

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 31321/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

20 MAY 2016

FHD VAN OOSTEN

In the matter between

MDUDUZI RANDOLPH NGUBANE

PLAINTIFF

And

MINISTER OF POLICE

FIRST DEFENDANT

LT-COL QANGASE

SECOND DEFENDANT

Delict - unlawful arrest and detention - plaintiff arrested at his workplace - police officers in meeting with plaintiff in investigation of a criminal case - plaintiff allegedly obstructing police officers in the course of their duty - not such a serious case as to warrant an arrest and incarceration - claim upheld.

Damages - general damages - award of - plaintiff incarcerated in police holding cell for three-and-a-half hours - embarrassment and distress - negative impact on plaintiff's employability - R80 000-00 awarded - costs of High Court scale.

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] In this action the plaintiff claims damages for an alleged unlawful arrest and detention. The plaintiff's arrest on 4 January 2012, at his workplace during mid-day and his detention from approximately 14h30 until 18h00 that afternoon, are common cause. The defendants' case is that the arrest was effected in terms of s 40(1)(j) of the Criminal Procedure Act 51 of 1977, which provides that a peace officer may without a warrant arrest any person who wilfully obstructs him in the execution of his duties and that the plaintiff was detained in terms of s 50(1) of the CPA. The onus to prove the lawfulness of the arrest is on the defendants (see *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A); *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A)).

[2] In respect of the plaintiff's case the plaintiff and Daniel de Jager testified. The second defendant was the only witness called to testify for the defendants.

Background

[3] Before I deal with the evidence of the plaintiff's witnesses it is necessary to set out the background facts that lead to the incident. The plaintiff at the time of the incident was the managing director of Tanker Services Fuel and Gas (Pty) Ltd (Tanker) a subsidiary of Imperial Ltd, with business premises situated in Germiston. He was appointed in that position on 1 September 2011. He however, is unemployed at this time. De Jager was, and still is, the national investigator in the employ of the company, a position he has held for 4 years. The reason for the second defendant and 3 of his colleagues visiting the premises on the day of the incident, has its genesis in a complaint lodged at the Germiston police station, by one Yusuf Hussein Hassen, concerning an alleged theft under false pretences, pursuant to a transaction he had concluded with Tanker in 2009. Hassen, it is common cause, had paid a cash amount of R200 000-00 into Tanker's bank account, on 1 April 2009, which was the purchase price of a trailer sold to him by Tanker. For some reason the tanker was never delivered to him and he specifically came from Dar es Salaam, in Tanzania to Germiston in order to obtain a refund of his money. The plaintiff, of course, was unaware of the transaction, as it had occurred prior to his appointment. The financial director of Tanker, Ms Magdalena Nel, was the *dramatis persona* concerning the transaction.

[4] Two members of the SAPS accompanied Hassen to the premises of Tanker on the day before the day of the incident, but Ngubane was not there, and they promised to return the next day. The next day Hassen and the second defendant, accompanied by three SAPS constables, arrived at the premises of Tanker. They were granted permission at the security gate to enter the premises and they were eventually invited to sit at conference table in the office of the managing director, the plaintiff. Also present were the plaintiff, De Jager and Ms Nel. The purpose of their visit and the subsequent meeting, the second defendant testified, was to obtain information concerning the transaction.

The plaintiff's version

[5] The plaintiff testified that he had been informed by Ms Nel of the police-visit the previous day and that they would return. As managing director of Tanker he regarded it as essential that any refund of Tanker's monies should be done under his auspices. The second defendant informed the plaintiff that he was there 'with my client' to secure a refund of the monies he had paid to Ms Nel. Hassen produced the proof of payment of the amount. The plaintiff then explained that the money had been paid into a corporate account and not to Ms Nel personally. At that moment the second defendant instructed the constable sitting next to him to handcuff the plaintiff. The constable proceeded to cuff the plaintiff's hands behind his back. The plaintiff did not say anything. The meeting continued and he slowly gained an understanding of exactly what the issue was. The meeting ended sometime between 11h00 and 12h00. The police officers then grabbed him and escorted him out of the office past the offices of other employees, who were all able to and did, observe what was happening, to the main gate. The police officers first had a smoke and discussed their shifts whereafter he was shoved into the police van and taken to the Germiston police station. There he waited for an attorney who had been summoned by De Jager, to arrive. He was allowed to phone his wife who in disbelief assumed that it was all a practical joke. At 14h30 he was taken to a cell in which there were 5 to 8 other persons, in the most appalling conditions. He was eventually released at 18h00 and appeared in court the following morning when all charges against him were withdrawn.

[6] De Jager confirmed that he was present at the meeting. He expressed the view to

the second defendant that this was a civil matter and challenged the authority of the second defendant and his colleagues, as uniformed policemen, to investigate the case which according to him, had to be conducted by detectives. The challenge, he testified, was premised on his experience having been a member of the SAPS for 18 years, 13 of which as a detective. He confirmed that the plaintiff was handcuffed after having said that the monies had not been paid to Ms Nel personally but to the company, and added that he specifically warned the second defendant that the plaintiff was not obstructing him and that 'what he was doing, was wrong'.

The defendants' version

[7] The second defendant testified that after introducing himself and the other members and explaining the purpose of their visit to those present, the plaintiff loudly, while banging on the table, interfered in preventing him from asking any questions to Ms Nel, resulting in it becoming impossible to obtain any information from her. The plaintiff, he continued, took issue with them as uniformed police officials, to conduct the investigation. The plaintiff used abusive language in accusing them of being 'useless'. He warned the plaintiff twice that he was interfering with and obstructing him in the execution of his duties and that he would have to arrest him, but to no avail. He then ordered the arrest of the plaintiff 'by touching him on the shoulder' and handcuffing him as he was gesticulating. He explained his rights to the plaintiff and they all, without more ado, in particular without attempting to question Ms Nel, left for the gate and then proceeded to the police station. The plaintiff was charged with obstructing the police in the execution of their duties and a case of theft 'was opened' against him.

Evaluation of the evidence

[8] The evidence of the plaintiff and De Jager, in my view, is to be preferred to that of the second defendant. The second defendant was an unsatisfactory witness. His evidence in material respects was evasive and he stubbornly latched onto plainly unacceptable notions. He was unable to recall anything more than the plaintiff's alleged challenge to their authority, as to have caused the interference which he maintained made it impossible to continue with the questioning. The possibility of an ulterior motive moreover cannot be excluded: a second case of theft was 'opened'

against the plaintiff that same afternoon, for which there was admittedly no justification at all.

[9] The probabilities, in my view, clearly support the plaintiff's version. The plaintiff had no prior experience concerning the operation of police investigations as opposed to De Jager who, having been a member of the police, was well acquainted with their internal arrangements. It has not been argued that De Jager's evidence should be disregarded, nor am I able to find any reason for doing so. I therefore accept the version of the plaintiff.

[10] It should be added that the arrest, even on the version of the second defendant was unlawful. This was not such a serious case as to warrant an arrest and incarceration. The second defendant was a senior police officer with some 28 years' experience; he was in control of the meeting and could have exercised restraint and common sense in employing less drastic measures than an arrest particularly where a managing director of a company was involved. On the contrary, he testified that he considered himself bound to arrest the plaintiff once he had interfered with his duties. It is abundantly clear from his evidence that he did not at all consider any alternatives (see *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) 186-8).

[11] For all the above reasons I hold that the arrest of the plaintiff was unlawful and it follows that plaintiff's claim must succeed.

Quantum of damages

[12] There can be no doubt that the arrest and detention of the plaintiff caused him embarrassment and distress. It has moreover negatively impacted on his employability. He endured the indignity of being paraded to the main gate while handcuffed for all and sundry, in particular his sub-ordinates, to observe. His dreadful experience being incarcerated in a cell in appalling circumstances, needs no further comment.

[13] Plaintiff contended for an award of general damages of R80 000-00 as opposed to the amount of R35 000-00 contended for by the defendant. I have reviewed the numerous cases in which awards were made for shorter periods than 12 hours

detention and I have come to the conclusion that an award of R8k0 000-00 is fair and reasonable in the circumstances of this case.

Costs

[14] Counsel for the defendant submitted that costs on the appropriate magistrate's court scale should apply. I do not agree. I consider that costs on the high court scale would be appropriate.

[15] In the result judgment is entered for the plaintiff against the defendants, who are ordered, jointly and severally, the one paying the other to be absolved, to pay:

1. The amount of R80 000-00.
2. Interest on the amount in paragraph 1 above at the applicable *mora* rate, from 30 days after the date of this judgment until final payment.
3. Costs of suit.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

ATTORNEY FOR PLAINTIFF

PLAINTIFF'S ATTORNEYS

COUNSEL FOR DEFENDANTS

DEFENDANTS' ATTORNEYS

DATES OF HEARING

DATE OF JUDGMENT

MR L KOTZÉ

BOTHA & SUTHERLAND

ADV Z BUTHELEZI

THE STATE ATTORNEY

19 & 20 MAY 2016

20 MAY 2016

