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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GRAHAMSTOWN**

Case No: CA&R 51/2015

Date Heard: 29/05/2015

Date Delivered: 4/06/15

In the matter between:

BRIAN HENDRICKS

Appellant

and

THE MINISTER OF SAFETY AND SECURITY

Respondent

Appeal against quantum of damages-Unlawful arrest-Liability conceded-Award of R30 000,00 held to be substantially out of general accord with previous awards-Substituted with R100 000,00 as claimed in summons-general principles restated.

JUDGMENT

REVELAS J

[1] The appellant, a [.....] year old plumber, instituted action against the respondent in the Magistrates' Court, Port Elizabeth, wherein he claimed R100 000.00 as damages, together with interest and costs of suit. In his particulars of claim he alleged that he was unlawfully arrested on Friday, 11 November 2014 at approximately 22h00 whilst at Pier 14 in Port Elizabeth, detained at the Mount Road Police Station until Monday 14 November 2014 whereafter he was summarily released on bail without

any charges being levelled against him. The action was defended and the plea filed consisted of a bald denial. At the commencement of the trial the respondent conceded the merits and the trial was confined to the quantum of the damages. The appellant was the only witness who testified at the trial.

[2] On 21 May 2014 the trial court awarded the appellant R30 000.00 damages with costs. (No order in respect of interest was made but, as a matter of law, interest would accrue to the amount awarded in any event¹). This appeal is directed solely against the quantum of the magistrate's award. The appellant contends that the magistrate did not apply his mind to the facts of the case, did not consider comparable awards, and, as a result, made an award substantially lower than awards generally made by courts in matters of this nature.

[3] The undisputed evidence before the magistrate was the following: The appellant was a churchgoing, married man with three children. His highest level of education was Grade 10 (Standard 8). He had one previous conviction for driving without a licence, in respect of which he paid a fine.

[4] After his arrest, the appellant was detained at the Mount Road police station. He and other persons shared a dirty, unhygienic cell with a

¹ Section 2(2) of the Prescribed Rate of Interest Act, 55 of 1975

blocked, malodorous toilet. The blankets supplied to him were dirty, full of lice and he was unable to use them. His request for clean blankets fell on deaf ears. He was therefore compelled to sit upright and cover himself with his jacket for the entire period of his incarceration in the cell. To compound his physical discomfort, his safety was compromised because his fellow inmates had robbed him of the R250.00 he had in his pocket and had threatened to assault him should he report the incident.

[5] In the holding cell at court, he once again had reason to fear his co-detainees, as they, too displayed an unwelcome interest in the contents of his pockets. The food provided was inedible to the extent that his wife was compelled to provide him with sustenance. Although he conceded that only his wife and one other person knew of his arrest, the arrest impaired his dignity, caused him humiliation and embarrassment to appear as an accused person in a court of law.

[6] In his *ex tempore* judgment, the magistrate referred to certain aspects of the plaintiff's evidence and concluded as follows:

"In the light of what I have said I take into account that the plaintiff was employed and was earning about R1500.00 a week (indistinct) about R6000.00 and I find that amount that is reasonable in the circumstances in favour of the plaintiff, the court will grant an amount of Thirty Thousand Rand".

[7] Although the judgment makes reference to certain cases to which the magistrate was referred to during argument, it is impossible to discern from the transcript of his unedited judgment which cases the magistrate was referred to. It is apparent from the judgment that the concession of the merits was a factor which weighed quite strongly with the magistrate and he clearly took into account the income of the appellant in arriving at the aforesaid amount. It is apparent from the award made, that the magistrate did not have regard to the awards of this nature given in comparable cases and did not have the necessary regard for the applicable legal principles referred to hereinafter.

[8] Our law has always regarded the deprivation of personal liberty as a serious injury,"and where the deprivation carries with it the imputation of criminal conduct of which there was no reasonable suspicion, the injury is very serious indeed."² In *Ntshingana v Minister of Safety and Security and Another*,³ Erasmus J set out the approach to be adopted when determining the quantum of damages in matters which concern the unlawful deprivation of personal liberty. He referred to the general principle that the amount of damages to be awarded is in the discretion of the court, amounts to an estimate, is calculated *ex aequo et bono* and is based on the extent and nature of the violation of the personality (*corpus, fama* and *dignitas*) of the plaintiff. The learned judge then cited a passage

² *May v Union Government* 1954 (3) 120 at 130 E-F per Broome JP

³ Unreported judgment, Case No 1639/01, ECG, 14 December 2003 at paragraph 28

from Visser and Potgieter's *Law of Damages*⁴ where the authors extracted from our case law, the many relevant factors which can play a role in the exercise of the court's discretion in awarding damages. The aforesaid approach of Erasmus J was followed by Plasket J in *Peterson v The Minister of Safety and Security*⁵, where the same passage (with reference to *Ntshingana's* case) was cited. This passage has since been edited by the authors of *Law of Damages*⁶ in the later, third edition of the work. Certain additional factors which can play a role in the exercise of the court's discretion were added thereto. The passage which contains a useful and comprehensive list of the factors under discussion is cited below and the additions thereto (since the second edition), are highlighted:

"The circumstances under which the deprivation of liberty took place, the presence or absence of an improper motive or "malice on the part of the defendant; the harsh conduct of the defendant; the duration and nature (e.g. solitary confinement **or humiliating nature**) of the deprivation of liberty; the status, standing, age and health **and disability** of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name **and constitutionally entrenched fundamental rights** have been infringed; the high value of the right to physical liberty; the effects of inflation; **the fact that the plaintiff contributed in some way to his or her misfortune; the effect the award may**

⁴ 2nd ed at 475

⁵ Corbett and Honey, QOD, 2011 (6K6) 1 ECG at 3

⁶ 3rd ed, at 548

have on the public purse; and, according to some, the view that the *actio iniuriarum* also has a punitive function.”

[9] Even though each case must be determined on its own particular facts and merits,⁷ and awards in comparable cases remain guidelines only, there is an obligation on a court, when determining the quantum of damages to be awarded in a certain type of matter, to have a degree of deference to the patterns of previous awards granted by the courts in broadly similar cases. It makes good sense and ensures legal certainty.

[10] In *Protea Assurance Co Ltd v Lamb*,⁸ a court’s wide discretion as to what it regards in the circumstances to be fair and adequate compensation to the injured party, was reiterated by Potgieter JA who added the following at 534H-535A of his judgment with regards to interference by a court of appeal with that discretion:

“Further, this Court will not interfere unless there is a ‘substantial variation’ or as it is sometimes called ‘a striking disparity’ between what the trial Court awards and what this court considers ought have been awarded.”

⁷ *Ngcobo v Minister of Police* 1978 (4) SA 930 D at 935 B-F

⁸ *Protea Assurance v Lamb* 1971 (1) SA 530 AD at 535 (H) and *Minister of Safety and Security v Seymore* 2006 (6) SA 320 (SCA)

Although the judgment in *Protea Assurance* related to general damages for bodily injuries, the principles enunciated therein apply equally to cases such as the present.⁹

[11] Counsel for the appellant referred us to several cases in support of the proposition that the amount claimed by the appellant in his summons (R100 000.00), was entirely in keeping with the awards generally made in similar cases. To avoid unnecessary repetition, I shall refer to the cases in question by the names of the plaintiffs only, since the defendant in each case was the Minister of Safety and Security. In all five cases the plaintiffs were unlawfully arrested by members of the South African Police Services and unlawfully detained for relatively short periods, as in the present case. The following awards (in present day monetary terms) were respectively granted to them:

1. *Peterson (supra)*¹⁰, detained for 8½ hours: R83 185.00.
2. *Van Der Merwe*¹¹, detained for 3 days and 2 nights: R151 860.00.
3. *Majuca*¹², detained for 2½ days: R126 000.00.
4. *Stolz*¹³, detained for 2¾ days: R211 152.00.
5. *Thlaganyane*¹⁴, detained for 19 hours: R186 000.00.

⁹ *Minister of Safety and Security v Seymour* 2006 (6) SA 320 at 323 D

¹⁰ See footnote .

¹¹ Corbett and Honey, QOD, 2011 (6K6) 34 ECG.

¹² 2012 JOL 2384, Case No: 1721/2011 ECG.

¹³ Unreported judgment, Case No: 3114/2004 SECLD

¹⁴ Unreported judgment, Case No: 2267/2010 NWHC.

[12] The awards in the aforesaid cases illustrate quite plainly that the award under consideration was disproportionately low compared to previous awards made in similar cases. The facts of *Majuca* in particular, were very similar to the present matter. The plaintiff was a married fisherman and father of four children and was, as the appellant had been in the present matter, unlawfully detained for two and a half days by the State. The award (R126 000.00) granted by Dambuza J to Mr Majuca, is an indication of what type of award would have been more appropriate in the matter under consideration and supports the contention that the amount claimed by the appellant in his summons accorded with previous awards, whereas the amount awarded to him by the magistrate, was "*substantially out of general accord with previous awards in broadly similar cases*"¹⁵.

[13] The magistrate, as shown earlier herein, was influenced by the respondent's concession on the merits and the appellant's income. The respondent only conceded its liability on the morning of the trial. This belated concession is no justification for the paltry sum of damages awarded, particularly when no apology or explanation for the unlawful actions of the servants of the respondent was proffered. A plaintiff's income is an irrelevant consideration in determining an appropriate award for non-patrimonial loss or general damages. The magistrate's reasoning in this regard is not legally sustainable and if such reasoning were

¹⁵ The phrase is borrowed from Potgieter JA in *Protea Assurance* at 536B

permissible in matters of personal injury, only the rich would benefit and the poor would be discriminated against. The magistrate clearly misdirected himself in taking the aforesaid irrelevant factors into account.

[14] A court making an award in respect of non-patrimonial loss should have in mind the purpose to be served by an award of damages, even if it is not expressed, otherwise the award would be based on arbitrary speculation.¹⁶

[15] If one has regard to the principles applicable to the determination of awards in cases such as the one under consideration, and in particular the requirement to have due regard to comparable cases, one can only conclude that the magistrate's award was made without bearing in mind what purpose the award may serve.

[16] The undisputed facts of the matter and the case law referred to above, demonstrably underscore the striking disparity between the amount the appellant was awarded and what he ought to have been awarded, namely the amount he claimed in his summons. Accordingly, the appeal must succeed.

[17] In the circumstances, I propose that the orders granted by the magistrate are set aside and substituted with the following:

¹⁶ Marine Trade Ins Co Ltd v Katz 1979 (4) SA 961 at 983

1. The appeal is upheld with costs.
2. The order of the court a *quo* is set aside and the following substituted:

- 1. "The defendant is ordered to pay the plaintiff damages in the amount of R100 000.00 (One Hundred Thousand Rand).**
- 2. Interest is payable on the aforesaid amount at the legal rate from date of summons to date of payment.**
- 3.The defendant is ordered to pay the plaintiff's costs of suit".**

E REVELAS
Judge of the High Court

Chetty J:

I agree and it is so ordered.

D CHETTY
Judge of the High Court

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