



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: 380/2013

In the matter between:

LLEWELYN DU RANDT

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

DEFENDANT

Judgment Date: 18 February 2015

PLOOS VAN AMSTEL J

[1] The plaintiff in this matter sued for damages arising out of his arrest, detention and subsequent prosecution on a charge of possessing ammunition without the required permit¹. It was common cause before me that on 12 November 2011 he was arrested at his home by a member of the South African Police Service, who acted within the course and scope of his employment. The lawfulness of the arrest was not contested in argument at the conclusion of the trial, but it was in relation to the detention and prosecution.

¹ Contravening section 90 of the Firearms Control Act 60 of 2000.

[2] The background was briefly as follows. On Saturday 12 November, in the evening, Sergeant Martin and a colleague were in uniform and patrolling the Amanzimtoti area on crime prevention duties. They received a report from the police station concerning an incident at 63 Fynn Road involving trespass and pointing a firearm. When they got there two of the residents told Martin that a man had been seen on the premises and when they tried to investigate what he was doing he pointed a firearm at one of them. They said they knew the person as he had previously resided on the premises, and identified him as Llewelyn du Randt (the plaintiff). Martin and his colleague searched the premises but found nothing untoward. They then patrolled the area to see if they could find him. While doing so, they received a report from the police station that Du Randt had returned to the premises. They rushed back but could not find him. The owner of the property, who was the plaintiff's former wife, gave them his address in Warner Beach and they proceeded there. The plaintiff was not there, but arrived in his bakkie as they were in the process of leaving. Martin testified that he noticed a firearm on the plaintiff's hip. He told him to put his hands behind his head, whereupon he removed the firearm from its holster. It had a bullet in the chamber and was cocked. It also had bullets in the magazine. Martin found a second magazine on the plaintiff, which had seven bullets in it. He said he informed him of the charges of trespass and pointing a firearm and arrested him.

[3] At the police station Martin found two firearm licences in the plaintiff's wallet. One pertained to the firearm which he had taken from the plaintiff's holster. He asked him where the second firearm was, and was told that it was in a safe at the home of his former wife. Martin returned to 63 Fynn Road, where he found the second firearm in the safe, together with 22 rounds of ammunition for a .303 rifle. He returned to the police station, where he asked the plaintiff if he had a licence or permit for the ammunition. He said the plaintiff refused to answer. He then added a charge of unlawful possession of ammunition to the charges of trespass and pointing a firearm.

[4] The plaintiff's version of the arrest and what happened at the police station was different. He said when Martin arrested him at his home he asked what he was being arrested for, but Martin refused to tell him. He confirmed that at the police station he told Martin about the second firearm in the safe, and that Martin went to fetch it. He said when Martin asked him about the ammunition which he had found in the safe he told him that he had a permit for it, but Martin told him to 'shut up' and

that he was not interested in his 'shit.' He said Martin did not ask where the permit was, nor did he ask to see it. The plaintiff confirmed that he was given a document which set out his rights and listed the three charges on which he was being detained. He confirmed that he read the document and signed it. He also confirmed that when he was given an opportunity to make a statement he elected to say nothing. He remained in detention in the police cells until the Monday, when he appeared in the magistrates' court and was remanded in custody for further investigation. He was then transferred to the Westville Prison. He was released on bail on 28 November.

[5] The plaintiff's trial proceeded only on the charge of possession of ammunition. According to the investigating officer, Constable Shezi, the charges of trespass and pointing a firearm were withdrawn as the complainant had moved to Johannesburg and was not willing to travel to Durban to testify. The plaintiff was acquitted at the end of the case for the State. The judgment was not put before me and it is not clear on what basis he was discharged.

[6] The basis on which the plaintiff contends that his detention was unlawful was as follows. Although he accepts that the arrest was lawful in terms of section 40(1) (b) of the Criminal Procedure Act², he contends that Martin failed to inform him of the cause of the arrest until hours later, that this was contrary to the provisions of section 39(2) and that consequently his detention pursuant to the arrest was unlawful³. He also contends that Martin should have satisfied himself that the identification of the plaintiff as the intruder was reliable and that unless he was so satisfied he should not have continued to detain him⁴.

[7] With regard to the claim for malicious prosecution the plaintiff contends that Martin set the law in motion against him in spite of having been told that he had a permit for the ammunition, and that in those circumstances he could not have had an honest belief that the prosecution had reasonable prospects of success. It was also contended that the search which resulted in the finding of the ammunition was unlawful and that Martin knew that this evidence would be inadmissible.

² Act 51 of 1977.

³ *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (AD) at 266 and further is authority for this proposition.

⁴ See in this regard *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) para [17].

[8] The plaintiff testified that he was the holder of a permit to possess and store the ammunition at the time when it was found in the safe. He produced the permit, on form SAPS 539, which was issued at the Amanzimtoti police station on 28 September 2010. The period of its validity is recorded as 28 September 2010 to 27 September 2012. Constable Shezi testified that when the plaintiff produced the permit at the magistrates' court he was instructed by the prosecutor to confirm with the designated firearm officer who had issued the permit that it was in order. He obtained a copy of the permit from Warrant Officer Mkhwanazi, who had issued it. The copy reflected the period of the permit as one year, not two, and it expired on 27 September 2011. If this was the correct permit then it had expired some six weeks before the plaintiff was arrested.

[9] W/O Mkhwanazi testified that he has been the designated firearm officer at the Amanzimtoti police station since 2006, and is still in that position. He said he is the only person there who issues these permits. He said he was taught when he did a course before his appointment that a permit such as this may not be issued for a period of more than one year. He has issued hundreds of permits, and has never issued one for more than one year. He explained that the form for the permit, which consists of two pages, is available to the public at the police station and can also be downloaded from the SAPS website. An applicant would typically arrive at the police station with the form already filled in, together with the supporting documents such as his identity document, a copy of the firearm licence and a letter of authority from the licence holder.

[10] A comparison of the second page of each of the two permits shows that they are identical. It is the page which contains the date of issue and the signature of the police officer who issued it, in this case W/O Mkhwanazi. None of this was in issue before me. The first pages of the two permits are however different. The handwriting is different and, as I have said, the validity of one permit is one year and that of the other two years. I was impressed with the evidence of W/O Mkhwanazi. It was logical and independent evidence. When he was approached by Cst Shezi in connection with the permit he produced the copy from his file. It was the one year permit which had expired on 27 September 2011.

[11] I find it odd that if the plaintiff had a valid permit he did not insist on showing it to Sgt Martin. Martin said he asked him if he had a permit and he refused to answer.

The plaintiff denies this. He said he told Martin that he had a permit, but Martin was not interested. I find this inherently improbable. Martin wanted to see the licences for the firearms, and even went to fetch the second firearm in the safe. He said there was no permit in the safe, and the plaintiff admitted that he did not tell Martin that it was in the safe. He said he was worried the permit would disappear. I think it highly unlikely that if Martin had been told that the plaintiff had a permit, he would not have wanted to see it. It is also of significance that when the plaintiff was given the opportunity to give an explanation in what is known as a warning statement, he elected to say nothing. I do not accept the plaintiff's version of the events where it differs from that of Sgt Martin. It is inherently improbable.

[12] The probabilities are that the plaintiff forged the permit by removing the first page, which reflected an expiry date of 27 September 2011, and replacing it with a first page which he had completed with the same details, except for the expiry date, which he reflected as 27 September 2012.

[13] I also do not accept the plaintiff's evidence as to the circumstances of his arrest. Martin said he told him that he was arresting him on a charge of trespass and pointing a firearm and that the complainant was at the police station, laying the charges. It is unlikely in my view that Martin would have refused to tell the plaintiff the reason for his arrest when he pertinently asked him what it was. Martin's evidence was not perfect, but it must be borne in mind that he was testifying about events which occurred more than three years ago. His version is in my view supported by the probabilities, while the plaintiff's version suffers from the inherent improbabilities to which I have referred. The further basis on which it is contended that the detention was unlawful was that Martin should have made some enquiries to satisfy himself that the identification of the plaintiff was reliable. There is no substance in this point. While it is correct to say that the police are obliged to release a person when it becomes clear that there is no case against him,⁵ I do not consider that there was a duty on Martin in the circumstances of this case to investigate the matter any further. The plaintiff had been identified by two people who knew him as they had previously all resided on the same premises. It cannot be said that further enquiries by Martin would have led to the plaintiff's release, as was the case in *Du Plessis*. I conclude therefore that the plaintiff's detention was lawful. I should add that when the plaintiff appeared in court and was remanded in custody, his continued detention was a

⁵ *Minister of Police v Du Plessis* (supra) para [17].

matter for the discretion of the court. Once he was brought before the court the authority of the police to detain him, which was inherent in the power to arrest him, was exhausted.⁶

[14] In order to succeed with the claim for wrongful prosecution, or malicious prosecution as it is known, the plaintiff had to prove that Sgt Martin instituted the proceedings without reasonable and probable cause. This means an honest belief founded on reasonable grounds that the institution of the proceedings is justified. It is not disputed that the plaintiff had custody and control of ammunition for which he required a permit. On Martin's evidence, which I accept, there was no permit in the safe and when he asked the plaintiff if he had one he refused to answer. In those circumstances Martin was perfectly entitled to charge the plaintiff with the unlawful possession of ammunition. It was also contended that the search of the safe was unlawful and that Martin knew the evidence relating to the ammunition would be inadmissible. I am not persuaded that the search was unlawful. Mrs Du Randt consented to the search of the safe which was in her home, as contemplated in section 22 (a) of the CPA. Counsel submitted that this is not enough, as the purpose of the search had to be the seizing of any article referred to in section 20. That section refers, inter alia, to an article which may afford evidence of the commission or suspected commission of an offence. I think the probabilities indicate that Martin wanted to satisfy himself that the plaintiff did not possess any firearm without being in possession of a licence for it. As it turned out he was right. The ammunition which he found afforded evidence of the commission of an offence, as contemplated in section 20 (b). In any event, if the search was unlawful the result would be to render the evidence inadmissible. There is no basis for a finding that Martin knew the evidence would be inadmissible and therefore did not have an honest belief that the prosecution had reasonable prospects of success. If he did think about it, he would have been entitled to leave that for the discretion of the prosecutor. The claim for malicious prosecution can therefore not succeed.

[15] I have found, on a balance of probabilities, which is the test in a civil case, that the plaintiff forged the permit by replacing its first page with a document which reflected substantially the same information, but an extended expiry date. I intend to refer these papers to the Deputy-Director of Public Prosecutions so that she can consider whether criminal charges should be brought against the plaintiff, and to the

⁶ *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) para [42].

Registrar of Firearms, so that she can consider whether the plaintiff should be declared unfit to possess a firearm.

[16] The order which I make is as follows:

- (i) The defendant is absolved from the instance with costs.
- (ii) I direct that a copy of this judgment, together with the documentary exhibits, be forwarded by the Registrar to the Deputy-Director of Public Prosecutions, so as to enable her to consider whether criminal charges should be brought against the plaintiff, and to the Registrar of Firearms, so that she can consider whether the plaintiff should be declared unfit to possess a firearm.

PLOOS VAN AMSTEL J

Appearances:

For the Plaintiff : Adv. E Lingenfelder

Instructed by : Weber Attorneys
Durban

For the Defendant : Adv. M M Matlamela

Instructed by : C W Dorkin State Attorney Natal
Durban

Date of Hearing : 4, 5, 6 February 2015

Date of Judgment : 18 February 2015