

**IN THE HIGH COURT OF SOUTH AFRICA**

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 2028/2008  
Date heard: 25 May 2010  
Date delivered: 29 June 2010

In the matter between:

**DANIEL MNONELELI HOCO**

Plaintiff

and

**INSPECTOR MTEKWANA**

First Defendant

**MINISTER OF SAFETY AND SECURITY**

Second Defendant

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**J U D G M E N T**

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**DAMBUZA, J:**

[1] This is a damages claim arising from the arrest and detention of the plaintiff by members of the Department of Safety and Security.

[2] The plaintiff is an adult male who resides at 29 Bangor Place, Kabega, Port Elizabeth. He is self-employed, conducting a business of trucking services.

[3] The first defendant is an adult male who is a member of the South African Police Services holding the rank of Inspector and stationed at Humewood Police Station in Port Elizabeth.

[4] The second defendant is sued herein in his capacity as the Minister of Safety and Security in charge of the South African Police Services.

[5] On 13 February 2008 the plaintiff was arrested by the first defendant at Kabega Police Station, Old Cape Road, Port Elizabeth. He was then detained at Humewood Police Station from 13 February 2008 to 18 February 2008, and thereafter transported by members of the South African Police Services to Gugulethu Police Station in Cape Town where he was detained overnight and released on 19 February 2008.

[6] It is common cause that when the plaintiff was arrested and detained the members of the South African Police Services who arrested and detained him, including the first defendant, were acting within the course and scope of their duties as employees of the second defendant.

[7] In their plea, the defendants plead that the arrest was lawful as the plaintiff was arrested on a warrant of arrest issued by a Magistrate in Athlone, Cape Town on 11 February 2008 under Gugulethu CAS No.: 418/01/2008.

[8] At the start of the trial, Counsel for both parties advised me that the parties had come to an agreement that, it being common cause that the plaintiff was arrested on a warrant of arrest and detained pursuant thereto, the only issue before me was the lawfulness of the detention from 15 February to 19 February 2008, that being the period subsequent to the expiry of the first

48 hours after the arrest of the plaintiff.<sup>1</sup> In this regard the plaintiff's contention is that from 15 February to his release on 19 February the detention was unlawful. On the other hand, the defendants maintain that the detention was lawful for the whole period save the 16 and 17 February.

[9] The defendants, having admitted the arrest of the plaintiff in their plea, bore the onus of proof and the duty to be the first to lead evidence. This much is recorded in the rule 37 minute. They, however, did not lead any evidence at the trial. They merely closed their case. The plaintiff then gave evidence, setting out the background to his arrest.

[10] His evidence was that during January 2008, he was in Cape Town on a visit. On his return he took his child Mninawe or Lolwethu Matiwanie, the youngest of his three children, back to Port Elizabeth with him. At the time, the child resided with his maternal grandmother in Cape Town. His mother resided in Johannesburg.

[11] About two weeks after the plaintiff returned from Cape Town, he received a message to contact the first defendant. He phoned the first defendant who told him that he had visited the plaintiff's home in connection

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<sup>1</sup> S 50(1)(a) of the Criminal Procedure Act 51 of 1977 provides that:

“(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that—

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.”

with the child that the plaintiff had taken from Cape Town and that a charge had been laid against the plaintiff in respect of that incident. The first defendant further explained to the plaintiff that a warrant had been issued for his arrest and that police were on their way from Cape Town to fetch him from Port Elizabeth.

[12] On 13 February 2008, the first defendant phoned the plaintiff advising him to go to Humewood Police Station. Because the plaintiff did not know where Humewood Police Station was, it was agreed that the plaintiff and the first defendant would meet at the Kabega Police Station. At Kabega Police Station, the plaintiff explained to the first defendant that he had taken the child from Cape Town because he wanted to secure a school for the child, as he was not satisfied with the conditions in which the child lived in Cape Town. The plaintiff was arrested and taken to Humewood Police Station where he was detained from about 12 noon on that day (13 February 2008). At about midday on Friday, 15 February 2008, the plaintiff enquired from police officers at Humewood Police Station as to when he would be taken to court, as the 48 hour period within which he had to be caused to be brought before a court had elapsed. He was advised that he would only appear in a court in Cape Town. He then remained in police detention over the weekend and on Monday, 18 February, the first defendant took him out of the police cells and he was then transported in a police vehicle to Cape Town, together with the child, Mninawe. In Cape Town he was detained at Gugulethu Police cells until the following morning (19 February) when he was transferred to the

Athlone Magistrate's Court where he remained for a short time until he was released.

[13] During argument *Mr Menti* who appeared on behalf of the defendants, advanced the defendant's case as that the denial that the detention of the plaintiff for the days 16 and 17 February was unlawful is based on the fact that it was impossible for the police to cause the plaintiff to appear before a court during these days as it was a week-end and the courts were not in session. Further, so the argument went, the period of 48 hours before which the plaintiff had to appear in court expired on Friday, 15 February when the plaintiff was still held in Port Elizabeth. The plaintiff could not appear in a court in Port Elizabeth as it was specified in the warrant of arrest that he had to appear before a court in Athlone, Cape Town. He had not yet been transferred to Cape Town as the police from Cape Town had not arrived to fetch him. Hence his continued detention from Friday, 15 February until Monday morning, 18 February when he was transferred to Cape Town. In the end, so it was argued, the plaintiff could only appear before a court on 19 February, when he was in Cape Town. In this regard, the defendants rely on the provisions of s 50(1)(d)(iii) which provide that if the period of 48 hours expires at a time when the arrested person is outside the area of jurisdiction of the lower court to which he/she is being brought for the purposes of further detention and he/she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.

[14] Firstly, there is no evidence to support the submissions made on behalf of the defendants. As I stated earlier, no evidence was led on their behalf. There is no explanation before me that, for some reason it became impossible for the plaintiff to be brought before a court within 48 hours. It was incumbent upon the police, having arrested the plaintiff, to make arrangements that he be brought before a court within the prescribed period. There is no explanation why police officers from Cape Town did not arrive in Port Elizabeth earlier than Monday (18 February). The evidence by the plaintiff was that, when he was arrested the first defendant told him that police were on their way from Cape Town to Port Elizabeth to take him to Cape Town.

[15] Further, the contention by the defendants was never pleaded by them. I am mindful that issues between the parties seem to have narrowed down subsequent to the close of pleadings. And when it became clear that the arrest was founded upon a warrant of arrest issued in Cape Town, the plaintiff amended the basis of his claim to unlawfulness of the detention after the expiry of the 48 hour period following the arrest. In any event, as it was submitted by *Mr van Rooyen* who appeared on behalf of the plaintiff, the defendants' reliance on s 51(3)(d) cannot stand as the plaintiff was not in transit at the time of the expiry of the 48 hour period. He was still in detention in Port Elizabeth.

[16] My further view is that in any event, the defendants' admission that the detention of the plaintiff on 16 and 17 February 2008 was unlawful is self-defeating as regards to the period of detention subsequent thereto. If the

detention during this period was unlawful, I have difficulty in understanding how it again became lawful in respect of the period subsequent thereto, without a fresh warrant authorising re-arrest and further detention.

[17] Consequently I am satisfied that, the plaintiff's detention from 12 noon on Friday, 15 February 2008 until 19 February 2008 when he was released, was unlawful.

[18] As regards the quantum, the plaintiff was in unlawful custody for almost four days, two and a half of which he spent in police custody at Humewood Police Station, Port Elizabeth, one day in transit and in police cells at the Gugulethu Police Station, and the last few hours at Athlone Magistrate's Court in Cape Town.

[19] The plaintiff's evidence was that on Wednesday, 13 February, he was alone in the police cell at Humewood Police Station. He described the cell in which he was kept as a typical cell in a South African Police Station which only has a toilet and a water tap. He slept on the floor and was given blankets to sleep with. The plaintiff remained alone in the cell until Friday, 15 February when other people were brought in, in connection with charges of theft of a motor vehicle. A cousin visited him during the time he spent in the police cells in Humewood Police Station. There was no shower in the cell or any other bathing facilities, with the result that the plaintiff last bathed prior to his arrest on 13 February and could only bath again after his release from police custody on 19 February 2008. He testified that the incident left him

hurt and he felt embarrassed and abused. His business also suffered during the period that he was in police custody, particularly as he drives some of the trucks himself.

[20] *Mr van Rooyen* referred me to the **Minister of Safety and Security v Seymour** 2006 (6) SA 320 (SCA). At 325 in **Seymour's** case, Nugent JA held that in assessing awards of general damages, Courts should view awards made in previous cases only as guidance as to what other courts have considered to be appropriate. Seymour, a 63 year old man, was unlawfully arrested and imprisoned by the state for a period of five days. He was awarded general damages of R500,000.00 by the High Court. On appeal the Court reduced the award made by the High Court to R90,000.00.

[21] I have further considered awards made in other cases by this Court in **Brander v Minister of Safety and Security**, Case No.: CA100/2007 (an unreported decision of the then Eastern Cape Division, delivered on 6 December 2007), wherein an award of R15,000.00 damages was made in respect of the arrest and detention of an appellant overnight. In **Minister of Safety and Security v Tyulu** [2009] 4 All SA 38 SCA, a 48 year old magistrate was arrested and kept in police custody overnight; damages in the amount R15,000.00 were awarded. In **Russell v Minister of Safety and Security** [2009] JOL 23425 (E) the plaintiff, a candidate attorney, was awarded damages in the amount of R130,000.00 for unlawful arrest and detention. In **Slabbert v Minister of Safety and Security**, Case No.:



1128/2005 (an unreported decision of the Eastern Cape Division, delivered on 13 November 2007), the plaintiff who had been arrested for being drunk and disorderly, was awarded damages of R20,000.00 for continued detention in police custody after his wife had offered to the police to drive the plaintiff home. At para [38] in **Slabbert's** case (*supra*), Kroon J referred to guidelines set out by the authors of Visser and Potgieter's *Law of Damages*, 2<sup>nd</sup> Ed. at p475 as to factors relevant in assessing damages to be the following:

“The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or ‘malice’ on the part of the defendant, the harsh conduct of the defendants; the duration and nature (eg solitary confinement) of the deprivation of liberty; the status, standing, age and health of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interest such as honour and good name have been infringed, the high value of the right to physical liberty; the effect of inflation; and the fact that the *action injuriarum* also has a punitive function.”

The learned Judge added that Neethling's *Law of Personality* op cit. 130-1 adds the following factors to those listed above:

“The circumstances surrounding the deprivation of liberty ‘its duration’ and the presence or absence of an apology or satisfactory explanation. Naturally, satisfaction is increased if additional personality interests such as dignity and good name are involved.”

[22] In this case the conduct of the police leaves an impression that they did not appreciate the seriousness of depriving the plaintiff of his liberty through arrest and incarceration. It appears that they became content in the

knowledge that the accused had been arrested and failed to take reasonable and necessary steps to protect his interests and to comply with the law relating to arrest and detention. Further, I consider the embarrassment caused to the plaintiff by being transported as a prisoner together with his minor child. The continued detention must have lowered the esteem in which he was held by his child, as a father. The continued unlawful detention further exposed him unnecessarily to the indignity suffered in the well known squalor of prison cells. They never explained to him why they did not bring him to Court earlier. He was taken away from his home and business, was released from custody in a city hundreds of kilometres from home without appearing in court and was left to pay for the transport back to his home.

[23] During argument it was submitted by *Mr Menti* on behalf of the defendants that in the event that I find for the plaintiff, costs should be awarded on a magistrate's court scale. This argument is fuelled by the amendment by the plaintiff of his particulars of claim to limit his claim to only a portion of the period of detention that he had initially claimed for, thus placing the probable quantum of his damages within the jurisdiction of the magistrate's court. But, it was common cause at the trial that there was an agreement between the parties that, having regard to the fact that the amendment was effected at a late stage in the filing of the pleadings, the matter would remain in the High Court. I do agree with the submission made on behalf of the plaintiff that, even subsequent to the amendment of the particulars of claim, the quantum is not far off from the jurisdiction of this

Court. It was therefore not unreasonable of the plaintiff to continue with the case in this Court rather than transfer to the magistrate's court. In the cases referred to in paragraphs 20 and 21 above, in which damages of far less than R100,000.00 were awarded, proceedings were held in the High Court even though, in most of these cases, the period for which the plaintiffs claimed was less than in this case. My view is that, it would not be just to award costs, in this case, on the magistrate's court scale.

[24] In the result I make the following order:

Judgment is granted in favour of the plaintiff against the defendant in the sum of R80,000.00 together with costs.

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**N. DAMBUZA**  
**JUDGE OF THE HIGH COURT**

Appearances:

For the plaintiff: Adv C van Rooyen instructed D Gouws Inc.  
Attorneys of Port Elizabeth

For the defendants: Adv E Menti instructed by the State Attorney of  
Port Elizabeth