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

Case no: 2565/2009
Date Heard: 06/12/2010
Date Delivered: 13/01/2011

In the matter between:

JUAN JONATHAN VAN DER MERWE **PLAINTIFF**

Versus

THE MINISTER OF SAFETY AND

SECURITY **DEFENDANT**

JUDGMENT

SANDI J:

[1] This is an action for damages arising form an alleged unlawful arrest, detention and assault. The plaintiff seeks judgment against the defendant in the sum of R200 000-00, interest plus costs. The plaintiff was arrested and detained on 21 July 2006 at about 16h00. He was released from such detention at the Magistrate's Court in Grahamstown on the morning of Monday, the 24th July 2006.

[2] The facts relevant to the action may be summarised as follows. In 2006 the plaintiff and his wife were divorced by an order of this court. The divorce was an acrimonious one. Part of the divorce order granted dealt with the minor children whose custody was awarded to the

plaintiff's ex-wife, Mrs Van Der Merwe, subject to plaintiff's right of reasonable access to the minor children.

[3] The plaintiff was a builder and also ran a coffee shop near Fruit and Veg at Hill Street in Grahamstown

[4] On 18 July 2006, Mrs Van der Merwe visited the coffee shop together with the children. The youngest child entered plaintiff's coffee shop and started to help herself to a cheesecake she found in the shop. Whilst the child was busy enjoying the cheesecake, Mrs Van der Merwe sent her elder son to fetch the younger child from the shop. The plaintiff told the older child to inform Mrs Van der Merwe that the younger child was busy eating the cheesecake and requested Mrs Van der Merwe to leave the child at the shop until she had finished eating the cake. The plaintiff promised that he would transport the child to her place of residence. The plaintiff testified that he told the elder child to inform Mrs Van der Merwe that he (the plaintiff) would be spending that weekend in Port Elizabeth.

[5] The plaintiff said that after Mrs Van der Merwe had made a call from her cellphone Sergeant Oosthuizen, a member of the South

African Police Services (SAPS) arrived at the shop. According to the plaintiff

[6] Sergeant Oosthuizen was courteous to him. Sergeant Oosthuizen was allowed into the shop and witnessed the child eating the cheesecake. The plaintiff told Sergeant Oosthuizen that he would transport the child to Mrs Van der Merwe after the child had finished eating the cake. Sergeant Oosthuizen was happy with plaintiff's suggestion and left the coffee shop. The plaintiff said that there was no altercation between him and Mrs Van der Merwe in the presence of Sergeant Oosthuizen. In the end the child left with Mrs Van der Merwe. As stated above it is alleged that this incident occurred on Tuesday, the 18 of July 2006. Nothing happened between 18 July and 20 July 2006. On 21 July 2006 three police vehicles arrived at Illchester Street where the plaintiff was busy at work with his employees.

[7] Female Constable De Reuck came up to him and asked him to accompany her to the police station. He testified that he was not told the reason why he had to accompany Constable De Reuck to the police station. He obliged and was placed in the back of a police van. This happened in the full view of his employees.

[8] At the police station he said he was made to sign documents, the contents of which were not explained to him. In particular his constitutional rights were not explained to him.

[9] The plaintiff's attorney, Mr Powers and Advocate Louw, made attempts to get him released on bail. All these efforts came to nought.

[10] On Saturday the 22nd of July 2006, and whilst he was still asleep in the cell, a policeman kicked him on his neck. This occurred again on Sunday. On both occasions he was kicked by a police officer. On the second occasion he reprimanded the police officer who kicked him. That police officer did not answer him and did not deny that he had kicked him.

[11] The plaintiff testified that his friend, Colonel Botha, was on duty as from Saturday until Sunday. Botha visited him in the cells before the first assault took place.

[12] The plaintiff described the conditions of his detention as appalling. The cell was crammed; the toilet was dirty and a faecal smell was hanging in the air; he could not eat during the entire period of his

detention. I gained the impression that the cells were not fit for human habitation.

[13] Testifying about the circumstances of his arrest he said the following. Three police vehicles arrived at the building site at Illchester Street; his employees witnessed the arrest; he was placed in the back of the police vehicle van and taken to the Grahamstown police station; no explanation was given to him by Constable De Reuck as to why he had to accompany the police to the police station; his constitutional rights were not explained to him. He said he was humiliated and degraded by the arrest.

[14] The plaintiff is a regular churchgoer. After his release from detention he was shunned by the members of his church. People perceived him as a criminal.

[15] He could not focus properly on his business so much so that he decided to close it. He has since relocated to Port Elizabeth where he is working at present.

[16] The whole incident was quite depressing to him.

[17] Professor Edwards, a psychologist at Rhodes University in Grahamstown, testified that though the plaintiff was suffering from depression as the result of the acrimonious divorce that he went through, such depression was exacerbated by his subsequent arrest and detention. A few questions were put to Proffessor Edwards during cross-examination. Nothing of note was revealed by the cross-examination.

[18] The plaintiff also testified that during or around December 2006 he was attending a wedding ceremony when an accident involving his friend occurred outside of Grahamstown. He went to the scene of the accident and there met Constable De Reuck who apologised to him for having arrested and detained him. The plaintiff said that De Reuck told him that she had been under orders from her superiors to carry out the arrest and detention.

[19] The defendant tendered the evidence of two witnesses, namely Constable De Reuck and Sergeant Oosthuizen.

[20] Constable De Reuck's evidence was the following. She is a police investigator attached to the detective branch of the Grahamstown police. On Thursday 20 July 2006 the file of the plaintiff was handed to

her by her supervisor. The file contained some documents relating to the breach of a protection order issued in terms of the Domestic Violence Act, no. 116 of 1998 (the Act). These documents were: an application for a protection order (exhibit "C") which was signed by Mrs Catherine Maria Van der Merwe on 04th July 2006;an interim protection order in terms of the Act which was signed by the Magistrate of Grahamstown on the 04th of July 2006; a sworn statement signed by Mrs Van der Merwe in the presence of a police officer at about 14h15 on Thursday the 20th of July 2006 ; and a warrant of arrest (exhibit F) issued by the Magistrate of Grahamstown on the 04th of July 2006. She said that on reading the statement of Mrs Van der Merwe dated 20 July 2006, it appeared that the breach of the protection order complained of by her allegedly occurred at 17h40 on the 18th of July 2006 in the presence of one Sergeant Oosthuizen who is also a member of the Grahamstown police. According to the statement Mrs Van der Merwe stated that the plaintiff called her a "hoer", "'n slegte teef" and that he "told the policeman to take me away from his face because he will kill me."

[21] Constable De Reuck testified that she viewed this matter in a serious light because the plaintiff had threatened to kill Mrs Van der Merwe. On the basis of this information she decided to arrest the

plaintiff. However, she could not execute the arrest on the 20th of July 2006 because it was about time for her to knock off work. However, she consulted with Mrs Van Der Merwe telephonically in order to verify her statement. She testified that what Mrs Van der Merwe told her over the phone agreed with the statement she made on the 20th of July 2006. She made no attempt to communicate with Sergeant Oosthuizen and obtain his version of the incident from him. One of the reasons she gave was that Sergeant Oosthizen was not on duty at the time. However, she conceded that Sergeant Oosthuizen could have been contacted by other means.

[22] On Friday the 21st of July 2006 Constable De Reuck was on duty. She did not consider the arresting of the plaintiff for the whole of the day on Friday. She stated that she was busy with other duties at the time, such as charging suspects in other matters who had already been in detention. In the course of Friday the 21st of July 2006, her superior reminded her about the warrant of arrest that she had to execute in this matter. She said though that she had not forgotten about the warrant at the time that her superior reminded her about it. Questioned further by Mr Cole she sought to deny that she had forgotten about the warrant of arrest.

[23] She testified that at 17h25 on Friday the 21st of July 2006, she went to the plaintiff's coffee shop situated at the entrance to Fruit and Veg in Hill Street. She went there alone in an unmarked police vehicle and she was unarmed. She found the plaintiff in the coffee shop together with his shop assistant. She said that she explained the purpose of her visit to the coffee shop; she informed the plaintiff of the charge against him; she explained his rights to him and told him that he was under arrest. She said that the plaintiff was cooperative and went with her to her vehicle. Before leaving for the police station the plaintiff was given an opportunity to lock his shop.

[24] She produced a document titled notice of rights in terms of the Constitution (exhibit "A"). According to her all the rights contained in that certificate were explained by her to the plaintiff at about 17h35 on the same day. She completed a warning certificate (exhibit "D") in which she informed the plaintiff of the charges against him, namely breach of a protection order and *crimen injuria*. The warning statement contained a list of the constitutional rights which she said she explained to the plaintiff. The warning statement was signed by the plaintiff at about 17h53.

[25] Under cross-examination she denied that the plaintiff was arrested by her at Illchester Street. She denied that at the time of the arrest of the plaintiff she was accompanied by other police officers who were travelling in two police vehicles.

[26] Even though she testified about an incident that occurred in July 2006, she had not made a statement from which she could refresh her memory. Her pocket book could not be found. She consulted with the defendant's legal representatives a few days before the trial.

[27] Under cross-examination by Mr Cole, she was questioned about her failure to have arranged for the plaintiff to be released on bail on the date of arrest. In this regard, her evidence was that in matters of this nature they have standing instructions from their superiors not to allow suspects out on bail. She testified that even if she had arrested the plaintiff on the morning of Friday the 21st of July 2006, the plaintiff would not have been allowed out on bail because the Grahamstown Magistrate court would have refused to accept the plaintiff's file in order to deal with the bail application. I must say that her evidence in this regard was not satisfactory at all.

[28] I do not believe that the Grahamstown Magistrate's court would have denied the plaintiff the opportunity to make a bail application had such an application been brought before it. In my view, Constable De Reuck made the statement in order to extricate herself from the stinging cross-examination which was directed at her by plaintiff's counsel. If Constable De Reuck had been acting under standing orders from her superiors not to bring the plaintiff before court for a bail application, her superiors as well as herself have themselves to blame for the outcome of this matter. By issuing such an instruction her superiors would clearly have acted beyond their powers and therefore unlawfully.

[29] In his particulars of claim, the plaintiff has alleged that he was arrested at Illcherster Street in Grahamstown at approximately 16h00 on the 21st of July 2006 by a female member of the South African Police Service without a warrant. In its plea the defendant admitted these allegations.

[30] However, the evidence tendered by De Reuck is at variance to the pleadings and to the admission made by the defendant regarding the plaintiff's place and time of arrest.

[31] When confronted by counsel about the difference between the admission made in the plea and her evidence in court, she stated that she was able to remember the events of the 20th and 21st of July 2006 clearly. She said this was so in spite of the fact that she never made a statement about this matter and that the first time that she consulted defendant's counsel about it was a few days before the trial.

[32] It is trite law that "[t]he object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion." See *Robinson v Randfontein Estates 1925 AD 173 at 198.* At some stage after the plaintiff had closed its case and whilst Constable De Reuck was giving evidence, an attempt was made by defendant's counsel to launch an application from the bar to amend it's particulars of claim. The effect thereof would have been to erase the admission made by the defendant regarding the place and time of plaintiff's arrest. However, the application was abandoned by defendant's counsel.

[33] As I have said, an attempt was made to launch the application after the plaintiff had closed its case and after counsel for the plaintiff had decided not to call witnesses who would have supported the

plaintiff's case that he was arrested by Constable De Reuck in the presence of his employees.

[34] An arrest constitutes a serious invasion of the liberty of a subject. It is *prima facie* wrongful and unlawful and the onus is on the defendant to allege and prove its lawfulness. See *Minister of Law and Order vs Matshoba 1990 (1) SA 280 AD*. Once the arrest and detention are admitted the onus of proving lawfulness rests on the defendant. See *Mhaga vs Minister of Safety and Security (2001) 2 All SA 534 TK.*

[35] In Amler's Precedents of Pleadings, 7th edition, by LTC Harms at 47 the following is stated:

> "An arrest without a warrant is lawful if, *inter alia*, at the time of the arrest the arresting officer had a reasonable belief that the plaintiff had committed a Schedule 1 offence. The defendant has to show not only that the arresting officer suspected the plaintiff of having committed an offence but that the officer reasonably suspected the plaintiff of having committed a Schedule 1 offence specifically".

See section 40 of the Criminal Procedure Act 51 of 1977; *Manqalaza vs MEC for Safety and Security*, *Eastern Cape (2001) 3 All SA 255 TK.*

[36] All that Constable De Reuck did in the present matter was to telephone Mrs Van Der Merwe at about 19h00 on Thursday the 20th of

July 2006 in order to verify her statement. She did not apply her mind to obtaining a statement from Sergeant Oosthiuzen who was alleged by Mrs Van der Merwe to have been present when the plaintiff allegedly abused and threatened to kill her. Neither did she take the trouble of contacting the plaintiff in order to find out his side of the story. She was content with the only telephonic consultation she had with Mrs Van der Merwe. Yet on the interim protection order (exhibit "D") the plaintiff's home and work addresses are set out on the front page of the document as well as his telephone number. As is clear from her evidence Constable De Reuck has no understanding of the provisions of the Domestic Violence Act applicable in this case. Quite clearly, in her evidence, she did not apply the provisions of the Act and did not know what its requirements were. In the matter of *Mhaga vs Minister of Safety and Security 2001) 2 All SA 534 TK at 538* by Zilwa AJ*:*

> "it clearly emerges from Inspector Duma's testimony, especially under cross-examination, that at no stage during his arrest of plaintiff did he ever consider whether or not the offence which plaintiff was accused of having committed in Port Elizabeth was a first schedule offence or not…. That fact, in my view, deals a fatal blow to the defence case regarding the legality of plaintiff's arrest and subsequent detention. Since, as already stated, the onus is on defendant to show and prove the lawfulness of plaintiff's arrest and detention, defendant's attempted reliance on section 40(1)(b) of the Act."

[37] Furthermore in the matter *of Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 SE* Jones J, expressed himself as follows at 658 F–H;

> "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."

In *Manqalaza vs MEC for Safety and Security 2001 (3) All SA 255 TK* Jafta J (as he then was) stated the following at 262 para [18] e;

> "Zotweni did none of these things. All that he did was to verify the accuracy of the statement by the complainant and on the basis of that statement he decided to arrest the plaintiff. It is common cause that the complaint was lodged on 25 February and that the plaintiff was only arrested on 27 February. Therefore, Zotweni did not act on the spur of the moment with no time to reflect on the allegations made by the complainant... In the circumstances he could have and should have investigated the allegations before deciding to arrest the plaintiff."

[38] The evidence of Constable De Reuck fails foul of the criticisms levelled against arresting officers in the judgments that I have referred to above.

[39] The plaintiff pleaded that he was arrested without a warrant which allegation has been admitted by the defendant. The plaintiff stated further in his evidence that "no protection order was ever

served on him during July 2006". At no stage during cross-examination was plaintiff's evidence challenged in this regard. None of the witnesses called by the defendant gave any evidence to show that the protection order was served upon the plaintiff in July 2006. Neither was there evidence that a warrant of arrest in terms of the Domestic Violence Act was served on the plaintiff. Defendant's attempt to produce a warrant of arrest (exhibit "F") after an admission had been made that the plaintiff was arrested without a warrant of arrest confuses the issues further and ignores the rules applicable to pleadings.

[40] Mr Cole submitted that the warrant of arrest (exhibit "F") which the defendant produced in the course of trial is not a valid warrant of arrest. Referring to section 5 (6) of the Domestic Violence Act Mr Cole submitted that there is no evidence before the court that the interim protection order or any other protection order was served upon the respondent and that the only direct evidence is that of the plaintiff to the effect that he did not receive any such documentation.

[41] Section 5(6) of the Domestic Violence Act no 116 of 1998 provides that; "an interim protection order shall have no force and

effect until it has been served on the respondent". Counsel submitted therefore that the warrant of arrest had no force and effect.

[42] He submitted that in the light thereof the defendant's admission in the plea that the arrest was effected without a valid warrant was made by the defendant correctly.

[43] An arrest in terms of the provisions of the Domestic Violence Act can only be effected under certain specified circumstances. A protection order must have been obtained and served upon the respondent. In executing a warrant of arrest pursuant to the issue and service of a protection order a police officer is obliged to comply with the provisions of Sections 8(4)(b) and 8(5) of the Act.

[44] Section 8(4)(b) provides;

> "If it appears to the member concerned that subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a)."

[45] Section 8 (5) provides;

> "In considering whether or not a complainant may suffer imminent harm as contemplated in subsection 4(b), the member of the South African Police Service must take into account –

a) the risk to the safety, health or well being of the complainant;
b) the seriousness of the conduct comprising an alleged breach of the protection order; and
c) the length of time since the alleged breach occurred."

[46] In the absence of a valid warrant the plaintiff could only have been arrested under section 40(1)(q) of the Criminal Procedure Act if he was reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, and which constitutes an offence in respect of which violence is an element. The definition section of the Domestic Violence Act defines domestic violence as "where such conduct harms, or may cause imminent harm to the safety, health or well-being of the complainant".

[47] Constable De Reuck did not consider the provisions of section 8(5) of the act as she was not aware of them. She did not take into account that if there had been any risk to the safety, health or well-being of the complainant (Mrs Van Der Merwe) it had started and ceased on the same day, ie the 18th of July 2006. She did not take into account that at the time she arrested the plaintiff a period of about three days had lapsed and that no further allegations of unlawful conduct were made against the plaintiff between Tuesday the 18th of July and Friday the 21st of July 2006. Because Constable De Reuck did

not have a valid warrant of arrest in this matter she could only have acted in terms of provisions of section 40(1)(q) of the Criminal Procedure Act. She did not comply with the requirements set out therein. It follows that the arrest of the plaintiff was made by Constable De Reuck without a warrant.

[48] The plaintiff impressed me as a witness. He gave his evidence in a straightforward manner. His evidence was free of any inconsistencies and improbabilities. On the other hand Constable De Reuck did not impress me as a witness. She chopped and changed her evidence on very important aspects of the case. It was quite clear to me that it was impossible for her to have been able to remember the details of the matter after such a long lapse of time particularly where she did not make a statement from which she could refresh her memory.

[49] Constable De Reuck was very argumentative during cross-examination. She was evasive in her answers to material questions put to her by counsel. Comparing her evidence to that of the plaintiff I am satisfied that plaintiff told me the truth. The same does not apply to Constable De Reuck. I believe the evidence of the plaintiff that on one occasion Constable De Reuck apologised to him for having arrested and detained him. She obviously is a very inexperienced police officer

who did not have the capacity to administer the provisions of the Domestic Violence Act independently of those in authority over her. I am quite surprised that her seniors could have allowed her to handle a matter of this magnitude without the necessary training and experience. During argument Mr Sandi, for the defendant, conceded that the legal position is as stated in this judgment. For that reason he did not advance any argument on the merits in support of the defendant's case. There was no attack levelled at the veracity of the plaintiff as a witness.

[50] Two assaults were alleged by the plaintiff to have taken place in the police cells. The plaintiff was the only witness who gave evidence in this regard. His evidence was quite convincing. He did not exaggerate the assault. On the probabilities I find that those police officers who visited the cells found him sleeping near the door of the cell and had every opportunity to kick him in the manner testified by the plaintiff I reject the suggestion made by defendant's counsel from the bar that the plaintiff may have been kicked by his inmates. The plaintiff did not give such evidence and I can find no reason as to why his cell mates would have kicked him particularly when police officers were present there to visit the detainees. No such evidence was given by the defendant. In any event, had such assault occurred in the presence of the police I would have expected them to have taken

action against the plaintiff's cell inmates.

[51] In the circumstances I find that the defendant is liable to pay plaintiff's damages in respect of the unlawful arrest, detention and assault.

[52] On the question of quantum I have been referred by Mr Cole to unreported decisions of this division. The first one is the matter *of Fubesi v The minister of Safety and Security case no. 680/2009* where a plaintiff was awarded damages in the sum of R80 000 for arrest without a warrant and a detention which lasted for three days and about 18 hours. In the matter of *Tommy Peterson v The Minister of Safety and Security case no.1173/2008* the plaintiff was assaulted by members of the police force. He was arrested and dragged from his home in only a pair of shorts. At the police station he was assaulted. He was arrested at 20h00 and released at about 04h00. He claimed damages for an unlawful arrest and detention and for the assault on him. In respect of the unlawful arrest and detention the plaintiff was awarded R60 000 and R120 000 in respect of the assault which was a fairly serious one. Having considered the facts of this matter and the judgments to which I have been referred I am of the view that an

amount of R120 000 would be reasonable in respect of the unlawful arrest and detention. In so far as the assaults are concerned I propose to award an amount of R2000 in respect of each assault.

[53] Mr Cole has asked me to issue a special order in respect of the costs incurred by the plaintiff in securing the attendance of Professor Edwards in court. Mr Cole informed me from the bar that he had approached the defendant's legal representatives and advised them that Professor Edwards would be travelling to Grahamstown to testify and suggested to them that his report be admitted without the necessity for proof thereof.

[54] The report does not deal with the merits of the case. The effect of the evidence of Professor Edwards was that the depression that the plaintiff experienced during the divorce action was exacerbated by the arrest and subsequent detention. There was no challenge to the evidence of Professor Edwards either by way of cross-examination or by gainsaying evidence.

[55] The attendance of Professor Edwards in court could have been avoided by the defendant and I can see no reason why the plaintiff should be out of pocket regarding the costs of securing Professor

Edwards in court on the 2nd day of the trial. These costs should be borne by the defendant.

[56] In the circumstances the following order is made;

1. Judgment is entered in favour of the plaintiff and against the defendant for:
    (a) payment of the sum of R120 000 in respect of the unlawful arrest and detention;
    (b) payment of the sum of R4000-00 in respect of the assault;
    (c) interest on the damages set out in paragraphs (a) and (b) at the legal rate from a date 14 days after judgment to date of payment;
    (d) costs of suit together with the interest thereon calculated at the legal rate from a date 14 days after the allocatur to the date of payment. Such costs to include the qualifying expenses of Professor Edwards;
    (e) the defendant is to pay the additional costs incurred by Professor Edwards in respect of 6 November 2010 on the scale as between attorney and client.

Judge of the High Court;
Eastern Cape, Grahamstown

Appearances

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Counsel for the Respondent : MR SANDI

Attorneys for the Respondents : MR YOKWANA

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