IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 17730/2010

Date: 19 March 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
....
DATE SIGNATURE

In the matter between:

ANNELISE DU PLESSIS	Plaintiff
And	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Defendant
MRS HABIB	Second Defendant
MINISTER OF CORRECTIONAL SERVICES	Third Defendant

JUDGMENT

PRETORIUS J,

[1] Initially the plaintiff instituted action against the Minister of Justice and Constitutional Development as first defendant, Mrs Habib, as second defendant, and the Minister of Correctional Services as third defendant.

[2] Claim 1 is based on a claim for unlawful detention against the first and second defendants. Claim 2 is a claim against the third defendant for unlawful detention. The plaintiff claims an amount of R300,000.00 from each of the defendants.

[3] The first defendant pleaded that Ms Habib had not acted as an employee as there existed no employer-employee relationship between the first and second defendants. The first defendant pleaded that Ms Habib had acted independently and therefore the first defendant could not be held vicariously liable for the deeds she had committed in her capacity as a magistrate.

[4] This resulted in the claim against the first defendant being withdrawn and the plaintiff continued with the claims against the second and third defendants.

[5] The main argument by counsel for the second defendant was that the plaintiff had not complied with section 2(1) of **Act 20 of 1957 the State Liability Act**, which provides:

"2 Proceedings to be taken against executive authority of department concerned

(1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent."

[6] In this case the plaintiff did cite the Department of Justice and Constitutional Development as defendant from the outset. Notice of intention to defend was given on 10 April 2010 by all parties. On 17 January 2011 the plea was delivered in which it was pleaded:

"- There did not and currently does not exist an employer-employee relationship between the First and Second Defendant.

- *At all relevant times hereto the Second Defendant acted as Magistrate in the execution of a judicial function.*
- *As Magistrate the Second Defendant acted independantly as member of the judiciary which is not part of the executive of the Government of the Republic of South Africa, of which the first and third defendant are part of.*
- *The First Defendant can not be held vicarious liable for the deeds committed by the second defendant in the execution of her judicial function."*

[7] On 3 August 2011 the plaintiff withdrew the action against the first defendant as a result of the plea and all parties were served with the

notice of withdrawal. On 3 October 2013 the matter was enrolled for hearing. The evidence of two witnesses for the plaintiff was lead and the witnesses cross-examined by Ms Swart, the legal representative for both the second and third defendants at the time. During cross examination of Adv Strauss, Ms Swart requested a postponement, as the second defendant had indicated that she was no longer satisfied with Ms Swart as legal representative and intended amending her plea. Ms Swart withdrew on behalf of the second defendant. This conduct by Ms Habib necessitated a postponement to 2 December 2013 to enable her to obtain legal counsel. On 2 December Adv Sadler appeared for Ms Habib and requested a further postponement as he had only received instructions at a late stage.

[8] The matter was then postponed to 30 and 31 January 2014 to lead further evidence. Although Ms Swart had indicated on 3 October 2013 that the second defendant intended amending her plea, no such application for amendment was forthcoming on 2 December 2013 and no indication was provided that the second defendant was still intending to amend her plea.

[9] On 7 Janaury 2014 notice of intention to amend in respect of rule 28 was served on the plaintiff's attorney. This amendment was not effected within the 10 days as provided by the rule, but was done by agreement during the trial on 30 January 2014.

[10] A special plea by the second defendant was served simultaneously with the amendment to the plea. In this special plea the second defendant pleaded that:

> *"The second defendant is an employee of the Department of Justice and Constitutional Development and the Minister of Justice and Constitutional Development is the executive authority of that National Department."*

[11] The second defendant relied on the provisions of sections 1 and 2(1) of the **State Liability Act 20 of 1957**.

[12] It is so that the plaintiff withdrew the claim against the first defendant on 3 August 2011. The second defendant had known since 2011 that the action had been withdrawn against the first defendant and had waited 2 years and four months to tender a special plea.

[13] In these circumstances, where the plaintiff had cited the first defendant as first defendant in accordance with the provisions of the act, the first defendant denied being vicariously liable, the plaintiff withdrew the action against the plaintiff and second defendant waited two years and four months to raise a special plea, I find that the plaintiff had complied with the provisions of the Act. The second defendant is a magistrate with years of experience and at the latest stage of the trial

amended her pleadings by tendering a special plea. At the outset the plaintiff had complied with the provisions of sections1 and 2(1) of the Act.

[14] I have heard further argument by both counsel for plaintiff and the defendants regarding the special plea. I find that the plaintiff has complied with sections 1 and 2 of the Act, as the first defendant was cited as first defendant and the claim agaist the first defendant was only withdrawn once the first defendant had pleaded that it was not viacriously liable for the second defendant's conduct as a magistrate.

[15] It is common cause that Mrs Du Plessis, the plaintiff, was arrested and appeared in the Commercial Crimes Court for the Regional Division of Gauteng on 9 April 2009. It is further common cause that Ms Habib was the presiding magistrate at the time and that Adv Carstens was the prosecutor. The Easter weekend started on 9 April 2009, which was a Thursday, and it is common cause that some of the court's personnel on that day left early.

[16] The record of proceedings of 9 April 2009 was provided to this court as the plaintiff relied on the record of proceedings, *inter alia,* to prove her claim. It is common cause that the case against Mr van Rensburg and the plaintiff had been set down for a formal bail

application by the plaintiff for 9 April 2009. Adv Strauss represented the plaintiff in this bail application on 9 April 2009.

[17] According to the record of proceedings Adv Carstens, on behalf of the state, informed the court that it was a formal bail application due to the amount involved in the crime, which was R5,286 million. Ms du Plessis was charged with a crime that was provided for in schedule 5 of the Criminal Procedure Act. The state indicated to the court that it was not formally opposing bail.

[18] Adv Strauss introduced herself in court to the second defendant as follows:

> *"As the court please your worship. I would like to apologise for not being able to introduce myself. I went to your offices, pushed the buzzer, but I think I just missed you. I am advocate Strauss from the Pretoria Bar.*
>
> *Your worship my client is Afrikaans. I have attended to prepare an affidavit in Afrikaans. With leave of the court, I will directly interpret it to make is easy for the court."*

[19] She had, from the start of the proceedings indicated that she was an advocate from the Pretoria Bar, although the second defendant denied, during her evidence, that Adv Strauss had indicated from which bar she had been.

[20] As soon as Adv Strauss informed the court that her client was Afrikaans speaking and she had drawn up an affidavit in Afrikaans, the second defendant indicated:

> *"No, please this matter will stand down. This court is English. The matter will proceed in English and your affidavit must be done in English. If you are not prepared, I will adjourn the matter for that purpose."*

[21] To which Adv Strauss replied:

> *"I was prepared your worship. I just not have knowledge that the court did not speak Afrikaans. As the court pleases"*

[22] This elicited the strange reply from Ms Habib:

> *"COURT: I think you have been presumptuous.*
>
> *MS STRAUSS: Your worship my client does not speak English.*
>
> *COURT: And you were not properly dressed to appear in front of me. Is this how you appear in the courts? Are you trying to undermine the authority of this court?"*

[23] This was the first time that Adv Strauss was informed that she was inappropriately dressed, but she was not informed in what respect she was inappropriately dressed.

[24] Thereafter the court adjourned to enable Adv Strauss to translate the affidavit in English. Whilst busy doing so, with the help of Adv Carstens, the interpreter rushed into the office and told them that Ms Habib was waiting for them in court. As they, Advocates Strauss and Carstens, walked into court, Ms Habib, without granting them an opportunity to speak, remanded the matter to 15 April 2009. Neither of the legal representatives was afforded the opportunity to address the court in any way before the case was postponed. There was no enquiry from Ms Habib in relation to the translation of the affidavit. Adv Strauss objected and requested an opportunity to speak but was cut short by Ms Habib who remarked:

> *"Madam you are not in a position to address me because I disapprove of the manner in which you are dressed. I do not want to speak to you. So please do not voice your objections to me because I am not even seeing you at this moment"*

[25] The initial objection by Ms Habib had nothing to do with Adv Strauss' dress, but with the fact that the affidavit by the plaintiff was in Afrikaans. Ms Habib did not want to listen or to consider Adv Strauss' suggestion that the plaintiff may appear on her own behalf and apply for bail. She summarily adjourned the court. Adv Carstens' evidence was that no date for postponement was arranged with the state or the accused, Ms Habib unilaterally supplied the date without consulting anybody. Normally the state and defence are consulted regarding

suitable dates for a bail application. Adv Carstens' evidence was that the interpreter, Mr Matlala, was present at all times in court until the court adjourned the first time and would have been able to interpret from Afrikaans to English and *vice versa*. Adv Carstens' evidence was that Ms Habib was not correct to maintain that there was no interpreter available. The court had finally adjourned for the day before 12h00 on 9 April 2009.

[26] According to Adv Carstens Adv Strauss was formally dressed in a formal blouse with the trouser pants of a pant suit. Adv Carstens denied that the court had started at 8h15 on 9 April 2009, as Ms Habib testified. Adv Strauss confirmed the evidence of Adv Carstens. Her evidence was that she had worn a long sleeved shirt, which was buttoned except for the top button. She wore beige coloured trousers, but definitely not cargo pants.

[27] In the plea Ms Habib denied the evidence of both advocates Carstens and Strauss that they were busy translating the plaintiff's affidavit from Afrikaans to English and pleads:

> *"The second defendant did not allow the plaintiff to start with her bail application by handing in the affidavit drawn Afrikaans, as the second defendant is not fluent in Afrikaans. In the interest of justice and without conceding that the second defendant was not obliged to adhere thereto, the second defendant gave the plaintiff opportunity to translate the affidavit in English during the*

adjournment, ***which opportunity was not made use of.***" (Court's emphasis)

[28] This evidence is contradicted by both the prosecutor and Adv Strauss for the defense, as they had adjourned the court for the sole purpose to translate the affidavit into English. There is no indication on the record of proceedings of 9 April 2009 that Ms Habib, when she was in court the second time, had made any effort to ascertain whether the affidavit had been translated. Ms Habib merely, without much ado, postponed the case to 15 April 2009.

[29] Ms du Plessis was hysterical at that time and after Adv Strauss had calmed her she endeavoured to find Ms Habib to solve the situation. The court orderly told her that Ms Habib had already left, although it was still in the morning and during working hours.

[30] Both Advocates Carstens and Strauss went to the High Court in Johannesburg where an urgent bail application was launched on behalf of the plaintiff. Bail in the amount of R15 000.00 was granted to the plaintiff by Tshiqi J. The order was typed and stamped by the registrar of the high court, after which the plaintiff's stepfather took it to the magistrate's court to pay the bail.

[31] Mrs du Plessis' evidence confirmed the evidence of Advocates Carstens and Strauss in all material aspects. Her evidence was that Adv Strauss was dressed in a black long sleeved shirt. She denied that Ms Habib had indicated at her first appearance that as the plaintiff could not speak English, that the matter would be postponed. On 3 April 2009 the case was postponed to enable the plaintiff to obtain a legal representative. Her evidence was that after the failed attempt to obtain bail from Ms Habib, she was taken to prison. She was placed in a large cell with 40 to 50 women – she was the only white women. There were only six beds in the cell and the inmates had to sleep on mattresses. There were not enough mattresses and 4 to 5 of the inmates had to share a mattress. She had 2 filthy blankets. The floors were cement, there were one toilet and one shower, with no toilet paper provided. There were plenty of cockroaches. She was very emotional when bail was not granted, as it was her daughter's birthday and she envisaged being home over the Easter weekend to celebrate it with her family.

[32] On 10 April 2009 she was transferred to the cell for awaiting trial prisoners. There were 40 to 50 women in this cell and 4 to 5 women had to share bunk beds. She was traumatized, degraded, alone and felt unsafe, as some of the inmates made inappropriate suggestions to her.

[33] Mr van Rensburg, the stepfather of the plaintiff and her co-accused in the criminal trial, gave evidence to the effect that on 3 April 2009 he was granted bail and the language used by Ms Habib when addressing both him and the plaintiff on that day was English, which they both understood.

[34] He was present when the urgent bail order was granted by the High Court. Advocate Strauss provided him with the court order and instructions and he proceeded to the prison to pay the bail money, after he had ascertained that the plaintiff had been moved from the magistrate's court to the correctional facility.

[35] His evidence was that he arrived at the gate of the prison and was told by an officer that everybody had left for the day. He was referred to the gate at medium C where a lady behind a counter informed him that the person who must sign was not available and he must return after the long weekend. Nobody informed him that the order for the release of the prisoner had to be verified. He then left. Nobody made any calls to verify the order in his presence.

[36] At the close of the plaintiff's case the particulars of claim was amended by changing the time when bail was granted from 16h00 to 14h00.

[37] Mr Sadler took over as counsel for the second defendant, Ms Habib, on the second occasion that the matter was set down for trial, as Ms Habib indicated that Ms Swart, who had represented both the second and third defendants was not dealing with the case in an appropriate manner.

[38] Ms Habib testified that she had been a magistrate for 21 years. She had been a regional court magistrate since 2007. She was presiding in the special commercial court in April 2009. On 3 April 2009 Adv Carstens appeared for the state when bail was granted to Mr van Rensburg and the plaintiff's case was postponed. Her evidence was that on 3 April 2009 there was no interpreter and she had explained the charges, rights and procedures to Mr van Rensburg, the second accused and to the plaintiff, as the first accused, in English which they both had understood. Plaintiff's case was remanded to 9 April 2009 for a bail application.

[39] Advocates Carstens and Strauss entered the court at 9h05 on 9 April 2009 for the plaintiff's bail application. Ms Habib's evidence was that she was dissatisfied with Adv Strauss' dress. She stood the matter down for Adv Carstens to assist Adv Strauss to translate the affidavit into English and it was agreed that Adv Strauss had to, at least, put on a jacket. This version of Ms Habib was in stark contrast to the evidence of all the witnesses for the plaintiff, which included the evidence of Adv

Carstens, who was an independent witness and employed by the Department of Justice and Constitutional Development.

[40] According to Ms Habib's unconfirmed evidence she was informed during teatime at 11h05 by Cynthia that there was no Afrikaans interpreter available and she proceeded to court at 11h25. As Advocates Carstens and Strauss walked in she postponed the matter. Ms Habib's impression of advocate Strauss' attire was that *"it appeared as if she was on a road trip."* The further problem, according to Ms Habib, was that advocate Strauss had no laptop. She could not explain why that would have been a problem or why the possession of a laptop would have confirmed to her that Adv Strauss was an advocate.

[41] During cross examination Ms Habib told the court that the plea had been filed without any consultation with her. The first time she saw the plea was in 2012 when the first attorney showed it to her. She realized at the time that the pleadings were incorrect and she pointed it out to her counsel, Ms Swart, who did nothing to correct it. She did not insist that it should be corrected at the time, although she had been a judicial officer for 21 years and would have known that the plea should have been ammended as soon as she found it to be wrong.

[42] On 22 August 2012 she consulted with counsel, who did not go through the pleadings with her. The only time Ms Habib gave her

version, according to her, was when she wrote a letter to the Regional Court President. She could not explain where the information in the plea had been obtained. She had perused the transcript of proceedings of 9 April 2009 and disputed the correctness thereof. Once again she did not discuss this very important document with her counsel at any time and no questions was put to the witnesses indicating that the record of proceedings was incorrect. The court finds it extremely strange that she did not point it out to her attorney and counsel at the time.

[43] The defendant delivered a supplementary discovery affidavit on 30 January 2014. She could not explain to the court what paragraph 3 of this document means as it sets out:

> *"After carefully perusing the content of the docket and or documents at my disposal, it transpired that there is no protection order in relation to Plaintiff's arrest."*

It is not clear at all what this paragraph means and as a result the court does not know what the next paragraph indicates either, which reads:

> *"Further, it is my respectful submission that in my view of the above, the Defendant's Plea shall be accordingly amended to incorporate same."*

[44] It is stated in the plea that:

> *"At no point in time did the person that purportedly appeared as counsel recorded that she acted on proper instructions and brief*

by an attorney when so appearing in court on behalf of the plaintiff. There was no duty on the second defendant to give her an audience in the proceedings before the second defendant."

[45] Once more the second defendant could not explain how it came about that this was pleaded without her instructions.

[46] Ms Habib's evidence regarding the derogatory remark that Adv Strauss was *"presumptuous"*, was that she meant that Adv Strauss presumed the bail application would be conducted in Afrikaans. According to The New Shorter Oxford English dictionary "presumptuous" means:

"Presumptuous – Characterized by presumption or undue confidence; forward, impertinent"

[47] This court cannot agree that counsel was *"presumptuous"* when assuming that the case would be conducted in Afrikaans, as English and Afrikaans are still the official languages in court and Adv Strauss' client was Afrikaans speaking. Her remark was therefor totally irrelevant and derogatory.

[48] Ms Habib's evidence was that she had a problem with Adv Strauss's trousers and not due to the fact that she was not wearing a jacket. There was no mention of a jacket at all during the court

proceedings of 9 April 2009. The court finds her version to be contradictory and dishonest in this regard.

[49] There is no indication at all on the record that Ms Habib enquired from either advocates Strauss and Carstens as to how far they were with the translation of the affidavit. The actions by Ms Habib when postponing the matter without any further arguments by any of the parties are highly irregular. The constitutional rights of the accused were not taken into consideration at all and were violated as a result of Ms Habib's unwarranted annoyance with Adv Strauss.

[50] If the court considers the contents of the letter written by Ms Habib to the Regional Court President there are contradictions and discrepancies in this letter in comparison to her evidence and the record of proceedings of 9 April 2009, which Ms Habib could not explain.

[51] It is quite clear that she was dishonest in the letter where she stated:

> *"When the matter was again called up later in the day, I noticed that the advocate had done nothing to improve her manner of dress,* ***that the papers were still in Afrikaans and there was still no interpreter.***" (Court's emphasis)

[52] The matter was not called later in the day, Adv Strauss did not know why her clothing was inappropriate and Ms Habib had not known whether the affidavit had been translated, nor did she place on record that there was no interpreter.

[53] The further contradiction on a material fact is in the next paragraph of the letter where Ms Habib stated:

> *"After the matter was adjourned the accused refused to step off the dock and insisted on addressing the court directly. She stated that she did not want her advocate any more and wished to proceed with the bail application on her own and in English."*

[54] This version was never put to the plaintiff, as Mr Sadler, on behalf of the second defendant, had no cross examination of the plaintiff. There is no mention of this on the court record. The court finds this evidence by Ms Habib to be untrue.

[55] It is quite clear that this bail application was the last matter on the roll for the day and Ms Habib's statement in the letter is untrue where she states:

> *The matter was not recalled and the court proceeded to hear other matters"*

[56] No further matters were heard and the court adjourned immediately after postponing the case, according to Ms Habib's evidence and confirmed by the plaintiff's witnesses. No questions were put to any of the witnesses that the court had further matters to hear. Adv Strauss' evidence was undisputed that she had calmed down the plaintiff and thereafter, when she tried to locate the second defendant she had already left.

[57] The last paragraph in the letter is also untrue as it is clear from the record that Adv Strauss introduced herself as being from the Pretoria Bar.

[58] At a very late stage during Ms Habib's evidence, a copy of the court book of 9 April 2009 was provided. It is evident from the court book that the plaintiff's matter was the last on the roll. No times were entered indicating when the court had commenced and adjourned, to confirm Ms Habib's evidence.

[59] Ms Simba's evidence on behalf of the third defendant, was that on 9 April 2009 she had been on duty at the correctional facility and was the clerk dealing with bail. She confirmed that the court order was received by her, although she said it was after 16h00, contrary to Mr van Rensburg's evidence who said it was before 16h00. Her evidence was that she had phoned to confirm the court order, but could not find

anybody to confirm it. She then sent Mr van Rensburg away and informed the plaintiff that she would have to wait until after the Easter weekend to be released on bail.

[60] Mr van Rensburg contradicted this evidence and testified that nobody tried to confirm the court order telephonically. It is common cause that there is always a judge and clerk on duty over weekends and at night and that there is an emergency phone number which can be called. According to Ms Simba there was no procedure after hours to establish whether a court order for bail was authentic.

[61] Mr Mabusa, a deputy director in the employ of the third defendant gave evidence that there was no procedure in place at the time of the incident to verify the authenticity of a court order after hours.

[62] There is currently a pilot project where the station commander of the South African Police Services would be called to verify that bail had been granted to a certain prisoner. That evidence concluded the 3rd defendant's case.

[63] Both advocates Strauss and Carstens, as well as the plaintiff, were recalled after the court had granted the request for the plaintiff to reopen the case to clarify the contents of the letter to the Regional Court President. This letter was only provided to the court after all three

these witnesses had testified. The court held that it was in the interest of justice to have all the facts before court. And therefor allowed the plaintiff to reopen the case.

[64] The paragraph of the letter in which Ms Habib stated:

"I ordered that the matter stand down for the advocate to, at least, obtain a jacket." was put to all three witnesses, who vehemently denied that Adv Strauss was adviced to get a jacket. Adv Carstens went so far as to testify that if this had happened, she would have provided Adv Strauss with a jacket as she had two jackets in her office. Ms Du Plessis, the plaintiff, denied this paragraph as well. She further denied that she had addressed Ms Habib at all in court on 9 April 2009. Their evidence is confirmed by the record of proceedings of 9 April 2009.

[65] Ms Habib was totally dishonest when she adviced the Regional Court President that when she returned to court the papers were still in Afrikaans – she never requested the papers or endeavoured to find out how far the translation was.

[66] Section 12(a) of the Constitution provides:

"12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;" (Court's emphasis)

[67] It is entrenched in the oath that a magistrate has to take before commencing office which provides:

"do hereby swear/solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, ***will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.*** (Court's emphasis)

[68] It is so that a judicial officer has limited immunity against liability. This immunity does not apply to conduct which can be regarded as mala fides or wrongful. In **Zealand v Minister of Justice and Constitutional Development 2008 (4) SA 458 (CC)** the Constitutional Court held at paragraph 33:

"The next stage of the enquiry is whether that deprivation was 'arbitrary or without just cause' in terms of s 12(1)(a). ***It is by now well- established in our constitutional jurisprudence that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivations."***(court's emphasis)

[69] In **S v Coetzee and Others 1997 (3) SA 527 (CC)** at paragraph 159 O'Regan J held:

> *"These are separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in Bernstein and Others v Bester and Others NNO1996 (2) SA 751 (CC) (1996 (4) BCLR 449) at paras [145]--[147], our Constitution recognises that both aspects are important in a democracy:* ***the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.*** *The two issues are related, but a constitutional finding that the reason for which the State wishes to deprive a person of his or her freedom is acceptable,* ***does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair.***" (Court's emphasis)

[70] The court has to decide whether Ms Habib was merely negligent and therefore not liable, or whether she acted wrongfully, and with a *mala fide* intent in which instance she will be liable.

[71] In **Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)** Harms JA found that:

> *"Decisions made in bad faith are, however, unlawful and can give rise to damages claims."*

[72] In **Tuch v Meyerson 2010 (2) SA 462 (SCA)** Streicher JA held in paragraph 13:

> *"The onus was on the deceased to prove the alleged malice on the part of the respondents. No direct evidence of such malice was adduced by the deceased but, malice being a state of mind, that is hardly surprising.* ***Being subjective in nature malice will often have to be inferred from intrinsic or extrinsic facts.***" (Court's emphasis)

[73] The court has to consider the extrinsic and intrinsic facts. Ms Habib alleged that Mr Le Roux, the state attorney, had not consulted with her to draw up her plea. Her further evidence was that Adv Swart, who appeared for her until the cross examination of Adv Strauss, had not dealt with the plea, nor with the record of the court proceedings of 9 April 2009, when they consulted before trial. The court finds it hard to believe that a magistrate with a LLB degree and 21 years experience as a judicial officer will not be properly prepared where she is being personally held liable for damages. Neither Mr Le Roux, the state attorney, nor Adv Swart, counsel for the third defendant, were called as witnesses to confirm this version of Ms Habib. They are both

experienced legal practitioners and the court draws the inference that their version of events would not confirm Ms Habib's evidence.

[74] The record of proceedings of 9 April 2009 is common cause. Ms Habib tries to convince the court, for the first time during cross examination, that everything had not been recorded. This version was not canvassed with the plaintiff's witnesses at all. The court finds that it was the first time that it was alleged that everything had not been recorded. This was not put to the plaintiff's witnesses and when the three witnesses were recalled, they emphatically denied that anything relating to a jacket which Adv Strauss had to wear was ever mentioned in court by Ms Habib. The only conclusion I can come to is that Ms Habib was dishonest in this respect.

[75] Both Advocates Carstens and Strauss made a good impression in court as witnesses. They were honest and straight forward when giving evidence. There was no indication from the defence that they were lying. The court accepts their evidence as the transcript of what had transpired in court on 9 April 2009 confirms their evidence in all respects. It is clear that the language was the first problem that Ms Habib objected to and thereafter she commented as to Adv Strauss's attire. In her evidence in this court her problem, according to her, was that Adv Strauss was wearing cargo pants and no jacket. I cannot but find that she was dishonest in this regard as there was no mention of

her indicating to Adv Strauss to put a jacket on in the record of proceedings.

[76] If Ms Habib had done her duty, as could be expected from a reasonable judicial officer, she would have entertained the plaintiff's bail application without Adv Strauss. It is clear that on 3 April 2009 she had no problem in communicating with the plaintiff in English. This should have alerted her that she should have enquired from the plaintiff as to whether she wanted to proceed with the bail application on her own in English. Ms Habib's dishonesty either in court or in her letter to the Regional Court President is blatant and clear for all to see if the record of proceedings of 9 April 2009 is compared with her evidence and the letter.

[77] Ms Habib did not uphold the oath of a magistrate on 9 April 2009. This is even more reprehensible as she is an officer of the court, who due to unknown reasons deliberately caused the plaintiff to spend the Easter weekend in prison. The court can come to no other conclusion, when considering all the facts and evidence that Ms Habib's conduct on 9 April 2009 was wrongful and mala fide.

[78] The third defendant conceded that there was no protocol in place to release prisoners after hours, although the third defendant had known that bail could be granted after hours and during weekends. The

lack of arrangements to accommodate such events cannot deprive prisoners, to whom bail had been granted, from their liberty. Freedom is one of the pillars of the Constitution and should not be violated due to the third defendant's inaction. The third defendant is equally liable for the deprivation of the plaintiff's freedom for 5 days and 5 nights.

[79] In **Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA)** Nugent JA held at paragraph 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.*"

[80] It must be reiterated that money is a solatium for the deprivation of freedom and liberty. There is no way that such a loss can be measured. The court can only rely on the dictum in the **Seymore case *(supra)*** where Nugent JA found at paragraph 20:

> "*It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.*"

[81] The plaintiff was incarcerated for 5 days and 5 nights under dire circumstances. Her evidence was that she had suffered emotionally as she could not attend her daughter's birthday celebrations. It is so that she was ultimately sentenced to imprisonment in the case, but that cannot mitigate these circumstances where she had not been granted bail and after bail had been granted, she was not released for 5 days and 5 nights. It is clear that the plaintiff had to incur additional legal expenses to obtain her liberty by an urgent application to the High Court, which amounted to R15,000.00. This expenditure could have been prevented if the second defendant had not conducted herself in such a manner as to be *mala fides* and wrongful. This amount should be added to any amount which the court considers to be reasonable as a solatium in these circumstances.

[82] The following order is made:

1. Claim 1 against the second defendant;
    a. Payment in the amount of R115,000.00;
    b. Interest on the amount at 15.5% per annum a *tempore more*;
    c. Costs of suit.
2. Claim 2 against the third defendant:
    a. Payment in the amount of R30,000.00.
    b. Interest on the amount at 15.5% *per annum a tempore* morae;
    c. Costs of suit.

3. The registrar is requested and directed to send a copy of this judgment together with the record of proceedings of 9 April 2009 and the record of proceedings in the present case to the Magistrates Commision to investigate the conduct of Ms Habib in the light of this judgment and to take whatever action against her which the Magistrates Commision considers appropriate.

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Judge C Pretorius

Case number	: 17730/2010
Heard on	: 3 October 2013
For the Plaintiff	: Adv Brandt
Instructed by	: Surita Marais
For the Second Defendant	: Ms Sadler
Instructed by	: State Attorney
For the Third Defendant	: Ms Sadler
Instructed by	: State Attorney
Date of Judgment	: 19 March 2014