulties which the State faced on the question of causation, Horn J found the plaintiff and his co-accused guilty of attempted murder rather than murder itself.

[11] The appeal court refrained from expressing any view on the correctness of the court's reasoning relating to the issue of causation because it considered that

it was bound to intervene because the question of whether the person who had died was the victim of the assault in question could not be determined.

[12] Upon conviction, the plaintiff was sentenced to 12 years' imprisonment of which nine years were suspended on certain conditions. As mentioned earlier, Horn J granted leave immediately. The plaintiff was thus convicted, sentenced and granted leave to appeal on 13 December 2005, approximately two years after the assault. Horn J refused the plaintiff's request for bail pending the appeal.

[13] The registrar of the High Court instructed "Sneller Verbatim" to transcribe the record on the trial proceedings on 9 January, 2006. He used a form J33 for this purpose. Sneller Verbatim were succeeded as the official court transcribers for the whole of the Gauteng Province by the first defendant, LOM Business Solutions (Pty) Limited, the official date of commencement being I June 2006. In actual fact, it took until October 2006 before the first defendant had taken over from Sneller Verbatim.

[14] The evidence of several witnesses, including Annette Leonard who had worked for Sneller Verbatim at the beginning of 2006, the chief registrar, the

plaintiff and one Lionel Greenberg who assisted the plaintiff makes it clear that the reason for the delay in preparing the record for the appeal lay in the fact that difficulties were experienced in locating certain documentary exhibits used during the trial. It was common cause, in the end, that transcribing the oral evidence given in the trial – which ran to about 1100 pages – should have taken a matter of weeks at most and not months. In other words, the transcript should have been ready by the end of the first term of 2006. Thereafter, everyone agreed that a date for the hearing of the appeal would have to be arranged. This should reasonably have occurred in the second term of 2006. Everyone also agreed that it would have been reasonable to have expected the appeal to have been heard either during the third or the fourth term of 2006.

[15] It so happens that the complete record of the trial hearing was made available by the first defendant to the registrar only on 7 October 2007, i.e. during the fourth term of 2007. As has been noted previously, the appeal was heard on 29 February, 2008, i.e. during the first term of 2008. The appeal was therefore heard a year to 15 months later than it reasonably should have been. In regard to the computation of 'reasonableness'. I have sought to apply the Constitutional

Court's decision in *Saunderson v Attorney-General, Eastern Cape*.[1] In that case Kriegler J referred with approval to the 'balancing test' in *Barker v Yingo*[2] which he described as 'seminal'.[3] By parity of reasoning, the plaintiff was kept in gaol for a year to 15 months longer than he should have been.

[16] The plaintiff gave a harrowing account of his time spent in gaol. He referred to the overcrowded conditions and generally unpleasant atmosphere that prevailed in prison. He described how he could not afford to pay for the transcript himself and had to rely on the State to do so. He described how he had repeatedly followed up his request for a transcript with both the transcribers and the office of the registrar even to the extent of making a nuisance of himself. He had also engaged the assistance of Lionel Greenberg, a person well known to the court and almost all officials in this building. Lionel Greenberg rendered this assistance free of charge. On his own admission, Greenberg made a nuisance of himself in championing the plaintiff's cause while he was in prison.

[17] The plaintiff is a qualified fitter and turner. He was born on 7 March 1977. Immediately before his arrest he was earning R1800,00 per week as a

[1] 1998 (2) SA 38 (CC) at paragraph [25]
[2] 407 US 514 (1972) at 530-2
[3] 1998 (2) SA 38 (CC) at paragraph [25]

maintenance fitter. Almost as soon as he was released after his successful appeal he was again employed as a maintenance fitter earning R2000,00 per week. He now runs his own business.

[18] I do not think the plaintiff has a claim against the first defendant. In the first place, the record should have been ready during the time when Sneller Verbatim were employed by the second defendant. Secondly, the delays related to the tracking down of missing documentary exhibits. It seems that both Sneller Verbatim and the first defendant had been diligent in attempting to track down these exhibits, even to the extent of attempting to enlist the assistance of an advocate who had been on private brief for one the plaintiff's co-accused. Thirdly, the first defendant credibly claimed that it did not get the support which it could reasonably have expected to have received from the second defendant – a fact objectively illustrated by the fact that it only received payment for the transcript in this matter on 18 December 2008 – more than a year after it was made available on 7 October 2007. Fourthly, it is the responsibility of the staff in the National director of Public Prosecutions' office – which falls under the aegis of the second respondent – to ensure that there are sufficient duplicate copies of documentary exhibits to cater for situations such as the one in question. The first

defendant fairly and correctly indicated that it would not seek an order for costs against the plaintiff in the event that the claim against the first defendant failed but succeeded against the second defendant.

[19] The second defendant has protested that Sneller Verbatim was not joined as a party to these proceedings. The right to object that other parties have not been joined is limited.[4] I am not sure that it can even be said that Sneller Verbatim has a direct and substantial interest in the issues involved.[5] In any event, the following factors are relevant: (i) the objection of non-joinder was raised late in the day; (ii) the evidence shows the reason for the delay is to be found in the fact that documentary exhibits were not located – the blame for which could not be placed at the feet of the transcribers, whoever they may have been; (iii) there does not appear to have been any registered legal persona known as "Sneller Verbatim", either at the office of the registrar of companies or close corporations and (iv) no one seems to know of any legal entity which traded as "Sneller

[4] See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 v(4) SA 212 (SCA) at paragraphs [64]-[66]; *Burger v Rand Water Board And Another* 2007 (1) SA 30 (SCA) at paragraph [30]; *Bowring N.O. v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) at paragraph [21].

[5] See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 v(4) SA 212 (SCA) at paragraphs [64]-[66]; *Burger v Rand Water Board And Another* 2007 (1) SA 30 (SCA) at paragraph [30]; *Bowring N.O. v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) at paragraph [21].

Verbatim". The non-joinder objection of the second defendant cannot, in the circumstances be sustained.

[20] Does the plaintiff succeed in his claim against the second defendant? Ms *Buthelezi*, who appeared for the second defendant, conceded that her client owed a duty to appellants in the position of the plaintiff to ensure that records were prepared for the hearing of an appeal within a reasonable time.

[19] In terms of section 12 of our Constitution, everyone has a right to freedom; in terms of section 21 to freedom of movement; in terms of 34 to access to the courts; in terms of section 35 the right to challenge the lawfulness of one's detention and a right of appeal. These constitutional rights cannot be rendered nugatory by unreasonable delays in the offices for which the second defendant is responsible.

[20] Section 316(7)(b) of the Criminal Procedure Act 51 of 1977, as amended ("the Criminal Procedure Act") provides as follows:

> (b) If an application under subsection (1) for leave to appeal is granted and the appeal is under section 315 (3) to be heard by the full court

> of the High Court from which the appeal is made, the registrar shall without delay prepare a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be prepared of such parts of the record as may be agreed upon by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the full court of the High Court concerned may nevertheless call for the production of the whole record.

[21] In *S v Carter*,[6] a case which dealt with the preparation of documents by the registrar for forwarding to the Supreme Court of Appeal ('the SCA'), rather than a full bench, Heher JA delivering the unanimous judgment of the court said:

> …. More important, s 316 contains no equivalent of SCA Rule 8(3) which brings about the lapse of an appeal on failure to lodge the record within the prescribed period. The reason for this is obviously that the duty is imposed on the registrar of the High Court and not the appellant. This is also understandable given that a high proportion of appellants in criminal matters come to this Court on legal aid.

[6] 2007(2) SACR 415 (SCA) at paragraph [8]

[22] He continued:

> Consequently, if there was a failure to comply with s 316(7)(a) in this case, which as will be seen, was not resolved, then the primary responsibility must be sought in the office of the registrar of the High Court.[7]

[23] The purpose of the statutory obligation imposed on the registrar to prepare a record of appeal in criminal matters is, in my respectful view, expressed with admirably succinct accuracy and clarity by Erasmus J in *S v Manyonyo*[8] where the learned judge said:

> The reason for the statutory insistence on the expeditious despatch of records on review is generally to promote the speedy and efficient administration of justice, but in particular to insure that an accused is not detained unnecessarily in cases where the court of review sets aside the conviction or reduces the sentence.[9]

[24] Similar views have been expressed in a long line of cases such as *S v Letsin*;[10] *S v Raphatle*;[11] *S v Lewies*;[12] *S v Hlungwane*;[13] *S v Maluleke*;[14] *S v Sanatsi* [15] and *S v*

[7] At paragraph [9]
[8] 1996 (11) BCLR 1463 (E)
[9] At 1466C
[10] 1963 (1) SA 60 (O)at 61E –H
[11] 1995(2)SACR 452 (T)
[12] 1998 (1) SACR 101 (C) at 104b
[13] 2001(1) SACR 136 (T) at 142 *et seq*.
[14] 2004 (2) SACR 577 (T) at paragraph [12]
[15] 2006 (2) SACR (SCA) at paragraph [11]

Heslop.[16] None of these cases deals, however, with the civil remedy that may be available to someone whose rights were infringed by delays in preparing the appeal record. An eloquent lamentation about the law's delays is also to be found, albeit in a somewhat different context, in the civil case of *Minister of health and Another N.O. v New Clicks South Africa (Pty) Ltd and Others* (*Treatment Action Campaign and Another as Amici Curiae*)[17]

[25] Ms *Buthelezi* submitted that the Minister had a defence of *vis maior* or *casus fortuitus*, that her client was prevented from preparing the record for appeal by forces beyond his control. I disagree. It was not beyond the control of the officials who worked in the second defendant's department to ensure that delays relating to having copies of documentary exhibits are readily available. It is true that the principles of *vis maior* and *casus fortuitus* usually apply to questions of the enforceability of contracts.[18] Nevertheless, there seems to be no reason why the principle should not extend to obligations that arise from a duty of care to the public as a whole: in the leading case concerning the point, the Appellate Division referred with approval to *Averanius' Interpretatio Juris Civilis* 4.24.2 where the justification for the principle is stated by *Averanius* as follows: *Quia impossibilium nulla est obligatio* (Because where there is an impossibility, there is no obligation – my translation).[19]

[16] 2007 All SA 955 (SCA) at paragraph [2]
[17] 2006 (2) SA 311 (CC) at paragraph [68]
[18] See, for example, the leading case, *Peters, Flamman and Co. v Kokstad Municipality* 1919 AD 427
[19] *Peters, Flamman and Co. v Kokstad Municipality* (*supra*) at 435

[26] In *Olitzki Property Holdings v State Tender Board and Another*[20] Cameron JA, delivering the unanimous judgment of the SCA, said as follows:

> Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable" that a civil claim for damages should be accorded. The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.

[27] It must also be borne in mind that, even if the law recognises the existence of a legal duty to act and even if such duty has been breached, with the result that the conduct complained of is unlawful, the element of fault must still be satisfied

[20] 2001 (3) SA 1247 (SCA) at paragraph [12] (Footnotes omitted)

before liability will attach to the defendant. In order for fault or culpability to attach to an omission, the classic test referred to in *Kruger v Coetzee* [21] is applied. This entails that liability arises if a reasonable person in the position of the defendant would have foreseen that his conduct would reasonably possibly cause harm to another and would have taken reasonable steps to avert it, but the defendant failed to do so. The test is an objective one which does not depend on the subjective intent or mind set of the defendant, but rather on the particular circumstances of each case. The reasonable person would have foreseen the prejudice to the plaintiff occasioned by the delay. It is obvious. It is a needlessly long time spent in prison. Steps could reasonably have been taken to prevent it.

[28] A further relevant consideration is that there must be a causal connection between the unlawful and negligent conduct complained of, and the harm which is alleged to have ensued. The element of causation involves two distinct enquiries. This is clear from the decision of the SCA in *mCubed International (Pty) Ltd & Another v Singer & Others*.[22] First, in regard to the issue of factual causation, it must be determined whether or not the postulated cause can be identified as the sine qua non of the loss in question. This has become known as

[21] 1966 (2) SA 428 (A) at 430E-F
[22] 2009 (4) SA 471 (SCA) at paragraphs [21] to [23]

the ʻbut-for' test. In applying such a test, one makes a hypothetical enquiry as to what would probably have happened, but for the wrongful act of the defendant.[23] If the plaintiff's loss would still have ensued absent the defendant's conduct, factual causation is lacking and that is the end of the matter.[24] Secondly, if factual causation has been established, it must be determined whether the wrongful act is linked sufficiently closely to the loss concerned for liability to ensue.[25] If the damage is too remote, no liability will accrue.[26] Both the 'but-for' test and the lack of remoteness of the linkage between the plaintiff's prejudice and the second defendant's negligence have been satisfied in this case.

[29] The judgment of the Constitutional Court in *Carmichele v Minister of Safety and Security*[27] emphasized that prosecutors, for example, owe the public a duty to carry out their functions in the interests of the public.[28] The court also made the point that the courts must take into account the pressures under which court officials work and must be careful not to use hindsight as a basis for making unfair criticisms.[29] The *Carmichele* case is furthermore one of the leading authorities on

[23] At paragraph [22]
[24] *Ibid*.
[25] At paragraph [23]
[26] *Ibid*.
[27] 2001 (4) SA 938 (CC)
[28] At paragraph [72]
[29] At paragraph [73]

the duty of the courts in South Africa to develop the common law.[30] In that case the court emphasized that in considering the question of whether a positive duty rests on persons employed by the State to act in a particular manner due regard should be had to the principle of proportionality taking into account the 'spirit, purport and objects of the Bill of Rights' contained in the Constitution.[31]

[30] I have derived considerable comfort from the case of *Zealand v Minister of Justice and Constitutional Development*[32] decided in the Constitutional Court. One Jonathan Zealand was convicted on 28 September 1998 of murder in the Port Elizabeth High Court. On appeal, his conviction and sentence were set aside on 23 August 1999. The registrar of that High Court negligently failed to issue a warrant for Jonathan Zealand's release until 8 December 2004, with the result that he remained in custody until 9 December, 2004, more than five years after his conviction and sentence had been set aside. Although there are differences between the factual matrices of the two cases, there are also significant similarities. Langa CJ, delivering the unanimous judgment of the Constitutional Court, gave firm endorsement to the principle that Jonathan Zealand's right to

[30] At paragraphs [33] to [43].
[31] At paragraph [43]
[32] 2008 (4) 458 (CC)

freedom had been seriously infringed.[33] Langa CJ held the detention from 23 August to 30 June 2004 had been unlawful and justified a delictual claim m for damages. [34]

[31] Against this background, I am satisfied that the plaintiff should be successfully be awarded damages arising from his extended period of incarceration attributable to the failure of the Department of Justice and Constitutional Development to ensure that his record of proceedings was prepared within a reasonable time for the appeal hearing to have taken place. The more difficult question is this: how does one quantify the general damages in this particular case?

[32] Since the case of *Salzmann v Holmes*[35] it has been recognized that in claims for damages based on *injuria*, a court takes into account a variety of factors. These relate, in the main to *contumelia* but also take into account loss of reputation and a penalty to be inflicted upon the defendant.[36] It has been clear

[33] See paragraphs [24] to[47]
[34] See paragraphs [53] to[55]
[35] 1914 AD 471 at 483
[36] *Ibid*.

since the case of *Matthews and Others v Young*[37] that for an action to rely on *injuria* (the *actio injuriarum*) the wrong committed must have been intentional.[38] *Contumelia* requires *dolus* (intent).[39] A claim based on negligence, as in this case, is brought in terms of the *actio legis Aquliae* for which either *dolus* or *culpa* may be elements.[40] Under the *actio legis Aquliae* the plaintiff is awarded 'the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act'.[41] The compensation (*skadevergoeding*) awarded is 'die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatigde daad en daarna… Skade is die ongunstige verskil wat deur die onregmatigde daad ontstaan het.'[42] The amount of compensation is therefore computed according to the diminution in the plaintiff's patrimony. Compensation is not punishment.[43] Nevertheless, even in the *Santam Versekeringsmaatskappy Beperk v Byleveldt* case which affirmed this 'compensation is not punishment' principle, Rumpff JA (as he then was) delivering the majority judgment, affirmed the view of McKerron in *Law of Delict* that 'the interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory

[37] 1922 AD 492
[38] At p503-4
[39] See, *Matthews and Others v Young* (*supra*) at 503.
[40] See, *Matthews and Others v Young* (*supra*) at 503-4.
[41] See *Oslo Land Co. Ltd. v The Union Government* 1938 AD 584 at 590.
[42] See, *Santam Versekeringsmaatskappy Beperk v Byleveldt* 1973 (2) SA 146 (A) at 150B.
[43] See, *Santam Versekeringsmaatskappy Beperk v Byleveldt* (*supra*) at 152F-H.

measure.'[44] Rumpff JA also referred with approval to the observations of Lord Reid in the English case of *Parry v Cleaver*[45] that 'the ordinary man's sense of justice' and public policy were relevant considerations.[46] The ordinary person's sense of justice and considerations of public policy are particularly important in a case such as this. It seems there can be no easy or rigid formula.

[33] I accept that the plaintiff suffered psychologically as a result of his long period of imprisonment. Since the case of *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk*[47] it has been clear in South African law that damages may be awarded for psychological pain and suffering provided the consequences could reasonably have been foreseen. That it is no holiday to be in prison in South Africa is sufficiently well known for the plaintiff's trauma to have been foreseeable.

[34] During the course of hearing counsel's submissions on quantum it was agreed that a court must avoid on the one hand, sending out a message that there are large sums of money to be made out of the mistakes which may be

[44] 1973 (2) SA 146 (A) at 153C-D
[45] 1970 AC 1 at p14
[46] *Santam Versekeringsmaatskappy Beperk v Byleveldt* (*supra*) at 150G
[47] 1973 (1) SA 769 (A) at 779B-782D

made by state officials. On the other hand, it was also accepted that the amount should not be derisory showing contempt or indifference to the loss of freedom. The approach to quantum should be different in a case such as this from the situation where there has been an unlawful arrest and/or detention. An unlawful arrest need not always be intentional but may also occur negligently.[48] Nevertheless, society's disapprobation is less in a case such as this than one in which there has been an unlawful arrest. Counsel for the parties spent some time in making computations according to a daily rate. The question arises as to whether there should be a '*per diem* rate' in matters of this kind. A 'daily rate' in cases such as this would be inappropriate. It would be too formulaic to do justice in different cases[49]. As I pointed out in *Mvu v Minister of Safety and Security*,[50] views as to what may be an appropriate award in a particular set of circumstances may differ quite markedly from person to person.[51]

[35] The plaintiff assaulted a person in a perverse act of 'revenge' for the armed robbery which he experienced. The perversity lies in the fact that because the robbers were black, he thought he would exact vengeance on a black man who

[48] See, for example, *Thompson and Another v Minister of Police and Another* 1971 (1) SA 371 (E) and *Newman v Prinsloo and Another* 1973 (1) SA 125 (w) at 127G-128A.
[49] I have adopted the adjective 'formulaic' in respectful admiration of Cameron JA's pithy use of the word in the *Olitzki* case (*supra*).
[50] 2009 (6) SA 82 (T); 2009 (2) SACR 291 (GSJ) at paragraph [15]
[51] At paragraph [15]

had nothing to do with the robbery. Nevertheless, there are far too many unanswered questions to accept that the assault was as severe as only one witness, his co-accused (accused 1) made out. Accused 1, 18 years old at the time of the trial, was considerably younger than the plaintiff. Accused 1 had been under the influence of the plaintiff. He had been on bail throughout all the proceedings. He was clearly anxious to heap as much blame on the plaintiff as possible. Horn J, found in his judgment that accused 1 had been an opportunistic witness, blaming the plaintiff as much as he could but trying to extricate himself from culpability for the common cause fact that he had participated in the assault of a fellow human being. Accused 1 appears, frankly, to have been an appalling witness. Why?

[36] If the victim had been severely assaulted, how come his case did not come to the attention of the Boksburg police station: the only case of assault with which the Boksburg police dealt that night was one which, according to their records and that of the local hospital nearby, could not have been the case in which the plaintiff had been involved?

[37] If the relationship between the plaintiff and his erstwhile girlfriend had not been troubled (as the plaintiff claims), how come she did not accompany him to buy petrol? How come she went alone with Hennie Badenhorst to buy cooldrinks late at night? Why, as the court of appeal found, was Hennie Badenhorst such an unsatisfactory, indeed contradictory witness? Why, if the victim as seen by Hennie Badenhorst and Mariette Labuschagne was as badly assaulted as they said, did they merely assist him to cross the road and not take him to the nearest police station or the hospital?

[38] Horn J found that the plaintiff was an unsatisfactory witness. Before me, the plazintiff gave a good account of himself. In the judgment in the criminal appeal the learned judges expressed the hope that the appellants had “learned a lesson from this case”. Perhaps the plaintiff did. What kind of lessons may he have learned, however? This case has been a difficult one. Among the reasons for the difficulty is that we continue to be haunted by South Africa’s great demon: race.

[39] In evaluating the evidence, I am mindful of the well known passage set out in the case of *SFW Group Limited & Another v Martell et Cie & Others*[52] 2003 (1) SA 11 (SCA) at paragraph [5] as follows:-

> On the central issue as to what the parties actually decided, there are two reconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes may conveniently be summarised as follows:
>
> To come to a conclusion on the disputed issues, a court must make findings on:
>
> a) The credibility of the various witnesses;
> b) Their reliability;
> c) The probabilities.
>
> As to (a) the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a number of subsidiary factors not necessarily in order of importance such as:
>
> (i) The witness' candour and demeanour in the witness box;
> (ii) His bias, latent or patent;
> (iii) Internal contradictions in his evidence;
> (iv) External contradictions in what pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions;
> (v) The probability or improbability of particular aspects of his version;
> (vi) The calibre and cogency of his performance compared to that of other witnesses testified about the same incidents or events.
>
> As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv), (v) above, on

[52] 2003 (1) SA 11 (SCA) at paragraph [5]

(i) the opportunity he had to experience or observe the events in question; and

(ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of a probability or improbability that each parties' version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors equipoised the probabilities prevail.

Having regard to this test and the evidence outlined above, the factual finding of this court regarding the plaintiff's assault on his victim is that the plaintiff perpetuated a perverse racist assault on his victim, the severity of which cannot be determined.

[40] By agreement between the parties, the Minister defendant called his witness before the first defendant did so. When, at the end of the second last day of the trial, the first defendant's witness had given evidence-in-chief, I informed counsel for the parties that as it was clear we would finish the next day and as it was common cause that it had taken an inordinately long time to prepare the record of the trial proceedings, counsel should please prepare argument on the question of

liability if any and, if so, the quantum to be awarded. The next morning counsel for the second defendant applied for my recusal. She submitted that, by this request before the first defendant's witness had been cross-examined by her, I had shown 'bias'. The application was opposed by the first defendant and the plaintiff. Applications of this nature have become a 'vogue item' in this division. I dismissed the application.

[41] The opening lines in the first section of our Constitution refer to State of South Africa as being founded on the values of 'Human dignity, the achievement of equality and the advancement of human rights and freedoms'. Section 7 (1) of the Constitution goes on to provide that:

> This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

In the case of *Kaunda and Others v President of the Republic of South Africa*[53] in which there were four separate judgments in the Constitutional Court, the learned justices of that court repeatedly referred to 'dignity, equality and freedom' collectively, listing the words in the self-same sequence as appears in section 7 (1). I am aware that there are those who consider that the sequence of dignity first,

[53] 2005 (4) SA 235 (CC)

equality second and freedom third in this phraseology indicates a hierarchy of rights with equality preceding freedom and dignity preceding equality. I am reminded of the fact that, in the fourth century A.D. (C.E.), a vital aspect of Christian doctrine turned, in a certain sense, literally, upon a single iota:[54] were the Father, Son and Spirit of 'like' substance (*homoiousios*) or of the 'same' substance (*homoousios*)?[55] Much division may be avoided if it was accepted that dignity, equality and freedom are fundamentally inter-related and inter-connected.

[42] The history of slavery makes it clear that without freedom, human dignity is severely eroded, if not destroyed. In our experience of freedom, ordinary human beings may rejoice that their quality of life in a significant respect surpasses that of queens and princes. As Elizabeth I of England said in her *Golden Speech*: 'To be a king, and wear a crown, is a thing more glorious to them that see it than it's pleasant to them that bear it.'[56] It is the thirst for freedom that reminds us of the fundamental equality of all human beings.

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[54] The ninth letter of the Greek alphabet, transliterated as 'i', being the smallest letter of that alphabet and synonymous with something small – *The Oxford English Dictionary*.

[55] Drobner, H. 2007, *The Fathers of the Church*, Peabody, Massachusetts, USA: Hendrickson Publishers p203-97; Bettenson, H. Editor and translator, 1970. *The Later Christian Fathers, A Selection of the Writings from St Cyril of Jerusalem to St Leo the Great,* Oxford: Oxford University Press, , p2-3; 48; 63-84.

[56] The speech is readily available. I have used *The Penguin Book of Historic Speeches* edited by Brian MacArthur,1995, London: Penguin Books, p41-4.

[43] Isaiah Berlin contended in his famous essay, *Two Concepts of Liberty* based on his inaugural lecture delivered in 1958, that 'upon the permissible limits of coercion opposed views are held in the world today, each claiming the allegiance of very large numbers of men.'[57] In that essay he made a helpful distinction between two central senses of the word 'freedom'.[58] The one sense he describes as 'negative freedom'.[59] This is the freedom of a person to act in an unobstructed manner.[60] He also terms this a 'freedom from'.[61] The other freedom he describes as 'positive freedom'.[62] This is the freedom of individuals to be the instruments of their own and not other persons' acts of will.[63] This 'positive freedom', he says may be described as a 'freedom to'.[64]

[44] No interested observer of society will be oblivious to the question: but what about freedom from hunger, poverty and disease? Should there not be an interference with economic freedom not only in order to ensure that there is freedom from these scourges of hunger, poverty and disease but also the

[57] The essay is to be found in numerous publications. Here I have used *The Proper Study of Mankind, An Anthology of Essays by Isaiah Berlin,* edited by Henry Hardy and Roger Hausheer; 1997, London: Chatto and Windus, p191-242.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*.

achievement of equality? Is this not what the socio-economic rights in sections 26 to 29 of the Constitution are all about? I contended in *Emfuleni Local Municipality v Builders Advancement Services CC and Others*[65] that the evidence is now overwhelming that 'robbing Peter to pay Paul' has prevented millions of human beings around the world from escaping from the bonds of poverty. It is better to encourage Peter to employ Paul. If Peter is to employ Paul, Peter needs to be free to innovate, to take risks, to explore his economic freedom. Economic freedom is the engine through which to achieve the equality of a minimum standard of living, consistent with human dignity, for all.

[45] That freedom is important has had an ancient, even religious resonance. For example, those familiar with *The Book of Common Prayer* used by the Anglican Church will recall that in the Order for Morning Prayer there is the Prayer for Peace. In that prayer there is the invocation of this apparent paradox: 'O God… whose service is perfect freedom…'. Perfect freedom is not freedom to do as one wants but freedom to choose a way of life.[66] That way of life may lead to freedom from fear, anxiety, failure, selfishness, envious self-regard and so on.

[65] 2010 (4) SA 133 (GSJ) at paragraphs [18] to [31]
[66] The point, in my opinion, is well made by Berlin in the essay to which I have already referred.

[46] Ms *Buthelezi*, who appeared for the Minister, submitted in her written heads of argument that Jonathan Zealand, the litigant in the *Zealand v Minister of Justice and Constitutional Development* case[67] received the equivalent of R1100,00 per day as damages. In round figures, this would translate into an award of R2 million today.

[47] Having regard to the principles and the case law set out above, R300 000,00 as general damages would seem appropriate. Insofar as loss of earnings is concerned, approximately R2000,00 per week translates, over 15 months, to around R120 000,00. Not without irony, Ms *Buthelezi* pointed out that, while in custody, the plaintiff had 'enjoyed' 'free board and lodging'. I shall take this into account and award R50 000,00 as the net loss of earnings. The total of the plaintiff's proven damages therefore amounts to R350 000,00.

[49] Counsel for the plaintiff asked that I make a pertinent provision that the costs of the second defendant's application for absolution from the instance at the close of the plaintiff's case as well as the costs of the application for my recusal be included in the order for costs. I responded by saying that, in my understanding,

[67] (*supra*)

an order that one party is to pay another's costs of suit would include these costs. Mr *Snoyman* persisted with his request, saying that this would avoid any problems on taxation. I shall oblige, even though I think the order will be pedantic.

[48] Judgment is given in favour of the plaintiff against the second defendant. The following is the order of the court:

(i) The second defendant is to pay the plaintiff the sum of R350 000,00 (three hundred and fifty thousand rand) together with interest at the rate of 15,5% per annum from the date of judgment to date of payment and costs of suit;

(ii) The aforesaid costs are to include the costs of the second defendant's application for absolution from the instance at the close of the plaintiff's case as well as the costs of the application for my recusal;

(iii) The plaintiff's claim against the first defendant is dismissed without there being any order as to costs.

DATED AT JOHANNESBURG THIS 9TH DAY OF SEPTEMBER, 2011

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N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. *C. Snoyman*

Counsel for the First Defendant: Adv. *I.T. Allis*

Counsel for the Second Defendant: Adv. *Z. Buthelezi*

Attorneys for the Plaintiff: L.A. Marks

Attorneys for the First Defendant: Thomson Wilks

Attorneys for the Second Defendant: The State Attorney

Dates of hearing: 22nd to 25th August, 2011

Date of judgment: 9th September, 2011