THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 944/2023

In the matter between:

NTJANYANA DANIEL MASITENG **APPLICANT**

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Masiteng v Minister of Police* (944/2023) [2024] ZASCA 165 (04 December 2024)

Coram: NICHOLLS, MOLEFE and KGOELE JJA and KOEN and DOLAMO AJJA

Heard: 7 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 04 December 2024

Summary: Reconsideration of application for leave to appeal – s 17(2)*(f)* of the Superior Courts Act 10 of 2013 – whether exceptional circumstances exist – unlawful arrest and detention – whether compensation awarded is fair – costs order – *Biowatch* principle – no exceptional circumstances.

ORDER

On application for reconsideration: Referred by Molemela P in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013:

The application for leave to appeal is dismissed with costs.

JUDGMENT

Molefe JA (Nicholls and Kgoele JJA and Koen and Dolamo AJJA concurring):

[1] This is an application for reconsideration in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the Act).[1] The central issue for determination is whether damages in the amount of R30 000 awarded to Mr Ntjanyana Daniel Masiteng, the applicant, arising from his unlawful arrest and detention, are fair and reasonable having regard to the circumstances of the case.

[2] The applicant instituted an action against the Minister of Police, the respondent, for pecuniary damages arising from his arrest and detention that took place on 29 September 2019, in Warden, Free State Province. The Regional Court for the Division of the Free State, held at Bethlehem (the regional court), awarded the applicant damages in an amount of R30 000. Aggrieved by the awarded damages, the applicant appealed the regional court judgment in the Free State Division of the High Court, Bloemfontein (per Daniso J and Rantho AJ) (the high

[1] Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 provides that where leave to appeal has been refused by two judges of the Supreme Court of Appeal, the President of the Supreme Court of Appeal may refer the decision for reconsideration and, if necessary, variation.

court), on the basis that the award was inappropriate. The high court dismissed the appeal with costs on 12 May 2023.

[3] The applicant petitioned this Court for leave to appeal, which was dismissed on 10 August 2023. He then applied to the President of this Court to reconsider the application for leave to appeal. On 18 January 2024, the President referred the decision of this Court for reconsideration, and if necessary, variation. The application was further referred for oral argument in terms of s 17(2)*(d)* of the Act, and that the parties must be prepared, if called upon, to address the Court on the merits of the appeal.

[4] Section 17(2) prescribes the manner in which this Court is to deal with applications to it for leave to appeal.[2] They are referred to two judges for consideration. Sub-section *(f)* provides that the decision to grant or refuse an application is final, but then introduces the following proviso:

'Provide that the President of the Supreme Court of Appeal may in *exceptional circumstances,* whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'[3] (Own emphasis.)

[5] The factual background relevant to the consideration of this application is this. On 9 March 2020, the applicant instituted an action in the regional court against the respondent for unlawful arrest and detention effected by the members of the South African Police Services (SAPS), on an alleged charge of assault with intent to do grievous bodily harm. The members of SAPS were acting within the

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[2] Section 17(2)*(f)* of the Superior Courts Act 10 of 2013, was amended in Government Gazette No. 50430, with effect from 3 April 2024, and reads as follows:

…

(f) … Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

[3] *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (*Avnit*) para 2.

course and scope of their employment with the respondent. The arrest was effected without a warrant of arrest at approximately 22h00 on 29 September 2019. He was detained in a Warden police cell and was released on 1 October 2019 at 16h00, without appearing in court after the prosecutor declined to prosecute. As a result of his detention, the applicant remained in custody for 42 hours.

[6] The applicant claimed an amount of R210 000 for deprivation of freedom, *contumelia*, discomfort, emotional stress and embarrassment. On the day of the hearing of the trial, the respondent conceded liability, and the matter proceeded on the determination of a fair and reasonable quantum of damages to be awarded to the applicant.

[7] According to the applicant's unchallenged testimony, during the period of his detention, he shared a small cell with many other inmates. The cell was congested, and its conditions were inhumane. The toilet facilities were not working and there was water on the floor of the cell. He was cold as he had to share a blanket with other inmates. He described his arrest as humiliating as he was arrested in front of his wife and children. At the time of his arrest, he was 42 years old and working on a farm as a shepherd. When he was brought to court, he spent approximately 8 hours in the court holding cell which was very small and overcrowded.

[8] The regional court found that the applicant's constitutional right to liberty was infringed as a result of his unlawful arrest and detention. Damages in the amount of R30 000 plus costs was awarded to the applicant.

[9] The applicant launched an appeal in the high court on the basis that the amount awarded was shockingly inappropriate for an unlawful detention of a

period of 42 hours. The applicant argued that the regional court did not exercise its discretion judicially as it did not consider previous comparable awards. The high court found that in cases involving deprivation of liberty, the quantum of damages awarded is at the discretion of the regional court, which must exercise this discretion judicially. The high court found no evidence to suggest that the regional court failed to exercise its discretion judicially and dismissed the appeal with costs.

[10] The assessment of the amount of damages to award to a plaintiff who was unlawfully arrested and detained, is not a mechanical exercise that has regard only to the number of days that a plaintiff spent in detention. The duration of the detention is not the only factor that a court must consider in determining what would be a fair and reasonable compensation to award. Other factors that a court must take into account could include: (a) the circumstances under which the arrest and detention occurred; (b) the presence or absence of improper motive or malice on the part of the defendant; (c) the conduct of the defendant; (d) the duration and nature of the deprivation; (e) the status and standing of the plaintiff; (f) the presence or absence of an apology or satisfactory explanation of the events by the defendant; (g) awards in comparable cases; (h) publicity given to the arrest; (i) the simultaneous invasion of other personality and constitutional rights; and (j) the contributory action or inaction of the plaintiff.[4]

[11] These are factual matters determined by the regional court after evaluating all the evidence. The applicant, however, introduced a new issue pertaining to costs, stating that he should not be mulcted with costs as he was seeking to

[4] J M Potgieter, L Steynberg, and T B Floyd. (2012) *Visser & Potgieter Law of Damages*. 3rd ed at 545-548; H B Klopper (2017) *Damages* para 255-259.

vindicate his constitutional rights. In this regard he relied on the *Biowatch Trust v Registrar Genetic Resources* (*Biowatch*) principles.[5]

[12] It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court.[6] In cases involving deprivation of liberty, the quantum of damages to be awarded is at the discretion of the trial court, to be exercised fairly, and generally calculated according to what is equitable and good, and on the merits of the case itself (*ex aequo et bono*). As a result, an appeal court should be slow to interfere, unless there are specific reasons to do so.[7]

[13] This Court in *Minister of Safety and Security v Tyulu*[8] said:

'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 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. . . .'

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[5] *Biowatch Trust v Registrar Genetic Resources and Others (Biowatch)* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 21.
[6] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 698.
[7] *Neethling v Du Preez and Others; Neethling v Weekly Mail and Others* [1994] ZASCA 133; 1995 (1) SA 292 (A); [1995] 1 All SA 441 (A) at 301G-H, as applied by the Constitutional Court in *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 94.
[8] *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (2) SACR 282 (SCA); [2009] 4 All 38 (SCA); 2009 (5) SA 85 (SCA) (*Tyulu*) para 26.

[14] Comparable cases and the awards made therein are nothing more than a useful guide to what courts have considered to be appropriate on the facts before them, but they have no higher value than that. Ultimately, each case must be determined on its own facts.[9] In my view, the high court correctly endorsed this principle and did not interfere with the amount awarded by the regional court.

[15] Counsel for the applicant submitted (without it being specifically mentioned in the judgment) that, the social status and standing of the applicant seem to have been regarded as the overriding criteria in determining what was an appropriate compensation. It was an injustice to the intrinsic value of the applicant because he was a farm worker, and 'poor people should not be compensated less simply because they are poor'.

[16] Counsel argued that the regional court materially misdirected itself, as it was influenced by the wrong principles and did not exercise its discretion judicially, by only awarding an amount of R30 000 to the applicant. It was contended that an amount of R100 000 would have been a fair amount under the circumstances. Furthermore, the court did not consider other comparable cases.

[17] Regarding exceptional circumstances, counsel for the applicant argued that this was a social injustice as the disparity in the amount is based on the applicant's social standing. It was argued that the high court erred in not adjusting the compensation awarded to the applicant and failing to apply all the relevant considerations.

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[9] *Minister of Safety and Security v Seymour* [2006] ZASCA 71; [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA) para 17.

[18] Applying the legal principles mentioned above, these submissions are without merit. The high court confirmed that the unlawful arrest and detention of the applicant infringed his personal rights of liberty, body integrity and human dignity. And that the primary purpose of an award is not to enrich a party but to offer him a solatium for his injured feelings.[10]

[19] The applicant's leave to appeal in this Court is largely predicated on the same grounds as those in the high court: that the court erred in the assessment and evaluation of the quantum in respect of the unlawful arrest and detention. The high court correctly reiterated that there was no evidence to suggest that in awarding the damages to the applicant, the regional court failed to exercise its discretion judicially. I am of the view that the criticism that the high court misdirected itself in finding that the award was appropriate based on the applicant's status and social standing cannot be sustained.

[20] The question now is, are there any exceptional circumstances in this case that would justify leave to appeal being granted. In *Liesching and Others v S*,[11] the Constitutional Court in considering an application of this nature remarked that s 17(2)*(f)* was not intended to afford disappointed litigants a further attempt to procure relief that had already been refused. It was designed to enable the President of the Supreme Court of Appeal to deal with a situation where injustice might otherwise result. The threshold for granting an application in terms of s 17(2)*(f)* is therefore high. The applicant has to satisfy this Court that the circumstances are truly exceptional to hear this matter again after the application for leave to appeal was dismissed and the petition to this Court was unsuccessful.

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[10] Op cit *Tyulu* fn 8 para 26.
[11] *Liesching and Others v S* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 para 139.

[21] The applicant failed to demonstrate that exceptional circumstances exist for leave to appeal to be granted by this Court. The applicant therefore did not meet the stringent test required in this application. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued.[12] Refusing leave to appeal will not result in a denial of justice.

Costs

[22] The high court ordered the applicant to pay the respondent's costs when it dismissed the appeal. Counsel for the applicant submitted that the high court erred in not considering that the applicant was claiming compensation following the unlawful breach of his constitutional rights. Counsel contended that the applicant should not be mulcted with costs, solely on the basis that an adverse costs order is in direct contrast with the principles laid out in *Biowatch*. I disagree that there is any constitutional issue, or any right asserted against an organ of the State. Although an infringement of liberty is jealously guarded by our Constitution, it is protected under the *actio inuriarum* and is a delictual matter.[13]

[23] In my view, this contention is misplaced. Not only is the applicant's claim delictual, this point was raised for the first time when leave was sought in this Court in terms of s 17(2)*(d)* of the Act. The applicant's reliance on *Biowatch* is therefore misconceived.

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[12] Op cit *Avnit* fn 3 para 6.
[13] *AK v Minister of Police* [2022] ZACC 14; 2022 (11) BCLR 1307 (CC); 2023 (1) SACR 113 (CC); 2023 (2) SA 321 (CC).

[24] The respondent seeks the costs of two counsel in this application on the basis that both parties employed two counsel. I consider this to be unjustified as the matter was not complex.

[25] In the result, the following order is made:
The application for leave to appeal is dismissed with costs.

D S MOLEFE
JUDGE OF APPEAL

Appearances

For the appellant:	S J Myburg SC with A C Gobetz
Instructed by:	Loubser Van Wyk Inc., Pretoria
	Jacobs Fourie Attorneys, Bloemfontein
For the respondent:	B S Mene SC with P G Chaka
Instructed by:	State Attorneys, Bloemfontein.