IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A3014/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

In the appeal of:

LOUIS NGWENYA Appellant

and

THE MINISTER OF HOME AFFAIRS Respondent

Coram: WEPENER et VALLY JJ

Heard: 14 August 2017

Delivered: 15 August 2017

Summary: Unlawful arrest and detention – damages. Each case to be considered on own facts – awards from State coffers should be approached with restraint.

JUDGMENT

WEPENER J:

[1] The appellant appeals against the judgment of the additional magistrate of Johannesburg. There were no heads or argument filed on behalf of the respondent and no appearance on its behalf when the matter was called. This is a rather disturbing trend in this Division.

[2] The appellant instituted a claim against the respondent (the Minister of Home Affairs) and the Minister of Police as a result of his arrest and detention during September 2015. The appellant sought condonation and reinstatement of his lapsed appeal. There being no opposition to that application and having read the reasons for the delay, I am satisfied that condonation should be granted and the appeal be reinstated.

[3] At the outset of the hearing, the legal representative of the appellant indicated that the appellant was no longer pursuing a case against the Minister of Police.

[4] The evidence before the court showed that an immigration officer in the employ of the respondent indeed arrested the appellant. The immigration officer had obtained information that the appellant was in possession of fraudulent documents. On the assumption that the appellant had indeed committed the crime of fraud, I have to consider the question of his arrest. The magistrate, after setting out the facts, referred to the defence raised by the respondent (at that time pleaded by both defendants) that the arrest was lawful by virtue of the provisions of s 40 of the Criminal Procedure Act[1] (CPA). The plea further averred that the arrest was in terms of s 37(1)(a) of the Refugees Act[2] (The Refugees Act). The magistrate also said that she was 'mindful of

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[1] Act 51 of 1977.
[2] Act 130 of 1998.

the provisions ss 33 and 34 of the Immigration Act 13 of 2002' (Immigration Act), although the respondent did not rely on these provisions. The judgment then continues to find that 'the police' indeed had authority to arrest without a warrant as set out in s 40 of the CPA. The difficulty with that reasoning is that s 40 of the CPA applies to peace officers, usually policeman, although not limited to them. There is no evidence to show that the immigration officer was indeed a peace officer who could invoke the provisions of s 40 of the CPA. The resultant finding that the arrest was justified in terms of s 40 of the CPA is consequently erroneous.

[5] The magistrate's reliance of s 37(1)(a) of the Refugees Act is similarly misplaced. The section that declares certain conduct to be offences and provides for penalties. It does not allow or prescribe that an immigration officer may arrest any person be it with or without a warrant.

[6] The further reliance or cognisance taken of ss 33 and 34 of the Immigration Act is also misplaced. Section 34 deals with the deportation of illegal foreigners and finds no application to a person arrested for the crime of fraud. Section 33 allows for an immigration officer to serve notices upon persons as defined in the section and authorises the immigration officer to obtain warrants issued by a magistrate to do certain things including the apprehension of an illegal foreigner. None of the powers of the immigration officer include a power to arrest a person without a warrant for the crime of fraud.

[7] It is common cause, that the arresting immigration official was not in possession of a valid warrant to apprehend the appellant. In all the circumstances the conclusion of the magistrate that the arrest was justified cannot be upheld as the arrest the appellant was unlawful.

[8] The damages suffered by the appellant as a result of the arrest per se, is limited. The appellant's detention by members of the South African Police Services cannot be held against the respondent and the abandonment of the plaintiff's case against the second defendant was probably ill advised. The South African Police Services should not have detained the appellant after his arrest by the immigration officer as the arrest

was unlawful. The detention of the appellant was therefore as a result of the unlawful conduct of the members of the South African Police Services and not the conduct of the employees of the respondent.

[9] The facts of the arrest as such, being based on the *actio inuriarum,* shows that immediately after the arrest the appellant was taken to the police cells by the immigration officers. The arrest was without fanfare or public humiliation. I accept however, that the arrest must have been traumatic for the appellant. There is very little else on record to assist the court in order to determine the amount of damages to be awarded to the appellant.

[10] The only question which I am required to determine is the quantum of damages to be awarded to the plaintiff. Counsel referred me to a number of decided cases where damages were awarded in similar matters and contended that an amount of R150,000.00 would be an appropriate award of damages. I refer to *Louw v Minister of Safety and Security*[3] where an amount of R75,000.00 was awarded; *Van Rensburg v City of Johannesburg*[4] where an amount of R75,000.00 was awarded; *Murrel and Another v Minister of Safety and Security*[5] where an amount of R90,000.00 was awarded; and *Olivier v Minister of Safety and Security and Another*[6] where an amount of R50,000.00 was awarded. These awards were for both an unlawful arrest and detention. Inevitably, the length of the detention plays an important role in the amount awarded.

[11] I also take into account that in an unreported matter *Muraor V Ekurhuleni Metropolitan Counci*[7], where this court awarded an amount of R50,000.00 as damages for the unlawful arrest and detention of a plaintiff where the plaintiff was manhandled and incarcerated overnight.

[12] 'The awards by any courts in other similar matters provide a useful basis for comparison in determining a fair and just award. At the same time one must be mindful of the caution

[3] 2006 (2) SACR (T).
[4] 2009 (1) SACR 32 (W).
[5] (24152/2008) (2010) ZAGPPHC 16 (22 February 2010)).
[6] 2009 (3) SA 434 (W).
[7] (2009/24023) delivered on 6 December 2010.

expressed by Innes CJ in *Hulley v Cox* 1923 AD at 236 that such a comparison "while instructive, could never be decisive"' - per Kollapen AJ (as he then was) in *Murrell and Another v Minister of Safety and Security*[8].

[13] The invasion upon a person's liberty must be seen in perspective and I follow the decision of the Supreme Court of Appeal in which Nugent JA said in *Minister of Safety and Security v Seymour*[9] as follows:

> 'I do not think that the courts in earlier cases placed less value on personal liberty than ought to be placed on it today. Indeed, what was said in May shows the contrary. Nor do I think there is any basis for concluding that awards that were made at that time reflect a more tolerant judicial view of incursions upon personal liberty. It was precisely because personal liberty has always been judicially valued that the incursions that were made upon it by the Legislature and the Executive at that time were so odious. The real import of the Constitution has not been to enhance the inherent value of liberty, which has been constant, albeit that it was systematically undermined, but rather to ensure that those incursions upon it will not recur. To the extent that the learned Judge placed a jurisprudential premium on personal liberty that was absent before now, in my view, it was misdirected.'

[14] Any infringement on this basic right is a serious inroad into an individual's liberty and will be open to censure. The censure in this matter is by way of solatium awarded to the plaintiff for his injury.

[15] The plaintiff's damages will ultimately be forthcoming from the State coffers to which the citizens of this country contribute. Some restraint is called for when awarding damages where the fiscus is the source thereof.

[16] I am further of the view that amounts of damages to be awarded for wrongful arrest should be approached with circumspection. There is no justification for awarding amounts which are out of proportion with the indignity suffered by an arrested person.

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[8] (24152/2008) [2010] ZAGPPHC 16 (22 February 2010) para 29.
[9] 2006 (6) SA 320 (SCA) para 14.

[17] Brandt JA, quoting Homles J (as he then was), in *De Jongh v Du Pisanie NO*[10], said:

> 'Dit betaam net so min die gemeenskap (of dan die Hof) om te gulhartig te wees met die verweerder se geld, al was hy of sy regtens aanspreeklik weens sy of haar nalatige gedrag. Die volgende uitlating van Holmes R in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA C 284 (D) op 287E - F vind dus eweneens toepassing in onderhawige verband:
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> "(T)he Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."
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> Konserwatisme by die toekenning van algemene skadevergoeding het sy oorsprong in 'n behoefte dat daar ook teenoor die verweerder billikheid moet geskied en nie in die suinigheid van die gemeenskap teenoor die eiser nie.'

and at paras 64 – 65:

> '[64] Die benadering wat van oudsher deur hierdie Hof gevolg word, is egter juis andersom (sien byvoorbeeld, Hulley v Cox (supra op 246), Sigournay v Gillbanks (supra op 556) en Protea Assurance Co Ltd v Lamb1971 (1) SA 530 (A) op 535). Volgens hierdie benadering is die beginsel juis dat die vasstelling van nie-patrimoniële skade in die diskresie van die Hof is. By die uitoefening van die Hof se diskresie is vergelyking met toekennings in vorige sake 'n nuttige hulpmiddel omdat dit darem vir die Hof die breë parameters oftewel 'n patroon aandui waarbinne sy toekenning tuisgebring moet word. Dit is ook 'n nodige riglyn omdat konsekwentheid in toekennings 'n inherente vereiste van billikheid is. Nietemin bly dit steeds 'n riglyn. Dit vervang nie die Hof se diskresie met 'n letterknegtige gebondenheid aan die aangepaste waarde van vorige toekennings nie.
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> [65] Die stygende tendens van toekennings in die onlangse verlede is, soos ek alreeds gesê het, duidelik waarneembaar. Die effek daarvan is egter weer eens nie met matematiese presiesheid bepaalbaar nie. Dit is nie seker presies wanneer die tendens begin het en wanneer dit sal eindig nie. Dit het bes moontlik reeds tot 'n einde gekom. 'n Bepaalde toekenning uit die verlede waarna verwys word kon dus reeds met inagneming van die tendens geskied het. As die vorige beslissing wat as maatstaf dien reeds met

[10] 2005 (5) SA 457 (SCA) para 60.

inagneming van die stygende tendens gemaak is, kan dit nouliks geregverdig word om op grond van dieselfde oorwegings sonder enige bykomstige rede, 'n verdere styging toe te laat. Daarbenewens verg die tendens klaarblyklik nie die vermenigvuldiging van vroeëre toekennings met 'n voorafbepaalde of bepaalbare faktor nie. Op die ou end is die tendens maar net nog 'n oorweging wat die Hof geregverdig is om in ag te neem wanneer hy, by die uitoefening van sy diskresie, na vorige toekennings, veral in ouer sake, as riglyn verwys.'

[18] I have considered the facts before me and I am of the view that an amount of approximately R20,000.00 would adequately compensate the appellant for unlawful arrest. Due to the magistrate dismissing the appellant's claim, she did not consider the appellant's entitlement to damages which was claimed due to the plaintiff incurring legal costs for an attorney to represent him when he was criminally charged after his arrest. Although the claim was said to be for 'special damages'. That term refers to the damages that may arise from conduct. Nevertheless, as a result of his arrest, the appellant employed the services of an attorney to assist him and paid R5000.00. There is no evidence regarding the exact legal services and whether it was a reasonable fee. However, I am mindful of the fact that the appellant indeed incurred expenses subsequent to his arrest and as a direct result thereof.

[19] I consequently make to following order:

1. The appeal is upheld with costs.

2. The order of the magistrate is set aside and the replaced with the following:

'1. The defendant is liable to pay:

1.1 damages to the plaintiff in the sum of the R25 000.00.

1.2. Interest at 10.5% on the aforesaid sum from date of service of notice of demand ie 8 September 2015 to date of payment.

1.3. Costs of suit.'

Wepener J

I agree.

Vally J

Counsel for Appellant: T. Ntshwane

Attorneys for Appellant: N. Ndebele Attorneys

For Respondent: No appearance