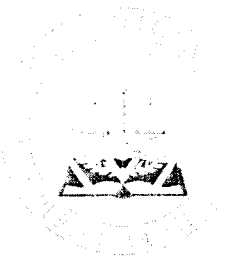

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

26/4/16

Not reportable

Not of interest to other Judges

CASE NO: **A315/2015**

In the matter between:

RAYMOND AUGUSTINE	First Appellant
SHARON AUGUSTINE	Second Appellant
JARRED SHELDON AUGUSTINE	Third Appellant
CELINE JANINE AUGUSTINE	Fourth Appellant
and	
MINISTER OF SAFETY AND SECURITY	Respondent

MINORITY JUDGMENT

MAKGOKA, J

[1] I have read the judgment prepared by my colleague, Tolmay J. I agree that the appeal should succeed. I, however, disagree with the order she proposes in respect of the *quantum* for general damages and the scale of costs. Below I set out my reasoning for disagreement on those two aspects.

[2] The factual background is largely common cause and is fully set out in my colleague's judgment. As a result, I do not intend to repeat it here, save the following

essential features: The appellants - a couple and their two teenage children - were victims of an unfortunate incident on 16 June 2009, when heavily armed police officers broke into their residence. They were looking for a suspect in an armed robbery during which a police officer was killed. As it turned out later, the police had been directed to a wrong address. The suspect lived in a property adjacent to that of the appellants. For approximately half an hour the appellants were subjected to a traumatic experience. They were ordered to lay on the floor, and pointed with guns while their house was searched. During that ordeal, the police did not identify themselves as such, or the purpose of their presence at the appellants' property.

[3] As a result of the incident, the instituted action against the respondent, each claiming R750 000 for general damages and R20 000 for future medical expenses. The amount claimed in respect of general damages for each of the appellants was said to be 'a global (sic) figure in respect of the infringement of the plaintiff's *fama*, *dignitas*, privacy and honour, deprivation of freedom and infringement of the (appellants') rights to freedom, psychological trauma, medical expenses, future medical expenses, pain and suffering'. Initially, in their notice in terms of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002, each of the appellants claimed an amount of R2 000 000 (TWO MILLION RAND) from the respondent.

[4] The appellants were successful in the trial court before Mali AJ, who awarded the appellants R25 000 each in respect of general damages, and nothing in respect of future medical expenses. The learned Judge awarded the appellants costs, but ordered that such costs should be taxed on a magistrate court scale. Interest on the capital amounts was ordered at the rate of 9%. The appellants are aggrieved with the amounts awarded in respect of general damages; the fact that no award was made in respect of future medical expenses; the order of party and party costs on a magistrate court scale, and the rate of interest at 9% *per annum*. The appellants appeal to this Court with leave of the Deputy Judge President.

[5] I consider briefly, the trial court's judgment. The learned Judge correctly applied the trite principle that although some guidance can be obtained by having

regard to previous awards made in comparable cases, which afford a useful guide, the process of comparison is not a meticulous examination of awards, and should not interfere upon the court's general discretion, as stated in *Protea Assurance v Lamb* (above) at 535B-536A and *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) paras 17 and 18. The learned Judge was therefore conscious that awards in previous cases can only offer broad and general guidelines in view of the differences that inevitably arise in each case.

[6] In coming to the conclusion she did in respect of general damages, the learned acting Judge considered, mainly, three comparable cases: In *Kritzinger v Road Accident Fund,*[1] parents of two children who were tragically killed in a motor vehicle accident had to identify the bodies of their children in the mortuary. As a result of the grief associated with the identification of their children's bodies and the incident as a whole, they suffered chronic post-traumatic stress disorder and major depressive disorder, respectively. In *Walters v Minister of Safety and Security*[2] the plaintiff's husband committed suicide in police custody after requesting him to be detained there because he was drunk. The plaintiff suffered extensive psychological *sequelae* as a result of the death of her husband. In *Draghoender v POF*[3] the plaintiff, a mother of a young child, was called to the scene of a motor vehicle collision outside her home where her child had been run down and killed. She suffered emotional shock and trauma and was diagnosed with anxiety disorder (post-traumatic stress), a major depressive disorder with psychosis and a panic disorder with related agoraphobia. In all of the above cases, the plaintiffs were awarded amounts in excess of R100 000.

[7] The learned Judge was satisfied that all the appellants in the present case suffered psychological *sequelae*. She, however, was 'not persuaded that the severity of suffering by (the appellants) weighs far more than the suffering experienced by the plaintiffs in *Draghoender* and *Kritzinger*...' The learned Judge awarded R25 000 for general damages in respect of each appellant. On behalf of the appellants it was contended among others, that this award is totally inadequate

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[1] *Kritzinger and Kritzinger v Road Accident Fund* 2009 (5K3) QOD 21 (ECD).
[2] *Walters v Minister of Safety and Security* 2012 (6K3) QOD 11 (KZD).
[3] *Draghoender & 'n Ander v Padongeluksfonds* [2006] JOL 18271 (SE).

in the circumstances, and fails to give sufficient weight to the impact of the incident and how it impacted on the appellants.

[8] It is common cause that the appellants each suffer from a post traumatic disorder as a result of the incident, although the extent varies from one person to the other. In para 5 of my colleague's judgment, the full extent of each appellant's psychological effect is set out, as testified by the clinical psychologist who testified on behalf of the appellants. What remains is to determine whether the trial court's assessment of the quantum adequately compensate the appellants for the trauma they suffered.

[9] It is trite that the award of damages lies as a sole discretion of the trial court. The appeal court's power to interfere with the exercise of that discretion is circumscribed to instances where the award is vitiated by an irregularity, misdirection or where there is a striking disparity between the award and that which the appeal court would have imposed had it been the trial court.[4] As pointed out by the Supreme Court of Appeal (SCA), a misdirection might sometimes appear from a court's reasoning and in other instances it might be inferred from a grossly excessive award.[5]

[10] In the present case, I am unable to fault the reasoning of the trial court that the circumstances giving rise to the trauma should be considered as a factor in awarding general damages, although focus should be more on the impact that those circumstances had on a particular person. However, I am of the view that the misdirection can be inferred from the particularly low award that the trial court made. This Court is therefore at large to interfere with the award, and determine what it considers fair and adequate compensation for the appellants.

[11] The determination of a fair and adequate compensation is where my colleague and I part ways. She proposes that the first to third respondents be awarded R200 000 each, and that the fourth respondent should be awarded a

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[4] *Protea Accident Fund v Lamb* 1971 (1) SA 530 (A) at 534H535A.
[5] *Minister of Safety and Security v Kruger* 2011 (1) SACR (SCA) para 27.

slightly higher amount of R250 000. Without underplaying the trauma that the appellants suffered, I am of the view that those amounts are excessive. It should be borne in mind that an appeal court which interferes with an award made by the trial court, exercises a discretion itself, and as such, it has to do so judiciously.

[12] I am quite aware of, and take into account, the recent tendency by our courts to make higher awards than has been the trend in the past. See *Road Accident Fund v Marunga,*[6] where the rationale therefor was articulated, with reference to *Wright v Multilateral Vehicle Accident Fund,* in *Corbett and Honey, The Quantum of Damages in Bodily and Fatal Injuries Cases* vol 4 at E3-31. However, the remarks in *Marunga* were tempered later in *De Jongh v Du Pisanie N.O.*[7] where, after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages.[8] The court concluded that the principle remained that the award should be fair to both sides – it must give just compensation to the plaintiff, but 'not pour out largesse from the horn of plenty at the defendant's expense', as pointed out in *Pitt v Economic Insurance Company Limited.*[9]

[13] The conservative approach propounded in *De Jongh* is clearly discernible in the judgments of the SCA, where the awards made by the High Court are routinely, and significantly, reduced by on appeal to it. See for example: *Marunga* (above) (R375 000 to R175 000); *Minister of Safety and Security v Seymour* (above) (R500 000 to R90 000); *Minister of Safety and Security v Tyulu,*[10] (R50 000 to R15 000); *Minister of Safety and Security v Kruger*[11] (R300 000 to R20 000) and *Minister of Police v Dlwathi.*[12](R675 000 to R200 000).

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[6] *Road Accident Fund v Marunga* 2003 (3) SA 164 (SCA) para 27.
[7] *De Jongh v Du Pisanie N.O.* 2005 (5) SA 457 (SCA).
[8] Para 60.
[9] *Pitt v Economic Insurance Company Limited* 1975 (3) SA 284 (N) at 287.

[10] *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA).
[11] See fn 5 above.
[12] *Minister of Police v Dlhwati* (20604/14) [2016] ZASCA 6 (2 March 2016).

[14] In *Dlwathi*, an advocate in private practice was unlawfully assaulted by the police in the presence of friends. He suffered serious and permanent physical injuries. As regards the psychiatric effect of the assault the respective experts on behalf of parties agreed that the plaintiff:

(a) experienced a significant deterioration in his functioning;

(b) has no self-confidence and feels self-conscious about his appearance and the difficulty with his teeth;

(c) has memory and concentration difficulties;

(d) has withdrawn from his hobbies, social and leisure time activities;

(e) is more irritable and has developed depression and anxiety;

(f) suffers from post-traumatic stress.

[15] The High Court had awarded Mr Dlwati a globular amount of R675 000 as general damages for the physical and psychological injuries. The SCA found the amount of R675 000 to be excessive and substituted R200 000 for it.

[16] My colleague relies heavily on the award made in *Pillay v Minister of Safety and Security*.[13] There, as is the case here, there was unlawful and forceful entry into the property of the plaintiff, a 62 year old lady. She suffered post traumatic disorder, and was awarded R150 000. Having read that judgment, it does not appear that the learned Judge there heeded the caution sounded by the SCA in *De Jongh*. To my mind, and with respect, the award in *Pillay* is indicative of 'pouring largesse out from the horn of the plenty at the defendant's expense' cautioned against in *Pitt v Economic Insurance*, referred to with approval in *De Jongh*. I doubt very much whether that award would have borne the appellate scrutiny of the SCA, in the light of that Court's conservative approach.

[17] In the circumstances I am unable to agree with the compensation proposed by my colleague. When one compares, for example, the far-reaching and career-

[13] *Pillay v Minister of Safety & Security* 92004/9388 [2008] ZAGPHC 463.

altering *sequelae* in *Dlwati,* with those in the present case, it is clear that the appellants should also be conservatively compensated. I find it very difficult to justify an amount of R200 000 (or more) as compensation for the appellants in light of the conservative path that the SCA has consistently followed in such matters, as demonstrated more recently, and lucidly, *Dlwati.*

[18] My colleague seeks to distinguish *Dlwati* in suggesting that the psychological effects there were limited. With respect, this is not correct. I have, in para 14 above, set out the full extent of the *sequelae*, among which, was post-traumatic stress as a result of serious assault. The SCA accepted that Mr Dlwathi's emotional well-being had been seriously compromised and his major depressive disorder was in all probability of a permanent nature. At the very least, the prognosis for treatment of that disorder was poor.[14] Mr Dlwati had to, among others, abandon his first career choice as an advocate in private practice to seek employment as a State Advocate. That, in my view, cannot be brushed aside as being of 'limited' consequence.

[19] It must always be borne in mind that the appellants in the present matter were not assaulted, except for limited physical contact on appellants 3 and 4. That should also be a factor in the assessment of the compensation. If my colleague is correct in the compensation she awards to the appellants for only unlawful entry and the psychological trauma, it means that had there been physical assault on the appellants, she would have awarded more, probably in the region of R600 000 to R800 000. That would clearly be out of proportion with previous comparable awards. At the risk of repetition, the SCA in *Dlwati* awarded a globular amount of R200 000 for severe assault which resulted in, among others, post-traumatic stress and permanent psychological damage. In the present case there was no assault, and that should be reflected in the compensation the appellants receive.

[20] In all circumstances, taking into account all the relevant factors mentioned in this judgment, and in particular the approach of the SCA in such matters, a sum of R100 000 for each of the appellant would be just and adequate compensation. Unlike my colleague, I do not think that the fourth respondent is entitled to receive a

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[14] Para 10 of the judgment in *Dlwati.*

higher award than the rest of the appellants. That was never prayed for in the pleadings, and it was never foreshadowed by the appellant's counsel, who presented very able written submissions, both in the trial court and before us. Consistently, the appellants have sought a similar amount of compensation for general damages. It is not for us to grant something beyond that which the parties seek as relief. As a matter of policy, courts should be slow to do so, unless there are compelling reasons for such an approach. In the event the court does this, the parties should be granted adequate opportunity to address the court on the aspect *mero motu* raised by the court. That is not the case here.

[21] The trial court did not make any award in respect of future medical expenses, most probably due to an oversight, as correctly pointed out by my colleague. That order should be made in the amount of R63 000 as a total amount for all the appellants. With regard to interest, I agree that the interest should have been ordered at the rate which was applicable as at the time the cause of action arose, which is 15.5% *per annum.*

[22] Finally, I turn to the issue of costs. I agree that the trial court erred in granting costs on the magistrate court scale. I however disagree that the trial court erred in not awarding costs on a scale as between attorney and client. The award of costs and the scale thereof is a matter within the discretion of the court making the order.[15] The appeal court will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made. Put differently, a court of appeal's power to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court, acting reasonably, could have made the order in question.[16] The order of costs on a scale of attorney and client is an extra-ordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. The fact that a litigant came to court with a version which was found to be false and

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[15] *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 976H; *Minister of Prisons and another v Jongilanga* 1985 (3) SA 117 (A) at 124B.
[16] See *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670D – E.

contradictory, does not necessarily mean a punitive costs order should follow. If a trial court does not grant it, in the exercise of its discretion, so be it.

[23] The trial court exercised a discretion in the present matter. There is nothing in the record which suggests that that discretion was capriciously exercised, or that there was a misdirection. My colleague does not identify any of the above in the manner in which the trial court considered the issue of costs. The fact that my colleague would have granted an order of costs on a scale between attorney and client had she sat as a trial court, is not a basis for interfering with a discretion, properly exercised. Accordingly, costs should be ordered on a High Court scale. In my view, it is not necessary to make the elaborate order as proposed by my colleague in respect of the taxation of costs. That is the province of the Taxing Master of this court, in the exercise of his discretion as to which items should be allowed in the appellants' bill of costs, presented for taxation.

[24] For the above reasons, I would uphold the appeal and substitute the order of the trial court for the following:

1. The defendant is ordered to pay:
   1.1 An amount of R100 000 to each of the plaintiffs in respect of general damages;
   1.2 An amount of R63 000 in respect of future medical expenses for all the plaintiffs;
   1.3 Interest on the capital amounts at the rate of 15,5% *per annum* from the date of the judgment until final payment;
   1.4 Costs of the suit, be taxed on the High Court scale, as between party and party.

T.M. Makgoka
Judge of the High Court