



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 39728/08

DELETE WHICHEVER IS NOT APPLICABLE

DATE: 17/6/2010

- (1) REPORTABLE: YES/NO. ☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES
(3) REVISED.

11.06.2010
DATE

[Signature]
SIGNATURE

IN THE MATTER BETWEEN

DIRK JOHANNES MULLER

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

MAKGOBA, J

- [1] The plaintiff instituted a claim against the defendant for damages arising out of his alleged unlawful arrest and detention by members of the South African Police Service. At the trial both liability and *quantum* were in dispute.

- [2] It is common cause that the plaintiff was arrested without a warrant of arrest on 27 August 2005 at Barberton and released on 29 August 2005 without any charge being preferred against him or any appearance in court. It is further common cause that the plaintiff was arrested by a peace-officer in the service of the defendant, who at all material times acted within the course and scope of his employment with the defendant.
- [3] In his defence the defendant denied that the arrest was unlawful and stated that the plaintiff was arrested in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 in that the plaintiff was reasonably suspected of having committed an offence referred to in Schedule 1 of the Act in that the plaintiff was reasonably suspected of having stolen an amount of R2 400,00 from one Stefan van den Berg on 26/27 August 2005.
- [4] It is trite that an arrest is *prima facie* unlawful and wrongful. It is for the defendant to prove the lawfulness of the arrest. See *Ralekwa v Minister of Safety & Security* 2004(1) SACR 131 (T); *Louw v Minister of Safety & Security* 2006(2) SACR 178 (T); *Minister of Law and Order v Hurley* 1986 3 SA 568 (A) at 587-589.

In *Zealand v Minister of Justice and Constitutional Development* 2008(2) SACR 1 (CC) at page 11 LANGA CJ held that:

"[24] There is another, more important reason why this court should rule in the applicant's favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of the freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken."

[5] The factual background to this case will have to be looked into in order to determine whether the defendant has discharged the *onus* of proof that rests on him.

[6] On the morning of 27 August 2005, at Barberton police station, the plaintiff and one Alwyn Nunes were arrested by a member of the South African Police Force. They were detained in the holding cells at the police station at 12:00 until he was released on the morning of 29 August 2005 at around 09:25. The arrest relates to the complaint lodged by Mr Van den Berg, who alleged that in late hours of 26 or early morning of 27 August 2005 his money in an amount of R2 400,00 was stolen from his house. Mr Van den Berg, his girl friend, the plaintiff and Mr Nunes had spent the night at this house.

- [7] The evidence of the plaintiff is that early the next morning of 27 August, Van den Berg informed plaintiff that his money was missing and that Mr Nunes had gone away. Van den Berg suspected Nunes as the thief and went to his house to confront him. At 11:00 Van den Berg came to the plaintiff's house with Nunes. The three then went to the police station at the insistence of Mr Nunes who said he wanted to go for a polygraph test. At the police station the police appeared to be reluctant to do anything about the case and Mr Van den Berg then informed the uniformed policeman who was on duty that he would personally deal with the matter by assaulting the guilty person. The policeman then decided to arrest both the plaintiff and Nunes and locked them up to "protect them against Van den Berg".
- [8] The plaintiff states that when he was locked up he was never informed of the crime he was being arrested for, that no constitutional rights were explained to him that he was under arrest and that form SAP 22 (a document containing a detainee's rights) was never completed, read out and given to him to keep. His personal properties in the form of a wallet containing about R150,00, licence, library card and bank card were left in his possession when he was locked up. According to the plaintiff Van den Berg begged the police not to detain the plaintiff but they could not listen to him.
- [9] The investigating officer arrived there the following morning on Sunday. Nunes told the investigating officer that he will admit guilt and will give the money back.

Notwithstanding that, the investigating officer told him that they can wait until the next day. The next morning on 29 August 2005 the plaintiff was released at about 09:00 without being charged or appearing in court.

[10] It is common cause that the investigating officer in the case relating to loss of Mr Van den Berg's money is Inspector Mhlongo, who gave evidence in this case on behalf of the defendant. According to plaintiff he was never arrested and detained by Inspector Mhlongo. He saw Inspector Mhlongo for the first time on Sunday and thereafter on Monday 29 August when he was released.

[11] Inspector Mhlongo testified that he is a police officer for the past eighteen years. On 27 August 2005 at around 08:00 he reported for duty at the police station at Barberton. He left the police station to attend to other dockets and came back at about 09:00 or 10:00. He found the complainant (Van den Berg), the plaintiff and Mr Nunes at the charge office. He was told by another police officer that he must attend to complainant.

[12] He had seen the docket which relates to the complainant's case. He interviewed the complainant who told him that his money was stolen. He suspected these people (referring to the plaintiff and Nunes). He then interviewed the plaintiff and Mr Nunes who denied having taken the money but admitted having been at Van den Berg's place on the day the money got lost. He was convinced that the

plaintiff and Mr Nunes might have stolen the money, therefore he arrested the suspects.

[13] Counsel for the defendant argued that Inspector Mhlongo's suspicion was rested on reasonable grounds and that it should be found that the arrest of the plaintiff was lawful as it falls within the ambit of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977. Before I can conclude that Inspector Mhlongo's suspicions was on reasonable grounds I need to make a finding that he was the peace officer who arrested the plaintiff on 27 August 2005. According to the plaintiff he was arrested by the unknown uniformed policeman in the charge office and not Inspector Mhlongo whom he saw for the first time on Sunday morning, 28 August 2005.

[14] On the issue as to who arrested the plaintiff there are two irreconcilable versions. The technique generally employed by courts in resolving factual disputes of this nature was summarised in the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martel ET CIE and Another* 2003 1 SA 11 (SCA) at 14-15 by NIENABER JA who said the following:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the

veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

- (i) the witness' candour and demeanour in the witness box,
- (ii) his bias, latent and blatant,
- (iii) internal contradictions in his evidence,
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions,
- (v) the probability and/or improbability of particular aspects of his version,
- (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof, has succeeded in discharging it."

- [15] There are stark differences in the evidence between the plaintiff and the defendant's witness, Inspector Mhlongo. In assessing the evidence I take into account the honest and open way in which the plaintiff testified in court. He was, although subjected to an intense cross-examination, not shaken in any way. He did not deviate from his evidence in chief. His evidence has, in my view, the ring of truth.
- [16] On the other hand the evidence of Mhlongo was of such a poor quality that the court cannot accept any of his evidence where it differs with the evidence of the plaintiff. He contradicted himself on material aspects and was admonished by the court on several occasions to speak up. He was not sure of himself when giving evidence in chief and when answering questions under cross-examination. To sum up, he was a pathetic figure in the witness box.
- [17] The probabilities show that Mhlongo did not effect the arrest of the plaintiff on 27 August 2005 but that another police officer did that as testified by the plaintiff. The case docket itself shows that he only received the docket for further investigation on 29 August 2005 when it was booked out to him by his superior, Superintendent Seimela. I therefore reject Mhlongo's evidence that he questioned the plaintiff on 27 August 2005, formed a suspicion that the plaintiff had committed an offence and then arrested him.

[18] Having rejected the version of Inspector Mhlongo, I accordingly find that there is no evidence to show that any police officer reasonably suspected the plaintiff of having committed an offence. The defendant's defence as pleaded can therefore not stand. I conclude therefore, that the arrest and detention of the plaintiff was unlawful. That brings me to the question of *quantum*.

[19] In reaching a decision on the damages to be awarded I am mindful of the fact that each case must be looked at on its own merits and that a comparison of cases could be used as a guideline to assist the court in arriving at an award. In *Minister of Safety and Security v Seymour* 2006 6 SA 320 (SCA) at page 325 NUGENT JA held that:

"[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."

[20] In this case I take into consideration that the plaintiff spent two nights in detention and was ultimately released without being charged. The police had an opportunity to desist from arresting him when the complainant, Van den Berg objected to the arrest and indicated that he did not suspect him. Furthermore on Sunday Mr Nunes admitted guilt but the police did not consider the plaintiff's

release. The conduct of the police in this regard can be said to have been heartless if not malicious.

[21] The plaintiff has undergone a harrowing experience of being locked up in police cells with seasoned criminals who harassed him for almost the two days he spent in detention. He could hardly eat and have a peaceful sleep. To date hereof he is still bitter and regards the incident unforgettable.

[22] I have considered several and comparable decided cases wherein different awards were made regard being had to the circumstances of the particular case. The following are such cases with corresponding amounts of damages awarded: *Seria v Minister of Safety and Security* 2005 5 SA 130 (C) (amount R50 000,00); *Van Niekerk v Minister of Safety and Security* 2008(1) SACR 446 (W) (amount R80 000,00); *Olivier v Minister of Safety and Security* 2008(2) SACR 387 (W) (amount R50 000,00); *Sibiya v Minister of Safety and Security* [2008] 4 All SA 570 (N) (amount R308 750,00); *Van Rensburg v City of Johannesburg* 2009(1) SACR 32 (W) (amount R75 000,00).

[23] It is not an easy task to determine the amount to be awarded and whilst cases referred to above have served as a useful guideline and taking into consideration the aggravating circumstances in this case as outlined in plaintiff's evidence, I am satisfied that an amount of R120 000,00 is reasonable in the circumstances.

[24] The following order is made:

- (a) The defendant is ordered to pay to the plaintiff an amount of R120 000,00.
- (b) Payment of interest at the rate of 15,5% per annum from 28 May 2010 to date of payment.
- (c) Costs of suit, which costs shall include the costs of plaintiff's senior counsel.


E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

39728-2008

HEARD ON: 4 JUNE 2010
FOR THE PLAINTIFF: ADV G C MULLER *Sc.*
INSTRUCTED BY: COETZER ATTORNEYS
FOR THE DEFENDANT: ADV PHASWANE
INSTRUCTED BY: STATE ATTORNEY