THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 969/2013
Reportable

In the matter between:

MINISTER FOR SAFETY AND SECURITY **Appellant**
(Now MINISTER OF POLICE)

and

JACO SCOTT **First Respondent**
SCOTTCO (PTY) LTD **Second Respondent**

Neutral citation: *Minister for Safety and Security v Scott* (969/2013) [2014] ZASCA 84 (30 May 2014)

Coram: Navsa, Shongwe, Theron and Willis JJA and Legodi AJA

Heard: 02 May 2014

Delivered 30 May 2014

Summary: Delict – pure economic loss – contract between second respondent and American entity cancelled due to first respondent's arrest and detention – loss of contractual income and profits suffered by a stranger to a contract – public policy considerations dictating that delictual liability not be imposed – danger of indeterminate liability - quantum – first respondent wrongfully arrested and detained for about nine hours – award of R75 000 altered to R30 000.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Vorster AJ sitting as court of first instance):

1 The late filing of the appellant's supplementary record and heads of argument is condoned.

2 The appeal is reinstated.

3 The respondents are directed to pay the costs of opposition in the reinstatement application.

4 The appeal is upheld with costs including the costs of two counsel.

5 The order of the high court is set aside and replaced with the following:

'(i) The defendant is directed to pay the first plaintiff the amount of R30 000 being damages for unlawful arrest and detention, which amount shall bear interest at the rate of 15,5 per cent per annum from 8 February 2013 until the date of payment and in relation thereto, the defendant is directed to pay the first plaintiff's costs.

(ii) The second plaintiff's claim for special damages is dismissed and in relation thereto the second plaintiff is to pay the defendant's costs.'

JUDGMENT

Theron JA (Navsa, Shongwe and Willis JJA and Legodi AJA concurring):

[1] During 2005 Mr Jaco Scott (Scott), the first respondent, and Scottco (Pty) Ltd, trading as Scottco African Safaris (Scottco), the second respondent, instituted action against the appellant, the Minister of Safety and Security (the

Minister), in the North Gauteng High Court for payment of damages arising from the alleged unlawful arrest and detention of Scott. This included a claim by Scottco for loss of contractual income and profits. Prior to the commencement of the trial, the high court (Du Plessis J), issued an order in terms of Uniform Rule 33(4) and by agreement between the parties, that the issues of liability and quantum be separated. In respect of the merits, the high court found that the arrest and detention was unlawful and accordingly held the Minister liable for damages flowing from such arrest and detention.

[2] Subsequent to the determination of the merits, Vorster AJ was called upon to determine the quantum of the respondents' claim. Vorster AJ awarded Scott damages in the amount of R75 000 for general damages in respect of the unlawful arrest and detention and R577 610 being wasted advertisement costs, the details of which will become apparent in due course. The high court awarded damages to Scottco in the amount of R49 268 289 in respect of loss of income, which is probably more accurately described as the loss of contractual income and profits referred to in paragraph 1 above. The Minister, with the leave of this court, now appeals against the award of loss of contractual income and profits awarded to Scottco and the amount of R75 000 awarded to Scott.

[3] A proper appreciation of the issues in this matter requires an examination of the facts that gave rise to the respondents' claim. Scott is a professional hunter and a registered undertaker of big game hunting enterprises in South Africa. He is also the chief executive officer of Scottco, which is the owner of Mopane Ranch, constituted by five contiguous farms, situated about forty kilometres outside Musina, Limpopo Province. Scottco conducts hunting safaris for paying guests on Mopane Ranch.

[4] The respondents have, since 1995, been targeting the overseas, and in particular the American, market, in order to attract big game hunters to Mopane Ranch for hunting safaris. To this end, Scott attended hunting exhibitions in America. In 2001, during one such exhibition, he met Mr Michael Francis Cassidy (Cassidy), a resident of Orlando, Florida, in the United States of America and the associate publisher of Field & Stream magazine, which is dedicated to hunting and fishing and has a readership of approximately 14 million people. The February 2004 issue of the magazine carried an advertisement promoting the hunting facilities of Scottco. This was to have been one of three advertisements to appear in the magazine. The cost of the three adverts was $89 000 which, in terms of the applicable rates of exchange at the time, amounted to R577 610.

[5] At the time Cassidy had been looking for a partner in South Africa to host hunting trips for American game hunters. Cassidy visited the ranch in order to ascertain its viability for his purposes. He formed a favourable opinion and subsequently, on behalf of Field & Stream magazine, entered into an agreement with Scottco, represented by Scott, in terms of which:

'… *Field & Stream* will bring on an annual basis for a period of five (5) years beginning January 2004 not less than 50 of our top clients and/or staff to Mopane Ranch for plains game safaris, not to exceed 10 days in duration.

The agreed upon cost per client/staff will not exceed $10 000.00 (USD) and this sum shall include room and board, bar privileges in the main camp, and all plains game trophy fees. This sum does not include airfare, trophy fees (excluding plains game), and any taxidermist fees. Those fees not covered in this agreement shall be covered either by the client/staff member or *Field & Stream* and the financial responsibility will be determined and agreed upon by all parties prior to departing Mopane Ranch at the end of each Safari.

This above listed agreements can be terminated at any time by either party for good cause or by mutual agreement.'

[6] Pursuant to that agreement the first hunting trip was to take place in June 2004. The American hunters were expected to arrive at Mopane Ranch during the evening of 10 June 2004. Scott had made arrangements for the hunters to be transported by vehicle from OR Tambo Airport in Johannesburg to Mopane Ranch. He had also arranged with the driver to keep in telephonic contact so that he (Scott) could meet the hunters at the Ranch upon their arrival.

[7] What is set out in this paragraph is Scott's version of the events on the evening in question. Scott was with Mr Richard Kok and Mr Deon Scheepers, also professional hunters, on the day in question. After they had completed preparations at the Ranch in anticipation of the arrival of the American hunters, they went to the Spur restaurant in Musina for dinner. They arrived there at approximately 21h00 hours. At about 23h00, the driver of the vehicle transporting the American visitors telephoned Scott and advised him that he was at Makhado. Scott and his companions then left the restaurant, intending to proceed to the farm. While stationary in their motor vehicle at a stop street, they noticed a group of people standing at the nearby Horseshoe Pub and Grill who they had earlier observed at the Spur. Scott testified that he heard the group swearing and shouting at them. He gained the impression that the group was confusing him with someone else and he decided to approach them. Scott drove his motor vehicle into the parking area of the Horseshoe Pub. Scheepers alighted and soon thereafter members of the group started assaulting Scheepers. While Scott was alighting from the vehicle someone hit him on the head with an object and he fell to the ground. Shortly thereafter, two police officers, Sergeant Abel Ramaphakela (Ramaphakela) and Constable Azwinidine Ndonyane (Ndonyane), arrived on the scene and arrested him (Scott). He was transported to the police station where he was advised he was being arrested for being in possession of a firearm while under the influence of alcohol. He spent the night in a police cell

and was released the following morning when the charges against him were withdrawn.

[8] The other version of what had occurred at the Horseshoe Pub was presented by Mr Jacques Verster, who testified on behalf of the Minister at the trial on the merits. Verster said that he and his father had gone to the pub that evening to play billiards. Just as the bar was closing, Scott, Scheepers and Kok, accompanied by two ladies, entered the pub and demanded alcohol. Scheepers asked Verster where they could purchase more alcohol. Scheepers became annoyed by the response he received from Verster and uttered words to the effect that the latter needed to be taught a lesson. As Verster was leaving the pub, he was attacked by Scott and his friends. Verster assaulted and overpowered both Scheepers and Scott. After Kok fired shots, Verster approached and disarmed him, and overpowered him as well. For reasons that will follow, Verster's version of events is to be preferred.

[9] It was common cause that Ramaphakela and Ndonyane arrived on the scene shortly after the shots were fired. They were confronted with what appeared to be a drunken brawl. Verster presented his version of events from which it was apparent that Scott and his companions were the aggressors. The police officers found Scott lying on the ground with his weapon visible in its holster. According to the police officers, Scott was under the influence of alcohol, unsteady on his feet and not in a position to speak. Ramaphakela testified that he had removed the firearm from Scott's possession, while Scott's evidence was that he (Scott) had handed over the firearm upon being instructed to do so by Ramaphakela.

[10] I turn to deal with the events that occurred simultaneously with or subsequent to the incident at the Pub. The American group had arrived at

Mopane Ranch at about midnight. The gate was locked and no one was there to meet them. Cassidy made numerous attempts to telephonically contact Scott without success but eventually managed to gain access to the Ranch. Scott only arrived at the Ranch during the course of the afternoon of the following day. By that time it was no longer possible to undertake a planned elephant hunting trip, as there was 'a small window' within which to conduct the hunt. Scott testified that the elephant hunt concession was only valid for 11 June 2004 and the group ought to have been in the hunting area in Zimbabwe within six hours of their arrival at the farm. Scott, in his evidence, contradicted himself as to whether the elephant hunt did occur. According to Scott and Cassidy, the entire hunting trip was a disaster for the American group.

[11] On 18 June 2004, Cassidy cancelled the contract with Scottco. The letter of cancellation reads:

'The purpose of this letter is to inform you that effective immediately we are rescinding our agreement of November 3, 2003 and as such we will not be publishing any further ads for Scottco African Safaris which includes the issues of July 2004 and October 2004.

Furthermore, effective immediately, we are also rescinding our agreement of bringing not less than 50 of our clients/staff to Mopane Ranch in South Africa for plains game safaris for a five year period which began in January 2004.

In light of the situation we do not feel that you are entitled to a refund of any monies for the ads that did not run as the costs incurred by *Field & Stream* due to the above mentioned incident are quite substantial and we consider those costs to be offset by that balance. However, if you disagree with this decision I encourage you to contact our legal department to discuss this matter in detail.'

[12] Cassidy's evidence was that the decision to terminate the relationship with the respondents was based solely on the incident that occurred in 2004 when Scott was arrested. He explained that his company would not let him do business with a 'suspected criminal'. That, in brief, is the background against which this matter is to be determined.

[13] At the commencement of the hearing before us we were faced with an application by the Minister which the parties were agreed can properly be categorised as an application for reinstatement of the appeal and condonation for the late filling of the appeal record and the Minister's heads of argument. The appeal had lapsed for failure on the part of the Minister to prosecute it by not timeously filing his heads of argument. The Minister's heads of argument should have been lodged with the Registrar of this court on 23 September 2013. SCA Rule 10(2A)(*a*) provides that if an 'appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse'. At the hearing of the appeal, the respondents persisted in their opposition to the application.

[14] The Minister's attorney, in his affidavit in support of the application, set out the circumstances that led to the lapsing of the appeal. He stated that he had timeously lodged the 'quantum record' on 12 August 2013. The record had to be lodged on or before 5 October 2013. Subsequent thereto, the Minister's counsel was furnished with a copy of the quantum record. The affidavit proceeds as follows:

'Counsel considered the record and thereafter, advised me that for the central issue on appeal, the merits record was necessary and crucial for the prosecution of this appeal, and that I should instruct the Transcribers to prepare a supplementary Record, consisting of the record on the merits. Counsel further advised that I should advise the respondents' attorneys of record that we are of the view that the merits record will be relevant for the SCA appeal. As appears from the application for leave to appeal to this court, the core component of the Appellant's argument is that the liability of the Minister to the Second Respondent ("Scottco") should not have been the subject of a hearing of quantum at all because the issue of liability had been disposed of in the Minister's favour in the hearing on the merits. The validity of this argument cannot be assessed without the merits record.'

[15] The respondents refused to accede to the request to file the entire record in relation to the merits on the basis that it was not relevant to the issues on appeal which they contended related only to quantum. There were also numerous written exchanges between the Minister's attorney and the transcribers regarding the preparation of the record. It was initially envisaged that the record would be prepared by 4 October 2013. This did not occur. The merits record only became available on 1 November 2013 and the heads of argument were filed on 15 November 2013, about seven weeks out of time.

[16] The principles relating to condonation are well established. The factors that this court will have regard to when considering such an application include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits.[1] Condonation is an indulgence, not to be had merely for the asking. A litigant who does not comply with the rules is required to show 'good cause' why the rules should be relaxed. [2]

[17] The initial failure on the part of the Minister's attorneys to appreciate that the record in relation to the merits was necessary in the determination of this appeal, resulted in that portion of the record not being prepared timeously and this in turn had as its consequence the late filing of the heads of argument prepared on behalf of the Minister. It was alleged that the heads of argument could not be prepared without regard to the record in relation to the merits. It is clear that as soon as it was discovered that the merits record was necessary for

[1] *United Plant Hire (Pty) Ltd v Hills & others* 1976 (1) SA 717 (A) at 720E-H. *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited* [2013] 2 All SA 251 (SCA) paras 11-13.
[2] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6. See also *United Plant Hire (Pty) Ltd v Hills & others supra.*

the appeal steps were taken by the Minister's legal representatives to obtain the record. In the circumstances, the complete record and the heads of argument were filed as expeditiously as possible. At worst for the Minister, there was a seven week delay in complying with the rules of this court. There is no doubt that this matter is of considerable importance to the Minister as it raises an important legal issue and involves a substantial sum of money.

[18] The resistance of the respondents to the record in relation to the merits being filed was unwarranted. Where issues of liability and quantum have been separated, such record is often useful in respect of the determination of quantum. In this matter, that record was certainly necessary for a proper appreciation of all the circumstances that led to the assault and arrest of Scott. As will become apparent, the reasoning of Du Plessis J and especially his credibility findings on the evidence, are relevant to enable a proper appreciation of the circumstances against which the respondents' claims are being brought.

[19] The prospects of success of the appeal can readily be said to be reasonable.[3] For these reasons this court has decided to grant the application for reinstatement of the appeal and condonation for the late filing of the appeal record and the heads of argument, together with an appropriate costs order against the respondents.

[20] At the hearing of this appeal there was considerable debate as to whether the liability of the Minister to Scottco for loss suffered by the latter was properly an issue before Vorster AJ. Put simply, the question was whether Du Plessis J had in fact and in law determined that the Minister was liable for Scottco's loss of contractual income and profits. The Minister contended that that issue had been decided in his favour by Du Plessis J. The submission on behalf of the

[3] *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] ZASCA 17 (26 March 2014) para 11.

Minister was that Du Plessis J had decided that the Minister was only liable to Scott personally and not for any loss suffered by Scottco.

[21] At the conclusion of the trial on the merits, Du Plessis J issued an order in the following terms:

'1 Dit word verklaar dat die eerste eiser onregmatig gearresteer en aangehou is;

2 Die eiser se eis gegrond op die beweerde aanranding van die eerste eiser word van die hand gewys;

3 Die veweerder word gelas om die koste van die verhoor te betaal.'

[22] On appeal to the full court of the North Gauteng High Court (Makgoba J with Rabie and Mngqibisa-Thusi JJ concurring), the order of Du Plessis J was upheld. The primary basis upon which the order was upheld however, was that the appeal had been perempted. For the sake of completeness, however, the full court dealt with the merits of the appeal. The sole question considered by the full court was the lawfulness or otherwise of Scott's arrest and detention.

[23] It is clear from the record that the question of the Minister's liability to Scottco for loss of contractual income and profits, with all its legal nuances, was not considered by the high court (Du Plessis J and Vorster AJ) or the full court. No thought was given and no reasons appear in relation to whether a claim for pure economic loss could in the circumstances of the case be sustained. All that Du Plessis J determined was that the arrest and detention was unlawful and that too, as will become evident later, on the narrowest technical basis. The parties were agreed that this court was in as good a position as the high court to determine the issue of the Minister's liability to Scottco. In light of the attitude of the parties and in the interests of justice, this court proceeds to determine that issue. I now turn to deal with it.

[24] Scottco's claim is formulated as follows:

'14.1 The second plaintiff operates Scottco African Safaris which derives its income from the American hunting market.

14.2 At the time of the first plaintiff's aforesaid arrest, detention and incarceration, the second plaintiff had hunters from America who were supposed to undertake an elephant hunt in Zimbabwe, which could not take place due to the first plaintiff's aforesaid unlawful arrest, detention and incarceration.

14.3 The first plaintiff's aforesaid unlawful arrest and detention occurred during the visit of the President and Founder of Field and Stream Magazine.

14.4 As a result of the first plaintiff's aforesaid unlawful arrest, detention and incarceration, and the consequent failure of the said elephant hunt in Zimbabwe, the second plaintiff's good name and reputation in the industry has been lost and the President and Founder of the Field and Stream Magazine, who is second plaintiff's main advertiser in America for hunting, no longer wishes to publish and promote second plaintiff's operations, due to the first plaintiff's aforesaid arrest and detention.

14.5 As a result of the first plaintiff's aforesaid arrest, detention and incarceration as well as the second plaintiff's resultant inability to have the American clients timeously at the elephant hunt concession in Zimbabwe, the second plaintiff has received adverse publicity and has and will further in future suffer a loss of income.'

[25] The parties were in agreement that the claim for loss of income and profits was a claim for pure economic loss.[4] Thus, the respondents accepted that such a claim could only be brought by way of an Aquilian action. Counsel for the respondents was constrained to concede that in that respect the particulars of claim were technically lacking. This concession was rightly made.[5] The respondents' particulars of claim purport to lay the basis for Scottco's claim against the Minister by stating that, as a result of the Minister's conduct (in the form of arresting and detaining Scott), Scottco's 'good name and reputation in

[4] Pure economic loss in this context relates to financial loss that does not arise directly from damage to the plaintiff's person or property but as a result of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution in the value of property. See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461; [2006] 1 All SA 6 (SCA) para 1. See also J Neethling, JM Potgieter & JC Knobel *Visser Law of Delict* (6 ed, 2010) at 290.

[5] *Media 24 Ltd & others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & others as* amici curiae*),* 2011 (5) SA 329 (SCA) para 8.

the industry has been lost' and that it 'has received adverse publicity and has and will further in future suffer a loss of income'. Scottco did not persist with its claim for general damages for its loss of reputation and good name in the hunting industry.

[26] It was contended on behalf of the Minister, relying on *Media 24 Ltd & others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & others as* amici curiae), that Scottco's pleadings were fatally defective in that it has failed to allege wrongfulness and plead the facts in support of that allegation.[6] The absence of such allegation may render the particulars of claim excipiable on the basis that no cause of action has been disclosed.[7] The Minister did not file an exception. I adopt the reasoning of Brand JA in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* that it would be futile, at this stage, to investigate whether the pleadings are excipiable.[8] Had an exception been filed, the respondents would have been entitled, if so advised, to apply for leave to amend their particulars of claim to make the necessary allegations.[9] The appropriate enquiry would be whether, despite the deficiency in the pleadings, and having regard to the evidence, the Minister ought to be held liable for the loss suffered by Scottco.[10]

[27] Scottco faces a number of insuperable difficulties in respect of the merits of its claim for pure economic loss. I propose to deal with each of these in turn.

[28] Neethling *et al*[11] in *Law of Delict* discuss claims based on an interference with a contractual relationship. They describe what this expression means:

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[6] *Ibid* para 11.
[7] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 14.
[8] *Ibid*.
[9] *Cotas v Williams & another* 1947 (2) SA 1154 (T) at 1159-1160.
[10] *Fourway Haulage* para 15.
[11] *Supra* at 306.

'Interference with a contractual relationship is present where a third party's conduct is such that a contracting party does not obtain the performance to which he is entitled *ex contractu,* or where a contracting party's contractual obligations are increased.' After discussing instances where a delictual action was granted to a prejudiced contracting party, the learned authors state the following:

'This exposition is, however, subject to the general rule in South African law that only the *intentional* interference with the contractual relationship of another in principle constitutes an independent delictual cause of action.'[12]

[29] With reference to the decision of this court in *Union Government v Ocean Accident and Guarantee Corporation Ltd*,[13] Neethling *et al* point out that courts have, as a rule, refused to extend delictual liability for negligent interference with a contractual relationship beyond historically justified instances. These instances are noted as follows:

(a) the delictual action of the master for injury to his domestic servant;[14] and

(b) a person who is in possession of property in terms of a contract with the owner may, to the extent that he has a direct interest in the economic value of such a thing, institute the *actio legis Aquiliae* against a third party who damages it.[15]

[30] In *Union Government*,[16] Schreiner JA said the following:

'[T]he law takes a conservative view on the subject of expansion of the Aquilian remedy beyond what the authorities have recognised in the past.'

This statement reflects the continuing concern of courts to guard against the spectre of indeterminate liability.

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[12] *Neethling et al* 307.
[13] *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A).
[14] One of the historically justified instances recognised in *Union Government* was the rule of Roman Dutch law that an employer could claim damages from a third party who had wrongfully injured his domestic servant. In *Pike v Minister of Defence* 1996 (3) SA 127 (Ck) at 130B–132D it was held that this rule has been abrogated by disuse and was therefore no longer part of our law. Neethling *et al* at 253.
[15] Neethling *et al* at 307.
[16] *Union Government* at 587A.

[31] In the present case, the police had no knowledge of the contract or its terms – an aspect to which I will return in due course. There can thus be no talk of an intentional interference in the contractual relationship. In addition, the kind of liability now sought to be imposed does not fall within historically recognised instances. For these reasons alone Scottco's claim should fail. However, Neethling *et al* at 308-309 suggest that the above stated approach is too restrictive and proposed the following:

'In our opinion, however, any negligent conduct by a third party which causes the infringement of a contractual personal right or the increase of a contractual obligation ought, in principle, to found the Aquilian action. The fear of unlimited liability may be allayed by the correct application of all the elements of a delict.'

[32] I turn now to deal with the relevant constituent elements of a delict. Even assuming that Scottco was able to get past negligence, which is doubtful,[17] it faces problems in relation to wrongfulness and causation, both of which serve as a brake on indeterminate liability. Neethling *et al* rightly state that the courts have held that the wrongfulness of an act causing pure economic loss almost always lies in the breach of a legal duty.[18] The authors note that there is no general duty to prevent pure economic loss. As to whether, in a particular case, there was a legal duty to avoid pure economic loss, the yardstick is the general criterion of reasonableness or *boni mores*.[19] This involves the exercise of a value judgment which embraces relevant facts and considerations of policy. In essence, this amounts to judicial control over the scope of delictual liability.

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[17] In *Kruger v Coetzee* 1966 (2) SA 428 (A) the test for negligence is set out in clear terms. Liability for *culpa* arises if (a) a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps. One can simply ask how, in the circumstances of the present case, the consequences which forms the basis of Scottco's claim could have been foreseen and guarded against. All the more so when one has regard to the lack of knowledge on the part of the police of the existence of the contract and its financial implications. See also Neethling *et al* at131-132. For a useful discussion on foreseeability in relation to consequence see Neethling *et al* at 141-148.

[18] See at 291 and the authorities there cited.

[19] *Rail Commuters Action Group Group v Transet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

[33] It is necessary to examine the relevant facts. Scott was arrested for being in possession of a firearm while under the influence of alcohol. Section 39(1)(*m*) of the now repealed Arms and Ammunition Act 75 of 1969 (which was still in operation as at 11 June 2004) made it an offence for a person to *handle* a firearm whilst under the influence of alcohol.[20] There was no evidence that Scott had handled the firearm. By having the firearm on his person while under the influence of alcohol, and without more, Scott did not commit an offence. It was this 'technicality' that formed the basis of the finding that Scott's arrest and detention was wrongful.

[34] Du Plessis J rejected Scott's version of the circumstances leading to the altercation with Verster and found that his version was improbable. The high court found that the probabilities favoured Verster's account of the incident. Du Plessis J reasoned as follows:

'Die meer waarskynlike oorsaak van die bakleiery is die Versters se weergawe dat die drie mans in die Horseshoe moeilikheid begin maak het. Scheepers se eie verklaring aan die polisie pas in elk geval beter in by die Versters se weergawe as by sy en Scott s`n. Daarby moet gevoeg word dat Scott ontken het dat daar enige dames in hulle geselskap was. Nogtans het mnr Geach, vir die eisers, aan die verweerder se getuies `n verklaring van ene Monica Woest gestel waaruit dit onomwonde blyk dat sy in die geselskap van Scott en sy maats was – soos wat Jaques Verster getuig het. Na my oordeel verskaf Jaques Vester en sy vader se weergawe `n sinvolle en waarskynlike oorsaak vir wat as `n tipiese kroeggeveg beskryf kan word.'

In my view, the high court's reasoning is unassailable.

[35] Du Plessis J also made certain credibility findings against Scott and his companions, with which I agree. In particular, the high court found that Scott

[20] Section 120(3)(*c*) of the Firearms Control Act 60 of 2000 makes it an offence to 'have control of a loaded firearm, . . . in circumstances where it creates a risk to the safety or property of any person and not to take reasonable precautions to avoid the danger'.

and Scheepers had presented a contrived version (bekookte weergawe) in order to advance the respondents' case. The judge put the matter thus:

'Daar is nog voorbeelde, maar na my oordeel is dit duidelik dat Scott en Scheepers met `n bekookte weergawe die eisers se saak probeer bevorder het en die gebeure probeer aandik het. Ek vind die weergawe namens die verweerder deurgaans meer waarskynlik. Spesifiek wat die twee polisiemanne betref, was dit my indruk dat hulle die gebeure so akkuraat moontlik probeer weergee het.'

[36] The evidence has demonstrated that the police officers resorted to the technically wrong basis for Scott's arrest. The police officers could lawfully have arrested Scott for assault with intent to do grievous bodily harm based on the report they had received from Verster. In my judgment, weighing up the nature of the error made by the police officers against the conduct of Scott and his companions, and particularly that the latter were the aggressors in respect of the assault incident, the error of the police officers pales into insignificance, and it would not be fair to impose liability upon the Minister in respect of Scottco.[21] Such imposition of liability on the Minister is likely to create an unascertainable class of potential claimants – one can imagine the absurdities that would arise if all persons or entities contractually linked to a person wrongfully arrested could sue the Minister for contractual loss suffered by them. Policy considerations militate strongly against the imposition of delictual liability on the Minister to Scottco.

[37] Over and above what is stated in the preceding paragraphs, legal causation is another obstacle on the part of Scottco. I am prepared to assume for purposes of this judgment, in favour of the respondents, that factual causation has been established and that it was Scott's arrest and detention that resulted in the failure of the elephant hunt and ultimately led Field & Stream to cancel the contract.

[21] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] 1 ALL SA 267 (SCA) para 25.

That being so, the enquiry turns to legal causation (remoteness of damage). This is an enquiry into whether the wrongful act is linked sufficiently closely to the loss concerned for legal liability to ensue.[22] Generally, a wrongdoer is not liable for harm which is 'too remote' from the conduct concerned,[23] or harm which was not foreseeable.[24] Thus the purpose of legal causation is to ensure that any liability on the part of the wrongdoer does not extend indeterminately without limitation. In this way, remoteness operates as a further limitation on liability, and thus the enquiry necessarily overlaps with that into wrongfulness.[25] However, this court in *Fourway Haulage* cautioned that wrongfulness and remoteness are not the same and involve two different enquiries.[26]

[38] This court has expressed a preference for the 'flexible approach' in determining legal causation. The traditional tests for legal causation ('reasonable foreseeability', 'direct consequences' and 'adequate causation') may nevertheless still be relevant as subsidiary determinants.[27] Brand JA in *Fourway Haulage* cautioned:

'[T]he existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable. If the foreseeability test, for example, leads to a result which will be acceptable to most right-minded people, that is the end of the matter.'[28]

[39] In my view, the damages claimed by Scottco are too remote to be recoverable. It is not possible, on the evidence, to find that the police officers knew of the contract between Scottco and Field & Stream Magazine. There was no evidence that the police officers knew, let alone foresaw, that Scott's

[22] *mCubed International (Pty) Ltd & another v Singer NNO & others* 2009 (4) SA 471; [2009] 2 All SA 536 (SCA) para 22.
[23] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A); *Fourway Haulage* para 30; Neethling *et al* at 188.
[24] *Country Cloud* para 27; *Fourway Haulage* paras 28, 34 and 35.
[25] *Fourway Haulage supra* paras 30-32.
[26] *Ibid* para 32.
[27] See generally Neethling *et al* at 187-206.
[28] *Fourway Haulage* para 34.

detention would have any impact on the planned elephant hunt, lead to the cancellation of the contract between the respondents and Field & Stream Magazine and cause financial loss to Scottco. The cross-examination of the police officers did not traverse the existence of Scottco or the arresting officers' knowledge, if any, of Scott's relationship to Scottco. During the cross-examination of Ramapakhela in the quantum trial, counsel for the respondents expressly put it to him that Scott had informed Ramaphakela 'that you [Ramapakhela] are making a big mistake and he [Scott] has visitors from America coming'. It is noteworthy that Ndonyane was not cross-examined on this aspect at all.

Scott's evidence in this regard was vague and surprisingly lacking in detail:

'Het u enigsins die Suid Afrikaanse Polisie Diens daarop attent gemaak dat u `n afspraak gehad het die aand? --- *Ja, as ek reg kan onthou het ek*.

Wat was hulle houding daaromtrent? --- Nee, die offisier wat my arresteer het was adamant dat hy my toe sluit.' (Emphasis added.)

[40] The imposition of liability on the Minister will have 'unmanageable' consequences as it will open the door for indeterminate or limitless liability. It would indeed be 'untenable to right-minded people' to hold the Minister liable to Scottco in the circumstances of this matter. Put simply, to have damages imposed on the police for loss of contractual income and profits in relation to a contract they were unaware of and in circumstances where the arrest of Scott was effected on the basis of having been the aggressor in a drunken brawl, and where the justification for the arrest can rightly be said to have been merely technically erroneous, is to cast the net too wide and to land the police with liability for loss that is too remote. It follows, for all these reasons that Scottco's claim against the Minister must fail.

[41] I turn now to consider the propriety of the damages awarded to Scott by the high court (Vorster AJ) in respect of the advertisements placed with Field and Stream magazine. This was a claim pleaded by Scottco as 'fruitless and wasted expenditure in respect of advertising costs in Field and Stream magazine' in the amount of R612 765. There was no basis to compensate Scott for the money spent on the advertisement as this claim did not form part of his pleaded cause of action. At the hearing of this appeal counsel for the respondents conceded, and correctly so, that this was not a claim to which Scott was entitled.

[42] It is trite that the assessment of general damages is a matter within the discretion of the trial court and depends upon the unique circumstances of each particular case.[29] An appeal court is generally slow to interfere with the award of the trial court but will do so where there has been an irregularity or misdirection.[30] Where the appeal court is of the opinion that no sound basis exists for the award made by the trial court or where there is a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made.[31]

[43] The court awarded Scott damages in the amount R75 000. The high court (Vorster AJ) identified the following factors as being relevant in its determination of the quantum: (1) Scott was unlawfully arrested and detained. (2) He suffered trauma and severe anxiety as result of the arrest and detention because he realised that the agreement with Field & Stream was in jeopardy and might be cancelled. (3) He was not given any medication although he reported

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[29] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 17; *Rudolph & others v Minister of Safety and Security* & *another* 2009 (5) SA 94 (SCA) paras 26-27.

[30] The misdirection might in some cases be apparent from the reasoning of the court, but in other cases it might be inferred from a grossly excessive award. *Minister of Safety and Security v Kruger* 2011 (1) SACR 529 (SCA) para 27.

[31] *Sekgota v South African Railways & Harbours; Ramotseo v South African Railways & Harbours* 1974 (3) SA 309 (A) at 314D-E; *Road Accident Fund v Delport NO* 2006 (3) SA 172 (SCA) para 22.

his injury and asked for medical assistance. (4) He spent the night in cell without sleeping as he feared interference from other inmates.

[44] There are a number of extremely relevant factors to which the high court did not make reference. I do not lose sight of the fact that because a fact was not mentioned in the judgment it does not mean that it was not considered.[32] What is striking about the reasoning of Vorster AJ is the complete absence of reference to the adverse credibility findings made against Scott by Du Plessis J (referred to in paragraph 35 above) and the finding that Scott and his companions were the aggressors in respect of the assault incident. It is also surprising that the high court made no mention of the relatively short duration of the detention, that the arrest was rendered wrongful on the basis of a 'technicality' and that the circumstances surrounding the arrest favoured the arresting officers. The further difficulty with which this court is confronted is that there was a dispute between the parties regarding the conditions of the cell in which Scott was detained and whether Scott's injuries were sufficiently serious to require immediate medical attention. It is not apparent from the judgment, which version the high court preferred and took into account in the determination of the quantum.

[45] A comparative study with other cases reveals that the award made by the high court is grossly excessive. In *Minister of Safety and Security v Seymour supra*, the respondent, a 63 year old man, had been unlawfully arrested and imprisoned by the state for five days. The high court had awarded him general damages in the amount of R500 000. On appeal, this court held that an appropriate award was the sum of R90 000. This court had regard to the fact that: throughout his detention he had free access to his family and medical adviser; he suffered no degradation beyond that which is inherent in being

[32] *Rex v Dhlumayo & another* 1948 (2) SA 677 (A) at 702.

arrested and detained; after the first period of about 24 hours the remainder of the detention was in a hospital bed; and although the experience was traumatic and caused him great distress, there were no consequences that were of sufficient concern to warrant further medical attention after his release.

[46] In *Rudolph v Minister of Safety and Security supra*, this court granted the first and second appellants R100 000 each for an unlawful arrest without a warrant and the consequent unlawful detention which lasted three nights. The court noted the conditions of their detention:

'The appellants were arrested and detained under extremely unhygienic conditions in the Pretoria Moot police station. The cell in which they were held was not cleaned for the duration of their detention. The blankets they were given were dirty and insect-ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water. Throughout their detention the first appellant, who suffers from diabetes, was without his medication. They were not allowed to receive any visitors, not even family members.'[33]

The first appellant was later, again unlawfully, re-arrested on a charge of sedition, again without a warrant, and detained for two nights ('from about 18h00 on Saturday 26 July 2003 to about 08h00 on Monday 28 July 2003'). It was noted that during his detention:

'He was made to sleep on a small, coarse mattress in a freezing cell and was not even provided with a blanket on the first night. It was only on the Sunday that his wife was allowed to visit him and bring him his medication and a sleeping bag.'[34]

The court awarded him R50 000 in damages.

[47] In *Minister of Safety and Security v Tyulu*,[35] the respondent, a magistrate, was wrongfully arrested for being drunk in public. While the detention following on from that arrest was for a relatively short period (less than a few

[33] *Rudolph supra* para 27.
[34] *Ibid* para 28.
[35] *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA).

hours), the court awarded the respondent R15 000 in damages. In doing so, the following considerations were deemed relevant: the age of the respondent, the circumstances of his arrest, its nature and short duration, his social and professional standing, and the fact that he was arrested for an improper motive.

[48] In *Mvu v Minister of Safety and Security & another*,[36] Willis J awarded the plaintiff R30 000 for a wrongful detention following on from a lawful arrest for malicious damage to property. The plaintiff had been incarcerated in the police cells with 'suspected rapists and robbers' from 10pm until the next morning.

[49] The plaintiff in *Seria v Minister of Safety and Security & others*[37] was an architect, in his fifties, who had been wrongfully arrested in the presence of guests he was entertaining at his home. He spent three and a half hours in full view of the public at the local police station and was detained overnight in the police cells, most of the time with a drug addict. The court found that a proper award was R50 000.

[50] In my view, bearing all the circumstances in mind and taking into consideration the decreasing value of money over the years since the decisions referred to and which were used as comparatives, an appropriate award is the sum of R30 000. This is so startlingly disparate from the award made by the high court that it justifies interference by this court.

Order

[51] 1 The late filing of the appellant's supplementary record and heads of argument is condoned.

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[36] *Mvu v Minister of Safety and Security & another* 2009 (6) SA 82 (GSJ).
[37] *Seria v Minister of Safety and Security & others* 2005 (5) SA 130 (C).

2 The appeal is reinstated.

3 The respondents are directed to pay the costs of opposition in the reinstatement application.

4 The appeal is upheld with costs including the costs of two counsel.

5 The order of the high court is set aside and replaced with the following:

'(i) The defendant is directed to pay the first plaintiff the amount of R30 000 being damages for unlawful arrest and detention, which amount shall bear interest at the rate of 15,5 per cent per annum from 8 February 2013 until the date of payment and in relation thereto, the defendant is directed to pay the first plaintiff's costs.

(ii) The second plaintiff's claim for special damages is dismissed and in relation thereto the second plaintiff is to pay the defendant's costs.'

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L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	G J Marcus SC with K M Mokotedi Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein
For Respondents:	G B Botha SC with De Weet Keet Instructed by: G P Venter Attorneys, Pretoria Honey Attorneys, Bloemfontein