IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 3500/09

Date Heard: 22 April 2014

Date Delivered: 8 May 2014

In the matter between:

LEON CHAMBERLAIN Plaintiff

and

MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

EKSTEEN J:

[1] At approximately 13h45 on Friday, 26 June 2009 the plaintiff was arrested at the Walmer Police Station on a charge of "indecent assault". (I shall assume for purposes of this judgment that it was intended to refer to "sexual assault" in terms of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.) He was detained in the police cells until Monday, 29 June 2009 when he was taken to court. There he was released and the charge provisionally withdrawn against him. The plaintiff was later charged with rape, arising from the same facts for which he was initially arrested and he was acquitted. He has instituted action against the defendant for the recovery of damages for what he alleges was a wrongful and unlawful arrest. I pause to mention that the Particulars

of Claim raised, in the alternative a malicious arrest and detention. The claim for malicious arrest and detention was abandoned prior to trial.

[2] This sorry tale has its origin in the events which occurred outside of the Legacy Sports Bar in Port Elizabeth during the evening of 20 June 2009. These events led to the said charge being laid at the Walmer Police Station. A docket was duly opened and the complainant attested to an affidavit which constituted the first information of crime contained in the docket. The affidavit was handed in as evidence before me and the parties agreed that the entire affidavit would constitute evidence before me. In the affidavit the complainant records that shortly before 23h00 that evening she and a few of her lady friends left the Legacy Bar in order to go to a café on the opposite side of the road. Whilst they were walking they met a man who suggested that he knew the complainant and wished to engage in conversation with her. The complainant acknowledged to him that she might have seen him before and undertook to talk to him on her way back from the café.

[3] On her return from the café she honoured her undertaking and proceeded towards this apparent acquaintance whilst her friends returned to the Legacy Bar. The statement records that this man then forced her into his vehicle, a maroon Mazda with tinted windows and a scoop at the back. He locked all the doors of the car and held her arms so as to restrain her. He pulled down her trousers and underwear and managed also to drop his own trousers. He thereafter attempted to have sexual intercourse with her. She repeatedly requested him to stop and successfully resisted his attempts to penetrate her. Having failed in this endeavour the man forced his penis into her mouth. At this stage, she records, two white men,

apparently friends of the man, approached his car. One opened the passenger door and she managed to escape and hastened back to the Legacy Bar. There she reported her experience to her lady friends. The statement then records that her lady friends, clearly concerned by the report which she had made, informed management at the Legacy Bar about what had happened. The manager, so it is recorded in the statement, then went to where the car was standing. When he returned he said simply that he knew the man.

[4] On 26 June 2009, Constable Lindiwe Mlaza, a Detective in the employ of the South African Police Services assumed duty at the Walmer Police Station and was assigned to deal with the docket. He had no knowledge of the events save for what he gleaned from the content of the docket. At this stage there were no further witness statements included in the docket. A number of entries had however been made in the investigation diary, including an entry made on 24 June 2009 which read as follows:

> "… complainant contacted and interviewed. Complainant alleged that she did not get the registration number of the suspect. Complainant also alleged that her friends did see the suspect but do not know him. Complainant did not receive medical treatment only slight leg injury.
> Complainant submitted contact number for Mr Frans Terblanche (manager at Legacy) … for more information.
> Contacted Mr Terblanche who submitted the particulars of suspect.
> Suspect: Mr Leon Chamberlain resident at …."

[5] Mlaza testified that he was on duty together with Sergeant Moneli at the time. Upon perusing the affidavit of the complainant and the inscription in the investigation diary which I have set out earlier he and Moneli proceeded to the address provided

by the said Terblanche. It was their intention to arrest the plaintiff on a charge of "indecent assault", that being the charge reflected on the docket at that stage. The plaintiff was not home and they left a note in the post box for him to attend at the police station in order to assist them in the investigation. Later, at approximately 13h45, the plaintiff arrived at the police station in Walmer. Mlaza states that he introduced himself to the plaintiff and advised him of the charge which had been laid against him. He advised him that it was a serious charge and that he intended to arrest the plaintiff. He thereafter asked the plaintiff whether he knew of the incident. The plaintiff responded that he knew of the charge which had been laid but he contended that the complainant was not being honest.

[6] In these circumstances Mlaza advised him that he was arresting him and his constitutional rights were read to him.

[7] Mlaza testified that he decided to arrest the plaintiff because there was an affidavit in the docket, it revealed a serious charge and previous investigation had identified the plaintiff as the suspect. He was therefore satisfied that there were good grounds for arresting the plaintiff. The purpose of the arrest, so Mlaza testified, was to bring the plaintiff before court. He had nothing further to do with the plaintiff and the plaintiff was taken to court on Monday morning.

[8] During the cross-examination of Mlaza it was suggested to him that he ought to have brought the plaintiff before court before the close of business on Friday afternoon. Mlaza testified that before a suspect could be taken to court his warning statement had to be taken, various forms had to be completed and he had to be

charged. The complainant's warning statement was taken at approximately 20h00 that evening.

[9] Mr Warren Dolph then testified that he was a prosecutor in the employ of the National Director of Public Prosecutions during June 2009. Dolph says that it would logistically not have been possible for the plaintiff to have been brought before a court in order to obtain bail before the close of business on Friday. He says that before a suspect could ask for bail he must first be formally charged, fingerprints must be taken and forms were to be completed. There were also logistical difficulties with transport to and from the court on Friday afternoons and therefore there is an informal agreement in place between the police and the prosecution staff that new suspects should not be brought before a court for purposes of bail after 13h00 on a Friday. The offence in issue, as set out in the affidavit of the complainant, was in fact rape, which is a Schedule 5 offence with an onus cast upon the suspect in terms of the Criminal Procedure Act, 51 of 1977 (the CPA). In the circumstances even if he had been brought before a court no bail application could have been heard on the Friday afternoon.

[10] Dolph was approached during the ensuing weekend by Attorney Nel and the possibility of bail was discussed. He was advised at the time that the charge was rape. He did not have sight of the docket at the time and was reliant entirely upon the discussions which he had with Attorney Nel and Colonel Helflicht, the officer commanding the Walmer Detective Branch. It was agreed thereafter that there would be no bail.

[11] It is common cause that the plaintiff was taken to the Magistrate's Court in Port Elizabeth on Monday, 29 June 2009. An inscription in the investigation diary records as follows:

> "As discussed this matter cannot be enrolled at this stage since the complainant did not name the acc by name and also there is no pointing out statement/statement of the club manager."

[12] Dolph testified that this inscription may be indicative thereof that the plaintiff did not appear before a court on 29 June and was simply released. He was, however, referred in re-examination to a further inscription in the docket which recorded that the charge had been "provisionally withdrawn" on 29 June 2009. This, he acknowledged was indeed indicative thereof that the plaintiff did appear before a court.

[13] The plaintiff did not testify. By virtue of the conclusion to which I have come the evidence of Dolph is largely immaterial and the matter is to be determined on the evidence of Mlaza.

[14] It is now trite that where the lawfulness of an established arrest and ensuing detention has been placed in issue the onus rests on the defendant to prove that the plaintiff's arrest and the ensuing detention was justified.

[15] The defendant admitted in its plea that the plaintiff was arrested without a warrant on 26 June 2009. It denied, however, that the arrest was unlawful and alleged that the plaintiff was arrested in terms of the provisions of section 40(1)(b) of

the CPA in that “the arresting officer had a reasonable suspicion that an offence was committed and was as such, entitled to arrest the plaintiff”.

[16] Section 40(1)(b) of the CPA provides that a peace officer may without a 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. The defendant must accordingly show:

(a) That the arrestor was a peace officer;

(b) that the arrestor entertained a suspicion;

(c) that the suspicion was that the suspect had committed an offence referred to in Schedule 1; and

(d) that the suspicion rests on reasonable grounds.

(See ***Duncan v Minister of Law and Order*** 1986 (2) SA 805 (A) at 818G-H.)

[17] It is not in dispute that Mlaza is a peace officer nor is it in dispute that a sexual assault is an offence referred to in Schedule 1 of the CPA. On the evidence of Mlaza it must be accepted that he did entertain a suspicion. These issues are not contentions.

[18] The question whether a peace officer “reasonably suspects” a person of having committed an offence within the ambit of section 40(1)(b) of the Act is, however, objectively justiciable. The test, it has been said, is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach he in fact has reasonable grounds for the suspicion. (See ***Duncan v***

Minister of Law and Order *sup*ra p. 184D-E and the authorities referred to therein.) In ***Mabona and Another v Minister of Law and Order and Others*** 1988 (2) SA 654 (SE) at 658E-H Jones J considered the approach to this issue in the following manner:

> "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, i.e 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."

[19] In the present instant Mlaza had an affidavit from the complainant in respect of the events which occurred. It clearly revealed the commission of a Schedule 1 offence and I think that Mlaza was clearly justified in his persuasion that it was a very serious offence. The affidavit by the complainant, however, which was the only witness statement in the docket at the time that the arrest was affected, did not name her assailant. She gave no description whatsoever of the man who had molested

her and she did not suggest that she had identified the man to any other person on the evening in question. There could be no basis found in the affidavit of the complainant to conclude that the plaintiff might have been her assailant.

[20] What the affidavit does record is that the complainant, after fleeing back to the Legacy Bar, had reported the distressing events to some of her lady friends. They in turn advised the manager of the Legacy Bar of what had been reported to them. The manager proceeded outside "to where the car was standing" and when he returned stated that he knew the person.

[21] There was no affidavit in the docket from the manager of the Legacy Bar, the said Terblanche. The subsequent entry in the investigation diary records no more than the fact that Terblanche had relayed the personal particulars of "the suspect" to the police official who had made the entry which I set out earlier herein in the investigation diary. In the circumstances there was no indication in the docket of precisely what was relayed to Terblanche by the complainant's friends nor what he observed when he stepped outside. There was no indication in the docket why he concluded that the person that he allegedly knew might be the perpetrator of the sexual assault upon the complainant. The docket did not reveal how long after the events it was when Terblanche proceeded outside. In all the circumstances there was no indication in the docket upon which Mlaza could have been able to assess the quality of the alleged identification by Terblanche or the reasonableness of the conclusion to which Terbanche apparently came. Mlaza, it seems to me, concluded that the plaintiff was probably the perpetrator solely on the basis that the word "suspect" appeared in the investigation diary alongside the particulars of the plaintiff.

Such a suspicion, I think, is "flighty or arbitrary" as described by Jones J in ***Mabona's*** case *supra*.

[22] It is significant in the present case that there was no urgency in effecting the arrest. The particulars of the plaintiff, including his address, were known to the police and he had given his co-operation and attended at the Walmer Police Station of his own volition. He could hardly have been a flight risk. There was no impediment to first obtaining an affidavit from Terblanche (or at least conducting an interview with him) in respect of what he observed and why he concluded that there were grounds to believe that the plaintiff may have committed the alleged offence. This he did not do. In the circumstances I consider that his conduct falls far short of the standard set out in ***Mabona's*** case. His suspicion did not rest on reasonable grounds.

[23] Ms **Ayerst**, on behalf of the defendant, argues that the plaintiff's admission to Mlaza that he knew of the charge was confirmation enough for Mlaza to affect the arrest. I do not agree. Mlaza testified that although the plaintiff acknowledged his awareness of the existence of the charge he contended that the complainant was lying. It is not apparent to me how this communication could contribute at all to assessing the reasonableness of the suspicion.

[24] In all the circumstances I consider that the defendant has failed to discharge the onus resting upon it to establish that Mlaza entertained a reasonable suspicion so as to justify the lawfulness of the arrest. By virtue of the unlawfulness of the

arrest the ensuing detention is also unlawful. The plaintiff is accordingly entitled to recover damages flowing from the unlawful arrest and detention.

[25] I pause to mention that the plaintiff in the particulars of his claim contended that even if it were found that the arrest was justified Mlaza had failed to appreciate that he retained a discretion as to whether or not to arrest the plaintiff and, in the event that he did appreciate the existence of such a discretion he had failed to exercise it rationally. It was further contended that it was incumbent upon Mlaza to bring the plaintiff before the court on the Friday afternoon. By virtue of the conclusion to which I have come above it is not necessary to explore these issues.

[26] I turn to consider the quantum of the plaintiff's damages. The primary purpose of an award for damages for wrongful and unlawful arrest and detention is to provide a *solatium* for his injured feelings. It cannot be determined with any measure of mathematical accuracy and each award must necessarily depend upon the peculiar facts of the particular case. The award should, however, reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed by our courts. (Compare ***Minister of Safety and Security v Tyulu*** [2009] 4 All SA 38 (SCA) at para [26] and ***Thandani v Minister of Law and Order*** 1991 (1) SA 702 (E) at 707B.)

[27] The assessment of general damages is always a matter of some complexity and whilst awards previously made in comparable cases may serve as a useful guide they should not be used as a yardstick to determine damages to be awarded in any given case. (Compare ***Minister of Safety and Security v Seymour*** 2006 (6)

SA 320 (SCA) at 325B.) The authors of *Visser and Potgieter's Law of Damages,* 2nd ed, p. 472 to p. 475 have extracted from our case law a number of factors which may play a role in the determination of the quantum of damages to be awarded:

> "… the circumstances under which the deprivation of liberty took place, the presence or absence of improper motivate or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature 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 defendant; awards in previous comparable case; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to right to physical liberty; the effect of inflation; and the fact that the *actio iniuriarum* also has a punitive function."

The list is not exhaustive.

[28] I have in the present matter been referred to a number of prior decisions where awards have been made for wrongful and unlawful arrest and detention of a limited period. I have given careful consideration to each of them. Predictably none of these can be said to be on all fours with the present matter.

[29] In the present case the plaintiff chose not to testify. There is no evidence before me of his age, level of education or occupation. The arrest did not occur in the public eye and there is no evidence before me of any extraordinary features which may have exacerbated the humiliation ordinarily associated with an arrest. The only evidence placed before me in respect of the circumstances of his detention emerged from the cross-examination of Mlaza who testified that the plaintiff was

detained in a large cell together with other suspected offenders. The cell has a sleeping area, sitting area, toilet and shower, however, there are no beds or other furniture upon which to sleep. Mlaza confirms that during the detention of the plaintiff he, together with other prisoners, would have been regularly fed. He is unable to provide particulars of the menu or the times at which prisoners were fed as these functions are performed by the Uniform Branch. Whilst the Particulars of Claim initially alleged a malicious arrest and detention the suggestion of malice was, correctly in my view, abandoned prior to trial. There has been no suggestion in the evidence that Mlaza, or any other police officer, had dealt unduly harshly with the plaintiff either at the time of his arrest or during his detention. The evidence does not establish the status or standing of the plaintiff in society nor is there any evidence relating to his health. The evidence does not suggest any publicity given to his deprivation of liberty.

[30] It is not in dispute that the plaintiff was detained for a period of 67 hours prior to his release when the charges were provisionally withdrawn against him. Mr Horn, on behalf of the plaintiff, argues that notwithstanding the limited information relating to the circumstances of his arrest or under which he was detained that the duration of his detention alone justifies an award to the plaintiff in an amount of R120 000 to R140 000. Ms **Ayerst** on the other hand has urged me to award the plaintiff R30 000 as and for damages. On a consideration of the known facts in the present matter and with due regard to the duration of the unjustified deprivation of the plaintiff's liberty and awards made in the numerous decisions to which I have been referred I consider that an award of R100 000 is fair in this case.

[31] The summons was issued in December 2009, prior to jurisdiction being extended to the Regional Courts in the amount of R300 000. In these circumstances I find no reason to deviate from the usual rule that the costs should follow the result of the litigation. In view of the extent of the award which I have concluded to be appropriate the plaintiff has succeeded in establishing that the matter warranted the attention of the High Court.

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

1. The defendant is ordered to pay to the plaintiff the amount of R100 000 as and for damages.
2. The defendant is ordered to pay interest on the amount of R100 000 calculated at the rate of 15,5% per annum from the date of demand to the date of payment.
3. The defendant is ordered to pay the plaintiff's costs of suit, together the interest calculated thereon at 15,5% per annum from a date fourteen (14) days after taxation to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv *D Horn* instructed by O'Brien Inc Attorneys, Port Elizabeth

For Defendant: Adv *H Ayerst* instructed by State Attorney, Port Elizabeth