

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA**

23/9/2016

CASE NO: 60082/2012

Reportable: No

Of interest to other judges: No

Revised.

J. H. W.

Plaintiff

and

MINISTER OF POLICE

1st Defendant

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

2nd Defendant

JUDGMENT

MSIMEKI J.

INTRODUCTION

[1] The plaintiff, a 29 year old male, is claiming damages from the Minister of Police and the Minister of Justice and Constitutional Development which he suffered when he was unlawfully arrested and detained on 21 August 2010 in Parys in the orange Free State.

[2] Advocate J. P Nel (Mr Nel) and Advocate D Mtsweni (Mr Mtsweni) appeared for the

plaintiff and the defendants respectively when the matter was argued.

BRIEF BACKGROUND FACTS

[3] The plaintiff, on the day of his arrest and detention, had visited his friends in Parys. The police allegedly stormed the house they were in and sprayed some form of gas and arrested them. The plaintiff, to no avail, protested his innocence. He was initially detained for about a month at a police station and later transferred to a correctional facility where he was detained for approximately 7 months. It appears to be common cause that he, on the whole, was detained for 226 days. The charges preferred against the plaintiff were withdrawn against him on 4 April 2011.

[4] On 7 March 2016 a pre-trial conference was held and a pre-trial minute was produced.

[5] The following can be gleaned from the pre-trial minute:

1. The issue of liability was conceded 100% in favour of the plaintiff.
2. The defendants would jointly and severally pay the plaintiff 100% of his proven, alternatively agreed damages.
3. The issue of quantum would be argued on the medico-legal report of Professor J. G Scholtz.
4. The defendant has no expert report.
5. The plaintiff was unlawfully arrested and detained for 226 days.
6. The costs of the pre-trial conference would be costs in the cause.
7. Counsel's fees for attending the pre-trial conference as well as the plaintiff's Counsel's time for preparing the pre-trial minute would be taxable.

[6] Professor Jonathan Geoffrey Scholtz, a clinical psychologist, assessed the plaintiff. His report reveals that he assessed approximately 95 forensic cases and testified in 43 of them. Annexure "A" to his report contains his qualifications which include:

1. BA Social Sciences (1984) (University of Johannesburg).
2. BA Hons (Psych) (*Cum Laude*) (1990) (University of Pretoria).
3. MA (Clin Psych) (*Cum Laude*) (1992) (University of Pretoria).
4. PHO (Psychology) (1999) (University of Johannesburg).

[7] Professor Scholtz is registered with the Health Professions Council of South Africa as an independent practitioner with PS 34495.

[8] He has twenty-four years' experience in Clinical Psychology. He has published in peer review journals and presented papers at various conferences nationally and internationally. He has been appointed as a reviewer for the South African Journal of Psychology. He has assessed 95 forensic cases and testified in 43 of them. He has more than 18 000 hours of clinical contact with his patients.

[9] He conducted interviews with the plaintiff, Mr Schalk Van Rensburg, the plaintiff's maternal Uncle who lived with the plaintiff once he was released from prison. He also interviewed Mr S. W., the plaintiff's older brother and conducted psychometric tests. His expertise is not challenged.

HIS CLINICAL IMPRESSION OF THE PLAINTIFF

[10] He found the plaintiff neatly groomed.

The plaintiff-

1. appeared anxious;
2. had a mildly depression mood;
3. displayed restricted affect with minimal flow and animation;
4. his speech was normal in rate and with a soft tone;
5. his thought processes were normal;
6. displayed and reported signs of depressive disorder, anxiety disorder and posttraumatic stress disorder; and
7. had memory which was intact.

FAMILY CONSTELLATION AND RELATIONSHIPS AND EMPLOYMENT

[11] The plaintiff was the middle child of an older brother and younger sister raised in Fochville. He passed grade ten. He was sixteen when his father committed suicide. He is the one who discovered the father and this was very traumatic to him. He never received counselling. The plaintiff's mother too, after the husband's passing, died years later from complications due to severe alcohol abuse. This severely distressed the plaintiff who informed the Professor that his mother had "weighed only 40Kg's before she died".

[12] He was sixteen when he left school in order to make ends meet. He worked at restaurants for seven years. He was arrested and detained when he was assisting his brother in a cash loan business. After his arrest, the plaintiff lived with his maternal Uncle who reported that that could not work out due to the plaintiff's conduct. He left Witbank for the Cape where he made cabinets and sold wood and plants. He was later admitted to the "disciple school" in Vredenburg.

LEGAL

[13] The plaintiff, in the past, was arrested mostly for minor alcohol related incidents. He was, however, never detained.

EVALUATION

[14] The Professor after evaluating the plaintiff concluded that:

1. The plaintiff's arrest and consequent detention in August 2010 was a traumatic experience for him. This "exacerbated his pre-existing psychological problems which were confined mainly to a depressed mood and abuse of substances resulting from his father's death. The plaintiff, according to the Professor, "does not meet the full criteria for major depressive disorder" but "has significant symptoms of depression that affect his quality of life". The plaintiff, according to the Professor, was inconsistent prior to the incident "but would retain employment and remain in one geographical area". The Professor reports that the plaintiff's functioning, after the accident, "has deteriorated since the incident".
2. The Professor observed that:
 1. the arrest was completely unexpected;
 2. the detention was strange; and
 3. the arrest was violent.

The Professor lists the following psychological disturbing aspects of the plaintiff's arrest and detention which he had to contend with:

- 2.3.1. threats from fellow detainees;
- 2.3.2. the plaintiff was most of the time confined to his bed which he regarded as a safe place;
- 2.3.3. he was asked to intervene in a case where a fellow detainee was threatened with rape but was scared;

- 2.3.4. he would hardly sleep in an unsafe place;
- 2.3.5. racist attacks were directed towards him;
- 2.3.6. he witnessed assaults;
- 2.3.7. conditions in jail were dirty and unhygienic as there were fleas in his blanket and mattress as well as grime in the showers and bad odours;
- 2.3.8. fellow detainees robbed him of his food;
- 2.3.9. he was kept with convicted men he regarded dangerous;
- 2.3.10. he could not see his friends and family members for a month; and
- 2.3.11. he concluded that Correctional Services Officers were colluding with detainees.

3. The plaintiff, according to the Professor, "was robbed of his freedom and his dignity compromised". His self-esteem has suffered and his sense of direction and purpose has been affected. The Professor has observed that the plaintiff suffers from instructive symptoms of PTSD that disrupt his life daily.

The plaintiff, before the unlawful arrest and detention, could retain employment and make a reasonable living and this, according to the Professor, he is now unable to do. The plaintiff's "pre-existing problem with substance has been exacerbated by the incident". His reliance on alcohol and drugs to self-medicate and thereby alleviate his depression and anxiety, "has increased".

[15] The Professor has implored the Court to consider that:

1. the plaintiff's clinical condition will require Psychiatric (medication) and Psychological (psychotherapy) treatment;
2. this will involve costs of psycho-pharmacological treatment;
3. the plaintiff's "abuse of and possible dependence on substances was a pre-existing problem" which has merely been "exacerbated by the incident";
4. should the "rehabilitation" at the "discipline school" fail, the plaintiff will have to be admitted to an accredited institution for rehabilitation. The programs, according to the Professor, can run from a few months to a year at a cost of approximately R93 000 00 per three months.

[16] According to the Professor, it is not possible to quantify the psychological impact and the humiliation and embarrassment the incident had on the plaintiff. It is, according to the Professor, also difficult to quantify the impact of the plaintiff "being suddenly

deprived of his liberty". These aspects, according to him, have to be viewed separately

"as they occurred in the first moments, hours and days in the chain of events".

The actual circumstances of the arrest, the trauma to family members who cannot comprehend what has happened, personal embarrassment and humiliation (treated like a criminal), adverse publicity and the incarceration experience itself are significant psychological stressors according to Simon (Simon 1993) referred to by the Professor.

[17] As already alluded to before, the parties agreed that the issue of quantum be argued on the medico-legal report of Professor J. G Scholtz. The plaintiff would not testify in person.

[18] The matter, according to Mr Nel, would only involve future medical and related expenses and general damages. It was common cause that the arrest and detention of the plaintiff was unlawful.

[19] Indeed, to be determined, is the amount of damages that, the plaintiff should be awarded in respect of the future medical and related expenses and the general damages.

[20] I need to have regard to the medico-legal report, the expert report that the Court has at its disposal. The defendant has no report of its own.

[21] The Professor's report, in my view, is quite extensive. The professor had enough time to interview and assess the plaintiff. The report appears objective and helpful. It discloses the plaintiffs condition prior to and after the incident. It clearly is informative and instructive when it deals with the background of the plaintiff.

[22] The plaintiff, at the time of the assessment, was 29 years old. He had achieved grade 10. His home, at the time, was Vredenburg which is in the Cape Province. He was not married but had two minor children, at the time, aged 13 and 1 who were born out of two separate relationships. He had no occupation at the time of assessment. Apart from the interviews with the relevant people, psychometric tests were conducted.

[23] The report reveals that the plaintiff had a rough history and experience. His father committed suicide while his mother's health deteriorated remarkably mentally and physically after his father's passing resulting in her death years later from complications which had been caused by severe alcohol abuse. The mother, at the time of her death, weighed only 40kg's. All these experiences left the plaintiff severely distressed. The plaintiff was forced to leave school at a very early age of 16 in order to fend for himself. This indeed was traumatic.

[24] The plaintiff, according to the report, had pre-existing psychological problems which were confined "mainly to a depressed mood and abuse of substances. The arrest and detention, according to the report, "exacerbated the pre-existing psychological problems". The report clearly reveals that the arrest and detention left the plaintiff with "significant clinical symptoms" which I have referred to earlier in my judgment, which were not there before.

[25] According to the report, the arrest and detention were completely unexpected; were strange; violent and had several psychologically disturbing aspects which I have also referred to above. The plaintiff was held in custody under appalling conditions. The incident, according to the report, indeed exacerbated the plaintiff's pre-existing problem with substances.

[26] The report further reveals that a lot needs to be done to assist the plaintiff and that that will be expensive financially. The report gives estimate amounts which will be needed for the work. I should not, however, lose sight of the fact that the incident found the pre-existing condition of the plaintiff existing. It merely exacerbated it. The amount of the award should clearly reflect this aspect. This implies that blame should not entirely be placed on the defendant's shoulders. Blame has to be apportioned. The value of the award must also reflect this.

[27] In determining the damages, care has been taken that the incident had psychological impact and was accompanied by humiliation and embarrassment. The plaintiff was deprived of his liberty and this in itself is degrading enough to be deserving of compensation.

[28] Mr Mtsweni for the defendant, submitted that the plaintiff had a pre-existing condition. This is what the report reveals. Mr Mtsweni disagreed that the incident caused the plaintiff's condition as, according to him, there is no link between the condition and the incident. The report clearly reveals that there, indeed, was a pre-existing condition. To say that the incident had no impact on the plaintiff will be taking the issue too far as no one can deny that the incident, indeed, affected the plaintiff. You do not get arrested and detained and come out of there being the same person. However, what has to be borne in mind is that there was indeed a pre-existing condition.

[29] Mr Mtsweni's submission that the plaintiff had already had problems with the law does not help us because the plaintiff had never been incarcerated before. He only had alcohol related incidents without being detained. The report, it must be borne in mind, states that the arrest and detention worsened the condition. This, in my view, cannot be denied.

[30] Mr Nel provided the Court with case law which deals with cases where Courts faced and had to deal with similar problems. Different amounts were awarded as damages suffered by different claimants. Some were detained for hours, days, months and even for periods longer than that. It is important to note that the awards were made according to years. Obviously, older cases of yester-years will reflect lesser amounts while cases in later years will reveal higher awards. While Courts may work on daily, weekly, monthly or annual rates the element of arbitrariness has to be avoided as cases are not the same and need to be treated on their own merits. Extreme caution should be a requirement in the determination of awards to be made.

[31] While past cases are a useful guide in the determination of the awards I have, indeed, had regard to the facts of this case assisted by the only expert report I had at my disposal.

[32] I have duly considered the facts of the case, factors relevant thereto and the case law I have been referred to and provided with, and have come to the conclusion that an appropriate award for damages suffered by the plaintiff is an amount of R2 800 000 00 (two million eight hundred thousand rands).

ORDER

[33] I, as a result, make the following order:

- 1. Judgment is granted in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved for payment of the amount of R2 800 000 00 (two million eight hundred thousand rands).**
- 2. The said amount of R2 800 000 00 (two million eight hundred thousand rands) which is comprised as follows:**

- | | | |
|-------------|---------------------------------|----------------------|
| 2.1. | Future medical expenses: | R 100 000 00 |
| 2.2. | General damages: | R2 700 000 00 |

Shall be paid to the plaintiff's attorneys, in settlement of his claim for damages, by direct transfer into the plaintiff's attorneys Trust Account within thirty (30) days of this order, the details of which are as follows:

**D P DU PREEZ ATTORNEYS
NEDBANK-DIE HEUWEL (146 805)
NEDBANK TRUST ACCOUNT
ACCOUNT NUMBER: [...]**

- 3. The defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale.**
- 4. The costs shall include, but not limited to the reasonable taxable accommodation and consultation costs, including toll and e-toll charges, incurred by or on behalf of the plaintiff in attending medico-legal consultations with the plaintiff's expert(s), consultations with the legal representatives of the plaintiff and the court proceedings. The quantum is subject to the discretion of the Taxing Master.**
- 5. The aforementioned costs shall be determined as follows:**
 - 5.1. The plaintiff shall serve a notice of taxation on the defendant's attorney of record;**
 - 5.2. The plaintiff shall allow the defendant's thirty (30) court days to make payment of the taxed costs from date of settlement or taxation thereof;**
 - 5.3. Should payment not be effected timeously, plaintiff will be**

**entitled to recover interest at the applicable rate on the taxed and/or
agreed costs from date of the allocator to date of final payment.**

M. W. MSIMEKI

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA**