THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 497/2017

In the matter between:

EARL FLANAGAN **APPELLANT**

and

MINISTER OF SAFETY AND SECURITY **RESPONDENT**

Neutral citation: *Flanagan v Minister of Safety and Security* (497/2017) [2018] ZASCA 96 (1 June 2018)

Coram: Lewis, Seriti and Saldulker JJA and Makgoka and Schippers AJJA

Heard: 9 May 2018

Delivered: 1 June 2018

Summary: Delict : liability of the Minister of Safety and Security: appellant sodomised while in police custody for drunken driving and related charges: appellant entitled to be released on bail in terms of section 59(1) of the Criminal Procedure Act 51 of 1977: failure to grant bail in the circumstances, cumulatively considered with the failure of the police to detain the appellant separately from persons who had been arrested for violent crimes, gives rise to delictual liability on the part of the Minister for the police's conduct.

ORDER

On appeal from: Eastern Cape Local Division, Port Elizabeth (Msizi AJ) sitting as court of first instance):

1 The appeal is upheld with costs, including costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'Judgment is granted in favour of the plaintiff against the defendant for:

(a) payment of the amount R200 000;

(b) interest on the above amount at the rate of nine per cent per annum from the date of the judgment until date of final payment;

(c) costs of the suit.'

JUDGMENT

Makgoka AJA (Lewis, Seriti and Saldulker JJA and Schippers AJA concurring)

[1] The appellant, Mr Earl Flanagan, was sodomised by fellow detainees on 12 October 2009 while in police custody. As a result, he instituted a claim in the Eastern Cape Local Division, Port Elizabeth against the respondent, the Minister of Safety and Security,[1] for damages. His claim was based on the police's alleged breach of their duty to ensure his safety whilst in their custody. He alleged that the police officers, who were acting within the course and scope of their employment by the Minister, failed to take

[1] The Minister of Safety and Security, as cited in these proceedings, has been renamed the Minister of Police.

reasonable steps to prevent him from being sodomised. The court a quo (Msizi AJ) dismissed the appellant's claim, and made no order as to costs. The appeal is with the leave of this court.

Background facts

[2] The facts are simple. The appellant was arrested in the early hours of Saturday, 10 October 2009, at approximately 02h30, for driving under the influence of alcohol, reckless and negligent driving and failure to stop after an accident. This was after the appellant, whilst under the influence of alcohol, had driven into a fence wall of a residence in Korsten, Port Elizabeth. He attempted to drive away from the scene, leaving his injured passengers behind. He was arrested shortly thereafter and taken to Mount Road police station. After his blood had been drawn at the provincial hospital, he was returned to the Mount Road police station. The shift commander that day was Captain Singh. Later that morning, Inspector Van Huyssteen was assigned the docket as the investigating officer.

[3] After interviewing the appellant, he decided to charge him. It appears that another senior officer, Inspector Erasmus, later considered whether the appellant should be released on bail. For that purpose, he completed a document titled 'Bail Information Form.' In that form, Inspector Erasmus noted that the appellant had a fixed home address and employment; was married with a 5 year-old child; had no previous convictions and no outstanding warrants of arrest; was not on bail on another case; and had not committed an offence while on bail.

[4] On these considerations, Inspector Erasmus recommended that the release of the appellant on bail should not be opposed. The recommendation was agreed to and countersigned by Lieutenant Colonel Brand. Meanwhile, earlier that morning, the appellant's wife, Mrs Brenda Flanagan, was informed of the appellant's arrest, and that he would be released on bail of R500, which had to be paid before 08h30, as there was a likelihood that the appellant would be transferred to another police station. At approximately 08h30, Mrs Flanagan arrived at Mount Road police station to pay bail for

the appellant. She was informed that no bail had been fixed; that Captain Singh had ended his shift and gone home; and that the appellant had already been transferred to Walmer police station. She went to Walmer police station where she was informed that there was no bail for the appellant.

[5] As a result, the appellant spent the rest of the weekend in detention. During the early hours of Monday, 12 October 2009, the appellant was sodomised. According to the appellant, he woke up to find himself grabbed by fellow detainees, who ripped off his clothes and forced him to lie face down on the floor. His mouth was held shut as he was sodomised by an unknown number of detainees. He lost consciousness during the ordeal, and regained it just before sunrise. He did not report the incident to the police for fear of reprisals. Later that morning he was taken to court where he was released on bail in the amount of R500. The charges against him were eventually withdrawn.

The pleadings

[6] It is necessary to refer briefly to the pleadings. The appellant's damages claim is said to have arisen from the police's negligent conduct, and breach of their legal duty to ensure his safety whilst in their custody. The alleged breaches can conveniently be grouped in three broad categories. First, it was alleged that the police failed in their common law duty to prevent harm to the appellant. Second, it was alleged the police violated a number of the appellant's constitutional rights, including the rights to dignity, to freedom and security and to bodily integrity. Third, it was alleged that the police failed to separate the appellant from other categories of detainees, in violation of the relevant Standing Order, to which I will refer later. It was also alleged that the police failed to inspect the cells at regular intervals. The Minister admitted that the police officers owed a legal duty to the appellant, and that they were obliged to ensure the appellant's safety whilst in police custody. However, the Minister denied that the police had breached that duty as alleged. The respondent pleaded that all reasonable and necessary measures were taken to meet the police's legal obligations.

[7] The appellant's claim is founded in delict. To establish the respondent's liability he had to establish all the elements of a delictual claim. On the pleadings, the conduct of the police and its wrongfulness were not in dispute, as the respondent conceded that the police had a duty to protect the appellant from harm. Consequently, only two elements of delictual liability were in issue, namely negligence and causation.

The evidence

[8] Before I consider the issues in dispute, I refer briefly to the evidence, and how the court a quo approached the matter. A number of witnesses testified in the court a quo. Save for the brief outline below, I do not propose to embark on any detailed reference to the evidence adduced in the court a quo. Given the view I take of the matter and the proper basis upon which the appeal must be determined, no purpose would be served by such an exercise. Where necessary, I will refer to the relevant parts of the evidence in the course of the judgment.

[9] The appellant and his wife testified with regard to liability. A clinical psychologist, Mr Ian Meyer, testified on behalf of the appellant, primarily in relation to quantum. However, he also testified about the contents of his report, to the extent the appellant had narrated to him the facts giving rise to his arrest, his detention and the sodomy. I have already referred to the relevant parts of Mrs Flanagan's evidence. Apart from the undisputed evidence around the sodomy, referred to in para 4 above, the appellant also testified as follows. Shortly after his transfer and detention at Walmer police station on Saturday morning, he was warned by a friendly cellmate that the other detainees were planning to harm him. He informed two police officers about this, and requested to be placed in a different cell. Nothing was done about this. During the whole period of his detention, there were no cell inspections, and no food was provided to the detainees.

[10] On behalf of the respondent, a number of police officers testified, including Captain Singh and two other senior officers, Captain Richardson and Lieutenant-Colonel Van Zyl, who were on duty during the weekend of the appellant's detention. Lieutenant-Colonel Van Zyl was the station commander of Walmer police station at that

stage. All the police officers testified in rebuttal of the appellant's evidence that no cell inspections were done and that no food was provided to the detainees the whole weekend. Captain Singh, Captain Richardson and Lieutenant-Colonel Van Zyl were cross-examined on the issue of bail. Both Captain Richardson and Lieutenant-Colonel Van Zyl were cross-examined on the separation of detainees according to certain categories. I shall revert to these aspects later.

In the court a quo

[11] At the outset, it must be mentioned that whatever other factual disputes arose between the parties, there was no such dispute with regard to the sexual assault of the appellant. It was common cause that the appellant had been sodomised in the police cells in the manner testified by him. The appellant's evidence in this regard was uncontroverted. Accordingly, the trial was conducted on the basis that the sodomy had occurred as stated by the appellant in his testimony. This is also reflected in the court a quo's formulation of the issue it had to determine, as being:

'Did the police, as a result of negligence, fail to exercise their legal duty to protect the plaintiff whilst he was in their custody? Put differently, did the police fail to exercise reasonable care to prevent the plaintiff [from] being assaulted when there was a legal duty to do so?'

[12] Regarding the enquiry into the respondent's liability, the court a quo considered two aspects in its judgment. First, the effect of the police's failure to release the appellant on bail. Second, whether the appellant had warned the police of his likely harm at the hands of fellow detainees. With regard to the first issue, the court a quo found that liability for the respondent did not arise as there was 'no evidence' that the rape was foreseeable. After a brief disposal of the first issue, the court a quo devoted the rest of its judgment to the second issue. It found that the appellant's evidence suffered inherent contradictions when compared to the contents of Mr Meyer's report.

[13] Also, the court accepted the documentary evidence presented by the police in the form of occurrence book entries, which were to the effect that there were hourly cell

inspections; that the detainees were provided with sufficient food, and that no complaints were received from any of the detainees, including the appellant. It must be stated that the appellant was a very poor witness on that issue. He tailored his evidence to show the police in a bad light. The court a quo correctly preferred the evidence of the police over that of the appellant in this regard. But it is was plainly wrong for the court a quo, on that basis, to dismiss the appellant's claim.

[14] In this regard, it must be borne in mind that the issue on which the appellant's evidence was rejected, is secondary. The court a quo's rejection of the appellant's version did not disturb the core factual issue in the matter, which is that the appellant was sodomised while in the police cells. Whether the appellant had alerted the police of an imminent danger against him is a consideration concerning negligence. If the appellant had succeeded in establishing that he had informed the police of the impending harm, and that they did nothing, a conclusion of negligent omission would have been clear. But its importance should not be overstated. It remains secondary to the primary issue, which is whether in the circumstances of the case, the police were negligent.

[15] Viewed in this light, it follows that the appellant's poor performance as a witness on the issue considered by the court a quo, is of very limited significance in determining the issue of negligence. That enquiry must proceed on the basis of the following undisputed facts: the appellant was arrested for offences which entitled him to be released on police bail; he was not released on bail after being recommended for it; consequently, he spent the rest of the weekend in police custody; and he was sodomised by fellow detainees while in police custody. Thus, the court a quo misdirected itself by dismissing the appellant's claim only on the basis that he had failed to prove that he had alerted the police to possible harm to himself.

Negligence

[16] I turn now to consider the issue of negligence. The conduct of the police complained of is in the form of an omission to release the appellant on bail, and the alleged failure to take adequate measures to ensure that whilst he was in their custody, no harm befell him. The lodestar for establishing negligence remains *Kruger v Coetzee* 1966 (2) SA 428 (A) where this court formulated the now trite test at 430E-F. Applying that test to the present case, the questions are whether (i) reasonable police officers in the position of the police officers at Walmer police station would have foreseen the reasonable possibility of their conduct injuring the appellant's person and causing harm; (ii) reasonable police officers in the position of those police officers would have taken reasonable steps to guard against that harm; and (iii) those police officers failed to take those steps.

[17] Two aspects are relevant in the negligence enquiry. The first is the effect of the police's failure to release the appellant on bail. The second concerns the police's failure to comply with the Standing Order. Regarding the first, the power of the police to release suspects on bail is governed by s 59 of the Criminal Procedure Act 51 of 1977 (the CPA). It provides:

'Bail before first appearance of accused in lower court —

(1) (*a*) An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

(*b*) The police official referred to in paragraph (*a*) shall, at the time of releasing the accused on bail, complete and hand to the accused a recognizance on which a receipt shall be given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered.

(*c*) The said police official shall forthwith forward a duplicate original of such recognizance to the clerk of the court which has jurisdiction.

(2) Bail granted under this section shall, if it is of force at the time of the first appearance of the accused in a lower court, but subject to the provisions of section 62, remain in force after such

appearance in the same manner as bail granted by the court under section 60 at the time of such first appearance.'

[18] It is common cause that none of the offences for which the appellant was arrested falls under either Part II or III of Schedule 2 to the CPA. It follows that the appellant was a candidate to be released on bail in terms of s 59, and that a police officer of the required standing was entitled to release him. In this regard, it should be borne in mind that Inspector Erasmus recommended the release of the appellant on bail, after satisfying himself that he was not a flight risk. It seems that there was some communication breakdown between the police – firstly, internally at Mount Road police station, and secondly, the between Mount Road and Walmer police stations.

[19] This must be so because when Mrs Flanagan sought to pay bail at Mount Road, she was informed that there was no record of Inspector Erasmus' recommendation to release the appellant on bail. She encountered the same situation at the Walmer police station. Had any of the police officers encountered by Mrs Flanagan at either of the police stations cared to make a simple enquiry, they would have established that: the appellant was arrested for offences which qualified him for police bail; and that Inspector Erasmus had in fact, recommended his release on bail. They failed to do so. Instead, according to Mrs Flanagan, they adopted a supine and uncaring attitude towards her. Her unchallenged evidence is that the police officers at Walmer police station laughed at her and mockingly told her that the appellant was going to spend the weekend in custody, and that he 'had to be strong', whatever that meant. In all the circumstances, the appellant should have been released on bail on Saturday morning. The police failed in this regard.

[20] It is therefore clear that the failure by the police to release the appellant on bail is closely connected to his subsequent sexual assault. This is so because, having failed to release him under circumstances where he was entitled to be released, and had in fact

been recommended for bail by the investigating officer, the police failed to ensure that he was separated from violent crimes detainees.

[21] That brings me to the Standing Order. The relevant police Standing Order (General) 361, is titled: *Handling of Persons in the Custody of the Service from their Arrival at the Police Station*, Notice 31 of 2012. Clause 1 reads:

'Background

In order to comply with its obligations in terms of the Constitution, the [police] service is obliged to take certain steps with regard to every person in its custody. The steps that must be followed from the arrival of such person at the police station, are outlined below.'

Clause 13(1) of the Standing Order, titled *Safe Custody and Handling of Persons in Custody*, provides separation of detainees according to certain categories. Category (g) reads as follows:

'Whenever reasonably possible, persons in custody who are alleged to have committed violent crimes, must be detained separately from other persons in custody.'

[22] The failure to keep the appellant separated from persons detained for violent crimes was therefore in violation of clause 13(1)(g) of the Standing Order. Once they failed to keep the appellant separately from violent crimes detainees (in violation of the Standing Order) there was a real risk that such harm would ensue. In other words, it was reasonably foreseeable that the appellant could be harmed.

[23] With regard to the failure to detain the appellant separately, I need to dispose of a submission advanced on behalf of the respondent during argument in this court. It was common cause in the court a quo that it could not be determined from the police occurrence books what categories of detainees were in the same cell with the appellant. On that ground, counsel for the respondent submitted that the appellant should be non-suited because he could not prove that he was kept with violent crimes detainees. This is an untenable proposition. The information in this regard is within the peculiar knowledge of the respondent. Confronted with the allegation that there had been failure to comply with the duty in the Standing Order to detain violent crimes detainees from

other categories of detainees such as the appellant, it was incumbent upon the respondent to adduce evidence to meet that allegation. He did not.

[24] As was pointed by Jansen JA in *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39G-H, the failure of the respondent to reply or lead evidence in rebuttal of a fact peculiarly within his knowledge is taken into account when one decides whether a *prima facie* case has been made out. The appellant's undisputed evidence that he was sexually assaulted by fellow detainees, establishes a prima facie case that the assailants were violent crimes detainees. In the absence of contrary evidence, an ineluctable conclusion is that the appellant was detained with violent crimes detainees.

[25] Back to reasonable foreseeability. Given that it was reasonably foreseeable that harm could arise, the question is whether reasonable police officers would have taken steps to prevent such harm. To determine the reasonableness of guarding against the risk of the harm, a number of considerations are relevant. These include the degree or extent of the risk created by the conduct in question; the gravity of the consequences if the harm occurs; and the burden of eliminating the risk of harm. See *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776H-I.

[26] In this case, the risk created by placing a person detained for drunk driving in the same cell with violent crimes detainees was great, as was the gravity of possible consequences. The burden of eliminating this risk was slight. The obvious remedy was to separate the appellant from the violent crimes detainees. Even if this had not been possible (and nothing in the record suggests it was not) other reasonable steps were available to the police. In my view, the police could have, throughout the weekend, given careful consideration as to whether further detention of the appellant was warranted, and whether he should not be released on bail. That applies also to detaining him separately from violent crimes detainees. The police officers failed to take those steps. It is worth mentioning that it is not the failure only by junior police officers at Walmer police station. As already stated, at least one senior officer, Captain Richardson

inspected the cells during that weekend. On these considerations, I conclude that by failing to take the reasonable steps referred to above, the police were negligent.

Causation

[27] As explained in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-H and 35A-D, there are two distinct questions in the causation enquiry. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim. If it did not, then no legal liability can arise. If it did, then the second question is whether the negligent act or omission is linked to the harm sufficiently close or directly for legal liability to ensue, or stated differently, whether the harm is too remote. Here considerations of legal policy may play a part. See also *International Shipping Co (Pty) v Bentley (Pty) Ltd* 1990 (1) SA 680 (A) at 700E-H, where Corbett CJ restated the general principles of causation.

[28] With regard to factual causation, counsel submitted in this court that since the appellant could not prove that he was attacked by a violent crime detainee, the factual link has not been established. I disagree. That submission is at odds with the observation by this court in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25, that a plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human experience. That approach received the imprimatur of the Constitutional Court in *Lee v Minister for Correctional Services* [2012] 2 ZACC 30; 2013 (2) SA 144 (CC) para 47.

[29] Like Nugent JA in *Van Duivenboden* para 30, I find ‘a direct and probable chain of causation’ between the police’s failure to release the appellant on bail, and their failure to detain him separately, and the attack on the appellant. What is more, a retrospective analysis of the entries in the occurrence books reveals that during the relevant weekend, there were detainees arrested for murder, robbery and assault. Of

these, only the detainee held for murder was removed and held separately. Therefore, in all the circumstances, I am satisfied that the omissions by the police officers to release the appellant on bail and to detain the appellant separately from violent crimes detainees, materially contributed to the appellant being sodomised.

[30] In determining the presence of legal causation, the question is whether the negligence of the police officers was linked sufficiently closely or directly to the loss suffered by the appellant for legal liability to arise, or whether the loss is too remote. The test applied in such an enquiry is trite and settled. It is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all come into consideration. See *Delphisure Group Insurance Brokers Cape (Pty) Ltd and others v Dippenaar* [2010] ZASCA 85; 2010 (5) SA 499 (SCA) para 25. In the present case, I am of the view that the harm suffered by the appellant is sufficiently closely linked to the omission of the police to attract legal liability. There is no reason of policy militating against finding that the police's conduct was the cause of the harm to the appellant..

[31] In sum, I conclude that the appellant has shown that all the elements of delict have been established. The appeal must thus succeed.

Quantum

[32] It remains to consider the quantum of damages. The general rule is that the determination of damages is a function peculiarly within the province of the trial court. It is competent, however, for this court itself to fix the damages to which the appellant is entitled. See *Neethling v Du Preez and others; Neethling v Weekly Mail and others* 1995 (1) SA 292 (A) at 301A-C. This court has all the information necessary to consider this aspect. It is therefore in as good a position to do so, as the trial court. For that reason, no purpose would be served by remitting the matter for that purpose.

[33] Counsel for the parties informed us from the bar that the appellant's claim for loss of income had been abandoned. Accordingly, only general damages are to be considered. Arriving at an appropriate award for general damages is never an easy task. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the court's view of what is fair in all circumstances of the case. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 and *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA). In the latter case, this court noted that there was a readily perceptible tendency towards increased awards in respect of general damages in recent times. However, it reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages (para 60). It concluded that the principle remained that the award should be fair to both sides – it must give just compensation to the plaintiff, but 'not pour out largesse from the horn of plenty at the defendant's expense', as pointed out in *Pitt v Economic Insurance Company Limited* 1957 (3) SA 284 (D) at 287E-F.

[34] The unchallenged evidence of the clinical psychologist, Mr Meyer, can be summarised as follows. Following the sodomy the appellant was intensely traumatized. Six years after the fact, he was still being treated with anti-depressant medication. He had a chronic disorder which was likely to continue. He received tranquilizing medication to help him sleep and for general containment of anxieties. The medication was not particularly successful and the appellant was treated at a clinic. Psychologically, the appellant felt deeply humiliated and fearful. He had an intense fear of contracting HIV, and his sexual relationship with his wife was negatively affected by the experience. The couple experienced a profound breakdown in their marriage and were at a stage on the brink of divorce.

[35] The appellant could no longer cope at work and working in a team, as within that team he experienced triggers which precipitated him re-experiencing the traumatic experience. He was mocked by his colleagues. He deliberately absented himself from work and ultimately his employment was terminated. He attempted suicide by overdose

after losing his job and was hospitalised for five days in an intensive care unit in a hospital.

[36] Since the incident the appellant's personality has changed, and has affected his family relations. He has become withdrawn, irritable, impatient, easily provoked and aggressive to his wife. He has also struggled to relate to his child. The aspect of self-image has been affected. The appellant became self-rejecting and derogatory about his masculinity and, in a self-deprecating manner, suggested to his wife that she should 'find a real man.' For eight months after the trauma, the appellant suffered from a post-traumatic stress disorder (PTSD) as well as a mood and anxiety disorder. At the time of the trial, the appellant's PTSD was in remission, although some features of the disorder still manifested. His mood disorder was also largely in remission due to therapy. The findings by Meyer were, in material terms, confirmed by Mrs Flanagan and the appellant himself.

[37] It is clear from Mr Meyer's evidence that the sodomy has had a serious psychological impact on the appellant. In all the circumstances, I consider an amount of R200 000 to constitute adequate compensation for the appellant.

Costs

[38] Finally, to the issue of costs. The appellant sought costs of three counsel. Given the nature of the issues raised in the appeal, I do not believe that costs of three counsel are warranted. Costs of two counsel should suffice.

Order

[39] In the result the following order is made:

1 The appeal is upheld with costs, including costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following:

'Judgment is granted in favour of the plaintiff against the defendant for:

(a) payment of the amount R200 000;

(b) interest on the above amount at the rate of nine per cent per annum from the date of the judgment until date of final payment;

(c) costs of the suit.'

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T M Makgoka
Acting Judge of Appeal

For the Appellant:	A J Van der Linde SC (with him P E Jooste and T J D Rossi)
Instructed by:	Swarts Attorneys, Port Elizabeth Bezuidenhouts Inc, Bloemfontein
For the Respondent:	N Gqamana SC (with him V Madokwe)
Instructed by:	The State Attorney, Port Elizabeth The State Attorney, Bloemfontein