

**DAMAGES – WRONGFUL ARREST AND DETENTION –
QUANTUM OF DAMAGES
Minister of Safety and Security v Seymour
2006 6 SA 320 (SCA)**

1 Introduction

The judgment by Nugent JA (with whom Navsa and Heher JJA concurred) not only restates and applies well-known principles regarding the quantification of damages for wrongful arrest and detention, but also deals with the role of the Constitution in this regard. The court correctly places emphasis on the principle that the facts of each case are decisive in arriving at the appropriate amount of damages and that a comparison of awards made in previous cases must take proper account of this approach (see generally Visser and Potgieter *Law of damages* (2003) 472–474; Neethling, Potgieter and Visser *Neethling’s Law of personality* (2005) 121–122).

2 Facts

The respondent, 63 years of age and the chairman of an association of small-scale farmers, was unlawfully arrested and detained by the police for a period of five days (commencing on a Friday and ending on the following Wednesday). Allegations of irregularities made by members of the respondent's association formed the background to these events which led to his arrest on suspicion of fraud. Family members of the respondent had free access to him and he was also examined by a doctor who diagnosed hypertension and angina. Despite the doctor's advice that the respondent should receive medical treatment at a hospital, the police continued to detain him at the police station. He was later transferred to another police station (Johannesburg Central) and locked up in a cell. Only when the respondent's doctor again urged his transfer, was he taken to a clinic for medical treatment (paras 1–7).

When the respondent appeared in court on the Wednesday in question, the chief prosecutor declined to pursue the charge of fraud and the respondent was released. There was no evidence that he received medical treatment after his release, although he did consult a psychiatrist who diagnosed moderate to severe symptoms of depression and post-traumatic stress. When asked at the hearing of his civil case for damages why he did not submit to further treatment, the respondent replied that his Christian convictions would see him through and that payment of compensation would enable him to put the matter behind him (paras 8–9). The respondent was awarded a substantial sum of damages, namely R500 000, by the Johannesburg High Court and the State appealed against this amount (para 1).

3 The court's decision and reasoning

It comes as no surprise that the Supreme Court of Appeal set aside the amount of R500 000 ordered by Willis J in the court *a quo* and awarded substantially less, namely R90 000. Nugent JA restated certain well-known, general principles governing the award of money in cases of an infringement of personality rights:

- 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 (para 20).
- The trial judge has a wide discretion to award what the judge considers to be fair and adequate compensation to the injured party (para 11; *Protea Assurance Co Ltd v Lamb* 1971 1 SA 530 (A) 534; *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA); see Visser 2004 *THRHR* 312–315 for a discussion of the latter case).
- A court will not interfere on appeal unless there is a substantial variation or striking disparity between what the trial court awarded and what an appeal court believes ought to have been awarded (para 11).

Of considerable interest is how Nugent JA dealt with the fact that the right to physical liberty is now enshrined in the Constitution (para 14):

“The real import of the Constitution has not been to enhance the inherent value of liberty, which has been constant, but rather to ensure that those incursions upon it [by the legislature and the executive] will not recur. To the extent that the learned Judge placed a jurisprudential premium on personal liberty that was absent before now, it was misdirected.”

The court further referred to the use of earlier awards in comparable cases as an aid in arriving at an appropriate amount. The court emphasised that the assessment of damages with reference to earlier cases is fraught with difficulty (para 17). The facts of a particular case need to be considered as a whole and few cases are directly comparable. They are, however, a useful guide to what other courts have considered to be appropriate but they have no higher value than that (*ibid*). The court highlighted a *dictum* from the oft-quoted *Protea Assurance v Lamb* (535–536) to illustrate, *inter alia*, that comparable cases, when available, provide guidance in a general way to assist the court in coming to an award that is not substantially out of accord with previous awards in broadly similar cases. In the same breath the court warned against excessive reliance on earlier awards of damages (para 18), as well as the general undesirability of adhering slavishly to the consumer price index to adjust earlier awards for inflation to reflect current value (para 16; *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 3 SA 134 (A) 141).

Nugent JA pointed to the errors made by Willis J in the court *a quo* – for example, a misdirection in making a present-day estimate (of R350 000 – R400 000) of the damages of £1000 in *May v Union Government* 1954 3 SA 120 (N). He also referred to the facts and awards in a number of other cases before considering the facts *in casu* (paras 18–19; eg *Maphalala v Minister of Law and Order* unreported case 29537/93 WLD 1995-02-10 – plaintiff detained for 150 days and received R300 000 in current value; *Manase v Minister of Safety and Security* 2003 1 SA 567 (Ck) – plaintiff detained for 49 days and obtained R102 000 when adjusted for inflation; *Seria v Minister of Safety and Security* 2005 5 SA 130 (C) – detention of 24 hours and R52 000 damages in respect thereof).

In casu the court considered as relevant the fact that there was a period of detention of five days with full access to family members and that the respondent suffered no extra degradation except being detained (para 21). Most of the detention time was spent in a hospital bed and although it caused the respondent great distress, there is no indication that he required medical treatment after his release. His continuing depression and anxiety cannot be attributed solely to the arrest and detention. In view of everything, the court held that R90 000 was an appropriate award. Since this was so startlingly disparate from the award by the court *a quo*, the Supreme Court of Appeal held that it was fully justified to intervene.

4 Evaluation

There can be no doubt that the decision *in casu* is correct and that the considerations relied upon by the court are generally valid and convincing. The amount of R90 000 does do justice to the respondent's case. In fact, the R500 000 awarded by the trial court is so excessive in the circumstances that it induces a real sense of shock. The respondent should have been advised by his counsel to abandon part of the exorbitant award in order to avoid the inevitable reduction of damages on appeal (this is not to suggest that counsel did not in fact furnish such advice to him). To effectively receive R100 000 a day for being mostly detained in a hospital bed, can only be based on a judicial error and not on a legal principle known to our law. As stated in *Pitt v Economic Insurance Co Ltd* 1957 3 SA 284 (D) 287 the court must see that its award is fair and does not “pour out largesse from the horn of plenty”. The fact that taxpayers fund damages in this instance is obviously no licence to award an inflated amount.

In general, quantification should reflect the high premium placed by the law on a person's physical liberty. Personality rights are without doubt the most

important rights a person has and the right to physical liberty must be near the top of the hierarchy of personality and fundamental rights. There have been judicial warnings that the *actio iniuriarum* is not primarily a road to riches (as stated in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 590 with reference to a defamation claim). And although damage awards are generally, as a matter of legal policy, said to be “conservative” in our law, they should not be so conservative (low) that the defendant receives preferential treatment at the expense of the plaintiff (see Visser and Potgieter 438 fn 33 for references). There is thus something to be said for the observation in *Ramakulusha v Commander, Venda National Force* 1989 2 SA 813 (V) 847 that the sometimes small and insignificant awards made in Southern African courts (at that stage) for infringements of personality rights are not in accord with the relative importance of these rights (see further Visser and Potgieter 449 fn 114). Even taking all this into account, there can still be no justification for the R500 000 award by the trial court.

It should further be pointed out that the *actio iniuriarum* is not really a (fully) compensatory remedy in cases of an infringement of the right to personal liberty. We are here dealing with non-patrimonial loss where money can, by definition, never achieve actual compensation as in the case of patrimonial loss. However, the *solatium* (ie, money to provide consolation or some comfort to the aggrieved party) to which the court *in casu* refers (para 20), only describes a part of the object of this action. The action in question is in reality aimed at *satisfaction* and this is mainly achieved by imposing a kind of financial penalty on the defendant to benefit the plaintiff. Even though this “vindictive” element of the *actio iniuriarum* is often understated, ignored or even denied, the action has to a certain extent retained its character as an *actio vindictam spirans* (see generally Visser “Genoegdoening in die deliktereg” 1988 *THRHR* 468–491; Visser and Potgieter 191–193 464).

It is not necessary to dwell on the court’s remarks on the use of previous awards in comparable cases. Nugent JA merely restates the cautious approach of especially the Supreme Court of Appeal in this regard (see generally Visser and Potgieter 439–442).

A final issue that should be considered, is that the court *in casu* refused to accept that the recognition of the right to physical freedom as a fundamental right has enhanced the value of such right – which could lead to higher awards of damages than in the past (para 14). However, the court’s reference to *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 67 does not really support this conclusion. In the paragraph referred to in *Fose*, it is merely declared that there is no room for further constitutional damages to vindicate the personality (and fundamental) rights in question. The court in *Fose* was satisfied that “substantial damages” would be a sufficient and powerful vindication of the plaintiff’s rights, requiring no *further* vindication by an additional amount of damages. This is not the same as the court’s thesis *in casu* that the value of human liberty has remained constant before and after the introduction of the Constitution.

There has always been some support for the principle that the recognition of a common-law personality right as a fundamental right has enhanced the value of such a right. This is not surprising as it appears to be based on a logical assumption regarding the purposes and effect of the Constitution. In, for example, the Namibian case of *Afrika v Metzler* 1997 4 SA 531 (Nm) 537 the court argued as follows concerning the protection of one’s right to *fama*:

“With the new democratic dispensation heralded by the Namibian Constitution entrenching fundamental human rights and fundamental freedoms and the premium

to be attached to one's good name and reputation in instances of flagrant violation thereof, the time has come to have a liberal approach in the determination of the *quantum* and award much higher damages, especially in instances where aggravating circumstances are present as in the present case."

Although the court's statement regarding "much higher damages" should be treated with some circumspection, the basic principle appears to be acceptable (see for a discussion Visser 1998 *THRHR* 152–155; see further Burchell *Personality rights and freedom of expression* (1998) 436–441; Neethling's *Law of personality* 60: "entrenchment [of personality rights] strengthens their protection and this protection will certainly be enhanced by an increase in the amount of *solatium*"; 78).

It is submitted that despite the fact that the court *in casu* is correct in confirming that the right to personal freedom existed even before the Constitution and even though the Constitutional Court in *Fose* held that "constitutional damages" are not required since "substantial damages" would in appropriate circumstances be a sufficient remedy to vindicate the victim's personality loss, these facts do not negate the consideration that generally higher awards than before the introduction of the Constitution could be appropriate after the entrenchment of personality rights as human rights. The Constitutional Court has held open the possibility that the assessment of damages raises a constitutional issue (see *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 267–268) and it may be that this court will eventually not accept the relatively narrow position of the court *in casu* on the import of the Constitution on the *actio iniuriarum*. However, in some instances, the influence of the Constitution could be to *reduce* damages in order to achieve the correct balance between freedom of expression and the right to good name (*idem* 267). In the final analysis, the Constitution should have some effect, where necessary and appropriate, not only on the requirements for an action for delictual damages but also on the vitally important factor of the *quantum* thereof (see generally Visser "Some remarks on the relevance of the bill of rights in the field of delict" 1998 *TSAR* 529–536).

PJ VISSER

University of Pretoria