THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 1037/13

In the matter between:

THE MINISTER OF SAFETY AND SECURITY	**First Appellant**
THE MINISTER OF JUSTICE	**Second Appellant**
INSPECTOR LEGANO PHOSHOKO	**Third Appellant**

and

JEREMIA JANSE VAN DER WALT	**First Respondent**
ANDRIES DANIEL VAN WYK	**Second Respondent**

Neutral citation: *Minister of Safety and Security v Van der Walt (1037/13)* [2014] ZASCA 174 (19 November 2014)

Coram: Mpati P, Tshiqi, Theron, Swain JJA, and Mocumie AJA

Heard: **09 September 2014**

Delivered: **19 November 2014**

Summary: Delict – unlawful detention – vicarious liability – Minister of Safety and Security liable for negligent conduct of a police officer – magistrate not

liable in delict for negligent conduct while performing judicial function – Minister of Justice consequently not vicariously liable for the negligent conduct of magistrate – malice – magistrates only liable personally for malicious conduct – malicious conduct not proved and magistrate not sued personally for alleged malicious conduct.

ORDER

On appeal from South Gauteng High Court, Johannesburg (Van Der Merwe AJ sitting as court of first instance):

1 The appeal by the first appellant is upheld in part.

1.1 The order of the high court in respect of the first appellant is set aside and substituted as follows:

'(a) The first defendant is ordered to make payment to the first plaintiff in an amount of R120 000.

(b) The first defendant is ordered to make payment to the second plaintiff in an amount of R120 000.

(c) The first defendant is ordered to pay interest on the amounts in (a) and (b) of the order at the rate of 15.5 per cent per annum from the date of demand to the date of payment.

(d) The first defendant is ordered to pay the plaintiffs' costs of suit together with interest thereon at the prescribed rate of 15.5 per cent per annum from 14 days after taxation to date of payment. Such costs are to include the costs of two counsel where employed.'

2. The first appellant is ordered to pay the costs of the appeal including the costs consequent upon employment of two counsel where employed.

3. The appeal by the second appellant is upheld. The order of the High Court is set aside and each party is ordered to pay their own costs in respect of the second appellant's appeal.

JUDGMENT

Tshiqi JA (Mpati P, Theron and Swain JJA, and Mocumie AJA): concurring

[1] This appeal flows from the arrest of the two respondents and their detention from the afternoon of 26 May 2004 to the morning of 1 June 2004, when they were ultimately released on bail. The arrest and detention took place at the Brackendowns Police Station, Alberton. The respondents were there in response to a telephone call made by the branch commander to the second respondent ('Van Wyk') on 25 May 2004 informing him that a warrant had been issued for his arrest and that of the first respondent ('Van der Walt'). When they arrived at the police station the branch commander referred them to the third appellant ('Phoshoko'), a detective inspector, who was the investigating officer in the case. Phoshoko confirmed that there was a warrant for their arrest and showed them two dockets, which he allowed them to read in his office.

[2] The complaints in both dockets stemmed from a sale agreement concluded between Van Wyk and one Kanti James Mochitele ('Mochitele') in terms of which the former purchased a fixed property ('the disputed property') from the latter. Van Wyk had taken occupation of the disputed property. Mochitele apparently purported to cancel the sale agreement but Van Wyk disputed the validity of the cancellation. What followed was a series of criminal and civil disputes between them.

[3] The first docket pertained to an alleged theft of a toilet which allegedly occurred on 29 November 2003 at the disputed property which was still occupied by Van Wyk and his family. On 28 November 2003, Mochitele, accompanied by a group of approximately fifteen people in mini busses and a big truck, arrived at the

premises without notifying Van Wyk, to conduct what turned out to be ancestral celebrations. Nothing untoward happened during the celebrations but by the following day a hired portable toilet, left at the premises overnight by Mochitele, had disappeared. He reported it stolen at the Brackendowns police station. In his initial statement to the police Mochitele did not identify any suspect. However, on 3 December 2003, he identified Van Wyk as a suspect. As a result of that information the case docket, which had initially been endorsed 'ongespoor', was re–opened and assigned to Phoshoko for further investigation. That incident gave rise to a charge of theft against the respondents but no warrant of arrest was issued in relation to that incident.

[4] The warrant that was issued arose from the complaints contained in the second docket which related to a separate incident that allegedly occurred on 7 December 2003, at a house in which Mochitele and his family were residing at the time. Earlier that day, Mochitele visited the disputed property and, without consulting Van Wyk, dropped off goods comprising of tyres, machinery and drums at the property and left. Van Wyk was angered by Mochitele's conduct and arranged with Van der Walt, who owned a bakkie, to load the goods onto his bakkie. They then went and dumped the goods at the property occupied by Mochitele. During that process an altercation ensued between Van Wyk and Van der Walt on the one hand, and Mochitele and his family on the other hand. There are different versions of what occurred during the incident but as a result of the altercation Mochitele, his wife and brother laid charges of assault with intent to do grievous bodily harm, two charges of unlawful possession of firearm and a charge of pointing a firearm against Van Wyk and Van der Walt.

[5] After the respondents had inspected the dockets, Phoshoko charged and arrested them in terms of the warrants. He detained them in the police cells and later transported them in a police van to the holding cells of the Alberton Magistrate's Court. Later that afternoon they briefly appeared before a magistrate and were remanded in custody. The charge sheet placed before the magistrate during that appearance reflected that Van Wyk was facing a charge of assault which allegedly

occurred on 7 December 2003 and a charge of theft which allegedly occurred on a different date, (29 November 2003). Van der Walt only faced a charge of pointing a firearm that allegedly occurred on 7 December 2003.

[6] The respondents testified that what occurred in court during their first appearance before they were remanded in custody was unusual and took them by surprise. After their case was called, the magistrate adjourned the proceedings abruptly and left the courtroom followed by the prosecutor. They saw the magistrate talking to the prosecutor for a while outside the court. The magistrate then came back into court followed by the prosecutor and wrote something on the papers before her. She then informed them that one of the charges they were facing was armed robbery, a schedule 6 offence, which required them to bring a formal bail application. It is uncontroverted that the charge of armed robbery was not reflected in the charge sheet placed before the magistrate, but was reflected in a form titled: 'Annexure "A" - Bail proceedings in terms of Section 60 of Act 51 of 1977', which was also placed before the magistrate during that first appearance. The form was, according to the Ms Edith Zinn ('Zinn') who was the prosecutor at all times during the respondents' appearances, normally utilised by magistrates in the Alberton Magistrate's Court as a check-list to guide them during bail proceedings. It is common cause that the form was indeed altered. A perusal of it shows that the third charge: 'possession of an unlicensed firearm', which was initially written there, and which appeared in the charge sheet, was scratched out and replaced with a charge of armed robbery. The alteration is initialled and a signature appears at bottom of the form.

[7] Zinn testified that she did not know who made the alteration nor did she know who signed the form. The respondents testified that they thought it was the magistrate because of the discussion that took place between her and Zinn during the adjournment, shortly before she informed them that they were facing a charge of armed robbery. According to Van Wyk, they tried on two occasions to explain to the magistrate that there was no substance to this charge and that the charges of assault and theft that he, Van Wyk, was facing arose from incidents that occurred on different dates and that Van der Walt was only facing a charge of pointing a firearm.

The magistrate, however, would not listen to him and there was no intervention by either Zinn or Phoshoko. Instead, the magistrate said they should discuss the issue with the senior prosecutor who, however, was not in court at that time and therefore could not assist them. Zinn testified that she did not have any recollection of the adjournment nor the discussion she was alleged to have had with the magistrate. Her evidence was mainly generic and not helpful in clarifying what occurred in court during that first appearance by the respondents. Phoshoko also testified. He simply denied that an adjournment took place but shed no light on the course of events relayed by the respondents. Both he and Zinn, however, agreed that the charge of armed robbery should not have been written on Annexure 'A'. The magistrate was not called to testify.

[8] After their appearance in court the respondents instructed an attorney, Mr Culhane, to arrange for a bail application on their behalf. On 27 May 2004 Culhane attempted to arrange a bail hearing but did not succeed to do so and the respondents were not brought before court. On 28 May 2004 Culhane succeeded in ensuring that they were brought before court. On that day Phoshoko was not in court but Zinn was present. Culhane testified that during the appearance on 28 May 2004 he made a fervent representation to the magistrate that there was no basis for the charge of armed robbery. He described the exchange between him and the magistrate as follows:

'Now I can remember very clearly on 28 May explaining to the magistrate that this is not a Schedule 6 offence, explaining to her that these are two incidents which took place on two separate days and together they do not constitute a Schedule 6 offence. M' Lord, I wish to make this very clear because I can remember on the day that I in fact afterwards reflected on the fact that I had never addressed a magistrate in my entire life as I could say sternfully as I did on that day. In fact I remember that at one point I said to the magistrate, "Do you not understand the point I am making to you?" I never addressed a magistrate or a judge like that, but I was frustrated at the fact that she simply would not hear my argument that this was not a Schedule 6 offence that I ended up uttering those words and that is also not recorded here madam.'

Regrettably bail was still refused. On 1 June 2004 the respondents again appeared before court. On this occasion their application for bail was unopposed and bail was set at an amount of R5 000 each. They managed to pay the amount and were released the same day.

[9] Aggrieved by their arrest and detention from 26 May 2004 until their release on bail on 1 June 2004, the respondents instituted action against Mochitele, the Minister of Safety and Security, the Minister of Justice and Phoshoko in his personal capacity. The basis of the claim against Phoshoko was that he had a legal duty, as the investigating officer in the case, to place all relevant information before the magistrate but had negligently failed in that duty. As a result of that failure the magistrate refused to grant bail to the respondents during their first appearance and their further appearances on 27 and 28 May 2004. The Minister of Safety and Security was sued on the basis that as Phoshoko's employer, he was vicariously liable for his employee's wrongful conduct. As against the Minister of Justice, it was alleged that Zinn, who was also present in court at all material times, also failed, like Phoshoko, to place such relevant information before the magistrate. Had they performed their legal duties, as required, the magistrate would probably have released the respondents on bail. The factual basis for the claim against both ministers was that Phoshoko and Zinn, who were at all times present in court during the first appearance, failed to inform the magistrate during that appearance, and also did nothing after that appearance, to clarify to the magistrate that there was no basis for the charge of armed robbery. And that had they done so, there would have been no basis for the magistrate to say that the respondents were facing a schedule 6 offence and the respondents would probably have been released on bail.

[10] Regarding the conduct of the magistrate, it was alleged that she had made the amendments in Annexure 'A', that in doing so she acted maliciously and that it was as a result of the alteration, which reflected a schedule 6 offence that the respondents were denied bail. It was also alleged that the error was brought to the attention of the magistrate by the respondents during their first appearance and by their attorney on 28 May 2004, but that she negligently failed to apply her mind to it.

Despite the allegation that the magistrate was malicious, she was not sued in her personal capacity. The respondents, however, sued the Minister of Justice on the basis that he was vicariously liable for the malicious, alternatively, negligent conduct of the magistrate. Mochitele was also sued on the basis that he had laid false charges against the respondents and that it was as a result of those charges that they were arrested and detained.

[11] The court a quo (Van der Merwe AJ) held that the detention of the respondents was unlawful. It held Mochitele liable in his personal capacity and awarded damages against him. Mochitele is not pursuing an appeal against the order. Regarding the claim arising from the alleged wrongful conduct of the prosecutor, the high court found that the Minister of Justice 'cannot be responsible for decisions by the National Prosecuting Authority…'. This finding is not challenged by the respondents on appeal. Regarding the conduct of the magistrate, the high court found that it was the magistrate who had interfered maliciously and intentionally in the erroneous formulation of the charge of armed robbery. And pertaining to the liability of the Minister of Justice for the wrongful conduct of the magistrate the high court stated (para 52):

'Although magistrates function independently and impartially (see *Van Rooyen v The State* 2002 (5) SA 246 (CC)), that does not detract from the fact that they are appointed by and employed by the Minister of Justice… In carrying out their functions independently and impartially, they act within the course and scope of their appointment and in accordance with the basis on which they were appointed. It follows that the Minister of Justice remains in my view, as in the past, vicariously liable for the conduct of magistrates acting within the course and scope of their employment…'.

In the end the court made an order directing the Minister of Justice, the Minister of Safety and Security and Phoshoko to make payment jointly and severally to each of the respondents in an amount of R250 000, plus interest at the rate of 15,5 % per annum from date of demand to date of payment. This appeal is with the leave of that court. Phoshoko was not represented on appeal before us.

[12] The issues that arise for determination in this appeal are:

(a) Whether the high court's decision that the detention of the respondents was unlawful was correct;

(b) Whether the high court's decision in finding the Minister of Safety and Security liable for Phoshoko's negligent conduct should be upheld;

(c) Whether the Minister of Justice is vicariously liable for wrongful conducts of magistrates committed while discharging judicial functions.

[13] Before dealing with these issues it is necessary to deal with the personal circumstances of the respondents at the time of their arrest, for it is uncontroverted that, but for the charge of armed robbery that was inserted in Annexure 'A', the respondents were in all probability eligible for release on bail. Both respondents were in the employ of Imperial Group as risk managers and had before then been in the employ of the South African Police Services 'SAPS' for respective periods of 14 and 16 years. At the time of their resignation they both held the rank of captain. Their functions at Imperial entailed investigation of criminal conduct such as theft, armed robberies and truck hijackings. In the course of their duties they were required to liaise with members of the SAPS in order to track and recover stolen property and apprehend possible suspects. They had in the past worked hand in hand with some members of the SAPS from the Alberton Police Station, including Phoshoko. Van der Walt was well known to Phoshoko as a former colleague in the SAPS and also at the time of their arrest as an employee of Imperial.

Unlawful Detention

[14] There was no conceivable reason for the refusal by the magistrate to release the respondents on bail. They remained in custody because of the groundless charge of armed robbery inserted in Annexure 'A' and the collective negligence of Phoshoko, Zinn and the magistrate. It follows that their detention for the whole period was unlawful.

The claim against the Minister of Safety and Security

[15] Phoshoko did not deny that he was present in court during the respondents' first court appearance. As an investigating officer it can be inferred that he knew the contents of the docket. It can also be inferred that, as he was present in court during that appearance, he heard the magistrate informing the respondents that there was an additional charge of armed robbery. He failed to ensure that the correct information was placed before the magistrate that there was no basis for this charge and thus failed to do what was expected of a reasonable investigating officer in his position.[1] He could have done so through Zinn who was present in court. The fact that the magistrate ignored the respondents when they tried to reason with her did not relieve Phoshoko of his duty as an investigating officer to do so. After the adjournment on 26 May 2004 he again adopted a supine attitude. A reasonable police officer would have followed up immediately after the first appearance and thereafter done whatever was reasonably necessary to rectify the situation, including clarifying the position with Zinn, or the head prosecutor, or the magistrate. Had he made an effort after the first appearance to keep abreast of developments in the matter, he probably would have been aware that the respondents were scheduled to appear in court for a bail application on 27 and 28 May, and ensured that he was present to rectify the error. For all those reasons Phoshoko was negligent and his negligence caused the prolonged detention of the respondents after their first appearance on the 26 May to 1 June 2004. It follows that the high court's finding of liability against the Minister of Safety and Security must stand.

The claim against the Minister of Justice and Constitutional Development

[16] In the light of the fact that there is no cross-appeal by the respondents against the finding that the Minister of Justice cannot be held liable for the negligent conduct of the prosecutor, what remains is the question whether the Minister is liable for the magistrate's refusal to release the respondents on bail.

[1] *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) paras 49-50.

[17] In the main the respondent's claim arising out of the magistrate's conduct was that she maliciously altered the charges to include the charge of armed robbery. It was further alleged that she negligently failed to establish what the correct charges were and ignored all attempts by the respondents and their attorney to clarify the issue.

Malice

[18] Was it proved that it was the magistrate who made the alteration to Annexure "A"? If the answer to that question is in the affirmative there can be no doubt that malice has been established for it is common cause that there was no basis for the alteration. The contention that it was the magistrate who made the alteration is deduced from what the respondents perceived to be unusual conduct between the magistrate and Zinn during the adjournment. Although the magistrate did not testify so as to dispute the evidence of the respondents, and Zinn did not have any specific recollection of what happened during the respondents' court appearance, the problem with the evidence of the respondents is that it does not shed light on what the magistrate and Zinn discussed during the adjournment, because they could not hear what was being said. Even if it is accepted that the magistrate wrote something after speaking to the prosecutor it cannot be inferred from the respondents' evidence that she was making the controversial alteration because the respondents could not see what she was writing and on which document. It follows that the decision of the high court that the magistrate interfered maliciously to alter the charges to include the charge of armed robbery cannot stand.

Negligence

[19] A finding that the magistrate did not act maliciously does not mean that negligence has not been established on the part of the magistrate. Her negligence stems from the fact that when the error was raised, she ignored it. On 26 May 2004, when the respondents explained to her that there was no basis for the charge, she could have asked Zinn to respond or give an explanation. She could also have adjourned and instructed the senior prosecutor to attend court to give an

explanation. Instead, she told the respondents (knowing that they were in detention and could not do so) to take it up with the senior prosecutor. When the issue was again raised by Culhane during the next court appearance she simply ignored him in spite of what he described as a passionate plea to her to apply herself to the issue. The information Culhane gave to her was in the charge sheet that was placed before her. She could easily have checked the charge sheet or raised pertinent questions with Zinn. In ignoring the respondents and their attorney the magistrate was grossly negligent and it was as a result of her failure to pay attention to the concerns raised with her that led her to order the continued detention of the respondents.

Vicarious liability of the Minister of Justice

[20] Can the Minister of Justice and Constitutional Development be held vicariously liable for the wrongful conduct of the magistrate? In holding the Minister of Justice vicariously liable for the wrongful conduct of the magistrate the learned acting judge placed reliance on s (9)(1)(*a*) of the Magistrate's Courts Act, 32 of 1944, which provides that magistrates are appointed by the Minister of Justice. The high court also relied upon section 10 of the Magistrates Act 90 of 1993, which provides that the Minister shall appoint magistrates in consultation with the Magistrate's Commission. It was the finding that magistrates are employed by the Minister of Justice that led the learned acting judge to the conclusion that the Minister, as an employer, is 'vicariously liable for the conduct of magistrates acting within the course and scope of their employment'. That conclusion ignores the well-established principle that magistrates, when they act in the course and scope of their judicial functions, enjoy, like all judicial officers, a status of judicial independence.[2] This status of judicial independence means that although magistrates may remain state employees under their contracts of employment, they perform a judicial function and form part of the judicial branch of government.[3]

[2] *Schierhout v Union Government (Minister of Justice)* 1919 AD 30 at 42-43; *Van Rooyen & others v The State & others (General Council of the Bar of South Africa Intervening)* 2002 (2) SACR 222 (CC) para 265.

[3] *President of the Republic of South Africa & others v Reinecke* 2014 (3) SA 205 (SCA) para 7.

[21] The question whether the Minister is vicariously liable for the negligent conduct of a magistrate requires a consideration of the concept of judicial independence in the context of delictual liability. There is ample authority to the effect that judicial independence for judicial officers means that they are protected from liability for their negligent conduct. Harms JA *in Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 14 stated:

'… there is obviously a duty - even a legal duty - on a judicial officer to adjudicate cases correctly and not to err negligently. That does not mean that a judicial officer who fails in the duty, because of negligence, acted wrongfully. Put in direct terms: can it be unlawful [wrongful], in the sense that the wronged party is entitled to monetary compensation, for an incorrect judgment given negligently by a judicial officer, whether in exercising a discretion or making a value judgment, assessing the facts or in finding, interpreting or applying the appropriate legal principle? Public or legal policy considerations require that there should be no liability, ie, that the potential defendant should be afforded immunity against a damages claim, even from third parties affected by the judgment.'

[22] The approach in *Telematrix* accords with the following statement by the Constitutional Court in *Le Roux and others v Dey* 2011 (3) SA 274 (CC) para 122:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct [which is part of the element of negligence], but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'[4]

[4] See also *F v Minister of Safety and Security and others* 2012 (1) SA 536 (CC) paras 117-124; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11.

[23] What those decisions mean, in sum, is that a magistrate is not liable for his or her negligent conduct when performing his or her judicial functions, because for reasons of public and legal policy his or her conduct is not regarded as wrongful. The fact that the magistrate is immune from liability for his or her negligent conduct means there is no basis to hold any other party vicariously liable for such negligent conduct. That is so because vicarious liability is in general terms defined as the strict liability of one person for the delict of another. What it means is that a person may be held liable for the wrongful act or omission of another even though the former did not strictly engage in any wrongful conduct.[5] But, as liability is closely linked to the wrongful conduct of the primary wrongdoer it is inconceivable that there could be vicarious or secondary liability where there is no primary delictual liability.

[24] This is in direct contrast with what happened in cases such as *Goldschagg v Minister van Polisie* 1979 (3) SA 1284 (T); *De Welzen v Regering van Kwa-Zulu en 'n ander* 1990 (2) SA 915 (N); and *Minister of Safety and Security v Kruger* 2011 (1) SACR 529 (SCA). Those cases dealt with a provision in the Police Act which exempted members of the SAPS from liability in certain circumstances. The question that arose was whether in those circumstances the Minister was also exempt from vicarious liability. It was held that the Minister was not exempt. This conclusion rested squarely on the interpretation that was given to the specific wording of the statutory enactment. According to that interpretation the section did not mean that the conduct of the member was not wrongful. What the section provided for, so it was held, was that in the circumstances contemplated, the member was exempt from liability despite the fact that his or her conduct remained wrongful (see *Kruger* para 18 and *De Welzen* 923H-I). The reason why the magistrate was not liable in *Telematrix* was that his or her conduct was not regarded as wrongful for public or legal policy considerations. Consequently, because the magistrate's conduct is not regarded as wrongful in delict vicarious liability cannot be imposed upon the Minister.

[5] *F v Minister of Safety and Security* (supra) para 40.

[25] In the light of the finding that the magistrate did not act maliciously, it is unnecessary to deal with the issue of whether the minister is vicariously liable for the malicious conduct of a magistrate.

Conclusion

[26] The Minister of Safety and Security is accordingly liable for the negligent conduct of Phoshoko. The Minister of Justice is, however, not vicariously liable for the negligent conduct of the magistrate. In the light of the finding of negligence on the part of the magistrate, a copy of this judgment will be made available to the Magistrate's Commission, as an entity responsible, amongst others, for disciplinary issues pertaining to magistrates for its consideration.

Quantum

[27] The high court made an award of R250 000 in favour of each of the respondents. Ms Baloyi, for the appellants, submitted that the individual awards were inconsistent with those made by courts in similar matters. She made reference to the case of *Minister of Safety and Security v Seymour*[6] where this court reduced an award in the amount of R500 000 and substituted it with one of R90 000. In that case the plaintiff was a 63 year old farmer who was detained for a period of five days. Whilst in prison he fell ill. A doctor who subsequently examined him diagnosed hypertension and angina and gave instructions that he should b*e* taken to hospital. That was not done immediately and after he was eventually hospitalised, it transpired that he also suffered from severe symptoms of post-traumatic stress and depression. In dealing with the appropriate approach in awarding damages this court said [para 17]:

'The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that…'.

[6] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 19.

In para 20 the court continued:

'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. The awards I have referred to reflect no discernible pattern other than that courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.'

[28] Recently, in *Woji v The Minister of Police*[7] this court awarded the plaintiff damages in the amount of R500 000. In that case the plaintiff was arrested as a result of mistaken identity and imprisoned for a period of thirteen months. He was placed in an overcrowded prison and was subjected to a gang that sodomised other prisoners. He was raped twice, and as a result experienced difficulty in having sexual relations with his girlfriend. He also witnessed another prisoner being stabbed, which made him fear for his life. He was allocated a single cell after eight months but was as a result isolated and lonely.

[29] In this case the respondents are former police officers who both held the rank of captain at the time of their resignation. They testified that they were subjected to appalling conditions and had to endure the humiliation of being imprisoned by and in front of their former colleagues. On the first night they had to withstand the cold cells as they were detained in winter and slept on the cement floor with only one blanket. As police officers who had arrested some of the prison inmates they were concerned about their safety. The following day, after the unsuccessful attempt to bring a bail application on their behalf, they slept in holding cells at the Alberton Police Station and upon their return to prison, they were moved to a single cell. Van Wyk stated that for a while after that experience he could not sleep well. Van Der Walt stated that as a result he suffered from influenza, lost weight and developed kidney complications which necessitated surgery to remove what turned out to be kidney stones. No evidence was led to dispute their testimony on the prison conditions and their personal experiences. Due regard being had to all of these factors the award

[7] *Woji v Minister of Police* (92/2012) [2014] ZASCA 108 (11 September 2014).

made by the high court is disproportionate. An appropriate award, in my view, is an amount of R120 000 for each of the respondents.

Costs

[30] In light of the fact that the Minister of Safety and Security has been unsuccessful in the appeal, the respondents are accordingly entitled to their costs. Although the Minister of Justice has been successful, regard being had to all the facts, I am of the view that the Minister of Justice and the respondents should each pay their own costs.

[31] In the result I make the following order:

1 The appeal by the first appellant is upheld in part.

1.1 The order of the high court in respect of the first appellant is set aside and substituted as follows:

‘(a) The first defendant is ordered to make payment to the first plaintiff in an amount of R120 000.

(b) The first defendant is ordered to make payment to the second plaintiff in an amount of R120 000.

(c) The first defendant is ordered to pay interest on the amounts in (a) and (b) of the order at the rate of 15.5 per cent per annum from the date of demand to the date of payment.

(d) The first defendant is ordered to pay the plaintiffs’ costs of suit together with interest thereon at the prescribed rate of 15.5 per cent per annum from 14 days after taxation to date of payment. Such costs are to include the costs of two counsel where employed.’

2. The first appellant is ordered to pay the costs of the appeal including the costs consequent upon employment of two counsel where employed.

3. The appeal by the second appellant is upheld. The order of the high court is set aside and each party is ordered to pay their own costs in respect of the second appellant's appeal.

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JUDGE OF APPEAL

APPEARANCES

For Appellants:	Advocate M.S Baloyi
	Instructed by:
	State Attorney, Johannesburg
	State Attorney, Bloemfontein
For Respondents:	Advocate RS Willis (with him A Mooij)
Instructed by:	Gerard Cullhane Attorneys, Roodepoort
	Van Schalkwyk and Partners, Bloemfontein

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