IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: A148/2008

DATE: 8 AUGUST 2008

In the matter between:

THE MINISTER OF SAFETY & SECURITY APPELLANT

and

GERHARDUS JOHANNES H CLOETE RESPONDENT

JUDGMENT

FOURIE, J:

This is an appeal against the judgment of the magistrate at Bellville delivered on 8 November 2007, as supplemented by written reasons in terms of Magistrate's Court Rule 51. Mr Jacobs appears for appellant (defendant in the court *a quo)* and Mr Engela for respondent (plaintiff in the court *a quo)*. For the sake of convenience, the parties are referred to as in the court below.

It is common cause that on 20 September 2005, plaintiff was arrested without a warrant of arrest by members of the South African Police Services acting within the course and scope of their employment with defendant. It is further common cause

that subsequent to his arrest, plaintiff was taken to the Ravensmead Police Station for the purpose of obtaining a so-called warning statement from him. There he was detained in custody in the police cells and released approximately one hour after he had been arrested. He appeared in court a few days later when the charge of common assault, which had been preferred against him, was withdrawn.

In his particulars of claim, plaintiff alleges that as a result of the aforegoing, he suffered damages in an amount of R100 000 due to the grave distress, inconvenience and humiliation suffered by him which, he alleges, resulted in a grave impairment of his dignity. The action was defended and after hearing evidence, the magistrate granted judgment in favour of plaintiff for payment of R60 000 as damages, together with interest thereon and ordered defendant to pay plaintiff's costs on the scale as between attorney and client. Defendant now appeals against the whole of the judgment and order made by the magistrate.

As appears from the magistrate's reasons for judgment, defendant conceded the merits of the action during argument. The magistrate was accordingly only called upon to decide the issue of the quantum of plaintiff's claim and to make an appropriate costs order. As appears from defendant's notice

of appeal, the contention on behalf of defendant is that the magistrate erred and misdirected himself in awarding the amount of R60 000 as damages and awarding plaintiff costs on the attorney and client scale.

It is trite that a Court of Appeal will only interfere with the exercise of a trial court's discretion in assessing the amount of damages if there is a striking disparity between the award made by the trial court and that which a Court of Appeal would award, or if the trial court committed an irregularity or misdirection. See Minister of Safety & Security v Seymour 2006(6) SA 320 (SCA) at 323 D to H and RAF v Delport N.O. 2006(3) SA 172 (SCA) at 179 D to H.

The general rules relating to an award of attorney and client costs are also trite and stated as follows in Cilliers, Law of Costs at paragraph 4.9:

> "The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs, and will grant such costs only on rare occasions. It is clear that normally the court does not order a litigant to pay

the costs of another litigant on the basis of attorney and client, unless some special grounds are present."

Turning to the issue of the quantum of plaintiff's claim, it has to be borne in mind that an arrest and detention is a drastic interference with the rights of an individual to freedom of movement and to dignity. Our courts have frequently emphasised that an arrest should only be the last resort as a means of producing an accused person or a suspect in court. See the authorities referred to in Louw v Minister of Safety & Security 2006(2) SACR 178 (T).

In the instant matter, it was never the intention of the police officers to arrest plaintiff for the purpose of producing him in court. As held by the magistrate, the intention in arresting plaintiff was rather to harass him and to teach him a lesson. It is clear that plaintiff was seriously humiliated in being arrested, handcuffed and placed in the police van in the presence of his employees. The arresting officer also conducted herself in an arrogant manner and did her level best to provoke plaintiff. There was also no reason for the police to detain plaintiff in the police cells. Their conduct in this regard was clearly malicious, as evidenced by the placing of plaintiff in a cell with several trial awaiting prisoners, with the arresting

officer gesturing to the other prisoners that they should manhandle plaintiff. Fortunately no physical harm befell plaintiff during his incarceration.

It is clear from the evidence that plaintiff is a sophisticated, educated and successful businessman, who at the time of his arrest and detention employed approximately 50 people in his two factories in the Western Cape. I have no doubt that being arrested and handcuffed in full view of his employees, plaintiff suffered severe humiliation and was gravely injured in his dignity. His dignity was further injured during his subsequent detention, especially in view of the manner in which he was treated.

However, on the other hand, this is not a matter where there is enduring trauma. The magistrate, in my view, correctly held that plaintiff had probably dealt with all the trauma he experienced. In Minister of Safety & Security v Seymour (supra), Nugent, J A emphasised that in a case of this nature, money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. As stressed by the learned judge of appeal, past awards of the courts in similar matters reflect no discernible pattern other than that our courts are not extravagant in compensating the loss.

Counsel have referred us to various judgments in which damages were awarded in cases of unlawful arrest and detention. It would not serve any purpose to try and analyse each of them, but in my view the recent decision of Minister of Safety & Security v Seymour (supra), can serve as a benchmark. The humiliation suffered by the plaintiff in Seymour was at least equal to the humiliation suffered by plaintiff in the instant case. The plaintiff in Seymour was wrongfully arrested and detained for five days and the present value of the damages awarded to him is approximately R101 000.

The plaintiff in the instant case was only detained for one hour and although I agree with the submissions made by Mr Engela in paragraph 15 of his heads of argument, the award of R60 000 as damages appears to me to be strikingly excessive if compared with the award made in Seymour. Reference can also be made to Seria v Minister of Safety & Security & Others 2005(5) SA 130 (C). There the plaintiff was unlawfully arrested at his home in the presence of guests, taken to the police station, initially locked up in a cell on his own and thereafter made to share a cell with a drug addict for the night. He was wrongfully detained for 24 hours.

The present value of the damages awarded to him is

approximately R60 000. In my view the plaintiff in the instant matter, who was detained for one hour and suffered no greater humiliation than the plaintiff in Seria, should not be entitled to damages in an amount of R60 000.

On reflection I am of the view that on the facts of the present matter, an amount of between R30 000 and R40 000 would constitute adequate compensation. In my opinion an amount of between R10 000 and R20 000, as suggested by Mr Jacobs, would not amount to adequate compensation for the plaintiff. It follows, in my view, that there is a striking disparity between the award made by the magistrate and that which I would have awarded.

In the circumstances I conclude that this Court should interfere with the exercise of the trial court's discretion by awarding a lesser amount as damages. I should add that in regard to interest on the damages, the magistrate awarded interest as from the date of judgment. Mr Engela, after being prompted by this Court, moved for an amendment to the summons to claim interest as from the date of an earlier demand. This application is opposed and, upon consideration, we are of the view that Mr Jacobs correctly submitted that in the absence of a cross-appeal, such an amendment cannot be granted. The application for an amendment of the summons is accordingly

refused.

In regard to the costs order made by the magistrate, I am of the view that there is no legally justifiable basis for the making of a punitive costs order. In awarding costs on a punitive scale, the magistrate found that:

> "The opposing of this particular claim was absolutely unnecessary and even vexatious and obstructive."

The mere fact that the defence to the merits was unsuccessful, does not mean that the opposition was vexatious or obstructive. In my view there are no special grounds justifying a punitive cost order, in fact, by defending the action, the defendant succeeded in having the claim of R100 000 reduced to R60 000. The magistrate also sought to justify the punitive costs order on the basis that plaintiff had a right to come to court. However, that is a right also afforded to defendant, who was successful in having the claim reduced. I accordingly conclude that the magistrate misdirected himself in finding that in the circumstances of this case, a punitive costs order is justified.

Finally, in regard to the costs of appeal, it should be borne in

mind that the general rule that costs follow the event, is not implied as rigidly on appeal as it is at first instance. See Cilliers, Law of Costs, paragraph 14.9. The fact that defendant should, in my view, succeed to a certain extent on appeal, does not necessarily mean that defendant should be entitled to its costs of appeal. I am of the opinion that plaintiff should not be penalised for the exuberance of the magistrate in awarding damages and that the appeal should be seen as part of the process of arriving at a fair award. In this regard it should also be borne in mind that on appeal defendant argued that the damages should be reduced to between R10 000 and R20 000. In all the circumstances, I am of the view that it would be just and equitable to make no order as to the costs of appeal. In the result I would make the following order:

1. The appeal succeeds and the order made by the magistrate is set aside and the following substituted therefor:

"(a) Defendant is to pay damages to plaintiff in an amount of R35 000, together with interest thereon at the rate of 15,5% per annum, calculated from date of judgment to date of final payment.

(b) Defendant is to pay plaintiff's costs of suit on the scale as between party and party,

including counsel's fees."

2. No order is made as to the costs of the appeal.

FOURIE, J

I agree

NGEWU, A J