IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO

Case No: 190/2022

In the matter between:

ASANDILE MLOMBO **Plaintiff**

and

MINISTER OF POLICE **Defendant**

JUDGMENT

Bloem J

[1] The issue is whether the plaintiff was lawfully detained between the date of his first appearance in court and his next appearance. The material facts are largely common cause or undisputed. They are that on 5 September 2021 Asandile Mlombo, the plaintiff, was arrested without a warrant by a member of the South African Police Service on a charge of malicious damage to property. He was detained until he appeared in court at Mdantsane the following day, when the magistrate ordered his release from custody and warned him to appear in that same court at 08h30 on 15 October 2021. Instead of being released, the plaintiff was remanded in custody at the East London Correctional Centre until 15 October 2021, when he appeared in court. The magistrate then again ordered his release from custody and warned him to appear in court on 8 November 2021.

[2] The plaintiff instituted a claim for damages against the Minister of Police, the defendant, for damages arising from his arrest and detention before his first appearance in court and his detention after his first appearance in court. He subsequently abandoned his claim for unlawful arrest and detention before his first appearance and proceeded only with his claim for damages arising from his detention after his first appearance in court.

[3] In his particulars of claim the plaintiff alleged that on 6 September 2021, the court orderlies, as members of the South African Police Service, took him into custody after the magistrate had ordered his release and had him transferred to the above correctional centre where he was detained until his next appearance in court on 15 October 2021.

[4] In his amended plea, the defendant denied that the court orderlies wrongfully and unlawfully detained the plaintiff. He pleaded that the court orderlies acted on a warrant for the plaintiff's detention (referred to as a J7 in the plea and the evidence) "*that was provided by the court clerks*", that "*the court orderlies were furnished with a J7 that requires that an accused be taken to prison and same was done*" and that, "*in order for the court orderlies to release an accused, they ought to be furnished with a J6, and in this case they were furnished with a J7*." The defendant accordingly denied that he was liable to pay damages to the plaintiff arising from his detention after his first appearance. In his replication the plaintiff denied the lawfulness of the warrant for his detention (the warrant). He challenged the warrant on the grounds that there was no legal or factual basis for the issue thereof since the magistrate had ordered his release from custody; and that the court orderlies were obliged to execute the magistrate's order. The plaintiff also disputed the authenticity of the warrant because *inter alia* it was not signed by the magistrate who had ordered his release on warning.

[5] The defendant decided to lead evidence first. Thandoxolo Mketo, who was the defendant's only witness, testified that he is a member of the South African Police Service for about 18 years, performing duties as a court orderly at the magistrate's court at Mdantsane. His experience at that court is that, after a magistrate had ordered that a person be kept in custody to appear in court on a later date, the clerk of the court would prepare a warrant for that person's detention and hand it to the magistrate for signature. The clerk of the court would then hand the warrant to him for execution. Before executing the warrant, he would not look at other court documents, like the charge sheet or criminal record book. An official stamp of the South African Police Service would be affixed to the warrant because, without an official stamp on it, a person will not be received at a correctional centre. He did not know who stamped the warrant in question. He testified that warrant officer Selana worked with him as a court orderly on the day in question.

[6] The plaintiff testified that, when he appeared in court on 6 September 2021, the magistrate said that he must go to prison. When he was asked in cross-examination why he claimed damages from the defendant, his response was that the magistrate had issued an order that he should be released, but despite that order, he was kept in custody.

[7] The magistrate who presided over proceedings on 6 September 2021, Anton Pretorius, testified that he postponed the case to 15 October 2021 and ordered the plaintiff's release on warning. He said that it would not have made sense for him to order the plaintiff to be remanded in custody when the interests of justice demanded his release on warning. He explained that a warrant for detention is completed by the clerk of the court and signed by him. Each magistrate has his or her own official stamp which should be affixed to a warrant for detention. He has been doing so for the last four to five years. In this case he neither signed the warrant nor was his official stamp affixed to it.

[8] Neziswa Manahla testified that she has been working for the Department of Justice as an administration clerk for the past 21 years. Her duties as clerk of the court included entering particulars of every criminal case coming before the presiding magistrate on that day, in the criminal record book, preparing warrant for arrest forms, as well as warrants for detention and warrant for release (J6). Before the commencement of proceedings on 6 September 2021, she entered the particulars of each of the four cases that served before the magistrate on that day in the criminal record book. She made entries under the headings of the case number, mass number, name of the police station from which the case emanated, name of the accused and the offence with which each of the accused had been charged. She does not, and did not in this case, complete the entries under the headings 'verdict, sentence or order'. Those entries are completed by the magistrate at the conclusion of each case. The entries under the heading 'remarks' are completed by a court orderly. She testified that she was in court when the magistrate wrote "RW 15/10/2021" under the heading 'verdict, sentence or order', which stands for 'remand on warning'. It means that the magistrate ordered the plaintiff's release from custody and warned him to appear in court on 15 October 2021. No entry was made under the heading 'remarks' in respect of the plaintiff and the fourth accused whose particulars were entered in the criminal record book for that day. The two of them were ordered to be released from custody and warned to appear in court on future dates. She testified that warrant officer Selana signed under the heading 'remarks' in respect of the two remaining accused persons whose particulars were also entered in the criminal record book. The magistrate had ordered that those two accused persons be kept in custody.

[9] Ms Nxazonke-Mashiya, counsel for the defendant, submitted that the plaintiff's claim should be dismissed because his detention was *prima facie* lawful. That submission was made because the court orderlies detained the defendant pursuant to a warrant for his detention. Her submission was accordingly that the mere production of the warrant justified the plaintiff's detention. The plaintiff challenged the validity of the warrant on the grounds set out in his replication.

[10] In *Cresto Machines (Edms) Bpk v Die Afdeling Speur-Offisier, SA Polisie, Noord-Transvaal*[1] the court dealt with a search warrant which the police (the respondent) had obtained from a magistrate to attach the appellant's pin-tables (the machines). The respondent alleged that the appellant or its lessees of the machines permitted the machines to be used in a manner that contravened certain statutory provisions. The police intended prosecuting them and intended using the machines as evidence in such prosecutions. Trollip JA said that it was clear that the warrant was issued under section 42(1) of the Criminal Procedure Act 56 of 1955 (the 1955 Criminal Procedure Act). Section 42(1) of the 1955 Criminal Procedure Act read as follows:

[1] *Cresto Machines (Edms) Bpk v Die Afdeling Speur-Offisier, SA Polisie, Noord-Transvaal* 1972 (1) SA 376 (A) at 394G and 395E.

"*If it appears to a judge of a superior court, a magistrate or a justice on complaint made on oath that there are reasonable grounds for suspecting that there is upon any person or upon or at any premises or in any receptacle of whatever nature within his jurisdiction-*

(a) stolen property or anything in respect of which any offence has been, or is suspected on reasonable grounds to have been committed, whether within the Republic or elsewhere; or

(b) anything in respect of which there are reasonable grounds for believing that it will afford evidence as to the commission, whether within the Republic or elsewhere, of any offence or that it was used for the purpose of or in connection with such commission of any offence; or

(c) anything in respect of which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence,

the may issue a warrant directing any policeman named therein or all policemen to search such person, premises or receptacle and any person found in or upon such premises, and to seize any such thing if found, and to take it before a magistrate to be dealt with according to law."

[11] It was held that, without a warrant, the onus of proof would have been on the respondent to establish that the attachment of the machines was legally justified, but that the warrant for attachment served "*to discharge the onus of proof initially resting upon the respondent"* and that consequently, "*the ultimate onus rested on the appellant to demolish the defence of the existence of the warrant*". The magistrate exercised his discretion in favour of the respondent by issuing the warrant. It appeared to him that there were reasonable grounds for suspecting that the machines were used in connection with the commission of offences or that they would afford evidence as to the commission of those offences. That was the factual basis upon which the warrant was issued. The legal basis for the issue of the warrant was section 42 of the 1955 Criminal Procedure Act.

[12] In *Minister van Polisie v Goldschagg*[2] the respondent failed to appear in court after a summons, intended for him, had been served on his brother's employee. The respondent did not know that he was required to appear in court. When he failed to appear in court in accordance with the prescripts of the summons, the magistrate issued a warrant for his arrest under section 309(3) of the 1955 Criminal Procedure Act. Section 309(2) and (3) read as follows:

"*(2) Except where otherwise specially provided by any law, the service upon an accused of any summons or other process in a criminal case in an inferior court shall be made by the prescribed officer, either by delivering it to the accused personally or, if he cannot conveniently be found, by leaving it for him at his place of business or usual or last known place of abode with some inmate thereof. The service of the summons may be proved by the evidence on oath of the person effecting the service or by his affidavit or by due return of service under his hand.*

(3) If any person fails to appear at the hour and on the day appointed for his appearance to answer any charge, and the court is satisfied upon the return of the person required to serve the summons that he was duly summoned or if it appears from evidence given under oath that he is evading service of the summons, or if it appears from such evidence that he attended but failed to remain in attendance, the court in which the said criminal proceedings are conducted, may issue a warrant, directing that he be arrested and brought, at a time and place stated in the warrant, or as soon thereafter as possible, before the court or any magistrate."

[13] It was held that the onus was on the respondent to prove the unlawfulness of his

[2] *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A).

arrest and detention as an essential element. The validity of that warrant was indeed challenged. The magistrate issued the warrant under section 309(3) when the respondent failed to appear in court. He was satisfied, based on the return of service, that the respondent had been duly summoned to appear on the day appointed for his appearance. His non-appearance in court was sufficient for the warrant to be issued under that section. There was accordingly also a factual and legal basis for the issue of the warrant for the respondent's arrest and detention.

[14] In the present matter there was no legal or other basis for the issue of the warrant for the plaintiff's detention. On the contrary, the magistrate had ordered his release from custody. In terms of section 12(1)(a) of the Constitution, everyone has the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. In *Zealand v Minister of Justice and Constitutional Development and Another*[3] it was held that the right not to be deprived of freedom arbitrarily or without just cause affords a person substantive protection. Langa CJ had the following to say in that regard:

> "*That right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons. The mere fact that a series of magistrates issued orders remanding the applicant in detention is not sufficient to establish that the detention was not 'arbitrary or without just cause'".*

[15] In *S v Bogaards*[4] it was held that it is an order of court, rather than a detention warrant, that is the legal basis for a person's detention. Khampepe J said that it does not follow that where a warrant, based on a court order, is held to defective, the detention necessarily becomes unlawful. The learned Judge found that "*the efficacy of the administration of the criminal justice system requires that the lawfulness of detention depends on the order of a court rather than the validity of a warrant*" and that "*it is the court order, not the warrant, that is the legal basis for a person's detention and it cannot be that, where the warrant is defective, detention necessarily becomes unlawful.*" Although a warrant serves the important purpose of guarding against unlawful detention, it does not mean that, where a court orders the detention of an accused person, his or her detention becomes unlawful because of a defective warrant.

[16] The mere production of a warrant for a person's detention is not a complete defence to justify such person's detention. It is settled law that, where a defendant detains a plaintiff, the onus is on the defendant to justify that detention. Where a defendant produces a warrant for the plaintiff's detention, such detention would be *prima facie* lawful. Without the warrant being successfully challenged, the warrant would legally justify the plaintiff's detention. The onus would then be on the plaintiff to prove that his or her detention was unlawful. That could be done by establishing, for instance, that the warrant was not based on an order of court. What is important is that the warrant

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[3] *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) at par 43.

[4] *S v Bogaards* 2013(1) SACR 1 (CC) at paras 36 and 37.

must be based on a court order for the detention to be lawful. It follows that, in the absence of a court order as the basis for the warrant for a person's detention, such a warrant is invalid and accordingly unlawful. In this case, the plaintiff established that there was no basis for the warrant for his detention. In my view, he has successfully established that the deprivation of his freedom was without a just cause. His right contained in section 12(1)(a) of the Constitution was infringed. His detention was not legally justified and accordingly unlawful.

[17] Ms Nxazonke-Mashiya submitted that if it is found that the warrant is unlawful, the plaintiff's claim should nevertheless be dismissed because he failed to establish that the police caused his detention. Counsel submitted that it was the clerk of the court who prepared the warrant and that the orderlies merely executed it. It was submitted that the Minister of Justice should accordingly have been cited as a defendant as he is vicariously liable for the wrongful conduct of employees of the Department of Justice, such as Ms Manahla. That submission is not supported by the facts and cannot be sustained. Warrant officer Mketo testified that the warrant was prepared by the clerk of the court. Ms Manahla was the clerk of the court on the day in question. She testified that she did not prepare the warrant. Her undisputed evidence was that the warrant was not completed in her handwriting and that she did not take the warrant to another magistrate to be signed. In my view, the probabilities favour Ms Manahla's version. She had access to the charge sheet and the criminal record book in which the magistrate made entries that the plaintiff's case was remanded to 15 October 2021 and that he was warned to appear in court on that day. She testified that she would not have prepared a warrant for the plaintiff's detention after the magistrate had ordered his release from custody. Warrant officer Mketo, on the other hand, testified that he had no access to any document other than the warrant. In the circumstances, I find that Ms Manahla did not prepare the warrant for the plaintiff's detention. It is unknown who prepared it and under what circumstances. Warrant officer Mketo testified that, because warrant officer Selana signed the criminal record book, he must have received the warrant for the plaintiff's arrest. No reason was given for warrant officer Selana's failure to testify. He might have been able to explain the circumstances under which the warrant was obtained and executed by them, since warrant officer Mketo was unable to do so.

[18] When the warrant was executed, warrant officer Selana in all probability knew that the magistrate had ordered that the plaintiff should be released from custody. Before the execution of the warrant, he signed the criminal record book wherein the magistrate's orders in respect of the four accused persons, who appeared before him on the day in question, were recorded. He must have seen that the magistrate had ordered the plaintiff's release, yet he, according to warrant officer Mketo, nevertheless received the warrant which they executed. With his knowledge of the magistrate's order, warrant officer Selana should not have executed the warrant without investigating how it came into existence. Had he done so, he would have realised that the warrant was invalid.

[19] In the circumstances, the defendant is liable for the plaintiff's unlawful detention which was caused by the court orderlies, as members of the South African Police Service. Since the plaintiff was in unlawful detention from 6 September 2021 to 15 October 2021, he must be compensated for the harm caused by such detention.

[20] The plaintiff's evidence about the conditions under which he was detained in the above correctional centre was unchallenged. No evidence was given about his personal particulars. From a copy of his identity document it appears that he was born on 1 October 1996. He testified that he was frightened because it was the first time that he was held in a correctional centre. There were between 22 and 25 inmates in the cell, sharing one toilet. There were fewer beds than inmates, which caused some of them to put two mattresses together on which three of them could sleep. Their meals consisted primarily of two slices of bread, pap and coffee, which would sometimes be cold. There was a positive note to his otherwise negative experience. He testified that, because of his experience, he knows that he should not commit offences.

[21] The primary purpose of compensation is not to enrich the aggrieved party but to offer him or her consolation for his or her injured feelings. The damages awarded should accordingly be commensurate, as far as possible, with the harm and consequences thereof. Counsel referred to various authorities[5] to serve as a guide in the assessment of the quantum of the plaintiff's damages. I have had regard also to *Phungula v Minister of Police*[6] wherein an adult male was detained for 24 days and awarded R75 000 on 8 June 2018; *Woji v Minister of Police*[7] wherein an adult male who was unlawfully detained for 13 months was awarded R500 000 on 11 September 2014; *Alves v LOM Business Solutions (Pty) Ltd and Another*[8] wherein a 34-year-old fitter and turner who was in custody for between 12 and 15 months longer than he should have been because the Department of Justice and Constitutional Development failed to ensure that the record of proceedings required for his appeal was prepared within in reasonable time was awarded R300 000 on 9 September 2011; *Rahim and 14 Others vs Minister of*

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[5] The plaintiff's counsel referred to *Louw v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) and *van Rooyen vs Minister of Police* (CA 332/2018) [2020] ZAECGHC 44 (26 March 2020), while the defendant's counsel referred to *Rahim and 14 Others v Minister of Home Affairs* (*supra*); *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA); *Ngwenya v Minister of Police* (924/2016) [2017] ZANWHC 78 (2 November 2017). I have been unable to access to the cases of *Gulane* and *Matshe* respectively *v Minister of Police* which have been referred to in paragraph 57 of counsel's written heads of argument. That paragraph seems to be a regurgitation of a portion of paragraph 24 in *Moumakwe v Minister of Police* (1046/2020) [2023] (ZANWHC 59) (24 May 2023) wherein Reddy AJ said the following: "In *Tobase v Minister of Police and Others* CIV APP MG 10/2021 (3 December 2021) Hendricks DJP (as he then was) addressed this notion wherein the following was stated:

> *[15] In* ***Ngwenya v Minister of Police*** *(92412016)* **[2019] 3 ZANWHC 3** *(7 February 2019) this Court awarded R15 000.00 per day for unlawful arrest and detention. The same amount* was *awarded in the matter of* ***Gulane v Minister of Police*** *CIV APP MG 21/2019, in an appeal which emanated from the Magistrate Court, Potchefstroom and decided by* ***Petersen J*** *et* ***Gura J. Petersen J*** *et* ***Gura J*** *did also in the matter of* ***Matshe v Minister of Police,*** case *number CIV APP RC 10/2020, likewise, award an amount of R15 000.00 per day for each of the two days that the appellant* was *detained."*

[6] *Phungula v Minister of Police* 2018 (7KS) QOD (KZP).

[7] *Woji v Minister of Police* 2015 (7K6) QOD 95 (SCA).

[8] *Alves v LOM Business Solutions (Pty) Ltd and Another* 2011 (6K7) QOD 1 (GSJ).

Home Affairs[9] wherein one plaintiff who was in detention for 30 days was awarded R20 000 and another who was in detention for 35 days was awarded R25 000 on 29 May 2015; and *Richards v Minister of Police*[10] wherein a 23-year-old who was 19 years old when he was exposed to jail for the first time and detained for 115 days was granted R500 000 on 23 October 2014 for his arrest and detention. I have taken into account the present value of the above awards, using the Schedule for updating previous comparable awards as read with the Annual CPI Tables in Part II of *The Quantum of Damages in bodily and fatal injury cases*.

[22] Regard being had to the above authorities, the circumstances under which the plaintiff was detained, that he was deprived of his freedom without just cause and he was in custody for 39 days, I am of the view that an appropriate award of damages would be R400 000.

[23] The plaintiff was successful in his claim against the defendant. He is accordingly entitled to the costs of the action. A lot of time was wasted in the presentation of the evidence. The evidence of warrant officer Mketo, the plaintiff and Mr Pretorius was concluded at 14h40 on the first day of the trial on 25 May 2023 when the case was postponed to 24 July 2023, for Ms Manahla to testify. She testified for not more than an hour on 24 July 2023. The parties were not ready to make submissions at the conclusion of Ms Manahla's evidence and requested that they do so on the following day, when the proceedings lasted for no more than an hour and a half. What the parties did over three days could easily have been done in two days. The hearing should accordingly have lasted no longer than two days, inclusive of the presentation of oral submissions.

[24] In the result, it is ordered that:

1. The plaintiff's detention, caused by members of the South African Police Service, from 6 September 2021 to 15 October 2021 was unlawful.
2. The defendant shall pay the plaintiff:

    2.1 R400 000 as damages for his unlawful detention;

    2.2 interest on R400 000 at the legal rate from the date of judgment to date of payment;

    2.3 costs of the action, such costs shall be limited, insofar as appearances are concerned, to two days.

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[9] *Rahim and 14 Others vs Minister of Home Affairs* 2015 (7K6) QOD 191 (SCA).
[10] *Richards v Minister of Police* 2015 (7K6) QOD 206 (GJ).

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GH BLOEM
Judge of the High Court

For the plaintiff:	Mr L Rusi, instructed by Magqabi Seth Zita Inc, East London and SZ Sigabi & Associates, Qonce.
For the defendant:	Ms Z Nxazonke-Mashiya, instructed by the State Attorney, East London.
Date heard:	25 May 2023 and 24 and 25 July 2023.
Date of delivery of the judgment:	8 August 2023.