

2/2/2010

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 24152/2008

In the matter between:

IAN GORDON MURRELL

First Plaintiff

SIYANANISO MASHAVA

Second Plaintiff

and

MINISTER OF SAFETY AND  
SECURITY

Defendant

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JUDGMENT

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KOLLAPEN A J

1. This is an action for damages for wrongful arrest and detention brought by the Plaintiffs against the Defendant arising out of the arrest and detention of the Plaintiffs by members of the South African Police Services acting in the course and scope of their employment with the Defendant.
2. The arrest which occurred on the 21<sup>st</sup> August 2007 at Beit Bridge was followed by the detention of plaintiffs who were initially held at Beit Bridge Police Station and thereafter at the Musina Police until their release on the 22<sup>nd</sup> August 2007.

The facts

3. Most, if not all, of the material facts in this matter are common cause. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff, citizens of Australia and Zimbabwe respectively, were living in the United Kingdom during 2007 and had come to South Africa on a holiday arriving in the country on the 14<sup>th</sup> August 2007. On the 19<sup>th</sup> August 2007 they proceeded to hire a vehicle, a Toyota Tazz, registration number TCP 165 GP, from Avo Car Rental in Boksburg and were issued with an invoice and other relevant documentation in respect of the hire of the vehicle. The period of hire was to be until the 24<sup>th</sup> August 2007. The vehicle was registered in the name of one H A Strauss, who was either the owner alternatively a partner in the firm Avo Car Rental.
4. On the 21<sup>st</sup> August 2007 and at Ultra City near Beit Bridge the vehicle was involved in a minor collision which resulted in no damage to the vehicle. The Plaintiffs, as a cautionary measure, decided to report the accident to the SAPS and proceeded to the Beit Bridge Police Station where they were attended to by Constable Mamabolo. Mamabolo proceeded, as was the practise, to check the status of the vehicle on the computerised SAPS Circulation System and it emerged from the system that the vehicle was listed as stolen. Mamabolo then called the Investigating Officer in the matter, one Inspector Botha who was off duty at the time and not in possession of the docket but who nevertheless confirmed the status of the vehicle as being stolen.
5. The Plaintiffs upon being confronted by this allegation explained that they had in good faith hired the vehicle from Avo Car Rental and placed Mamabolo in possession of the relevant hire documents in support of their claim. Mamabolo then called Avo Car Rental spoke to one Lotz who confirmed the hire of the vehicle to the Plaintiffs. Lotz however denied any knowledge of the vehicle having being stolen. It was common cause however that the vehicle had been stolen on the 10<sup>th</sup>

May 2007 and recovered on the 12<sup>th</sup> May 2007. The circumstances around the recovery of the vehicle was not clear and it appears that the police may not have been informed about the fact of the recovery of the vehicle. The police docket was also incomplete as it appears that some pages from the docket were missing and nothing could be ascertained from the docket with regard to the recovery of the vehicle.

6. Mamabolo then proceeded to arrest both Plaintiffs who were initially detained at Beit Bridge Police from where they were transferred to the Police cells at Musina and held overnight. Both plaintiffs were arrested at approximately 17h00 on the 21<sup>st</sup> August 2007 and were unconditionally released at approximately 11h40 on the 22<sup>nd</sup> August 2007.

#### The issues

7. The arrest and detention of both Plaintiffs was admitted but it was contended on behalf of the defendant that both the arrest and detention were lawful in terms of Section 40(1)(b) of the Criminal Procedure Act No 51 of 1977, in that the arresting officer, prior to effecting the arrest, had formed a reasonable suspicion that the Plaintiffs had committed an offence, namely a contravention of Section 36 of Act 62 of 1955 - the failure to give a satisfactory account of the possession of goods reasonably suspected of being stolen.
8. The question of the damages allegedly suffered by the Plaintiffs was also placed in issue.
9. On behalf of the Defendant it was admitted that the policemen in question were at all relevant times acting in the course and scope of their employment with the Defendant and further that Plaintiff had

complied with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act No 40 of 2002.

Discussion

10. Section 40(1) (b) of the Criminal Procedure Act 51 of 1977  
Provides that:-

*"A peace officer may without a warrant any person –  
(b) whom he reasonably suspects of having committed an  
offence referred to in Schedule 1, other than the offence of  
escaping from lawful custody."*

11. Section 36 of the General Law Amendment Act 62 of 1955  
provides that:-

*"Any person who is found in possession of any goods, other  
than stock or produce as defined in section 1 of the Stock Theft  
Act 57 of 1959, in regard to which there is reasonable suspicion  
that they have been stolen and is unable to give a satisfactory  
account of such possession, shall be guilty of an offence and  
liable on conviction to the penalties which may be imposed on a  
conviction of theft".*

In **Duncan v Minister of Law and Order 1986 (2) SA 805 (A)** at **818G-H**, the Appellate division concluded that in order to be able to rely on the protection of section 40(1)(b) it must be established that:

- (a) The person who effected the arrest was a peace officer;
- (b) He must have entertained a suspicion;
- (c) It must be a suspicion that the arrestee committed an offence

referred to in Schedule 1 of the Criminal Procedure Act;

(d) The suspicion must rest on reasonable grounds.

12. In this matter the dispute centred essentially around the issue of whether the suspicion 'rested on reasonable grounds'. In determining the question of reasonableness the dicta of our Courts are instructive and in **Mabona & Another v Minister Law and Order & Others 1988 (2) SA 654 (SE)** at 658E to F, Jones J described the test and the process by determining whether it was met as follows:-

*"Would a reasonable man in the Second Defendant's position and possessed of the same information have considered that there good and sufficient grounds for suspecting that the Plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen?"*

13. In **Ralekwa v Minister of Safety and Security 2004 (2) SA 342 (T)**, De Vos J alluded to a suspicion which was '*objectively sustainable*.'

14. It is clear that the test of reasonableness contemplates a thorough and critical assessment and evaluation of all the relevant and available information by the arresting officer. That this is so is both understandable and justifiable. Our new Constitutional order places a high premium on individual freedom and liberty. From the founding provisions and beyond, the commitment to freedom and dignity resonates powerfully in the architecture of the Constitution both as values as well as fundamental and justifiable rights.

15. Accordingly it must follow that any attempt to restrict such freedom and liberty should naturally be subject to strict and exacting, but not unreasonable, standards. While the scourge of crime and violence

does indeed represent a significant threat to our young democracy, it cannot in itself serve as a justification to depart from the norms and standards that characterise ours as a constitutional state committed to fairness and justice. What is required however is not the wisdom of hindsight but a suspicion that is based on substantial grounds falling which the suspicion may well be of the nature described by Jones J in *Mabona supra* as 'flighty or arbitrary'.

16. I now proceed to determine whether the actions of Constable Mamabolo satisfy the criteria of reasonableness as set out in Section 40(1) (b) of the Criminal Procedure Act No 51 of 1977 and as amplified and given content to by the dicta of our Courts.

17. In making that assessment the following relevant information served before Constable Mamabolo and required his critical consideration:-

- (a) The SAPS Circulation System reflected the vehicle as being stolen.
- (b) The investigating Officer telephonically confirmed the status of the vehicle as being stolen.
- (c) The Plaintiffs on their own volition had approached him for assistance on the day in question to report a minor collision, which probably did not warrant reporting.
- (d) The Plaintiffs provided an explanation of the circumstances under which they came to be in possession of the vehicle – namely that they were bona fide hirers of the vehicle.
- (e) The Plaintiffs placed Mamabolo in possession of documentation which on the face of it indicated the hiring of the vehicle by the Plaintiffs from Avo Car Rental.
- (f) He was able to verify all the information in the car hire documentation provided by the Plaintiffs with Avo Car Rental.

- (g) The address of the owner of the vehicle on the SAPS Circulation System namely H.A. Strauss, corresponded with the address of Avo Car Rental that Constable Mamabolo called and that appeared on the vehicle hire documentation.
- (h) Mr Lotz at Avo Car Hire had no knowledge of the vehicle having being reported stolen and was unable to confirm the status of the vehicle as being stolen. Mamabolo accepted that Lotz had the authority to speak on behalf of the owner of the vehicle and accordingly saw no need to phone Strauss, the owner.
- (i) The vehicle was reflected as being stolen on the 10<sup>th</sup> May 2007, a time when both Plaintiffs were not in the Republic of South Africa.

18. While the police status reflecting the vehicle as stolen may have justifiably created some suspicion with regard to its status it is indeed difficult to contemplate how any reasonable person placed in possession of all the above information and in particular the explanation offered by the Plaintiffs could persist in the belief that the Plaintiffs had committed an offence as described in Section 36 of Act 62 of 1955.

19. The explanation offered by the Plaintiffs and verified by Mamabolo was more than satisfactory. **The Shorter Oxford Dictionary 6<sup>th</sup> Edition pp 2672** defines satisfactory as being 'sufficient or adequate' and it is apparent that the Plaintiffs went beyond discharging the obligation placed upon them by Section 36. Simply put, the Plaintiffs could do no more and yet for some unfathomable reason it was not enough for Mamabolo who then proceeded to effect the arrest of the Plaintiffs.

20. It is worth recalling the evidence of Inspector Botha at this juncture who opined that in his view the explanation offered by the Plaintiffs was both reasonable and satisfactory. On the other hand Mamabolo persisted in

his stance that the explanation offered was not satisfactory but failed to elaborate why he took such a stance.

21. He alluded to the existence of smuggling syndicates and suggested that the possibility that the Plaintiffs may well have been a part of such syndicates could not be excluded in his mind. That possibility in the circumstances and on the available information is so remote and fanciful that it renders whatever suspicion he may have had flighty and hardly objectively sustainable.
22. It was argued for the Defendant that the information from the SAPS Circulation System reflecting the vehicle as stolen, the confirmation by Inspector Botha that the vehicle was indeed still on the stolen list and the denial by Lotz about the vehicle being stolen was sufficient to found a reasonable suspicion. I am unable to agree with this contention and it is certainly not sustainable. In making the determination of reasonableness, all the relevant available information should be considered. This cannot be a selective process where reliance is placed on some factors while others which do not support the stance taken are ignored.
23. It must therefore follow and for the reasons outlined above that the Defendant has failed on the probabilities to prove that the arrest and subsequent detention of the Plaintiffs was justified and that the requirements of Section 40(1)(b) of the Criminal Procedure Act No 51 of 1977 were satisfied.
24. It is accordingly held that the arrest of both Plaintiffs on the 21<sup>st</sup> August 2007 and their subsequent detention from the 21<sup>st</sup> August 2007 until their release on the 22<sup>nd</sup> August 2007 was unlawful.

The Quantification of Damages

25. The Plaintiffs were arrested on the 21<sup>st</sup> August 2007 at about 17h00 and initially detained in a room at Beit Bridge Police from where they were transferred to the Musina Police cells. They were incarcerated in separate cells from approximately 21h00 that evening until 8h00 the following day. They were then taken to Beit Bridge from where they were unconditionally released at approximately 11h40 on the 22<sup>nd</sup> August 2007.
26. Both Plaintiffs requested legal representation on no less than three occasions from the time of their arrest but nothing was forthcoming and the attempts by the police to secure representation can only be described as half hearted, grudging and unenthusiastic. It was hardly a case of a constitutional obligation being performed diligently and without delay as is required by Section 237 of the Constitution.
27. The 1<sup>st</sup> Plaintiff was held in a cell with some 20 other inmates under the most trying of conditions. The toilet was not in a condition that rendered it usable and there was no offer of food or water. He shared a sleeping space with a self confessed murderer and offered money and cigarettes in return for protection. Needless to say he spent the 11 hours in that confined and intimidating space anxious, bewildered and unable to sleep. The 2<sup>nd</sup> Plaintiff fared no better – she too shared a cell with others, was offered no food or water or even a blanket. She described the toilet as being strewn with faeces and sat upright against the wall during her 11 hours in the cell. The 1<sup>st</sup> Plaintiff was hospitalised immediately upon his return to England on the 25<sup>th</sup> August 2007 for pneumonia like symptoms and while there was a broad suggestion that his incarceration may have contributed to his ill health,

there was no evidence to support that conclusion and it will accordingly not be considered for the purpose of this judgment.

28. There is little doubt that the Plaintiffs experience was traumatic and distressing. At one point they were carefree holiday makers exploring the beauty and experiencing the splendour of a remarkable country and within an hour they were rendered criminals and confined to cells where the conditions fell shockingly short of the constitutional imperative found in Section 35(2) (e) of the Bill of Rights that every detained person be held under conditions consistent with human dignity. They were alone with no access to family, friends or a lawyer and until their release were totally uncertain about how the matter of their arrest and detention would unfold. It is accordingly necessary that the award of damages must recognise both the significance of the values of freedom and dignity that we are enjoined to uphold as well as respond to the trauma and the anguish the Plaintiffs had to undergo under circumstances that were not of their making and were easily avoidable.

29. The awards by our Courts in other matters of a similar nature provide a useful basis for comparison in determining a fair and just award. At the same time one must be mindful of the caution expressed by Innes CJ in **Hulley v Cox 1923 AD 234 at 236** that such a comparison while instructive could never be decisive. I have been referred to numerous cases by Counsel that provides some general guidance in this regard and they include:-

**Louw A O v Minister of Safety and Security A O 2006 (2) SACR 178 (T).**

**Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino  
2000 (4) SA 68 (WLD).**

**Seria v Minister of Safety and Security and Others 2005 (5) SA  
130 (CPD).**

**Heyns v Venter 2004 (3) SA 200 (T).**

30. Of course one must guard against the danger of a mechanical approach to awards in these matters where freedom and liberty are computed by reference purely to time and an hourly rate for such deprivation begins to take root. Freedom and liberty are germane to the identity and the very existence of the individual and when they are undermined without justification Courts should through their awards reaffirm the primacy of such values and rights.

31. Reverting to the conditions of detention that the Plaintiffs were subjected to, the Defendant suggested that a lack of resources prevented a situation where the conditions of detention could be said to conform with the prescripts of the Constitution. While I am mindful of the resource constraints a new and young democracy such as ours experiences, I am not convinced that the problem can always be attributed to a lack of resources.

32. What is required is a consciousness of caring and a commitment to the well being of those detained. That can often make a significant difference notwithstanding the constraint on resources and in this matter such an approach may well have eased the trauma and the distress the Plaintiffs experienced during their detention. It was not forthcoming.

For the above reasons I am of the view that an award of R 90 000.00 for each Plaintiff would be just and appropriate in the circumstances.

As a result I make the following order:-

1. The arrest and the detention of the Plaintiffs from the 21st August 2007 until the 22<sup>nd</sup> August 2007 was unlawful.
2. The Defendant is ordered to pay to each of the Plaintiffs the sum of R 90 000.00 as damages.
3. The Defendant is ordered to pay mora interest on the amounts referred to in paragraph 2 at rate of 15.5% per annum from the date of judgment.
4. The Defendant is ordered to pay the costs of suit.

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KOLLAPEN AJ  
ACTING JUDGE OF THE HIGH COURT