


REPUBLIC OF SOUTH AFRICA



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
_____	
DATE	SIGNATURE

CASE NO: 19296/10

8/12/2014

In the matter between:

AUGUSTINE RAYMOND

First Plaintiff

AUGUSTINE BASHNEE SHARON

Second Plaintiff

AUGUSTINE JARRED SHELDON

Third Plaintiff

AUGUSTINE CELINE JANINE

Fourth Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MALI AJ:

[1] The plaintiffs in this action seek damages against the defendant arising out of unlawful entry, search, humiliation, intimidation and assault by the members of the South Africa Police Service (SAPS) which occurred on 16 June 2009. The amount of damages sought is claimed under the following heads of damages:

1.1 general damages: R250 000.00 in respect of each plaintiff;

1.2 past medical expenses: R6 800.00 in respect of all the plaintiffs;

1.3 future medical expenses: R63 000.00 in respect of all the plaintiffs.

[2] On the first day of the trial, the court had to deal first with the application by the plaintiff to compel the defendant to produce the contents of the discovered docket. The defendant opposed the application. Subsequent to the arguments by both parties the defendant conceded and tendered to produce the docket. However, the defendant did not honour the undertaking on time as the incomplete contents of the docket were provided on the following day. This resulted in the delay of the proceedings. The plaintiff applied for the costs order against the defendant arising out of the delays. The costs were reserved.

[3] The first and second plaintiffs are husband and wife and the third and fourth plaintiffs are their children. On 16 June 2009, the plaintiffs were residing at

number 12 Mowbray Street in Benoni and that number 12 is a unit next to number 12B. Both units share a common wall and are also separated by the roof. The units have two separate entrances. Unit 12B is clearly marked on the wall with number 12B.

[4] On 16 June 2009 approximately thirty (30) members of the South African Police Service ("SAPS") broke into and entered the premises of the plaintiffs at about 2 am, without the plaintiffs' permission. The first plaintiff initially thought they were being robbed as the SAPS members did not identify themselves. They only identified themselves subsequent to having pointed rifles at the plaintiffs and shining flashlights and laser beams at them. They also assaulted the second plaintiff.

[5] In the process, some SAPS members refused to permit the second plaintiff to attend to her two and half year old baby who was sleeping alone in a separate bedroom. At the time all the plaintiffs were awake and scattered around the house. One policeman held the third plaintiff down and trampled him with his foot on his back and pointed a firearm at him. They then moved to the fourth plaintiff's bedroom, who was sixteen years old at that time. Other members of SAPS were busy opening the cupboards. The ordeal continued up until the first plaintiff, who was on his knees and having been shoved and pointed at with a rifle, heard someone saying they were members of SAPS. The members of SAPS then indicated that they were policemen and that they were waiting for their captain to explain their reason for being there.

- [6] Subsequent to that, they left the house and the first plaintiff followed them. He insisted on getting the reasons for the entering of his house. One of the younger policemen told him that they were looking for Eugene, who had robbed a casino a few days back. The first plaintiff told them there was no Eugene staying at his place. The Eugene he knew lived on the other side of the property, unit 12B.
- [7] The first plaintiff then noticed that there was a man in handcuffs in the company of the police officers. When he told them that he did not know Eugene, they were looking for they started assaulting the man in handcuffs and accused him of having brought them to a wrong house. The policemen then went to the house the first plaintiff had pointed out and broke down the front gate of the house. The first plaintiff testified that the incident took about 20 (twenty) to 30 (thirty) minutes.
- [8] After the policemen left, the first plaintiff checked his property and found that the padlock was wedged open and the gate was broken down as well as the sliding door and windows. The following day, all the plaintiffs went to the Benoni police station to lay charges against the police and to seek counselling for the trauma they had endured during the early hours of the morning. The plaintiffs stated that they did not receive any assistance from the Benoni police station.
- [9] They were traumatised by the actions of the police, to the extent that they could not stay at the property anymore. They were also humiliated by the hurtful

experience. The first plaintiff was hurt and embarrassed that as the head of the home he could not protect his family. The second plaintiff was embarrassed by the fact that she could not protect her children. She was shocked and, as a result, experienced a brain freeze during the process.

[10] Because of the post-traumatic stress and continued sleep deprivation caused by the fear they experienced, they had to seek counselling from a private doctor, which cost the first plaintiff an amount of R6 800.00 for all the plaintiffs. The fourth plaintiff's academic performance was impacted negatively and she had to repeat a grade at school. The third plaintiff developed aggression which affected his personality and attitude. The counselling they received did not assist them and they had to go to another doctor, Dr Swanepoel. They had to seek specialist counselling they could not afford as the medical aid would not pay for the sessions.

[11] The plaintiffs further allege that the actions of the policemen were unlawful and malicious due to, *inter alia*, the fact that there were no legal grounds, alternatively, reasonable grounds, in the further alternative, sufficiently reasonable grounds for the unlawful entry onto the property of the plaintiffs. The plaintiffs, therefore, contended that the detention and or assaults and/or other unlawful conduct by the policemen upon the plaintiffs amounted to unlawful conduct.

[12] The plaintiffs called Dr Swanepoel, an expert witness whose expertise is not in issue, to testify. He testified that the results from the battery of tests he conducted indicated that all of the plaintiffs suffered from post-traumatic stress. The stress has resulted in the first plaintiff suffering from dystonia, a condition where a person still functions but continues to live a life of depression. The second plaintiff, as a result of the post-traumatic stress, had to be prescribed specialised medication to deal with her insomnia and in order to address direct anxiety experiences. However, she needs on-going treatment as the tablets just address her insomnia, without addressing the anxiety, mistrust of the environment, cognitive impairments etc. The third plaintiff's concentration, amongst other things, is affected, something which probably led to the deterioration of his academic performance. He also suffers from anger and aggression, one of the symptoms of post-traumatic stress.

[13] Dr Swanepoel stated that the fourth plaintiff is suffering from severe psychopathology. Hence, she could not testify so as to avoid reliving the ordeal again. The defendant did not refute the testimony in respect of the fourth plaintiff except to raise the inadmissibility of evidence at the closing argument stage. I consider the reasons stated by Dr Swanepoel in respect of the fourth plaintiff's non-attendance at the trial to be acceptable. The court, therefore, finds it to be in the interests of justice to admit the evidence adduced on behalf of the fourth plaintiff.

[14] Dr Swanepoel further submitted that, as the plaintiffs were exposed to the post-traumatic stress incidents, psychotherapeutic treatment has to follow. The debriefing or consultation has to be done by a trained professional as it is a specialised form of treatment. It is an on-going process and cannot be addressed with once-off counselling. After the debriefing by the psychotherapeutic treatment specialist, the individuals will be referred to a specialist dealing with the process of treatment. He also conducted tests proving that the plaintiffs did not have tendencies to lie or exaggerate their symptoms. Post-traumatic stress and depression which is untreated can manifest in major depression as well as in other aspects like, for instance, substance abuse. His conclusion is that all the plaintiffs have to undergo severe long term treatment. They are likely to need 15 (fifteen) individual sessions and 10 (ten) family sessions.

[15] With regards to the effects of the post-traumatic stress disorder ("PTSD"), Dr Swanepoel expressed an opinion that the plaintiffs' conditions are more severe than a person who developed PTSD as a result of being informed of the death of family members who were involved in a motor vehicle accident and the effect of having to identify the bodies of victims. He stated that the severity is exacerbated by the direct involvement in the incident and the imminent threat upon one's life. His opinion was specifically expressed in direct comparison to the matters of *RAF v Ruth FS Draghoender*¹ ("Draghoender") and *Kritzinger*

¹ 2007 (5) QOD K3-16 (ECD)

and Kritzinger v RAF² (“Kritzinger”) to be discussed below. The defendants did not call their own expert to disprove Dr Swanepoel’s evidence.

[16] In the defendant’s initial plea it was denied that the members of SAPS ever entered the plaintiffs’ house. It was unequivocally stated that the defendant’s employees never entered the plaintiffs’ house; however, in its amended pleadings, the defendant states that the members of SAPS were granted permission by the first plaintiff to enter and search the premises of the plaintiffs. It is denied that they assaulted the second plaintiff and or pointed firearms at the plaintiffs or even humiliated the plaintiffs.

[17] The defendant’s case, *inter alia*, centres on the fact that the plaintiffs’ house was pointed out to them by a suspect as the house where a certain Eugene Morgan, who was involved in spate of robberies, resided. Although the police officers alleged that they were given permission by the first plaintiff to enter and search his house, they conceded that, if the padlock on the driveway gate was cut and if the burglar sliding gate at the dining room was broken open, they entered onto the premises without permission.

[18] From the evidence led, the policemen could not counter the fact that houses no 12 and no 12B are separate houses. Only three police officers out of varying numbers of between 10 (ten) to 15 (fifteen) policemen, as per the testimony of the defendant’s witnesses, entered the house. They testified that they just

² 2009 (5K3) QOD 21 (ECD) K3-21

stood at the door and the first plaintiff opened a storeroom for them, where they found documents belonging to Eugene Morgan and they left. In the event that the above is true, this court is taken aback as to why a contingent of about 15 (fifteen) policemen attended premises where a dangerous armed criminal was believed to be hiding.

[19] One Captain van Zyl, a witness for the defendant, later conceded that they also entered into a separate house from the plaintiffs' and that he did not know whether proper identification of the house was done. The above is not the only concession made by the witnesses of the defendant. There are other concessions made by Mr Swart confirming the plaintiffs' version such as that there were between 30 (thirty) and 45 (forty-five) SAPS members, some of whom wore woollen hats; that the members did have flashlights and that the driveway gate padlock was cut, albeit not in his presence.

[20] I find that there are various material contradictions by the defendant's witness, just to point out a few. They first testified that the documents were found in one of the rooms in the house but it was later stated that the "documents" were found in the "stoepkamer" with a separate access to the plaintiffs' house. Furthermore, in the defendant's plea and the testimony it was stated that the documents had Eugene Morgan's name on them. However, when the same documents were produced to the court, none of them had the name "Eugene Morgan" written on them. These documents were not even shown to the plaintiff on the night of the alleged search.

THE LAW

[21] Section 22(a) of the Criminal Procedure Act 51 of 1977 provides that:

“a police officer may without warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 –

(a) if the person consents to such search for and the seizure of the article in question, or if the person who may consent to search of the container or premises consents to such search and seizure of the article in question; or

(b) if on reasonable grounds believes -

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such a warrant; and

(ii) that the delay on obtaining such a warrant will defeat the object of the search.”

[22] The defendant's case turns on the alleged consent by the first plaintiff. However it is this jurisdictional fact that the plaintiff has placed under attack. Having considered all the factors and balancing the defendant's evidence against that of the plaintiffs, on a preponderance of probabilities, the plaintiff's version is accepted as reasonably true. In a nutshell, it is found that the policemen did not have permission to search the premises of the plaintiffs.

QUANTUM

- [23] It is a well-established principle that the court has a wide discretion in making an appropriate award for general damages. Although comparison of awards in other cases may offer a useful guide, such comparisons are not decisive. The following dicta in *Protea Assurance Co Ltd v Lamb*³ is instructive:

"It should be emphasised, however that the process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters."

- [24] Visser and Potgieter, *Law of Damages* 2nd edition at page 475 outline some of the factors to be taken into account in the awarding of damages to include:

"The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants, the duration and the nature (e.g. solitary confinement) of the deprivation of liberty; the status, age and health of the plaintiff; the extent of publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the action injuriarum also has a punitive function."

³ 1971 (1) SA 530 (A) at 535 H- 536 A

[25] In ***Kritzinger and Kritzinger v Road Accident Fund*** the first and the second plaintiffs were awarded the sums of R150 000.00 and R120 000.00 for general damages respectively. They were both parents of two children who were tragically killed in a motor vehicle accident. They had to identify the bodies of their children in the mortuary. As a result of the grief associated with identification of their children's bodies and the incident as a whole, they suffered **chronic** (my emphasis) post- traumatic stress disorder and **major** (my emphasis) depressive disorder.

[26] In ***Walters v Minister of Safety and Security***, the plaintiff was awarded general damages in the sum of R185 000, 00. The plaintiff instituted action against the defendant for damages arising from the death of her husband ('the deceased') who was arrested and detained for drunkenness. The deceased committed suicide whilst in police custody. Based on the evidence presented, the court found that the psychological *sequelae* suffered by the plaintiff as a result of the arrest and death of the deceased was extensive. This was a direct consequence of the manner of the death of her husband in the defendant's custody.

[27] In ***Marwana v The Minister of Police***,⁴ it was stated

"Although the police had no right to enter the premises of the plaintiff there is no evidence that they had done something wrong or anything beyond their mandate. This in my view cannot be regarded as a serious violation of the plaintiff's rights

⁴ [2012] ZAECPCHC page 56

when compared to the other violations abovementioned. I am of the view that an award of R10 000.00 would be justified in the circumstances.”

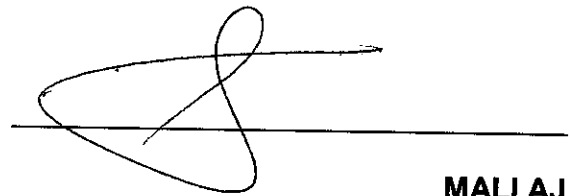
[28] *In casu*, the facts and the background to the psychological *sequelae* suffered by the plaintiffs differ significantly to the comparable cases. It is fair to consider all relevant factors in the circumstances of this case. The plaintiffs were sleeping in the safety and privacy of their home when they were violated by the unlawful entry of SAPS members. The first and the second plaintiffs were humiliated, caused to suffer indignity that made them feel useless and ashamed in the presence of their children who needed them most at the time. That negatively impacted on their role as parents. The third plaintiff was still an adolescent who had to endure humiliation, assault and witness his parents being violated and weakened. These are the people he would naturally see as his hope and refuge.

[29] I am satisfied, on the evidence presented, that the plaintiffs had suffered psychological *sequelae*. This was a direct consequence of the actions of the members of SAPS as indicated above. However, I am not persuaded that the severity of suffering by the plaintiffs weighs far more than the suffering experienced by the plaintiffs in ***Draghoender and Kritzing*** above. When regard is had to all the circumstances of the case, the amount of R25 000.00 appears to me to be a sufficient amount for damages suffered by the plaintiffs. It is my considered view that the matter should have been brought to the Magistrate's Court.

[30] In the result, the following order is made:

1. The defendant is ordered to pay the first plaintiff the amount of R25 000.00 for general damages with interest on the aforesaid amount at a rate of 9.0% from date of this order to date of payment;
2. The defendant is to effect payment to the first plaintiff in the sum of R6 800.00 in respect of the past medical expenses;
3. The defendant is to effect payment to the second plaintiff in the sum of R25 000.00 in respect of general damages with interest on the aforesaid amount at a rate of 9.0% from date of this order to date of payment;
4. The defendant is to effect payment to the third plaintiff in the sum of R25 000.00 in respect of general damages with interest on the aforesaid amount at a rate of 9.0% from date of this order to date of payment;
5. The defendant is to effect payment to the fourth plaintiff in the sum of R25 000.00 in respect of general damages with interest on the aforesaid amount at a rate of 9.0% from date of this order to date of payment;

6. The defendant is ordered to pay the plaintiffs' costs of suit, as taxed or agreed, to the date of judgment, including all reserved costs. Costs herein shall be taxed at the Magistrate's Court scale. Costs to be included, *inter alia*, are the costs of the medico-legal reports as well as reservation and preparation fees of the expert, Dr HJ Swanepoel (Clinical Psychologist) of both 18 and 20 August 2014.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

MALI AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 29 AUGUST 2014

Date of Judgment:

Counsel for Plaintiff: Adv D Groenewald

Instructing Attorney for Plaintiff: Aucamps Attorneys

Counsel for Defendant: Adv Phaswane

Instructing Attorney for Defendant: State Attorney Pretoria