IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: A343/2018
Court *a quo*: 30689/11

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

24 March 2022
DATE

SIGNATURE

In the matter between:

MINISTER OF SAFETY AND SECURITY Appellant

and

MUNDKISSOON LUTCHMAN First Respondent
AADIT KUMAR (JASON) LUTCHMAN Second Respondent

NEUKIRCHER J (Baqwa J and Millar J concurring):

1] This is an appeal against the quantum portion of the order granted by Hattingh AJ in the court *a quo* on 18 March 2018. The present appeal is with leave of that court.

THE FACTS

2] On 24 December 2008 the first and second plaintiffs and 5 others drove in a Combi from Newcastle to Cape Town for, what the first plaintiff envisaged would be a holiday for his 8 year old, physically handicapped, nephew[1]. Along the route they all stopped to buy some fresh seafood and some ice and were touring through Hout Bay when they were pulled over by the members of the appellant (SAPS) and the vehicle was searched without a search warrant. The upshot of the search was that the police found that one of the packets contained abalone.

3] Despite the fact that one of the occupants of the vehicle, a Mr Yeh, confessed that he had been the one to purchase the abalone, the police simply would not listen. All 7 occupants of the vehicle were eventually taken back to the police station where they were detained and they were arrested before their rights were explained to them.

4] All 7 were detained in the same police cell with other detained people. The first plaintiff testified that eventually their rights were explained to them and he was allowed to telephone his brother in Cape Town[2]. They

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1 The second plaintiff

2 The second plaintiff's father

were then placed in a cell together and given blankets – these were infested with fleas and bugs. The first plaintiff kept the second plaintiff on his lap the entire night because the cell they were all put in was filthy. It had a filthy toilet – the toilet was clogged and the water was flowing everywhere. The walls were filthy and so were the floors. There were no matrasses and the blankets, as stated supra, were unusable. He testified that it was the first time that the second plaintiff had been away from his parents and that he was scared. The food that was given they also refused – first plaintiff because he is vegetarian and the second plaintiff simply refused to eat the food. He testified that, as a result of this, the second plaintiff's parents no longer trust him with their son, that he now has a deep mistrust of the members of SAPS following on this ordeal.

5] The following morning, after an intervention by a female police officer, the second plaintiff was taken out of the cell and stayed with the female police officer until his father arrived and he was then released into his care.

6] Eventually, on 26 December 2008, the remainder of the group were all released on bail. When they appeared at the Wynburg Magistrate's Court the following day, they were informed that the charged had been withdrawn[3].

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[3] According to the attorney who represented them, the charges had been withdrawn as the abalone that was purchased was within consumable limits

7] The second plaintiff's evidence followed on that of the first plaintiff. He too testified to their arrest and detention. His evidence was that the blankets given to them were filthy and full of "bites and itches" and that he sat on the first plaintiff's lap throughout the night. His evidence is that as a result of this arrest he had a fear of bugs and public toilets. He also doesn't want to be near policemen and he can still remember that Christmas and the policeman saying to him: *"Enjoy your night in jail with bugs."*

THE ASSESSMENT OF DAMAGES

8] The court *a quo* granted the following damages to the first and second respondents:

8.1 First respondent : R200 000-00[4]; and

8.2 Second respondent : R170 000-00.[5]

9] In awarding the amount of damages, the court *a quo* found the following:

"[55] This court takes all the abovementioned factors in consideration but more specifically the tender age of the 2nd plaintiff in this matter coupled with his physical impairment as well as the fact that he was detained in a general cell with other detainees and had to

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4 R80 000 for unlawful arrest and R120 000 for the unlawful detention from 24 December 2008 until 26 December 2008

5 R100 000 for unlawful arrest and R70 000 for the unlawful detention

endure that for one night without a matr(a)ss and only having a blanket sitting on his uncle's lap. It is furthermore clear from the evidence that he is still affected by his arrest to this day.

[56] It is furthermore clear that the 1st plaintiff was detained on 24 December 2008 at 14h00 and remained in custody until 26th December 2008 at 13h45. This is +/- 2 (two) days. The 2nd plaintiff was detained on 24 December 2008 at 14h00 and remained in custody until 25th December 2008 at 09h30. This constitutes 18 ½ (Eighteen and a Half) hours...".

10] In **Minister of Safety and Security v Tyulu**[6] the following was stated:

"*[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such*

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6 [2009] 4 All SA 38 (SCA) para 26

an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour ***2006 (6) SA 320*** *(SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008)* ***[2009] ZASCA 39*** *(31 March 2009) (paras 26-29)."*

11] The approach to be adopted by an appeal court in matters such as these was set out in **Minister of Safety and Security v Scott**[7]

"[42] It is trite that the assessment of general damages is a matter within the discretion of the trial court and depends upon the unique circumstances of each particular case. An appeal court is generally slow to interfere with the award of the trial court but will do so where there has been an irregularity or misdirection. Where the appeal court is of the opinion that no sound basis exists for the award made by the trial court or where there is a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made"

12] When assessing comparable awards, adjustments should be made to the monetary value of those award so that they are reflected in today's terms[8]

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7 2014 (6) SA 1 (SCA) para 42

8 SA Eagle Insurance Co. Ltd v Hartley 1990 (4) SA 833 (AD) at 841D-E

COMPARABLE CASES

13] In **Rahim and Others v Minister of Home Affairs**[9] **(Rahim)** a number of asylum seekers, who were detained in police cells, prison cells and the Lindela Detention Centre, were awarded damages of between R3 000 and R25 000 (for 35 days in detention). However, these low amounts are hardly surprising given that the appellants in that matter had failed to present evidence concerning the conditions under which they were held and had failed to testify about the personal impact of the detention. The conditions at both the police station and the prison cells was elicited by way of cross-examination of the respondent's witnesses. As was stated by Navsa ADP when penning the award *"Appellant's counsel conceded that this sparse material was far from satisfactory and urged us to do the best we could under the prevailing circumstances."*

14] However the facts in the **Rahim** matter and those at hand, are not at all comparable. Faced with an absolute paucity of information, the SCA in **Rahim** did the best it could with the award for damages. Here, this court is not in that position. This court knows exactly the circumstances the respondents found themselves in for between 18 and 48 hours and knows the impact it had on them both.

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9 2015 (4) SA 433 (SCA)

15] In **Phefadu v Minister of Police**[10], the plaintiff was arrested and detained for a period of approximately 20 hours, and was severely assaulted. Rabie J awarded R350 000 damages in 2017. In today's terms that award is worth R369 000.

16] In **Schoombee and Others v Minister of Police and Others, Eastern Cape Division**[11] the court awarded between R180 000 and R230 000 to the 4 plaintiffs. In this matter, the plaintiffs were arrested and detained for approximately 25 hours. The police cells in which they were detained were filthy and unhygienic. The toilet was non-functional, there was no running water and the cell reeked of excrement and urine. The cells had an open courtyard uncovered by a roof. It was winter and the plaintiffs were exposed to the elements and to freezing cold conditions. Thus, the conditions under which the plaintiffs in the **Schoombee** matter were detained, bear a strong resemblance to the matter to hand.

17] Of course, the personal circumstances of each plaintiff is different. In this matter, we are dealing with two respondents who should never have been arrested in the first place. The second plaintiff was, at the time, an 8 year-old disabled child who was exposed to the most terrible circumstances that simply fly in the face of Section 28(2) of the

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10 2017 (7K86) QOD 388 GP

11 5 consolidated cases: case no 2680/2014; case no 992/2015; case no 994/2015; case no 995/2015; case no 996/2015; Rugunanan AJ, Eastern Cape Division, Grahamstown; 1 October 2019

Constitution[12], and more especially section 28(1)(g)[13]. The fact remains that the members of SAPS are supposed to be beyond reproach. They are supposed to protect and serve. They failed dismally.

18] It has been stated that

"[8] Various factors play a role in determining an appropriate amount, including 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 nature of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; awards in previous comparable cases (together with the effect of inflation) and the fact that, in addition to physical freedom, other personality interests (such as good name and honour) and constitutionally protected fundamental rights have been infringed.."[14]

NEW GROUND OF APPEAL

19] Mr Papier has argued that one of the factors that should have been considered by the court was the fact that in the particulars of claim, the

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12 *"A child's best interests are of paramount importance in every matter concerning the child"*

13 *"**28 Children***
(1) Every child has the right –
...(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner and kept in conditions, that take account of the child's age..."

14 Minister of Police v Page (CA231/2019) [2021] ZAECGHC 22 (23 February 2021)

plaintiffs claim R150 000.00 each in respect of general damages for *contumelia*, deprivation of freedom and humiliation. He argues that the fact that the court awarded an amount of more than that constitutes a material misdirection.

20] In **Chaza v Commissioner of Police and Another**[15] the court declined to award an amount of damages higher than those claimed *"because of the clearly established principle that the summons is the label that tells (the) defendant what he is to expect in the declaration. Consequently any pleading filed can only be taken as an expansion or elucidation of the summons. In the absence of that amendment, I can therefore proceed on the basis that the claim for general damages is as set out in the summons."*

21] However, this issue is raised in neither the Notice of Appeal, nor the appellant's heads of argument and the question before us is whether the appellant should be allowed to argue this new ground of appeal.

22] In **Songono v Minister of Law and Order**[16], Leach J remarked
"I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that

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15 1988 (4A3) QOD 10 (ZH) at pg 17
16 1996 (4) SA 384 (E) at 385-386

subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49(3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet – see for example, Harvey v Brown 1964 (3) SA 381 (E) at 383; Kilian v Geregsbode, Uitenhage 1980 (1) SA 808 (A) at 815 and Erasmus Superior Court Practice B1-356-357 and the various authorities there cited.

It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the appellant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory..."

23] In **Hing and Others v Road Accident Fund**[17] **(Hing)** the Full Court lamented the late filing of a notice of appeal which had replicated all the grounds set out in an application for leave to appeal and applied for leave to file it out of time. The court stated:

"...I consider the purpose of a notice of appeal must be kept in view. It is to define the ambit of the appeal for the benefit of the appellate court and the respondent. The court needs to know the issues arising out of the judgment of the court a quo that it is called upon to determine, and the respondent needs to be informed of what it has to address in argument..."

24]] In **Hing**, the Full Court found that the issues it was called upon to deal with were clear enough from the appellant's heads of argument and there was no complaint by the respondent that it was prejudiced in being able to argue the appeal. It therefore treated the heads of argument in lieu of a notice of appeal and *"counsel on both sides acknowledged [it] would be appropriate were we inclined to condone the absence of a proper notice of appeal."*

25] In the matter to hand, the argument set out in paragraph 19 supra is to be found neither in the Notice of Appeal, nor in the appellant's heads of argument. The first time it was raised was at this hearing. Of, course, the respondents' counsel objected. Mr. Jacobs' argument is that he was

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17 2014 (3) SA 350 (WCC) at para 5; Mpondo v Road Accident Fund [2011] ZAECGHC 24 (9 June 2011)

caught off guard and that, had he been made aware of this point, he would have filed a notice of amendment to bring the amount claimed in the particulars of claim in line with the award granted by the court *a quo*.[18] He also argued that he has had no time to prepare on this point because he was not notified of it at all.

26] I agree that, in the absence of some form of proper notification of this point, the appellant cannot raise it – it is tantamount to a trial by ambush which a court will not countenance.

THE AWARD

27] The argument by the appellant is also that the court a quo split the award which in effect gave the respondents' two bites at the same cherry. The argument is that there is only one incident of deprivation of freedom flowing from the arrest and detention and that it cannot award general damages for the unlawful arrest and then again for the unlawful detention.[19] But, in my view, that is not what the court a quo did – it awarded one amount of general damages and simply explained how it had calculated that amount. The fact that it awarded amounts under separate headings is not a duplication, it is rather a clarification.

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[18] The general rule is that an amendment will be allowed only in cases in which the issues raised have been thoroughly canvassed in the court below: Hillock v Hilsage Investments (Pty) Ltd 1975 (1) SA508 (A) at 513G – 514B

[19] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC); Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)

28] It is trite that an appeal court will only interfere with the award of the trial court:

"(i) where there has been an irregularity or misdirection (for example, the court considered irrelevant facts or ignored relevant ones; the court was too generous in making a contingency allowance; the decision was based on totally inadequate facts);

(ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court;

(iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award that the Appeal Court considers ought to have been made. In order to determine whether the award is excessive or inadequate, the Appeal Court must male its own assessment of the damages, If, upon comparison with the award made by the trial court there appears to be a 'substantial variation' or a 'striking disparity', the Appeal Court will interfere."[20]

29] I have carefully considered all the arguments placed before this court. Given the comparable cases, I am of that the court materially misdirected itself in the application of the facts to the exercise of its discretion and consequentially the award made. As to the first respondent, the emotional impact of the arrest and detention were not as severe as that experience by the second respondent. His evidence

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20 Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at 586-587; Herbstein & van Winsen; The Civil Practice of the High Courts of South Africa; Fifth Edition, Vol 2; pg1255-1256

was clearly that he had moved on and put it behind him. As to the second respondent, even though he was arrested and detained for a shorter period, the fact that the employees of the appellant completely ignored the provisions of s28 of the Constitution is an aggravating factor to be considered in the award. It is clear that the comparable cases have made similar awards to those granted *a quo*, but in circumstances far more extreme than in this matter – in **Phefadu** the plaintiff was severely assaulted and in **Schoombee** the circumstances under which the plaintiffs were held were far direr. I am thus of the view that the award made is excessive given the facts of this matter and in that respect, the court *a quo* materially misdirected itself.

30] I am of the view that an award of R120 000.00 for the first respondent and R150 000.00 for the second respondent will adequately compensate them.

COSTS

31] I am of the view that the misdirection of the court should not be visited on the respondents. My view is fortified by the fact that a considerable amount of time was taken up in argument by the submissions set out in paragraph 19 supra which took all by surprise, especially Mr Jacobs. As stated, he submitted that, had he had timeous notice of the point, not only would he have had time to serve an amendment, but he would also have been able to prepare argument on the point – all of which has

been denied to him given what transpired. Given this, I am of the view that each party should bear their own costs of appeal.

ORDER

32] The order I therefore propose is the following:

32.1 the appeal succeeds.

32.2 The order of the court a quo is set aside and replaced with the following:

32.2.1 the defendant is directed to pay to the plaintiff the sum of R120 000.00 together with interest *a tempore morae* from date of judgment to date of payment;

32.2.2 the appellant is directed to pay the second respondent the sum of R150 000.00 together with interest *a tempore morae* from date of judgment to date of payment.

32.3 each party shall their own costs of the appeal.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED

S BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 March 2022.

For the Plaintiff	: Adv GR Papier
Instructed by	: State Attorney, Pretoria
For the Defendants	: Adv G Jacobs
Instructed by	: Loubser Attorneys
Matter heard on	: 9 March 2022