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

CASE NO 1352/2012
DATE HEARD: 17/08/2015
DATE DELIVERED: 07/10/2015

In the matter between

SISONKE MACAKATHI **PLAINTIFF**

and

NATIONAL MINISTER OF POLICE **DEFENDANT**

JUDGMENT

ROBERSON J:-

[1] The plaintiff was arrested without a warrant on 15 December 2009 on a charge of fraud, allegedly by members of the defendant, in that he drove a motor vehicle with a false licence disc. He was detained at the Grahamstown Police cells and taken to the Grahamstown Magistrate's Court on 17 December 2009. On that day he was remanded in custody to 23 December 2009 for a bail application. On 23 December 2009 he was released on R500.00 bail.

[2] He instituted action against the defendant for damages arising from his alleged unlawful arrest and detention. The defendant pleaded that the plaintiff was arrested by Inspector Richard van der Merwe, an employee of the provincial

transport department, and that Constable Bongisani Mhlaba, an employee of the defendant, caused the plaintiff to be detained. The defendant denied that the arrest and detention were wrongful and pleaded that on 17 December 2009 when the plaintiff appeared in court, the magistrate postponed the matter in terms of s 50 of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] It was common cause or not in dispute at the trial that the plaintiff was at the time a taxi driver and on 15 December 2009 was stopped while travelling on the N2 freeway outside Grahamstown by van der Merwe, at a roadblock. The vehicle which the plaintiff was driving was owned by one Khanya, for whom the plaintiff had been driving for two years. The licence disc on the vehicle was false in that it was not an original disc and reflected a false expiry date. The licence of the vehicle had in fact expired.

[4] The plaintiff testified that he believed that the disc was in order. He had never licensed the vehicle and had not had sight of the licence documents. Van der Merwe looked at the licence disc and after going to his vehicle he returned and told the plaintiff that he was arresting him for a fraudulent disc. The plaintiff asked why he was being arrested because the vehicle did not belong to him. Van der Merwe telephoned the police who arrived and arrested the plaintiff. He asked why he was being arrested and he was told it was for the fraudulent disc. He told them that the vehicle belonged to Khanya but they said that if he was the driver, it was as if he was the owner. He was placed in the police van and taken to the police station. The police then checked to find out if the vehicle was stolen and reported that it was not stolen and that it belonged to Khanya. The plaintiff was placed in the cells and

appeared in court on 17 December 2009 when he was remanded in custody until 23 December 2009 for a formal bail application. He was detained at Waainek prison where he was visited by Khanya who asked why he had not been released because Khanya's vehicle had been returned to him. On 23 December 2009 the plaintiff appeared in court and was released on bail. The police cell was dirty and he slept on the floor. The cell at Waainek was dirty and crowded.

[5] Van der Merwe testified that the disc appeared to be a photo-copy. He telephoned the information centre and gave them the registration number of the vehicle and learned the true position regarding the licensing of the vehicle. The plaintiff told him that he did not know that the disc was false and told him who the owner of the vehicle was. According to Van der Merwe he then arrested the plaintiff for fraud. Mhlaba arrived at the scene, having been contacted by van der Merwe for assistance. Van der Merwe showed Mhlaba the disc and Mhlaba saw that it was a photo-copy. They proceeded to the police station where Mhlaba contacted the vehicle information centre and discovered that the engine and chassis numbers reflected on the disc were correct.

[6] Van der Merwe said that according to an eNatis system printout, on 17 December 2009 Khanya applied for a special permit and the vehicle would have been collected by him. Van der Merwe acknowledged that the plaintiff had nothing to do with the licensing of the vehicle and that there was a possibility that the person who was responsible for the fraud was the person with the licensing documents. He acknowledged that he should have gone a step further and located Khanya. He also conceded that the plaintiff may not have known that the disc was false and that there

was a possibility that someone else had tampered with the disc, but that it was for the plaintiff to explain in court.

[7] It was put to van der Merwe that he had not arrested the plaintiff and that it was Mhlaba who had done so. He was referred to Mhlaba's statement in which he said that he had explained the plaintiff's rights and detained him. Van der Merwe insisted that he had arrested the plaintiff and that Mhlaba had continued with the arrest and had just completed the forms.

[8] Mhlaba testified that he had been called to the scene by van der Merwe. Van der Merwe requested assistance and did not say that he had arrested anyone. On arrival at the scene Mhlaba was informed by van der Merwe that the licence disc on the vehicle was fraudulent and that the tyres of the vehicle were smooth. Mhlaba saw for himself that the disc did not look normal. Van der Merwe informed him that he had learned from the call centre that the disc had not been paid for (meaning presumably that the vehicle was not currently licensed). Van der Merwe also informed him at the scene of the identity of the owner. Van der Merwe asked him to assist in arresting the plaintiff. Mhlaba agreed that he was the arresting officer. He suspected that the vehicle might be stolen and after arriving at the police station and requesting the necessary checks, discovered that it was not stolen. He suspected that the plaintiff had committed fraud because the plaintiff used the vehicle daily. He arrested the plaintiff because the plaintiff failed to give an explanation for the false disc. The plaintiff's explanation was that he was the driver and not the owner. Mhlaba conceded that there was a possibility that someone other than the plaintiff had committed the fraud. He did not act on that possibility because the plaintiff lived

far away and it would not be easy to make contact with the owner. That is why he arrested the plaintiff.

[9] Despite van der Merwe's protestations that he had arrested the plaintiff, I accept that Mhlaba arrested the plaintiff. He stated as much. One can glean from van der Merwe's evidence that it was Mhlaba who had formally arrested the plaintiff.

Wrongful arrest, and detention for the period 15 to 17 December 2009

[10] The plaintiff was arrested on suspicion of fraud which is an offence contained in schedule 1 of the CPA. Although not specifically pleaded, the defendant appeared to be relying on s 40 (1) (b) of the CPA to justify the arrest. S 40 (1) (b) provides:

> "A peace officer may without warrant arrest any person –
> whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

[11] In Mabona v Minister of Law and Order and Others 1988 (2) SA 654 (SE) Jones J dealt with the requirement of a reasonable suspicion at 658E-H as follows:

> "The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA 28 (E) at 33H). 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."

[12] One must evaluate Mhlaba's conduct against that test. Mhlaba knew that the plaintiff was not the owner of the vehicle. In the normal course an owner of a vehicle takes responsibility for the licensing of the vehicle and would be in possession of the necessary licensing documents to do so. The person who placed the false licence disc on the vehicle would need to have had access to the licensing documents, especially when the engine and chassis numbers on the disc were correct. It is far more likely that such a person would be the owner and not an employee of the owner who merely drives the vehicle. One of the elements of the offence of fraud is the making of a misrepresentation. The most likely person to benefit from the misrepresentation that a vehicle is licensed is the person responsible for the licensing of the vehicle, namely the owner. Mhlaba conceded that there was a possibility that someone else might have committed the fraud but did not act on that possibility, for the alarming reason that the plaintiff lived far away and it would be difficult to make contact with the owner. That reason is simply no excuse for not seeking further information from the owner of the vehicle as to who was responsible for placing the false disc on the vehicle. In accepting the possibility that someone else was responsible for placing the disc on the vehicle, and knowing that the plaintiff was not the owner of the vehicle, Mhlaba's suspicion that the plaintiff had committed fraud was not based on solid grounds and was not reasonable.

[13] I therefore find that the defendant failed to justify the plaintiff's arrest on 15 December 2009 and detention up to the time that he appeared before the magistrate on 17 December 2009.

Detention from 17 December 2009 to 23 December 2009

[14] The defendant resisted liability for this period on the basis that the further detention of the plaintiff was as a result of an order of the magistrate. Reliance was placed on the judgment in *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A). The status and ambit of the judgment in *Isaacs* was discussed in *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA). At para [34] Fourie AJA said:

> "As submitted on behalf of the appellant, the judgment in Isaacs has not been overruled by the Constitutional Court or this court."

[15] Further at para [38] he said:

> "To summarise, what was decided in *Isaacs* is that the prior lawful arrest of a person is not a prerequisite to the provisions of s 50(1) of the CPA coming into effect. Put differently, it was held that the fact, that the person may have been arrested unlawfully, does not preclude him or her from being remanded lawfully in terms of s 50(1) of the CPA. However, what was not held in *Isaacs* is that an arrested person's continued detention, by virtue of an order of court remanding him or her in custody in terms of s 50(1) of the CPA, will automatically render such continued detention lawful. This was not an issue that the court in *Isaacs* was called upon to adjudicate."

[16] In *Tyokwana* the question of liability for the period in detention following an order by the magistrate was in dispute. Fourie AJA found that the police officers had mislead the prosecutor and the magistrate by wilfully distorting the truth, with the result that the respondent was remanded in custody and denied bail, and remained in custody until he was acquitted of the charge against him. (Para [41].) Had the prosecutor and the magistrate been apprised of all the relevant facts, it was inconceivable, so it was found, that the prosecutor would have permitted the prosecution to proceed or that the magistrate would have refused bail. ([Para [39] (d).)

[17] At para [42] Fourie AJA said:

> "In considering the respondent's delictual claim for damages pursuant to his wrongful detention, it is clear that his constitutional right to freedom and security of the person, as enshrined in s 12 of the Constitution, was unjustifiably and unreasonably violated by the employees of the appellant, and in particular by the malicious conduct of Kani. Section 12(1)(a) of the Constitution guarantees everyone the right to freedom and security of his or her person, including the right not to be deprived of his or her freedom without just cause."

[18] In *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) a similar dispute arose. The challenge to the lawfulness of the appellant's detention was directed at the manner in which the magistrate's discretion was exercised. It was alleged that the police officer involved owed a duty to the appellant to bring to the attention of the prosecutor and the magistrate information which was relevant to the exercise of the magistrate's discretion. At paras [27] and [28] Swain JA said:

> "In the present case the challenge raised to the lawfulness of Mr Woji's detention is directed at the manner in which the magistrate's discretion was exercised, influenced as it was by the erroneous view of Insp Kuhn that Mr Woji was the fourth robber in the video. In *Isaacs* and *Zealand* this court was concerned solely with the legal consequences of the detention orders issued by the respective magistrates and not the manner in which the magistrate's discretion was exercised prior to the grant of these orders. In the context of s 12(1)(a) of the Constitution and the decision by the Constitutional Court in *Zealand,* an examination, of the legality of the manner in which the magistrate's discretion to further detain Mr Woji was exercised, cannot be precluded simply by the existence of the magistrate's order. The Constitutional Court in *Zealand* did not require the decisions of the respective magistrates to be set aside, before the lawfulness of the appellant's detention could be determined. Once it is clear that the detention is not justified by acceptable reasons and is without just cause in terms of s 12(1)(a) of the Constitution, the individual's right not to be deprived of his or her freedom is established. This would render the indivual's detention unlawful for the purposes of a delictual claim for damages.
>
> The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty. See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Studies Intervening)* 2002 (1) SACR 79 CC (2001 (4) SA 938; 2001 (10) BCLR 995; [2001] ZACC 22) para 44. On the facts of this case, Insp Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr Woji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gives rise to a private law breach of Mr Woji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr

> Woji was entitled to have his right to freedom protected by the state. In consequence, Insp Kuhn's omission to perform his public duty was wrongful in private law terms. See *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA) (2004) (2) BCLR 133; [2003] 4 All SA 565) paras 34 – 38 and 43.

[19] It was found that Kuhn's omission to perform this duty was the factual and legal cause of the appellant's detention, in that if Kuhn had complied with his duty the magistrate would more probably than not have released the appellant on bail.

[20] In the present matter there was no specific allegation in the particulars of claim that there was a breach of a public duty on the part of an employee of the defendant in relation to the period of detention ordered by the magistrate. There was simply a broad allegation that the plaintiff's arrest and detention were "wrongful, unlawful and without any justification or excuse". The issue was however raised in the plea in that reference was made to the postponement in terms of s 50 of the CPA and it was addressed in argument.

[21] The record of proceedings before the magistrate on 17 December 2009 was contained in the defendant's bundle of documents, as were several statements/documents which according to the police investigation diary would have been in the police docket provided to the prosecutor when the plaintiff first appeared. One of the documents was headed "Bail Information Form" and appears to be a document from the police to the prosecutor providing information relating to whether or not an accused person should be released on bail. A number of factors in question form are listed on the form providing for a yes or no answer. The form completed in respect of the plaintiff indicated that the plaintiff had a fixed address and fixed employment. The form further indicated that he did not resist arrest, would

not be difficult to trace, would not interfere with witnesses or the investigation, and might not commit further offences if released. Curiously the question "surrendered to/co-operated with police" was answered in the negative. There was no evidence from Mhlaba or van der Merwe that the plaintiff had not surrendered or co-operated. In spite of all these positive factors with regard to release on bail, the form indicated that bail should be opposed. Interestingly, it was first indicated on the form that bail should not be opposed, but that notation was crossed out and the contrary notation made.

[22] One of the statements in the bundle of documents was that of Mhlaba. In his statement he made no mention of the fact that the plaintiff was not the owner of the vehicle nor did he disclose the identity of the owner. In my view he had a duty to disclose this information to the prosecutor, as well as to disclose that he thought there was a possibility that someone else had committed the fraud. Another statement was from van der Merwe, who also did not say that the plaintiff was not the owner of the vehicle or disclose who the owner was.

[23] Was this failure to give a full disclosure to the prosecutor and the request that bail should be opposed on apparently non-existent grounds, the factual and legal cause of the plaintiff's further detention? If full disclosure had been made and bail not opposed, is it probable that the prosecutor would not have objected to bail at the first appearance and that the magistrate would have released the plaintiff on bail or on warning? The record of proceedings before the magistrate on 17 December 2009 provides little assistance in answering this question.

[24] The record of proceedings reflected that certain rights were explained to the plaintiff and that he understood them. These rights included the right to legal representation, to remain silent, and to apply for bail. The last question by the magistrate to the plaintiff according to the record was:

> "Do you wish the question of your possible release on bail to be considered by the court?"

No answer by the plaintiff was recorded. Instead the following was recorded:

> "PP for FBA until the 23/12/2009. Acc i/c."

"PP" presumably means "postponed" and "FBA" must mean formal bail application. "I/C" means in custody.

[25] I assume that the postponement was granted at the request of the prosecutor. The record on 23 December 2009 reflected that the prosecutor and the plaintiff's attorney (he was now represented) agreed on R500.00 bail. No "formal" bail application took place after all. Thereafter the matter was postponed from time to time until the charge was eventually withdrawn.

[26] The relevant portions of s 50 (6) of the CPA are:

> "(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who –
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> (i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60 –
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> (aa) be informed by the court of the reason for his or her further detention: or
>
> (bb) be charged and be entitled to apply to be released on bail,
>
> and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or
>
> (ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.
>
> (b) .....
>
> (c) .....

(d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if –

(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;

(ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A);

(iii) .....
[Sub-para. (iii) deleted by s. 8(1) (c) of Act 62 0f 2000.]

(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to –

(aa) procure material evidence that may be lost if bail is granted; or

(bb) perform the functions referred to in section 37; or

(v) it appears to the court that it is necessary in the interests of justice to do so."

[27] It appears from the record on 17 December 2009 that the plaintiff was not informed of the reason for his further detention and was not given an opportunity to respond to the request that the case be postponed for a formal bail application and that he be kept in custody. Further there was nothing in the record which revealed that a postponement was granted on any of the grounds contained in s 50 (6) (d) of the CPA. At face value the record of proceedings on 17 December 2009 is disturbing to say the least.

[28] On the probabilities however, in my view the prosecutor would have acted on the information provided by the police, namely the statements of Mhlaba and van der Merwe, and the bail information form, which reflected that bail should be opposed. Had the information concerning ownership been available and had the police not recommended that bail should be opposed, it is in my view probable that the prosecutor would not have objected to the plaintiff's release on bail or on warning and that the magistrate would probably have ordered accordingly. I say so because in the normal course, and this would be known to the prosecutor, it is the owner of a

vehicle who would most probably misrepresent that a vehicle was licensed when in fact it was not. Moreover if the police had not recommended that bail be opposed, the prosecutor would probably have not opposed bail, especially given all the favourable factors in the bail information form.

[29] I am therefore satisfied that Mhlaba and the member who completed the bail information form wrongfully breached their public duty by respectively failing to disclose the full facts to the prosecutor and to recommend that bail should be opposed without any foundation for doing so. They also acted negligently, in that reasonable police officers in their position would have respectively furnished the full facts to the prosecutor and would not have opposed bail on baseless grounds. (See *Woji (supra)* at para [30].) Had they not breached their duty, the magistrate's discretion would more probably than not have been exercised differently.

[30] I accordingly find the defendant liable for the full period of the plaintiff's detention which amounted to between seven and eight days.

Quantum

[31] The plaintiff was detained in unpleasant conditions both in the police cells and the prison. In *Minister for Safety and Security v Scott and Another* 2014 (6) SA 1 (SCA) Theron JA at paras [45] to [49] performed a comparative study of awards in other cases. I have had regard to the circumstances and awards in the cases to which Theron JA referred, as well as to the depreciation in the value of money since

those awards. I am of the view that in the present case an award of R180 000.00 would be suitable.

[32] Judgment is accordingly granted for the plaintiff as follows:

[32.1] Payment of the sum of R180 000.00.

[32.2] Payment of interest thereon at the legal rate from date of judgment to date of payment.

[32.3] Costs of the action.

[32.4] Interest on such costs at the legal rate from a date 14 days after taxation to date of payment.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv M Mpahlwa, instructed by L.G Nogaga Attorneys, Grahamstown

For the Defendant: Adv NJ Sandi, instructed by Whitesides Attorneys, Grahamstown