UNLAWFUL DETENTION: A DISAPPOINTING JUDGMENT

Alves v LOM Business Solutions (Pty) Ltd 2012 (1) SA 399 (GSJ)

1 Facts

In *Alves v LOM Business Solutions (Pty) Ltd* (2012 (1) SA 399 (GSJ); [2011] 4 All SA 490 (GSJ)) the plaintiff, who had been indicted for murder, was convicted in the High Court of attempted murder on 13 December 2005. Leave to appeal was granted immediately. The appeal was directed to the full bench of the division and was heard on 29 February 2008, more than two years later. The appeal was successful and the plaintiff's conviction and sentence were set aside on 5 March 2008. The plaintiff claimed that the long interval of time between the granting of the leave to appeal and the hearing thereof should be attributed to the negligence of the defendants in that they failed to ensure that an appeal record was prepared within a reasonable time. He alleged that, as a result of the defendants' breach of their duty, he was incarcerated for about 15 months longer than was reasonably necessary in the circumstances. (The first defendant was a firm responsible for preparing the transcript for his appeal hearing; the second defendant was the Minister of Justice and Constitutional Development, responsible for the overall administration of justice in the country.) The plaintiff claimed general damages for psychological pain and suffering and special damages for loss of earnings.

2 Decision

Willis J (402H–404J) commenced his judgment by embarking upon a comprehensive description of the facts leading to the plaintiff's conviction and incarceration. It is incomprehensible why the judge found it necessary to do this since it was completely irrelevant for the purposes of the present case, which was concerned only with the matter of unlawful detention or deprivation of liberty as a result of the plaintiff's further unnecessary period of incarceration. The same applies to the judge's consideration (412G–414D) of these facts later on in his judgment, seemingly when dealing with the quantum of damages. With respect, the same can also be said about the judge's philosophical utterances concerning freedom (414G–416E).

According to Willis J (402D), this case was the first of its kind since he was unaware of any claim of such a nature having been brought before. After considering the evidence, the judge (406C–G) had no difficulty in dismissing the claim against the first defendant, *inter alia* because the reason for the delay in preparing the record lay in the fact that difficulties were experienced in locating certain documentary exhibits used during the trial. The delays could not be attributed to the first defendant but to staff in

the National Director of Prosecution's office which falls under the aegis of the second defendant.

With regard to the claim against the second defendant, it was conceded (407B) that the Minister owed a duty to appellants in the position of the plaintiff to ensure that records were prepared for the hearing of an appeal within a reasonable time. Willis J (407C) stated that in terms of the Constitution, everyone has rights to freedom, freedom of movement, access to the courts, to challenge the lawfulness of one's detention and a right of appeal. These constitutional rights cannot be rendered nugatory by unreasonable delays in the offices for which the second defendant is responsible. In this regard (407D–408D) section 316(7)(b) of the Criminal Procedure Act 51 of 1977 provides for an the expeditious dispatch of records on review in order to promote the speedy and efficient administration of justice, and in particular to insure that an accused is not detained unnecessarily in cases where the court of review sets aside the conviction or reduces the sentence. The court (408D–G) also dismissed the submission that the Minister had a defence of *vis maior* or *casus fortuitous* in that he was prevented from preparing the record of appeal by forces beyond his control. According to Willis J it was not beyond the control of the officials who worked in the second defendant's department to ensure that there were no delays relating to having copies of documentary exhibits readily available. With reference to *Olitzki Property Holdings v State Tender Board* (2001 (3) SA 1247 (SCA) par 12) the court (409A–F) apparently accepted that there was a legal duty on the second defendant to ensure that a certified copy of the record was prepared without delay and that his omission to do so was wrongful. The court (409F–G) also found that the second defendant acted negligently, applying the reasonable foreseeability and preventability test as formulated in *Kruger v Coetzee* (1966 (2) SA 428 (A) 430): "The reasonable person would have foreseen the prejudice to the plaintiff occasioned by the delay. It is obvious. It is a needlessly long time spent in prison. Steps could reasonably have been taken to prevent it." As regards causation – that there must be a causal connection between the unlawful and negligent conduct complained of and the harm which is alleged to have ensued – the judge (409H–410C) held that both factual and legal causation were present, applying the "but for" test for the former and the remoteness approach to the latter. Willis J (411B–C) was satisfied that the plaintiff should be awarded damages arising from his extended period of incarceration attributable to the failure of the Department of Justice and Constitutional Development to ensure that his record of proceedings was prepared within a reasonable time for the appeal hearing to have taken place. For this conclusion, the court (410C–411A) "derived considerable comfort" from the Constitutional Court decision in *Zealand v Minister of Justice and Constitutional Development* (2008 (4) SA 458 (CC)), and also relied on *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* (2001 (4) SA 938 (CC).

Finally, the court focused on the quantification of damages. Willis J (411C–412C) stated:

> "Since the case of *Salzmann v Holmes* [1914 AD 471 483] it has been recognised that in claims for damages based on *injuria*, a court takes into account a variety of factors. These relate, in the main to *contumelia* but also

> take into account loss of reputation and a penalty to be inflicted upon the defendant. It has been clear since the case of *Matthews and others v Young* [1922 AD 492 503–504] that for an action to rely on *injuria* (the *actio injuriarum*) the wrong committed must have been intentional. *Contumelia* requires *dolus* (intent). A claim based on negligence, as in this case, is brought in terms of the *actio legis Aquiliae* for which either *dolus* or *culpa* may be elements. Under the *actio legis Aquiliae* the plaintiff is awarded 'the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act'. The compensation (skadevergoeding) awarded is:
>
> > 'die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatige daad en daarna ... Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het.'
>
> The amount of compensation is therefore computed according to the diminution in the plaintiff's patrimony. Compensation is not punishment. Nevertheless, even in the *Santam Versekeringsmaatskappy Beperk v Byleveldt* case [1973 (2) SA 146 (A) 153] which affirmed this "compensation is not punishment" principle, Rumpff JA (as he then was) delivering the majority judgment, affirmed the view of McKerron in *Law of Delict* that 'the interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure' ... I accept that the plaintiff suffered psychologically as a result of his long period of imprisonment. Since the case of *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk* [1973 (1) SA 769 (A) 779–782] it has been clear in South African law that damages may be awarded for psychological pain and suffering provided the consequences could reasonably have been foreseen. That it is no holiday to be in prison in South Africa is sufficiently well known for the plaintiff's trauma to have been foreseeable … it was agreed that a court must avoid on the one hand, sending out a message that there are large sums of money to be made out of the mistakes which may be made by State officials. On the other hand, it was also accepted that the amount should not be derisory showing contempt or indifference to the loss of freedom. The approach to quantum should be different in a case such as this from the situation where there has been an unlawful arrest and/or detention. An unlawful arrest need not always be intentional but may also occur negligently. Nevertheless, society's disapprobation is less in a case such as this than one in which there has been an unlawful arrest."

The court awarded R300 000 as general damages and R50 000 for loss of earnings.

3 Evaluation and comments

First of all, it is not quite comprehensible why the case was based on the negligent breach of a legal duty and not simply on strict liability for unlawful detention, particularly in light of the fact, as stated, that Willis J "derived considerable comfort" from *Zealand supra* (see also Neethling and Potgieter "The Law of Delict" 2008 *Annual Survey of South African Law* 844–847), where the Constitutional Court dealt with an analogous case of unlawful detention. In *Zealand* the plaintiff was convicted of murder in the High Court in 1998 and his conviction and sentence were set aside in 1999. The Registrar of that court negligently failed to issue a warrant for the plaintiff's release until 2004 with the result that he remained in custody more than five years after his conviction and sentence had been set aside. According to Langa CJ (461) the case raised a single issue, namely whether the detention of the applicant as a sentenced prisoner in a maximum security section of a prison was unlawful, for the purpose of a claim for delictual damages. Langa CJ (468–469) stated that because the Constitution enshrines the right to freedom and security of the person, it was sufficient for the applicant to

plead that he was unlawfully detained. The respondents then bore the burden to justify the deprivation of liberty. The Chief Justice pointed out that this is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. (See also *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) 91; *Olivier v Minister of Safety and Security* 2009 (3) SA 434 (W) 437 443–444; *Terblanche v Minister of Safety and Security* [2009] 2 All SA 211 (C) 212; *Le Roux v Minister of Safety and Security* 2009 (4) SA 491 (N) 496; *Ingram v Minister of Justice* 1962 (3) SA 225 (W) 227; *Boland Bank Bpk v Bellville Munisipaliteit* 1981 (2) SA 437 (C) 444; *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) 559; *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) 589; *Masawi v Chabata* 1991 (4) SA 764 (ZH) 771–772; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 153; *Bentley v McPherson* 1999 (3) SA 854 (E) 859ff; *Lombo v ANC* 2002 (5) SA 668 (SCA) 680; *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) 133; *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C) 143ff; and see also Neethling, Potgieter and Visser *Neethling's Law of Personality* (2005) 114–115.) Since the state could not justify the plaintiff's continued incarceration, Langa CJ found that the state's action justified a delictual claim for damages.

To our mind, there is no reason why the approach in *Zealand* should not have been applied in *Alves*. The plaintiff's deprivation of liberty or detention was certainly *prima facie* unlawful from the moment that the delay in providing the court record became unreasonable. The onus was thus on the state to provide justification for the continued incarceration. There was no obligation on the plaintiff to prove that the incarceration was unreasonable (breach of a legal duty) and therefore unlawful as a result of the state's negligent delay in providing the records timeously. If the state failed to justify the detention, it was strictly liable and the question as to fault (intent or negligence) was irrelevant (see, *eg*, *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA) 377; and see also Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 329). The only remaining issue (accepting that causation was also present) related to the calculation of damages. The investigation into fault for the unlawful detention in *Alves* is all the more perplexing in view of Willis J's own judgment on unlawful detention in *MVU v Minister of Safety and Security* (2009 (6) SA 82 (GSJ)), where the plaintiff succeeded in an action for damages without having to prove fault on the part of the defendant.

Secondly, with regard to the quantification of damages, the court (411C–D, cited above) indicated that for the *actio iniuriarum* the wrong must have been committed intentionally. Although intent is generally required for an *iniuria*, in cases of unlawful arrest and detention, as said, liability is strict, whilst negligence sometimes suffices, for example in instances of liability of the media for defamation (*cf* Neethling and Potgieter *Delict* 342 364). As to *iniuria* the court also stated with reference to *Salzmann v Holmes* (1914 AD 471 483) that "a penalty to be inflicted upon the defendant" is a factor to be taken into account in the assessment of damages for *iniuria*. Although some earlier cases supported this view, nowadays the generally accepted view

appears to be that punishment is not a function of the law of delict and that punitive damages may not be awarded (see, *eg*, *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) 29–30; *Collins v Administrator, Cape* 1995 (4) SA 73 (C) 94; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) 263; *Mogale v Seima* 2008 (5) SA 637 (SCA) 641–642; *Tsedu v Lekota* 2009 (4) SA 372 (SCA) 379; *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W) 500; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) 823–828; and *cf Media 24 Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd as Amici Curiae)* 2011 (5) SA 329 (SCA) 365). However, the idea of punitive damages in a delictual context is far from dead. There is support for this idea in recent South African case law as well as in foreign jurisdictions. In *Masawi v Chabata* (*supra* 771), cited with approval in *Zealand* (*supra* 468), the court stated: "As regards *quantum*, it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to the plaintiff as a *solatium* for the injury to his feelings" (see also *Steele v Minister of Safety and Security* 2009-02-27 case no 10769/2005 (C) par 125–129 135; cf Neethling and Potgieter *Delict* 7 fn 29; Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (2010) 398ff; and Potgieter, Steynberg and Floyd *Visser & Potgieter Law of Damages* (2012) 548). In general, common-law systems such as the USA and England openly award punitive damages for certain torts while some European jurisdictions, for example France, do this covertly (*cf* Koziol "Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusions" in Koziol and Wilcox (eds) *Punitive Damages: Common Law and Civil Law Perspectives* (2009) 276–281 and 284–287).

Apart from the *actio iniuriarum*, Willis J (411D–412A, cited above) also referred to the *actio legis Aquiliae* which according to him was applicable *in casu* because of the second defendant's negligent conduct. It appears that in addition to the (special) damages for loss of income, the judge also attempted to quantify general damages in terms of the Aquilian action. This approach is not in conformity with our law since the Aquilian action is reserved to recover patrimonial loss whilst general damages for non-patrimonial loss for the negligent (or intentional) infringement of the physical-psychological integrity are claimed with the action for pain and suffering (*cf* Neethling and Potgieter *Delict* 5 15–16 239ff). It stands to reason that damages for psychological lesions or emotional shock should also be claimed with the latter action and not with the Aquilian action, as was seemingly allowed by Willis J. He accepted that the plaintiff suffered psychologically as a result of his long period of imprisonment and with reference to *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk* (1972 (1) SA 769 (A)) stated that "damages may be awarded for psychological pain and suffering provided the consequences could reasonably have been foreseen". Although damages may certainly be awarded for psychological pain and suffering (*cf* Neethling and Potgieter *Delict* 242; and Potgieter, Steynberg and Floyd *Damages* 508–509), this was not the *ratio decidendi* in *Bester*, which was concerned with liability for emotional shock (or psychiatric lesions) for which very specific requirements are set, *inter alia* that there must have been a recognizable harmful infringement of the brain and nervous system, the existence of which should as a rule be proved by

supporting psychiatric evidence (*Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) 208–209 and 216; *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) 61; and see Neethling and Potgieter *Delict* 285) and that the shock must have been reasonably foreseeable (see, *eg*, *Bester supra* 780–781; *Boswell v Minister of Police* 1978 (3) SA 268 (E) 273–274; *Masiba v Constantia Insurance Co Ltd* 1982 (4) SA 333 (C) 342–343; *Gibson v Berkowitz* 1996 (4) SA 1029 (W) 1049–1050; and Neethling and Potgieter *Delict* 287–290). These requirements were seemingly not met in *Alves*.

Ultimately it is not very clear how the various factors referred to by the court influenced the determination of the *quantum* of the plaintiff's general damages. It nevertheless appears that the following factors played a part: The ordinary person's sense of justice and considerations of policy; the need to avoid, on the one hand, sending out a message that there are large sums of money to be made out of mistakes of public servants and on the other hand, that the amount should not be derisory, showing contempt or indifference to the loss of freedom; that the detention was caused negligently and not intentionally; the fact that the plaintiff suffered psychological pain and trauma; that freedom is a paramount interest worthy of protection; the long duration of the unlawful incarceration and the fact "that it is no holiday to be in prison in South Africa". It is, however, not clear how the plaintiff's alleged "perverse racist assault on his victim" could have had a bearing on his general damages for the violation of his freedom, particularly in view of the fact that he was found not guilty on appeal.

4 Conclusion

Unfortunately the decision in *Alves* is disappointing because the court did not adhere to established principles of our law of delict consistently in general and the law on unlawful detention in particular. Firstly the court did not apply trite law that the deprivation of liberty is *prima facie* wrongful and that the onus is on the defendant to justify the deprivation. It was therefore unnecessary to require the plaintiff to prove that the defendant breached a legal duty negligently. Secondly, liability for unlawful detention is strict and negligence on the part of the defendant is therefore irrelevant. Thirdly, the *actio iniuriarum* is not only limited to intentional actions: in certain cases negligence suffices and in others strict liability applies. Fourthly, general damages for psychological pain and suffering are not recoverable under the Aquilian action; the action for pain and suffering (which was not even mentioned in the judgment) is apposite. Fifthly, the action for psychiatric lesion as recognized in *Bester* (*supra*) was not applicable to the psychological pain and suffering in this case. Finally, it was completely unnecessary for purposes of the plaintiff's claim for unlawful detention to revert to the facts leading to the plaintiff's conviction, particularly in view of his successful appeal.

J Neethling
University of the Free State
and
JM Potgieter
University of South Africa (UNISA)