

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

CASE NUMBER: 24029/2011

15/5/2013

In the matter between:

MHLONGO, S

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

STRIJDOM AJ

(A) INTRODUCTION:

1. The Plaintiff's claim is for damages for alleged wrongful and unlawful arrest and detention. Plaintiff claims damages of R9,928,300.00 (nine million nine hundred and twenty eight thousand three hundred rand) Plaintiff was arrested by Constable Banda in Witbank on 23 November 2009 and he

was released from custody on 8 June 2010 after the State declined to prosecute.

2. The Defendant has conceded the arrest and detention of the Plaintiff by the Defendant's members. Defendant denies the allegation that the Plaintiff was wrongfully and unlawfully arrested and detained.
3. The Defendant has raised a defence relying upon section 40(1)(b) of the Criminal Procedure Act no 51 of 1977. The salient wording of section 40(1)(b) reads:

"(1) A peace officer may without warrant arrest any person:

(a)

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1"

Forgery is a Schedule 1 offence.

DEFENITION OF FORGERY:

4. In his book Criminal Law, 2nd ed CR Snyman discuss the difference between fraud and forgery. He states on p514:

"Whereas fraud is completed only when misrepresentation has come to the notice of the representee, forgery is completed the moment the documentation is falsified..... The falsification can be achieved in many ways, for example by the alteration, erasure, substitution or addition of particulars on the document or by endorsement, but not by the destruction of the whole document."

5. In terms of Section 31(1)(d) of the Births and Deaths Registration Act No 51 of 1992 it is an offence for any person to falsely make or counterfeit or causes to be falsely made or counterfeited any document or record mentioned in the Act.

6. Section 31(2) reads:

"If in any proceedings the question arises whether, or it is alleged that, any person obtained in contravention of the provisions of this Act any certificate which has been or may be issued in terms of this Act, and such certificate is forged or spurious, such person shall be presumed to have so obtained such certificate and it shall be presumed that such certificate is forged or spurious until the contrary is proved."

7. The Plaintiff admitted that the birth certificate was issued by Home Affairs without a photograph. Plaintiff also admitted that he was the one who had affixed his photograph of himself to the birth certificate.
8. Section 18(1) of the Identification Act No 68 of 1997 provides that:

"No person shall -

*(e) Imitate, alter, deface, destroy or mutilate any identity card
..... certificate*

*(i) Posses any identity card, a certificate or temporary
identity certificate which has been initiated, altered,
defaced or mutilated"*

The definition in the Identification Act means a birth, death or marriage certificate.

COMMON CAUSE FACTS:

9. The Plaintiff was arrested in the Witbank branch of Standard Bank after the branch manager contacted the Police.

10. Plaintiff was in possession of a birth certificate to which his own passport size photograph was affixed.
11. The forenames, surname and identity number depicted on the birth certificate resembled that of complainant Mhlongo.

PLAINTIFF'S CASE:

12. Plaintiff testified that he had lost his original identity book in February 2009. he waited some four to five months before he could apply for a replacement identity book.
13. He was in the bank in Witbank for an inquiry for deposits and withdrawals which were allegedly made to his bank account, He had revived this banking account, which lied dormant in July 2009 because his employer wanted to deposit his wages into it, however, his employer did not take Plaintiff's banking details.
14. He conclude that at the end of October 2009 a sum of R6,500.00 was deposited into his account and he did not know where the money came from. He made inquiries at the Gezina branch of the bank. His bank cards were confiscated. He was then referred to the branch in Witbank where his banking account was kept. He had the birth certificate with his photograph affixed thereon with him when he went to Witbank.

DEFENDANT'S CASE:

15. Constable Banda's evidence, which is largely uncontested, testified that he called the Plaintiff aside at the bank in Witbank and requested him to recite the particulars on the birth certificate. He did likewise with complainant Mhlongo.
16. He decided to take the Plaintiff and complainant Mhlongo to the Office of Home Affairs in Witbank in order to verify their identities. Each one had put his thumb print on a scanner at the Office of Home Affairs.
17. The Plaintiff's forenames, surname, identity number, fingerprints and photographs did not show on the screen. The particulars of complainant Mhlongo showed on the screen.
18. Thereafter Constable Banda informed the Plaintiff that he was arresting him for forgery of the birth certificate that was not his.
19. Constable Tembi Ngwenya testified that she accompanied Constable Banda to Home Affairs to find out who the rightful owner was of the birth certificate and that no data of the Plaintiff appeared in the computer's screen. She confirmed the evidence of Constable Banda.

20. Constable Madiba testified that she received the case docket for further investigation and the case was later withdrawn by the prosecutor.

THE UNLAWFULNESS OF THE ARREST:

21. It is trite that the onus rested on the Defendant to justify the Plaintiff's arrest. The question is: did Constable Banda entertain a reasonable suspicion that the Plaintiff has committed an offence of forgery?

22. In **Minister of Safety and Security v Sekhoto and Another (131/10)** [2010] ZA SCA 141 his Lordship Harms DP stated:

"As was held in Duncan v Minister of Law and Order, the jurisdictional facts for a section 40 (1) (b) defence are that:

- (i) The arrestor must be a peace officer;*
- (ii) The arrestor must entertain a suspicion;*
- (iii) The suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and*
- (iv) The suspicion must rest on reasonable grounds"*

23. In **Duncan v Minister of Law and Order 1986 (2) SA 805 (A)** his Lordship Van Heerden JA (as he then was) said:

"If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e. he may arrest the suspect. In other words he then has a discretion as to whether or not to exercise that power."

He continued:

"..... an arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court."

24. Constable Banda testified that he suspected the Plaintiff to have committed forgery after seeing the Plaintiff's photograph on the birth certificate. To him it was suspicious and unusual and not done by Home Affairs.
25. What acerbated his suspicion was that the Plaintiff's particulars were not displayed on the screen after he had placed his thumb print on the scanner.
26. Constable Banda's evidence was not seriously contested in cross-examination by Counsel for the Plaintiff. He did not contradict himself or other witnesses and his evidence was corroborated by Constable Tembi Ngwenya.

27. Counsel for the Plaintiff submitted that Constable Banda was obliged before arresting the Plaintiff to evaluate the objective facts at his disposal and that the suspicion formulated by Banda was not founded on a reasonable ground and accordingly the arrest was unlawful.
28. In my view, considering the evidence of the Plaintiff and the Defendant the suspicion which Constable Banda entertained was not arbitrary. He checked the information at his disposal by taking the Plaintiff and the complainant Mhlongo to the Office of Home Affairs for verification of their particulars.
29. All the four jurisdictional facts were met, and the discretion to arrest was properly exercised. In my view the arrest was lawful and justified.

THE DETENTION:

30. The further detention of the Plaintiff in custody was authorised by the Magistrate on 24 November 2009.
31. The case was postponed for further investigations. On 24 December 2009 the Plaintiff was granted bail of R1,500.00 which he could not rise. He remained in custody until he was released on 8 June 2010 when the case was provisionally withdrawn.

32. In **Isaacs v Minister van Wet en Orde** 1996 (1) ALL SA 343 (A) the Court had to decide whether the appearance of the Appellant before the Magistrate ended the unlawful detention.
33. The Court considered the provisions of Section 50(11) of the Criminal Procedure Act 51 of 1977 and held that the purpose of this subsection was twofold: to ensure that the arrested person appeared before Court as soon as possible after the arrest, and to allow the Court to order the further detention of the arrested person for the purposes of the trial. The Court found that the Magistrate was competent to order the further detention of the Appellant and such detention was lawful.
34. In my view the further detention of the Plaintiff until 8 June 2010 was ordered by the Magistrate and was lawful.
35. If the further detention was unlawful, action should have been instituted against the Minister of Justice and not the Minister of Police.
36. In **Minister of Safety and Security v Sekhoto and Another** *supra* the Court stated:

“Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours. Once that has been

arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the Court."

37. It follows that the Plaintiff's claim is dismissed with costs.

SIGNED AT PRETORIA ON THIS THE 15th DAY OF MAY 2013


JJ STRIJDOM
ACTING JUDGE:
NORTH GAUTENG HIGH COURT

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