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

Case No: 37674/2020
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

In the matter between:

MTHANTI, MICHAEL BONGANI

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

THE PROVINCIAL COMMISSIONER OF SAPS

Second Defendant

Neutral Citation: *Mthanti Michael Bongani and The Minister of Police & The Provincial Commissioner of SAPS* (Case No. 37674/2020) [2023] ZAGPJHC 411 (28 April 2023)

JUDGMENT

VAN DER MERWE AJ:

Introduction

[1] The plaintiff instituted an action for delictual damages as a consequence of his arrest on 25 November 2018 and subsequent detention up to 5 December 2018. Plaintiff claims that he was unlawfully arrested without a warrant and detained for the alleged offence of assault with the intent to cause grievous bodily harm.

[2] At the onset of the trial, the plaintiff withdrew the action against the second defendant, The Provincial Commissioner of SAPS. An amendment to the particulars of claim was granted by agreement between the parties correcting the alleged offence plaintiff was charged with and the dates of the plaintiff's arrest, detention and release.

[3] The first defendant withdrew the special pleas relating to non-compliance with the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and the non-joinder of the National Director of Public Prosecutions.

[4] In the amended plea the first defendant (the Minister) pleads that the plaintiff was lawfully arrested in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act") and that he was detained at the Naledi Police Station on 25 November 2018 in terms of section 50(1) of the Act. The plea is silent on the further period of detention up to 5 December 2018.

[5] The questions for determination are the lawfulness of the arrest and subsequent detention and if the arrest and detention are found to be unlawful, the amount of damages to be awarded to the plaintiff.

The facts

[6] It is common cause that the plaintiff was arrested at his place of residence at [...], Soweto on 25 November 2018 without a warrant. The arresting officer was a peace officer who acted in the course and scope of his employment with the Minister. The plaintiff was detained at the Jabulani holding cells (after stopping at the Naledi Police Station) until his first appearance in the Protea Magistrate's Court the next day. His matter was remanded to 5 December 2018 without entertaining bail and the plaintiff was detained at the Johannesburg Sun City prison. On 5 December 2018 the matter was resolved by way of alternate dispute resolution, the charge was withdrawn and the plaintiff was released from custody.

Evidence

[7] The evidence can be summarized as follows: After a late night party which lasted into the early hours of the morning, the plaintiff, on the morning of 25 November 2018 and at [...], accused his brother Sithenjwa Wanda ("Wanda") of the alleged theft of his cell phone. The cell phone was a birthday gift he received the previous evening from Phumelele, a tenant at the property. He believed that Wanda stole the phone as he was the last person he gave it to. They used the phone to play music the previous evening. When Wanda denied this and blamed other party goers, the plaintiff and Mandla (one of the party goers who stayed over at the address) apprehended Wanda. The plaintiff then opted to involve the police.

[8] It is not disputed that it was the plaintiff who called the police helpline to report the alleged theft of his cell phone. The plaintiff was advised by the operating officer to keep Wanda at the address.

[9] The plaintiff testified that during the time that he was calling the helpline, Mandla (who he refers to as his friend) started to assault Wanda for allegedly stealing the cell phone. Plaintiff reprimanded and stopped Mandla from assaulting his brother. He noticed that Wanda had a minor swelling on the left side of his head. They locked Wanda in the backroom and waited for the police to arrive.

[10] When the arresting officer and other members of the SAPS arrived, the plaintiff introduced himself as the complainant and took the officers to Wanda. The arresting officer apparently noticed that Wanda was injured and asked Wanda how he could be of assistance. Wanda then indicated that he wanted to lay a charge and pointed to Mandla and the plaintiff as the ones who assaulted him. Instead of enquiring about the stolen phone and without further ado the plaintiff was then arrested with Mandla, despite the plaintiff's protests. The arresting officer did not give the plaintiff an opportunity to give an exculpatory statement before informing him that he was being arrested. The plaintiff's endeavours to inform the arresting officer that it was Mandla who assaulted Wanda, fell on deaf ears. They were handcuffed and transported in the back of the police vehicle to the police station. Wanda and Phumelele were also taken along, sitting in the front of the vehicle. They stopped at Naledi station and were kept in the vehicle for about an hour, where after they were transported and detained at Jabulani holding cells overnight.

[11] The next morning, 26 November 2018, the plaintiff appeared at the Protea Magistrate's court with Mandla and was requested to plead. He pleaded not guilty and the matter was remanded to 5 December 2018. In the afternoon he was taken to Johannesburg Sun City prison where he was detained until 5 December 2018. While he was detained he had telephonic contact with Wanda who admitted to him that he lied to the police because he was afraid of being arrested.

[12] The plaintiff fared well under cross examination and did not contradict himself. His version was largely corroborated by the evidence of the arresting officer.

[13] Plaintiff is the only person who testified in this court giving an account of the circumstances before the police members arrived at[...].

[14] The arresting officer, Mr. Nkosincedile Matwa testified that upon his arrival at the address provided to him, he was met by the plaintiff. When he was taken to the backroom where Wanda was kept he noticed that Wanda was "badly injured". Wanda told him that it was Mandla and the plaintiff who assaulted him. He then informed plaintiff and Mandla that they are being arrested for assault with the intent to do grievous bodily harm and informed them of their constitutional rights.

[15] He conceded that he arrested the plaintiff without a docket and without obtaining a written statement from Wanda. It is not disputed that the arresting officer did not obtain a statement from plaintiff. The docket which was uploaded on CaseLines does not contain a J88, a key document recording medical evidence. There is accordingly no evidence that a dangerous wound was inflicted.

[16] After the arrest and at the police station the arresting officer took down statements from Wanda and Phumelele and he himself commissioned the statements. These witnesses were not called to testify and their versions could not be tested in court.

[17] Both the arresting officer and the investigating officer testified that they had no knowledge of the events that transpired at the court of first appearance. All that the investigating officer knew is that the matter was remanded to 5 December 2018 for a formal bail application. He had instructions to create a profile for Mandla who had previous convictions. It is not disputed that the plaintiff had no previous convictions.

[18] During cross examination the arresting officer conceded that the purpose of arrest is to secure a person's attendance at court and that arrest is the last resort.

[19] The contention by plaintiff's counsel that plaintiff appeared in a "reception court" on 26 November 2018 was not seriously contested.

Submissions

[20] The parties' legal representatives filed extensive written heads of argument and referred the court to applicable case law.

Discussion

[21] The plaintiff was arrested without a warrant. He was detained overnight at the police's behest at the Jabulani holding cells until he was transferred to Protea Magistrate's Court on 26 November 2018 when his matter was postponed to 5 December 2018. He was not afforded the opportunity to apply for bail on the day of his first appearance.

[22] In terms of section 40(1)(b) of the Act:

"A peace officer may without a warrant arrest a person-

(a) ...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.”

[23] The jurisdictional facts to justify an arrest in terms of section 40(1)(b) of the Act are as follows: (i) the arresting officer 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. If the jurisdictional requirements are satisfied, a discretion to arrest arises.¹ All four jurisdictional facts must be present to succeed with such defence.²

[24] It is trite that arrest and detention is *prima facie* unlawful. It is for the defendant to allege and prove the lawfulness of the arrest and detention. When the police have arrested and detained a person and the arrest and detention is established, the onus of proving lawfulness rests on the State.³

[25] *In casu*, it is common cause that the arresting officer was a peace officer and it cannot be gainsaid that he entertained a suspicion. The arresting officer based this suspicion on observing that Wanda was “badly injured” and taking only Wanda’s word that the plaintiff also assaulted him. After the arrest, the plaintiff, Mandla, Phumelele and Wanda were all taken to Naledi police station.

[26] Had Wanda sustained such bad injuries or had the arresting officer reasonably suspected that a dangerous wound was inflicted, one would have expected of him or other members of the police to rush Wanda to hospital or at least seek medical assistance. No such evidence was tendered. The arresting officer proffered no explanation why he did not obtain a version from the plaintiff or Mandla regarding the assault before plaintiff was arrested. Had the arresting officer listened to or questioned the plaintiff he would have established that it was not the

¹ *Duncan v Minister of Law and Order* 1986(2) 805 (A) at 818 G-H

² *Minister of Safety and Security v Sekhoto and Another* 2011(5) SA 367 (SCA).

³ *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F.

plaintiff who assaulted Wanda and that plaintiff had been residing at 2337 Tshukudu Street since 2008.

[27] The plaintiff disputes that he committed an offence referred to in Schedule 1 (or any offence) and disputes that the suspicion rested on reasonable grounds.

[28] Assault with the intent to do grievous bodily harm is not listed as a Schedule 1 offence, but assault with the infliction of a dangerous wound is so listed. The arresting officer wrongly assumed that the alleged assault was committed to do grievous bodily harm and/or that the offence is listed in Schedule 1. The first defendant also failed to prove that the information at the disposal of the arresting officer gave rise to a reasonable suspicion.

[29] In considering whether or not the suspicion is reasonable, the approach to be adopted was set out by Jones J in *Mabona and Another v Minister of Safety and Security and others*:⁴

"It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

⁴ 1988 (2) SA 654 (SECLD) at 658E-H

[30] In the circumstances of the present matter, the arresting officer failed to take into account all the information available to him at the time upon which to found on solid grounds, a reasonable suspicion that the plaintiff had committed an offence listed in Schedule 1.

[31] The first defendant failed to establish that the arresting officer reasonably suspected the plaintiff of having committed an offence referred to in Schedule 1 and accordingly failed to discharge the onus that the arrest without a warrant in terms of section 40(1)(b) was lawful.

[32] In *Isaacs v Minister van Wet en Orde*⁵ the Supreme Court of Appeal held that:

‘a detainee’s continued detention pursuant to an order of court remanding him in custody in terms of section 50(1) of the Criminal Procedure Act may be lawful even though the detention followed from an unlawful arrest.’

[33] Referring to this decision, Theron J explained and highlighted in *De Klerk v Minister of Police*⁶ that the mere existence of a remand order is not enough to break the chain of causation and the proposition that a remand order pursuant to an unlawful arrest will necessarily render subsequent detention lawful, is not supported by *Isaacs*. Theron J summarised the principles emerging from our jurisprudence as follows:

‘[62] The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand*⁷, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the

⁵ 1996 (1) SACR 314 (SCA)

⁶ 2020 (1) SACR 1 (CC) at paras [44] to [46].

⁷ *Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3; 2008(2) SACR 1 (CC); 2008(6) BCLR 601 (CC).

later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.’

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.’ (Footnotes omitted).

[34] Plaintiff’s evidence that he was not afforded the opportunity to apply for bail was not challenged under cross-examination, neither was the evidence that the matter was postponed while he remained in custody. A reasonable arresting officer in the circumstances should have foreseen the possibility that, pursuant to the arrest, plaintiff would be remanded in custody because he was arrested for assault with the intent to do grievous bodily harm. The arresting officer furthermore omitted to obtain an exculpatory statement from the plaintiff, neither did he or the investigating officer record any information about his personal circumstances. The investigating officer assumed a passive role with regards to the plaintiff’s circumstances. It appears from the evidence that the focus was more on plaintiff’s co-arrestee Mandla who had a list of previous convictions. It also appeared that there must have been some confusion at some stage as initially when the trial commenced counsel for the first defendant withdrew the submissions that plaintiff had previous convictions and that he could therefore not be released on bail on the day of his first appearance. It was in any event not the first defendant’s case on the pleadings that the plaintiff’s further detention was justified. In these circumstances, and in the absence of any evidence to the contrary, it is reasonable and fair to hold

the defendant liable for the harm suffered by the plaintiff for the whole period during which he was detained.

[35] As a result of the unlawful arrest, plaintiff was detained and stripped of his liberty for the period between 25 November 2018 and 5 December 2018.

[36] The first defendant failed to discharge the onus on a balance of probability that the arrest and subsequent detention were lawful. .

Damages

[37] As for the quantification of the damages suffered as a result of the plaintiff's unlawful arrest and detention, I take into consideration that Mr. Mthanti was detained for 10 nights and released on day 11. The SCA cautioned in *Diljan v Minister of Police*⁸ against awarding exorbitant amounts. In order to explain the purpose for compensation of damages of the kind claimed in *Diljan*, as in this case, the SCA quoted from *Minister of Safety and Security v Tyulu*:⁹

'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. I readily concede that it is impossible to determine an award of damages ... with mathematical accuracy.'

[38] Makaula AJA explained in *Diljan*:

'[17] Thus, a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required solatium, the defendant (the Minister in this instance) should not be treated as a 'cash-cow' with infinite resources. The compensation must be fair to both

⁸ (Case no 746/2021) [2022] ZASCA 103 (24 June 2022).

⁹ 2009 (5) SA 85.

parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.

[18] The acceptable method of assessing damages includes the evaluation of the plaintiff's personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party's reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more.'

[39] In determining an amount for general damages, awards made in previous cases may serve as a guide. It is trite that such awards are not to be followed slavishly and each case must be determined on its own facts.¹⁰ I was referred to numerous cases by the parties' legal representatives.

[40] The plaintiff testified that he was born on 20 November 1988 at Baragwanath Hospital in Soweto and accordingly he was 30 years old at the time of the arrest. He was sent to KwaZulu-Natal for his school career, but returned to his grandmother's house at[...], Soweto in 2008. He has resided at the property ever since.

[41] At the time of the arrest plaintiff operated a spaza shop. His children were aged one and seven and they were financially dependent on him. Their mother had to borrow money to buy food for them while he was incarcerated. Upon his release from detention, he struggled to get back on his feet because when he arrived home his stock and money were missing. He was never arrested before.

[42] The conditions of the cells were appalling. He testified that the cells were overcrowded, that there was no privacy and that the toilet in the holding cell at Jabulani was out of order with no door. He was hungry, cold and did not sleep properly. The sheets, blankets and mattresses at Johannesburg Sun City prison

¹⁰ *Minister of Safety and Security v Seymour* 2006(6) SA 320 (SCA)

were smelly and dirty and it caused his skin to itch. He was robbed of his t-shirt and shoe laces by other inmates. The food was unsavoury and he developed diarrhoea. The evidence regarding the circumstances in which the plaintiff was detained was not meaningfully challenged, neither was the fact that this was the first time that he was arrested and detained.

[43] Considering these factors, in my view a fair and reasonable amount in the circumstances would be R425 000.

Costs

[44] As for costs, no reason exists to deviate from the principle that costs follow the cause.

ORDER

In the result, the following order is granted:

1. The first defendant is liable to the plaintiff for damages he suffered as a result of his unlawful arrest and subsequent detention from 25 November 2018 to 5 December 2018.
2. The first defendant shall pay the plaintiff an amount of R425 000 (four hundred and twenty five thousand rand) in respect of general damages.
3. The first defendant shall pay interest on the sum of R425 000 at the prescribed legal rate, calculated from the date of judgment until date of payment thereof.
3. The First Defendant shall pay the costs of suit.

A.M van der Merwe
Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the plaintiff: Mr. K. Mvubu

Instructed by: Yonela Bodlani Attorneys

For the defendant: Ms. Kau

Instructed by: The State Attorney

Date of the hearing: 31 January 2023 – 2 February 2023

Date of judgment: 28 April 2023