

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER:

8867/2002

5 DATE:

5 DECEMBER 2006

In the matter between:

**BASIL PETERSEN**

Applicant

and

10 **MINISTER OF SAFETY & SECURITY**

Respondent

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**J U D G M E N T**

**Application for Leave to Appeal**

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**DAVIS, J:**

This is an application for leave to appeal against the judgment of this Court on 5 September 2006. The events which gave rise to the action brought by plaintiff (applicant in this case) are indeed tragic. I do not intend to traverse the facts which are set out in the principal judgment. Suffice it to say that the case did divide into three separate issues, the lawfulness of the arrest, the alleged indecent assault and sodomy by fellow detainees and the alleged assaults by Inspectors Heunis and /bw

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Ockhuis and other police officials.

The Court found in effect that the arrest was lawful. The Court found that there was no evidence that the plaintiff had been  
5 assaulted by either Inspector Heunis or Ockhuis or other police officials, but did find that the defendants (respondents in this application) knew or should have known that the plaintiff was under the age of 18 at the time that he was brought to the Philippi Police Station and accordingly should have been put  
10 into a separate cell for children at that point.

Mr Sher, who again appears on behalf of the plaintiff, did not raise any new arguments with regard to the question as to why the Court had erred with respect to the alleged assaults by  
15 Heunis and Ockhuis and I think to that extent, no other court should be confronted with the matter on which there is absolutely no evidence and which there is no reasonable prospects of success.

20 The issue which Mr Sher urged this Court, not only to effectively reconsider, but to find that there were reasonable prospects of success, concerned the detention of the plaintiff in an adult cell at Philippi Police Station. In this regard he drew a distinction between the question of arrest and the  
25 detention. It is true that in the particulars of claim which were  
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drawn, subsequent to which an agreement with regard to damages was reached, the relevant paragraph reads:

5 "Basil Peterson has suffered damages in the amount of R2 683 150,00 which sum is made up as follows. For and in respect of wrongful arrest and detention and deprivation of liberty R100 000."

10 Although the issue was not argued with the precision which perhaps it required, it is correct, notwithstanding what was set out in those particulars of claim, that Mr Sher did submit in his written heads, that in the event that the detention was unlawful, at least insofar as the detention in a cell with adult gangsters was concerned, even if the arrest was not so  
15 unlawful. To that extent, there is no question in my mind that another court may well come to a different conclusion to that reached by this Court. Of course, that will have consequences for the damages, but that is not the point. The point is that plaintiff should have been put into a cell for juveniles, whilst  
20 arrested at the Philippi Police Station. This did not occur.

The Court has already found that this should have happened on the evidence which was made available to the police and accordingly to that extent, the continued detention of plaintiff  
25 at the Philippi Police Cells, could well be found to have been  
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wrongful by another court.

The essence of the argument with regard to wrongful arrest was that the information made available to Inspector Heunis, the arresting officer, by Mr A, was that by the time the fatal shots were fired, plaintiff and his fellow gangsters had already left the scene and accordingly it was not reasonable for Inspector Heunis to have proceeded to arrest plaintiff. I must confess that I find it difficult to conceive that another court might come to a different conclusion upon the test which this Court adopted. It may well be that another court has a stricter and narrower view as to the manner in which police can arrest suspects.

Turning to the issue of the assault by fellow detainees. Mr Sher submitted that another court might take a more generous view of the evidence as given by plaintiff and his mother. Mr Jamie, who again appears on behalf of the defendants (respondent in this case) contended that the first report of the assault only took place in Pollsmoor and not whilst the plaintiff was held at the police station. He further submitted that if there was no evidence, the police did not assault the plaintiff, when questions arose as to why plaintiff and/or his mother did not report the events at Philippi Police Station.

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Furthermore Mr Jamie urged upon me to take account of the fact that there was no challenging to the various cell inspections which had taken place whilst plaintiff was in the Philippi Police Station and that accordingly, the evidence to  
5 justify that he had been assaulted at the police station, was slim at best and certainly did not justify a finding against defendants on the probabilities.

I have found this case an extremely difficult one. A great  
10 tragedy has engulfed the plaintiff and his family and, I found, as a result thereof, that plaintiff's evidence was extremely difficult to deconstruct, given his state of mind. I have more confidence that this aspect of the case is less susceptible to appeal. However, in view of the fact that I consider that there  
15 are prospects of success, at least on the one point, and given that when the evidence is examined in its totality, it may well be that another court might be more generous in its interpretation thereof.

20 I thus find that leave to appeal should be granted in respect of the finding that the arrest and continued detention were lawful and further the finding in respect of the alleged indecent assaults and sodomy by fellow detainees at the Philippi Police Station. These are essentially factual questions not legal ones  
25 and it would, therefore, only be proper that the matter be sent  
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to a full bench of this Division for determination. Costs to stand over.

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DAVIS, J