REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG SOUTH LOCAL DIVISION, JOHANNESBURG

Case No. A5079/2013

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

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SIGNATURE **DATE**

DATE SIGNATURE

In the matter between:

MINISTER OF SAFETY AND SECURITY First Appellant

INSPECTOR M D KUTUANE Second Appellant

And

NICOLAAS GEORGE VAN DER WESTHUIZEN Respondent

JUDGMENT

MAKHANYA J, MAENETJE AJ, GCABASHE AJ

Introduction

[1] This appeal is before us with leave of the Supreme Court of Appeal ("SCA"), which was petitioned by the Appellants after the court *a quo* refused leave to appeal with costs on 29 April 2013.

[2] The SCA granted leave to appeal on the narrow ground of quantum only. In context, that order:

[2.1] set aside the costs order of the court *a quo* in dismissing the application for leave to appeal;

[2.2] directed that the cost of the application for leave to appeal in that court and the court *a quo* were to be costs in the appeal;

[2.3] granted leave to appeal the quantum of damages awarded on claims 1 and 2 and the costs orders in paragraphs 167.4 and 167.5 of the judgment of the court *a quo*.

[3] The central issue in this appeal is whether the quantum of the awards made in respect of both claims is, among others, disproportionate to, and/or not comparable with, other awards in similar cases.

[4] We have had the benefit of Counsel's written and oral representations.

Background

[5] The broad background that informed the quantum awarded by the court *a quo* is that the Respondent, Nicolaas George Van Der Westhuizen, instituted action in this court against the First and Second Appellants, respectively the Minister of Safety and Security and Inspector MD Kutuane, which matter was heard by our brother Kgomo J on 14 September 2012. Judgment was handed down on 10 October 2012.

[6] The summons issued was in respect of two claims for damages for:

[6.1] the payment, jointly and severally, of R500 000 plus interest and costs for unlawful arrest and detention; and

[6.2] the payment by the Second Appellant of R100 000 for defamation.

The formulation of the claims

[7] The above claims arise from an incident on 20 November 2009 when the Respondent was effectively arrested without warrant and thereafter detained on a charge of fraud. What compounded the unlawful arrest and detention was the fact that the Respondent was, without cause it has transpired, mistaken for a suspect by the name of Eugene Viljoen ("Viljoen") whom the police in Klerksdorp were looking for.

[8] The arrest and detention of the Respondent was effected at the instance of the Second Appellant, who, despite clear evidence to the contrary, refused to accept that the Respondent was not Viljoen.

[9] With regard to the arrest and unlawful detention, it is common cause that the Second Appellant and the other police officers who assisted him and/or carried out his instructions, acted within the course and scope of their employment as police officers under the control of the First Appellant.

[10] The claim for defamation, on the other hand, was at all times directed at the Second Appellant. The offensive words uttered came from the Second Appellant. The Second Appellant failed to testify at the trial. The matter proceeded on the basis that the words that form the basis of the defamation claim did not fall within the course and scope of the Second Appellant's employment. Counsel for the Respondent conceded that as the claim for defamation was not directed at the First Appellant, the Respondent could not claim what he had not sought from the First Appellant.

Conclusion on the merits

[11] The court *a quo* concluded that the evidence presented clearly and unambiguously proved that the arrest and detention of the Respondent was unlawful. It also found that he was arrested in a dehumanising way

and treated in an inhumane manner in front of his small children and that the arrest humiliated and traumatised him and his family.

[12] In the result, judgment was handed down in favour of the Respondent in respect of both the claim of unlawful arrest and detention and the defamation claim. In respect of the claim of unlawful arrest and detention, the court ordered the First and Second Appellants to pay the Respondent the sum of R400 000 (Four Hundred Thousand Rand) with interest at the prescribed rate.

[13] With regard to the defamation claim, it ordered the First and Second Appellants to pay to the Respondent R80 000 (Eighty Thousand Rand) with interest at the prescribed rate.

[14] In addition, the court *a quo* ordered that the Second Appellant was to pay the costs of suit in his personal capacity on a scale as between attorney and client. Further still, the First Appellant was ordered and directed to pay to the Respondent the costs due by the Second Appellant and to recover these costs from the latter's salary or emoluments at the rate and/or amounts that the rules, regulations or directives of the South African Police Services prescribe.

[15] Finally the court *a quo* ordered that a copy of the judgment be served on the Second Appellant's reporting office/officer.

Application for Leave to Appeal

[16] The court *a quo* dismissed the Respondents' (Appellants in this appeal) application for leave to appeal which sought to challenge:

[16.1] the basis for determining the quantum of R400 000;

[16.2] the order that the First Appellant pay the costs awarded against the Second Appellant and thereafter recover these from his salary and emoluments, particularly as

[16.2.1] the First Appellant was not a party to the defamation claim;

[16.2.2] the order imposes a liability on the First Appellant in the absence of a legal basis for such liability;

[16.2.3] the order does not take into account the possibility that the Second Appellant might cease to be employed in the service.

[17] The reasoning of the court *a quo* was that the evidence of defamation was uncontradicted as the Second Appellant who was the only person who could have shed light on this matter, failed to testify. The court *a quo* explained that the court's view of the unacceptable conduct of the police, and in particular the Second Appellant, was reflected in its determination of quantum. The purpose of the award was to show the

court *a quo's* displeasure and abhorrence of the behaviour displayed by the officers. Leave to appeal was refused with costs.

[18] The Appellants' petition to the SCA was partially successful, as indicated in the introduction to this judgment.

The argument on appeal

The Appellant's submissions

[19] The Appellants have taken issue with the court ***a quo's*** assessment of aspects of the Respondent's testimony, which they contend, focussed on irrelevant considerations. With respect to the unlawful arrest and detention claim and the award made in that regard, the contention advanced is that the court *a quo*:

[19.1] placed undue emphasis on the manner in which the Respondent was arrested and detained;

[19.2] erroneously concluded that there was an element of malice and racism in the arrest of the Respondent, and

[19.3] considered as an aggravating factor, the conditions of detention in the police cells, in circumstances where those conditions were no different to the conditions the cells were in most of the time.

[20] In relation to the defamation claim, the Appellants contended that the award made was excessive and that it failed to take account of various relevant considerations.

[21] In particular the Appellants took issue with the finding that the defamatory utterances were published in the presence of the Respondent's children and local policemen. They maintain that neither the Respondent nor his wife alleged that the children were present and could have overheard the words. With respect to the publication to the local policemen, the Appellants contend that these policemen did not know the Respondent and that the latter's reputation and standing in society could therefore not have been diminished in their eyes.

[22] The legal argument that the Appellants' counsel advanced was essentially that the award in respect of both claims was disproportionate to awards in comparable cases. In their submissions the Appellants emphasised that in the exercise of its discretion in determining the compensation that the Respondent was entitled to, the court *a quo* failed to apply two important principles, i.e. that the award must be fair to both sides, and that it must be in general accord with previous awards in broadly similar cases[1].

[1] *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 248 (D) at 387E-F; *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA); *Minister of Law and Order v Seymour* 2006 (6) SA 320 (SCA)

[23] Counsel summarised the facts and ratio of a few relevant cases, including that of *Seymour v Minister of Police* 2006 (6) SA 320 (SCA) in which the SCA adjusted a broadly similar award from R500 000 to R90 000. In *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA), also a broadly similar case, the SCA awarded damages of R100 000. The essential submission of the Appellants was that there was no peculiar feature in the treatment meted out to the Respondent that distinguished his case as one that justified the disproportionate nature of the award made. There certainly was no room for punitive damages or cause for the award to go beyond simply compensating the Respondent for the harm occasioned [2], argued counsel for the Appellants.

The Respondent's submissions

[24] The context of the Respondent's submissions was the pre-eminence of the rule of law, the constitutional obligations of police officers and the provisions of the Bill of Rights with particular emphasis on the right to human dignity and the right to freedom.

[25] The focal submissions of the Respondent can be summarised as the length of detention, his humiliation and degradation, the traumatic nature of his experiences and the unlawful and malicious nature of the conduct of the Appellants.

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[2] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [69]

[26] The Respondent relied on the judgment in *Minister of Safety and Security v Seymour*[3] in sketching the aberrant and offensive nature of, in particular, the Second Appellant's conduct, and in emphasising that when making its award the trial judge has a wide (though not unfettered) discretion to assess and evaluate the nature and gravity of the transgressions complained of. In particular, Counsel contended that the abuse of power by state officials must be dealt with decisively in order to indicate to others that officials must at all times comply with the rule of law.

[27] In circumstances such as those, the awards of the courts should reflect their disapproval of the conduct of officials who abuse state power that has been entrusted into their safekeeping for the benefit of society. In the result, including an element of deterrence in the award made was appropriate, contended the Respondent.

Analysis of the law and the facts

[28] The key issues that this Court is required to determine can be summarised as follows:

[28.1] whether this Court is satisfied that the exemplary damages awarded are justifiable in the given circumstances;

[3] 2007 (1) All SA 558 (SCA)

[28.2] whether this Court ought to confirm or set aside the order that the Second Appellant pay the costs of suit in his personal capacity on a scale as between attorney and client;

[28.3] whether the modality for the recovery of the costs that the First Appellant was ordered to pay constitutes a competent and effective order.

[29] It is trite that where an individual's personal liberty has been infringed by the wrongful and intentional act of another, this constitutes an iniuria. The party so wronged is entitled to bring an action for the recovery of sentimental damages as a solatium for his injured feelings. As articulated in *Masawi v Chabata and Another* 1991 (4) SA 764 (ZH) at 772 G the Court:

> "*…has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim*".

The unlawful arrest and detention

[30] When considering the quantum of damages to award, this determination is informed by factual and legal bases giving rise to the infringement of the Respondent's right to liberty and loss of dignity. A brief review of the circumstances surrounding the arrest of the Respondent clearly shows that his liberty was restrained as of the time

that he was asked to accompany the police to the police station. It is this act that set the law in motion, as found by the court *a quo*[4]. He was only released more than a day later after it was conclusively confirmed that he was not Viljoen.

[31] This Court is satisfied that the Judge in the court *a quo* correctly considered this factor as one that contributed to the quantum awarded to the Respondent. He also concluded that the approximately 32 hour period that the Respondent asserted was the period of detention, was not so materially different to the 28½ hours detention contended by the Appellants, as to affect the quantum of the award that might be imposed. We concur with the court ***a quo's*** assessment of the evidence and the conclusions drawn by that court on this aspect.

[32] The court *a quo* gave a detailed analysis of the evidential material that was relied on in justification of the arrest. That court interrogated the content of the evidence in justification of the arrest of the Respondent. The surrounding circumstances of the arrest, including the material facts placed before the Second Appellant by the Respondent's wife, attorney and father, were considered.

[33] The Respondent was led to the police station, where the Second Appellant formally detained him. The reasons advanced for the

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[4] *Birch v Johannesburg City Council* 1949 (1) SA 231 (T) at 237 – 238;

detention of the Respondent are spurious. All indications were that the wrong man had been arrested, yet the Second Appellant deliberately ignored these clear signs.

[34] The morning after the arrest and detention of the Respondent, a Captain in the South African Police Service advised the Second Appellant that the Respondent was not Viljoen. The Second Appellant simply ignored his colleague. Even when the Investigating officer from Krugersdorp arrived to verify that the Respondent was indeed Viljoen but was unable to do so, the Second Appellant appeared reluctant to release the Respondent and asked her to do so.

[35] The objective facts that could have influenced the decision to arrest and detain were reviewed. These included the occupation of the Respondent, his relationship with the local police, the proximity of both his residence and place of employment where witnesses or counter-veiling evidence could be obtained, his physical make-up including the fact that his fingerprints could not possibly be similar to those of Viljoen, the fact that he produced an identity document which had his name and not that of Viljoen, and the effort made by his wife to produce related documents that confirmed the Respondent's identity, all of which were ignored by the Second Appellant.

[36] All these factors, among others, led the court *a quo* to conclude that the evidence presented unambiguously and clearly proved the unlawful arrest and detention of the Respondent. Had the Second Appellant considered both the subjective and objective factors placed before him and promptly released the Respondent, such release would have ameliorated or mitigated the damages inherent in the unlawfulness of the arrest and detention.

[37] This Court agrees with the findings and conclusions of the court *a quo*. In our view, what compounded the situation was the nature and quality of the available evidence that indicated the innocence of the Respondent. This testimony was strengthened by the fact that the evidence tendered by the Respondent and his witness with respect to the Second Appellant's offending conduct was uncontested and remained uncontradicted.

[38] This Court agrees with the finding of the court *a quo* that the Respondent suffered humiliating treatment at the police station within full sight of his wife and young children. Furthermore, the findings and conclusions of the court *a quo* take into account the fact that the Respondent, who had a few days before been involved in a motor-bike accident and broken a few ribs, communicated his medical condition to the Second Appellant. Despite this, the Second Appellant persisted in

handcuffing him in a manner that caused greater pain and discomfort than was necessary.

[39] The court *a quo* aptly described as “harrowing” the overall experience of the Respondent during his arrest and detention. Put differently, the Respondent was not only inconvenienced, he was treated in a high-handed, demeaning and undignified manner in clear violation of his right to dignity, liberty and freedom.

[40] In the circumstances, this Court accepts that the findings and conclusions with regard to the objectionable conduct of the Second Appellant reflect what was presented in evidence before the court *a quo*. To the extent that this might be relevant, this Court therefore has no hesitation in concurring with the judgment of the court *a quo* on the merits, and with the principle that as a result, a substantial award that was however fair to both parties and true to the purposes of compensation, was due with respect to both claims.

[41] What now remains is for this Court to draw on the above facts and conclusions in determining whether the specific awards made by the court *a quo* are in keeping with prevailing trends and serve the purpose for which the action iniuriarum was crafted as a remedy.

Conclusions on the quantum determined

[42] In interrogating whether the award of damages in the amount of R400 000 was justifiable this Court has reviewed all the evidence relied on.

[43] In order to treat both Appellants and the Respondent fairly, as we must, guidance on the size of awards in broadly similar cases has been taken from the decided cases pointed to by Counsel. In our view, the deterrent effect of awards is inherent in the quantum of the award made, and should be viewed as an incidental as opposed to a primary objective in the making of an award. In aligning our views with those expressed in the *Fose*[5] (supra) matter, we thus wish to make it clear that punishment or deterrence, as a primary objective, does *not* form part of the consideration of the quantum that we arrive at in this matter. In determining what constitutes appropriate relief in this instance, this Court has sought to identify, and then strike effectively, at the source of the infringement of rights[6].

[44] We furthermore recognise that money values decline constantly, and that awards made must be adjusted accordingly.

[45] This Court is satisfied that though there were a number of aggravating factors to consider, on the objective established evidence, the award of

[5] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [70] – [72]
[6] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para [96]

R400 000 in respect of the unlawful arrest and detention is disproportionate to the broad tenor of awards made in comparable cases. There is in fact a striking difference in the awards that the SCA has made in similar cases and the award made by the court *a quo*[7].

[46] *Minister of Safety and Security* (*supra*) is an instructive case with regard to relevant factors that guide the determination of quantum. In that instance a sitting Magistrate was arrested and detained, though for a relatively short period of time. His original claim for the unlawful arrest and detention was R400 000. The Court awarded R280 000 in respect of both *contumelia* and loss of liberty. On appeal to the full bench, which appeal was partially successful, that Court reduced the award to the Respondent to R50 000. The SCA ultimately reduced this amount to R15 000 for the unlawful arrest and detention.

[47] In the *Rudolph* case, the claim of R100 000 was found by the SCA to be commensurate with the "*indignity to which the Appellants were*

[7] See *Seymour v Minister of Police* (**supra**); *Rudolph and Others v Minister of Safety and Security and Another* (**supra**); See also Hoffman v South African Airways 2001 (1) SA 1 (CC) at [42] – [45] where the Court addressed the question of appropriate relief and emphasized that appropriateness not only" *imports elements of justice and fairness*" but also requires, in its words, a "*balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief."*

subjected"[8]. That Court considered the R100 000 award it made to be "substantial" on the facts of that case.

[48] Though worthy of a substantial award, we recognise that the circumstances of the Respondent in the case before us were not as aggravating as those in the *Rudolph* case.

[49] What constitutes a highly aggravating factor in the matter before us is the fact that the Second Appellant could not be bothered to present himself to court and give a full explanation of why he conducted himself in the manner that he did. In the circumstances, and in the interests of fairness and balance, we have exercised discretion in adjusting the award made by the court *a quo*, and replace it with an award of R200 000.

[50] Due consideration has been given to the defamation claim which was undefended. The Second Appellant deliberately humiliated the Respondent in circumstances where he failed to ascertain that he had arrested the right suspect prior to calling him a criminal.

[51] The indignity suffered by the Respondent at the hands of the Second Appellant was completely gratuitous. In the circumstances an appropriate award for the humiliation and loss of dignity suffered in

[8] *Rudolph v Minister of Safety and Security* (id) at para [29]

respect of the second claim is adjusted to R30 000. We consider that the limited extent of the publication of the defamatory statements justify the reduced award. These damages are to be paid by the Second Appellant in his personal capacity.

Costs

[52] The issue regarding which party is to pay the costs of suit forms part of the matters under appeal. The modality for the recovery of the costs that the First Appellant was ordered to pay does not, in our view, constitute a competent and effective order on the facts before this Court.

[53] We have noted the submissions made on the nature and scope of the Treasury Regulations issued in terms of the Public Finance Management Act 1 of 1999 as amended. We are satisfied that the costs occasioned by the successful claim of the Respondent in respect of the unlawful arrest and detention must follow the normal course, i.e. these costs must be paid by both Appellants, the one paying the other to be absolved.

[54] This approach is consistent with the Treasury Regulations, which require the State to assume liability for the conduct of its employees acting in the course and scope of their duties. There is no gainsaying that the Second Appellant acted within the course and scope of his

duties with regard to the unlawful arrest and detention of the Respondent.

[55] We are also satisfied that the Treasury Regulations do not apply where an official has not acted within the course and scope of his duties. The claim for defamation falls outside the course and scope of the Second Appellant's duties. He had no authority to recklessly make utterances that, in our view, were intended to defame and humiliate the Respondent. The Respondent did not contend to the contrary.

[56] To the contrary, his duty is that of protecting and serving the public and abiding by the prescripts of the Constitution. This he failed to do. His conduct cannot be ascribed to any instruction or authority he had from his employer, the State, to act in this manner. The full might of the law ought to be visited on those who pay scant attention to the Constitution.

[57] This Court has taken note of the judgment of the SCA in *Minister of Safety and Security v Ndlovu* 2012 ZASCA 189 which both Counsel for the Appellants and Respondent took guidance from. In the result we make the order set out below.

Order

[58] The court *a quo's* order is set aside and substituted with the following order:

Claim 1

[58.1] In respect of the claim of unlawful arrest and detention, damages in the amount of R200 000 are awarded.

[58.2] Interest shall be payable at the prescribed legal rate from date of this judgment to date of payment.

[58.3] Costs.

Claim 2

[58.4] In respect of the claim for defamation, damages in the amount of R30 000 are awarded.

[58.5] Interest shall be payable at the prescribed legal rate from date of this judgment to date of payment.

[58.6] The Second Appellant is to pay the costs of suit on a party and party scale in respect of the defamation claim in his personal capacity.

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GM MAKHANYA J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

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NH MAENETJE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

_____

L GCABASHE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
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Date of Hearing: 26 November 2014

Date of Judgment: 15 January 2014