

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION – EAST LONDON**

Case no: EL259/2016  
ECD759/2016  
Date Heard: 24/11/ 2016  
Date Delivered: 17/01/2017

In the matter between:

<b>THULANI MIND MKWANAZI</b>	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>XOLISA SAMUEL GUMEDE</b>	<b>2<sup>ND</sup> PLAINTIFF</b>
<b>BONGANI MABHELE</b>	<b>3<sup>RD</sup> PLAINTIFF</b>
<b>SAKHUMZI MADUKO</b>	<b>4<sup>TH</sup> PLAINTIFF</b>

And

<b>THE MINISTER OF POLICE</b>	<b>DEFENDANT</b>
<b>REPUBLIC OF SOUTH AFRICA</b>	

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**JUDGMENT**

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**SMITH J:**

[1] A peace officer's job is not an easy one at the best of times. In the course of their duties they are regularly placed in situations where they are called upon to weigh up their statutory duty to enforce the law against the constitutionally entrenched rights of suspects. And these are more often than not snap decisions, taken on the spur of the moment and without the benefit of legal counsel. When the lawfulness of arrests is challenged by disgruntled suspects, the conduct of peace officers are critically picked apart by lawyers and

pronounced upon by judicial officers. And in the sterile environment of a Court of Law their best intentions count for nought since their actions are considered objectively and measured against the exacting standards of the mythical "reasonable man".

[2] This is exactly the invidious position which Warrant Officer Eugene Chipps, a Sector Head for Community Policing in the Beacon Bay area, found himself in on the 9<sup>th</sup> of December 2015. On the basis of information that he received through the WhatsApp chat group of a neighbourhood watch, he arrested the four plaintiffs without a warrant at about 9h00 that morning. The plaintiffs contend that their arrests and subsequent detentions were unlawful in that they were effected without probable cause. They consequently sued the Minister of Police for damages in respect of unlawful arrest and detention, *contumelia*, and pain and suffering in the sum of R550 000 each.

[3] In his plea, the Minister avers that the arrests and detentions were justified and lawful, and effected in terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977. He furthermore avers that Chipps reasonably suspected that the plaintiffs had committed either the offence of breaking and entering premises in Beacon Bay, East London, with the intent to commit an offence, or that they had been party to conspiracy, incitement or attempt to commit the said offence. Both offences are listed in Schedule 1 to the Criminal Procedure Act.

[4] The parties agreed at the outset that it would only be necessary for the plaintiffs to lead the evidence of the first plaintiff, and that any findings made in respect of him would also be applicable to the other plaintiffs. The defendant led

the evidence of Warrant Officer Chipps only. Since almost all the material facts are common cause, I need not burden my judgment with a detailed summary of their testimonies.

[5] At about 8h00 am on the morning of 9 December 2015, a message was posted on the Beacon Bay Neighbourhood Crime Prevention Forum's WhatsApp group to the effect that there had been a burglary at Hawkshead Drive, Beacon Bay, and that a maroon Toyota Camry sedan was seen driving around in the area. It is a matter of public record that burglaries in the area are rampant and that police investigations seldom result in the arrests of suspects. One can therefore understand Chipps' excitement and the over exuberant manner in which he pursued investigations into what he considered to have been a "hot lead".

[6] Since in his experience burglaries were rife in areas where building construction was taking place, Chipps asked a local contractor, one Juan, whether he recognised the maroon Camry. The contractor recognised the car as that belonging to the first plaintiff, who was also involved in various sub-contracts in the Beacon Bay area. Chipps and Juan then lured the first plaintiff to the latter's building site in Beacon Bay on the pretext that he would be offered a sub-contracting job. It is common cause that the first and second plaintiffs were arrested upon their arrival. Five of the first plaintiff's other employees, including the third, and fourth plaintiffs, were arrested about 30 minutes later. According to the first plaintiff Chipps and the other officers pointed them with a fire arm, handcuffed them and bundled them in the back of a police vehicle. Chipps, however, denied that they were pointed with a firearm or handcuffed. I am inclined to accept Chipps' version in this regard. It did appear to me that the first

plaintiff embellished these aspects of his testimony, and I am not convinced that he was able to establish his assertions in this regard on a balance of probabilities.

[7] The plaintiffs were all initially taken to the Beacon Bay Police Station and thereafter to the Fleet Street Police Station where they were incarcerated until the following Monday, i.e. 24 December 2015. According to the first plaintiff they were held in dirty cells together with other inmates who appeared to be members of some prison gang. They were released at approximately 10h00 am that morning without appearing in court, after the charges against them had been provisionally withdrawn.

[8] It is trite law that the onus to establish that the arrest and detention of a person is lawful, rests on the state. (*Zeeland v Minister for Justice and Constitutional Development and Another* 2008 (2) SACR (1) CC, at paragraphs 24 and 25.) While there can be little doubt that Chipps had been acting in the *bona fide* belief that the facts at his disposal constituted grounds for the reasonable belief required for a lawful arrest in terms of section 40 (1) (b) of the Criminal Procedure Act, the test is an objective one and his subjective belief does not avail him in this regard. Jones J described the applicable test as follows in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654, at 658E-H:

"Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at

his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

[9] When assessed in the light of this test, the grounds which had been proffered by Chipps for his reasonable suspicion are, to say the least, flimsy and fall far short of the required standard. And I did not understand defendant's counsel, Mr *Ntsaluba*, to contend otherwise. It is manifest that the mere fact that the first plaintiff's vehicle had been seen driving around in an area where a burglary had occurred is wholly insufficient to establish a basis for a reasonable suspicion that he had been complicit in the robbery. I accordingly find that the defendant has failed to prove that the plaintiffs' arrests and detentions were justified and lawful.

[10] Insofar as the issue of *quantum* of their damages is concerned, both counsel have referred me to various comparable awards in other matters. Mr Mtini, on behalf of the plaintiff, relying, *inter alia*, on the awards made in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) and *Rudolf and Others v Minister of Safety and Security* 2009 (5) SA 94 (SCA), submitted that an amount of R300 000 per plaintiff would be fair in the circumstances. Mr *Ntsaluba* on the other hand, relying on the judgments in *Rahim v The Minister of Home Affairs* 2015 (4) SA 433 (SCA), *Maart v Minister of Police* 2013 JDR 0747 (ECP); *Foster v Minister of Safety and Security* 2013 (6K6) QOD 166 (GSJ) and *Erasmus v Member of the Executive Council for Transport* 2011 (6K6) QOD 59 (ECM), argued that an award of R80 000 per plaintiff would be appropriate.

[11] While being useful and instructive, the awards in those cases are but mere guidelines, and I am constrained to consider the peculiar facts of this case in deciding on fair and reasonable awards of damages. Of course no two cases are ever the same. In this matter I am constrained to take into account that the plaintiffs' assertion to the effect that after their arrests and detentions they have been unable to secure further contracts in the Beacon Bay area, is well justified and understandable. There can be little doubt that word would quickly have spread throughout the Beacon Bay area that they were suspects in a housebreaking case. It is thus to be expected that contractors and residents in the area would be reluctant to contract their services in the future. Having considered the facts of this matter and previous awards in other comparable cases, I am of the view that damages in the sum of R120 000 for each plaintiff would be fair and reasonable in the circumstances.

[12] In the result the defendant is ordered to pay to each plaintiff:

- (a) Damages in the sum of R120 000;
- (b) Interest on the legal rate on the said amount from the date of service of summons to date of payment;
- (c) The plaintiffs' costs of suit; and
- (d) Interest on the plaintiffs' costs of suit at the prescribed rate from *allocatur* to date of payment.

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**J.E SMITH**  
**JUDGE OF THE HIGH COURT**

Appearances

Appearance for the Plaintiff	:	Adv Mtini
Counsel for the Plaintiff	:	MT Klaas Attorneys Suite 14 Zanempilo Health Centre Oxford Street East London Ref: Mr MT Klaas
Appearance for the Defendant	:	Adv Ntsaluba
Attorney for the Defendant	:	State Attorneys 17 Fleet Street East London Ref: 119/16-P6
Date Heard	:	24 November 2016
Date Delivered	:	17 January 2016