IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A262/2005

In the appeal between:-

MINISTER OF SAFETY AND SECURITY Appellant

and

KHALIPI OBED MOLOI Respondent

CORAM: EBRAHIM J *et* VAN DER MERWE J

HEARD ON: 4 FEBRUARY 2008

JUDGMENT BY: VAN DER MERWE J

DELIVERED ON: 28 FEBRUARY 2008

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[1] This is an appeal against a judgment delivered in the magistrate's court of Phuthaditjhaba finding that the respondent had been unlawfully arrested and detained and against the subsequent award of damages in the total sum of R100 000,00 with costs in favour of the respondent.

[2] It is common cause that during the morning of 23 October 2002 and at the Phuthaditjhaba police station, the respondent was arrested without a warrant by inspector S.S. Becezi, acting in the exercise of and within the scope of his employment with the appellant. It also common cause that the respondent was then detained till approximately 19h00 on 24 October 2002, when he was released on bail. Consequently the respondent claimed an amount of R50 000,00 for damages in respect of unlawful arrest and a further R50 000,00 in respect of damages for unlawful detention. As appears from the above, the magistrate allowed both claims in full. It is unnecessary to consider whether separate claims in respect of unlawful arrest and detention in these circumstances are proper or sustainable as counsel for the appellant fairly accepted for purposes of the appeal that the matter should be regarded as if a single claim for damages for unlawful arrest and detention had been instituted.

[3] The appellant sought to justify the admitted arrest without

warrant and detention of the respondent by reliance on the provisions of section 40(1)(b) of the Criminal Procedure Act, No. 51 of 1977 ("the Act"). This section provides that a peace officer such as inspector Becezi, may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act, other than the offence of escaping from lawful custody. The case for the appellant is that inspector Becezi on reasonable grounds suspected respondent of having committed the offences of breaking or entering into any premises with the intent to commit an offence and theft, both mentioned in Schedule 1 of the Act. In the result, the onus rested on the appellant to show that the arrest and detention had been lawful. See **MINISTER OF LAW AND ORDER AND OTHERS v HURLEY AND ANOTHER** 1986 (3) SA 568 (A) at 589 E – G and **MINISTER VAN WET EN ORDE v MATSHOBA** 1990 (1) SA 280 (A) at 284 H – I.

[4] Only the respondent and inspector Becezi testified at the trial.

[5] The respondent testified that his late father divorced his

mother and remarried a person who also happened to be the respondent's aunt. The respondent's late father was the owner of the house in question, that is where the respondent allegedly committed the aforesaid crime or crimes. The respondent's father left a will and an attorney from Naudes attorneys in Bloemfontein had been appointed the executor of the estate of respondent's father. By 23 October 2002 the estate had not yet been finalised. The respondent further testified that he received a letter from Naudes attorneys in Bloemfontein pertaining to the estate of his father. The respondent understood the letter as requiring him to look after the house in question and therefore allowing him to enter into the house. When the respondent wished to introduce this letter into evidence, it was objected to on the basis that the letter had not been discovered. Thereupon the attorney for the respondent elected not to pursue the introduction of the letter into evidence. However, the respondent testified that he took the letter to his aunt, that is his late father's second wife, at per parental home, in other words not at the house in question, in order to inform her that

the respondent was supposed to go to the house and to look after it. His aunt said that she needed her own letter, meaning that a letter should be directed to her by the executor. In this fashion his aunt refused to adhere to or give effect to the respondent's request. As a result the respondent went to the Phuthaditjhaba police station for assistance. There he was told that the police would not involve themselves in affairs involving attorneys and that that was not within the ambit of their work. For some or other reason he was then referred to the Child Protection Unit where in turn he was referred to the chief magistrate of Phuthaditjhaba. The respondent then went to a magistrate at the Phuthaditjhaba magistrate's court and showed him the letter. According to the respondent the magistrate then informed him that in terms of the letter the respondent is allowed to have access to the house, to do anything that he wanted to do there and that he could even change the locks of the house. The respondent then went to the house. He found it locked. He gained entry by breaking a window of the toilet, took the key to the kitchen door and damaged the lock

of the dining room door so that it would be difficult for anybody else to gain entry to the house. This took place on the 21st October 2002. When the respondent returned to the house on the following morning, he found his aunt there who then told him that the police had been looking for him as he was the one who broke into the house. After a while a certain police officer by the name of Mokoena arrived. The respondent explained to Mokoena why he broke into the house and also showed him the aforesaid letter from the attorneys. Mokoena then informed the respondent to meet with the investigating officer. On the following morning, 23 October 2002, the respondent did go to the Phuthaditjhaba police station where he met inspector Becezi. He said that inspector Becezi never listened to anything that he was telling him. He said that he did show the aforesaid letter to inspector Becezi but that he didn't want to look at it and simply arrested the respondent. The respondent was then detained. On the following morning, 24 October 2002, he was taken to court, granted bail and released on bail. Eventually, on 21 November 2002, the case against the

respondent was withdrawn.

[6] Inspector Becezi testified that he was the investigating officer in respect of a police docket pertaining to the alleged housebreaking and theft committed on 21 October 2002. He testified that he went to the house in question. Upon arrival he was told by a certain male person that he knew the person who had committed the housebreaking. This person said that he managed to see the respondent and also that the respondent took some things. Inspector Becezi took a statement of this witness. On the following day inspector Becezi also saw the complainant, that is the respondent's aunt, at the police station. She informed inspector Becezi where the respondent resides. Inspector Becezi took a statement of this witness as well. He then visited the respondent's place of residence where he spoke to his mother and informed her that the respondent should report at the Phuthaditjhaba police station. On the following morning he was informed that there was a person looking for him at the police station and he then met the respondent. He

explained to the respondent the charges against him. According to inspector Becezi the mother of the respondent then appeared and started swearing whereupon the respondent became uncooperative. Although he explained the charges to the respondent, the respondent said that he had nothing to say. Thereupon he arrested the respondent.

[7] The magistrate decided the matter on the basis that on inspector Becezi's own evidence, the suspicion that he entertained, was not a reasonable one. In this regard the magistrate firstly, *inter alia*, stated that it was required of inspector Becezi to first satisfy himself through full investigation that an offence had been committed before an arrest could be made. In this context the magistrate seems to even have suggested that it was not permissible to rely on a witness statement and that the police officer must independently verify the allegations. Secondly, the magistrate said that inspector Becezi should have allowed respondent to give an explanation, which he failed to do. In my judgment, the magistrate erred in both respects. What is

required by section 40(1)(b) of the Act, is a suspicion that an offence had been committed that objectively rests on reasonable grounds, not certainty thereof. The approach of the magistrate amounts to requiring certainty and is wrong. See **DUNCAN v MINISTER OF LAW AND ORDER** 1986 (2) SA 805 (A) at 819 G – 820 B. Secondly, on inspector Becezi's version, he requested the respondent to give an explanation in respect of the allegations against him and the respondent refused or elected not to do so.

[8] The magistrate made no finding of credibility. As the onus on the issue in question was on the appellant, the matter has to be decided on the version of the respondent, unless that version could be rejected as false on the record. In my judgment this is not possible. On the contrary, the probabilities tend to favour the respondent's version. It is not disputed that the respondent had a letter in his possession that was at least interpreted as permitting the respondent to have access to the house to the exclusion of others. It is not disputed that the respondent took this letter, *inter alia*, to the

magistrate and in fact showed it to the police officer Mokoena on the day before his arrest. It is common cause that on the day of the arrest the respondent went to the police station on his own in order to answer to the allegations against him. In the circumstances it is probable that the respondent would have taken the letter along and would indeed have attempted to show the letter to inspector Becezi. Also, on inspector Becezi's version, it is improbable that the respondent would have become uncooperative. In argument on behalf of the appellant, it was suggested that the letter may not have borne out the respondent's version. The difficulty with this argument is that the onus to show that, was on the appellant.

[9] On the version that has to be accepted for purposes of the decision of the appeal therefore, inspector Becezi ignored a document that was specifically put forward in answer to the allegations against the respondent. This was quite unreasonable. In fact, in my view, inspector Becezi was obliged to have a look at the letter. Had he done so, he

would soon have ascertained that a family dispute is involved and that there are at least considerable doubt as to whether the respondent had the intent to commit a crime. For this reason alone, inspector Becezi's suspicion cannot be said to rest on reasonable grounds. It follows that, although for different reasons, the finding that the appellant did not show a reasonable suspicion, cannot be disturbed.

[10] Regarding the quantum of damages awarded, it would appear from the magistrate's *ex tempore* judgment as if the respondent's claims were simply granted as if they were liquid claims which, of course, is impermissible and improper. In his subsequent reasons for judgment, the magistrate referred in this regard to two cases, namely **TOBANI v MINISTER OF CORRECTIONAL SERVICES NO** [2000] 2 ALL SA 318 (SEC) and **GELDENHUYS v MINISTER OF SAFETY AND SECURITY AND ANOTHER** 2002 (4) SA 719 (C). The **GELDENHUYS**-case is of no assistance in this case as the circumstances thereof are completely different. In this case an amount of R300 000,00 was awarded as

general damages for pain and suffering in a case where the plaintiff suffered significant brain damage as a result of negligent failure during cell visits to observe that the plaintiff had been severely injured. The **TOBANI**-case is in itself a clear indication that the present awards are excessive. In that case an award of R50 000,00 was made where the plaintiff was unlawfully detained from the date on which the case against him was withdrawn on 28 July 1998 to 17 February 1999. In the instant case the respondent was 32 years of age at the time of the trial, had passed matric and was married, but was unemployed. The respondent gave no evidence as to how he experienced the unlawful arrest and detention other than saying that he felt very sad. I accept, however, that respondent suffered unpleasantness and anxiety. Instructed by the approach and principles set out in **MINISTER OF SAFETY AND SECURITY v SEYMOUR** 2006 (6) SA 320 (SCA), I believe that an amount of R15 000,00 is an appropriate award of damages in respect of unlawful arrest and detention in this case.

[11] The question of quantum of damages received virtually no attention at the trial. Already in his heads of argument, counsel for the respondent conceded that the award of the magistrate cannot stand and should be substantially reduced. In the result, the hearing of the appeal was for the most part confined to the questions whether the arrest and detention were shown to have been lawful. The appellant argued that that was the case but was unsuccessful. In the exercise of our discretion in the particular circumstances of this case, I believe that justice and fairness require that the appellant be ordered to pay 80% of the respondent's costs of appeal. The appellant must of course bear the costs of the trial.

[12] The following orders are made:

1. The appeal succeeds only to the extent that the awards of damages in the total sum of R100 000,00 are set aside and replaced with judgment in favour of the respondent in the amount of R15 000,00.

2. The appellant is ordered to pay 80% of the respondent's costs of appeal.

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C.H.G. VAN DER MERWE, J

I concur.

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S. EBRAHIM, J

On behalf of appellant:	Adv. J.Y. Claasen With him Adv. L.H. Adams Instructed by: The State Attorney BLOEMFONTEIN
On behalf of respondent:	Adv. C. Snyman Instructed by: Lovius Block BLOEMFONTEIN

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