IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No 3858/2003

In the matter between :

HEZEKIA MUZIKAYISE BHENGU Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY Defendant

J U D G M E N T

NICHOLSON J

[1] The plaintiff has instituted an action against the defendant, the Minister of Safety and Security, for damages in the sum of R510 000 for his unlawful arrest and detention during the period 31 October 2002 until 7 November 2002.

[2] The damages in the sum of R10 000 being the fair and reasonable legal costs incurred by the plaintiff were agreed between the parties.

[3] It is trite law that an arrest or detention is *prima facie* unlawful and it is for the defendant to prove the lawfulness thereof. The plaintiff, who was represented by Mr Lombard, testified as did his erstwhile advocate Mr Slabbert. The defendant, represented by Mr Abrahams and Miss Bell, called erstwhile Inspector Vandayar and Inspector Govender to testify on his behalf.

[4] It is common cause that the plaintiff was arrested and detained as aforesaid by Inspector Vandayar. The sole remaining issues relate to the lawfulness of the arrest and detention and the quantum of his general damages.

[5] The defendant pleaded that the plaintiff's arrest and detention was lawful as the provisions of section 40 of the Criminal Procedure Act, 51 of 1977 were complied with. Section 40(1)(b) 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.

[6] Part of Schedule 1 is any offence the punishment whereof may be a period of imprisonment exceeding six months without the option of a fine.

[7] Inspector Vandayar was part of a unit investigating cash in transit (CIT) robberies and was tasked to apprehend armed persons who attacked a Fidelity vehicle on 11 September 2002 at 8.25am in Charter's Creek area of Zululand. There was a shootout and the armed robbers fled. According to Vandayar there

were no eye witnesses and no finger print evidence to assist the police in apprehending the culprits.

[8] Vandayar first arrested Thomas Mthembu and as a result of what he told the police he arrested one Mfanafuthi. Thereafter the police went to the home of the plaintiff who was not there. The home was not searched. The plaintiff was contacted and he eventually handed himself over to the police in the presence of his advocate Mr Slabbert on 31 October 2002. I do not agree with Mr Abrahams' submission that the plaintiff consented to his arrest. He was vehemently opposed to being arrested and detained and stayed away for three or more weeks to avoid that. It was never pleaded that he consented.

[9] The notion of suspicion implies an absence of certainty or adequate proof (see *Duncan v Minister of Law and Order* 1984(3) SA 460 T). The suspicion does have to be reasonable and by that I understand that the suspicion must be entertained upon reasonable grounds.

[10] Vandayar testified that he relied on information provided by Mthembu and also certain admissions made by the plaintiff during certain phone calls made by Mthembu to the plaintiff in Vandayar's presence.

[11] Mr Abrahams did not call Mthembu, although he told me that he had consulted with him at Court shortly before the trial resumed on 5 July 2010.

Govender testified that Mthembu was in jail serving a life sentence for murder and a lengthy prison sentence for cash in transit robberies and attempted murders.

[12] Govender described Mthembu as the fourth most wanted criminal in the country who was linked to 37 cash in transit cases.

[13] Mthembu had been evading arrest from 1995 to 2002. Clearly Mr Abrahams did not call him because he was not going to help the defendant's case.

[14] Vandayar was also in jail for 9 years for culpable homicide arising out of the death of a detainee in his custody He conceded lying under oath in his trial. He may well be testifying in the hope of an early release.

[15] There are numerous contradictions between Vandayar's evidence in Court and his police statement in the docket. The date and month of the visit to arrest the plaintiff at his home differs. Vandayar concedes finding no weapons at plaintiff's home. He then testified that he phoned the plaintiff on his cell phone and handed it over to Mthembu to speak to the plaintiff. Vandayar placed the phone on speaker and handed it Mthembu to speak.

[16] Assuming that the probabilities favour that it was the plaintiff who answered, Vandayar says the conversation was conducted in Zulu. Vandayar has a slight knowledge of Zulu but is not fully conversant. The weapons were not mentioned by name but referred to as “things”. At best the man who answered said he would hand “the things” to Mthembu in Durban. Under cross-examination Vandayar said Mthembu had dialled the number.

[17] Although Vandayar testified about “things” in his police statement he spoke about a LM6 rifle and an AK47.

[18] On the 3 October Vandayar testified that plaintiff phoned Vandayar on his phone and Vandayar did not answer as that would betray who he was. In his police statement Vandayar said he actually spoke to plaintiff on the phone and pretended to be Mthembu. He said to Mthembu that he would call back. This is a serious contradiction more especially because Vandayar said he spoke to plaintiff in Zulu. It seems most improbable that his limited Zulu would have satisfied the plaintiff that it really was Mthembu speaking.

[19] Vandayar said he visited Mthembu in the cells on the same day and told him to phone the plaintiff again, using the speaker phone. Mthembu did so and again speaking in Zulu was told by the plaintiff that the “items” they were looking for were taken by one Lawrence on the bridge at Charter’s Creek. When

Vandayar and the members of his squad went to apprehend Lawrence, he had fled.

[20] Again the conversation was in Zulu and I have grave doubts that the Court can rely on Vandayar's knowledge of the language. The telephone conversations are radically different in that the first posits the plaintiff as having the weapons and undertaking to hand them over in Durban, while the second is to the effect that they were with Lawrence having been taken on the bridge at Charter's Creek, where the attempted robbery took place.

[21] In addition it was put to plaintiff that the weapons were taken by Mfanafuthi, who I gather is not Lawrence.

[22] There are also other material differences between what was put to the plaintiff and what Vandayar said in evidence. For example it was put that an AK47 was recovered from Lawrence in Verulam, whereas in his evidence Vandayar says nothing was found.

[23] Vandayar was also most unimpressive when he explained his note in the Occurrence Book on 31 October 2002. The word "complainant" was deleted and the word "witness" inserted in its place. Vandayar said there was no complainant and then was confused as to who the witnesses were who pointed out the plaintiff.

[24] I accept that with serious crimes such as cash in transit heists arrests do have to be made. I also accept that the police had suspicions but I have doubts that they established on a balance of probabilities that there were reasonable grounds. In the absence of evidence from Mthembu, Mr Abrahams was left with what he conceded was very scanty evidence.

[25] In the premises I am of the view that the defendant failed to justify the arrest and detention.

[26] The plaintiff is 47 years old and worked for nearly 20 years as a policeman. He was held in custody for seven days which must have been a humiliating experience. He shared a cell with other prisoners and had to shower and use the toilet in full view of the others. There were suggestions that the police anticipated that the plaintiff would be held with hardened criminals who would want to exact revenge against him. Plaintiff also testified that he was threatened with ill-treatment by the police until he revealed the whereabouts of the firearms. He said he was aware that abuse does take place and he was apprehensive. In custody, he had no reading matter and no exercise.

[27] Plaintiff is married with four children and runs a taxi business. He is also active in the administration of soccer. He maintains that his incarceration upset his family and tarnished his reputation in the taxi community.

[28] In assessing what damages ought to be awarded I have taken cognisance of the Supreme Court of Appeal judgment in *Minister of Safety and Security v Seymour* [2006] JOL 17531 (SCA) and *Murray and another v Minister of Safety and Security* (Case No 24/52/2008), North Gauteng High Court, Pretoria. In the first mentioned case the plaintiff a 63 year old farmer was awarded R90 000-00 for five days in detention.

[29] In the second mentioned case the plaintiff was awarded the same sum for less than 24 hours detention. The Court in Murray's case does not seem to have considered *Seymour*'s case which may not have been drawn to its attention.

[30] Taking into account all the facts and circumstances and the relevant case law it seems to me that a fair amount of damages for the plaintiff's arrest and detention would be the sum of R130 000-00.

[31] In the premises I grant the following order:

(a) There will be judgment for the plaintiff against the defendant for

(i) damages in the sum of R130 000-00

(ii) damages in the sum of R10 000-00;

(b) Interest thereon a tempore morae at the prescribed rate in terms of Act No 55 of 1975 from date of judgment to date of payment;

(c) Costs of suit.

Date of hearing : 6 July 2010

Date of judgment : 19 July 2010

Counsel for the Applicant : W Lombard (instructed by J H Slabbert Attorney)

Counsel for the Respondent : F Abraham and D A Bell (instructed by the State Attorney).