

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DATE: 5 February 2010

CASE NO: 21226/2004

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

CHARLES PHILLIP PAYNE

PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY

1st DEFENDANT

NATIONAL COMMISSIONER FOR THE

SOUTH AFRICAN POLICE SERVICES

2nd DEFENDANT

PROVINCIAL COMMISSIONER FOR THE

SOUTH AFRICAN POLICE SERVICE

3rd DEFENDANT

ELIAS JOHANNES ROUX

4TH DEFENDANT

JUDGMENT

MAKGOKA. J

[1] This is an action for damages consequent upon the arrest and detention of the plaintiff. It is common cause that the plaintiff was arrested by the fourth respondent on 9 February 2004 and detained at the Norwood Police Station until 11:00 the following day, 10 February 2004, without being charged. The

plaintiffs arrest was in execution of a warrant of arrest authorised by the magistrate of Johannesburg on 7 December 1995.

[2] The circumstances that led to the issue of the warrant are the following: during May 1995, a Mr Charles Phillip Payne, with ID No: 5[...], made fraudulent purchases from three companies. On 23 May 1995, he purchased goods from Consumer Classic (Pty) Ltd t/a Encyclopaedia Britannica, in the amount of R12 482.00, payable over eighteen months. He did not pay for the goods.

[3] On 30 May 1995, trading as Charles Payne Construction, he ordered goods to the amount of R21 798.00 from Electrolux SA (Pty) Ltd on a cash-on-delivery basis. When the goods were delivered to his offices, Mr Charles Payne informed the delivery man that the second signatory to the cheque was not available. It was then arranged that delivery would take place, and the cheque to be collected on 5 June 1995. When a director of Electrolux went to Mr Payne's business premises on 5 June 1995, Mr Payne was nowhere to be found, together with the delivered goods.

[4] On 12 June 1995, he drew a cheque in favour of Pick 'n Pay, for goods purchased. The cheque was later dishonoured.

Evidence

[5] The plaintiff, as well as his son, testified on his behalf. For the defendants, the fourth defendant, Inspector Esias Johannes Roux ("Roux") and Inspector Bright Rato Motsekeledi, testified.

[6] The plaintiff testified that during June 1995 one Sam Rego of Tile Africa, Woodmead, phoned him and demanded payment for goods sold and delivered to him. He informed Mr Rego that he had never bought goods from Tile Africa, Woodmead. Rego told him that they had a copy of his identity document, which was faxed to him later.

[7] The copy of the identity document bore the following: a picture of a bearded man, whom the plaintiff stated was not him; ID No: 5[...] issued in the name of Charles Phillip Payne on 7 May 1980. It further bore an endorsement that the bearer participated in the referendum on 17 March 1982.

The plaintiff's arrest

[8] The plaintiff testified that Roux arrived at his residence just before midnight on 9 February 2004. He was woken up by his son, who informed him that the police officers were there to arrest him. When he asked Roux the reason for his arrest, Roux simply said to him that, he, the plaintiff, knew the reason. He then explained to Roux that there was a person who had stolen his ID in Brits and that that person was the culprit,

who used his false identity document.

[9] The fourth respondent was not interested in his explanation and ordered him to come along, otherwise he would handcuff him. At that stage he was only clad in a “pikkie broek”, a t-shirt and sandals. There were people who were watching and he felt aggrieved at being treated like a criminal.

[10] He was placed inside an unmarked police vehicle. There was a lady inside the vehicle and Roux drove at a very high speed. He was taken to the Norwood Police Station where a warning statement was completed and signed. He was detained at the police station overnight. The cell in which he was kept was dark, there was no bed, just a mattress. The cell was unhygienic. He was released the following day at approximately 11:00 after appearing in court. He was not charged.

[11] In cross-examination he stated that the identity number that was used for the purchases is his old identity number. His new and present identity number is the same, save for the last three digits. The old number ended up with 006, whereas his new number ended with 089. Asked why he applied for a new identity document, he stated that he got divorced at some stage, hence he applied for a new identity document.

[12] The plaintiff testified further during cross-examination that since the new identity number was allocated to him in 1990 he never used his old identity number.

[13] He was, however, challenged by Mr *Maakane*, for the defendants, with a supposition that, despite him having obtained a new identity book on 13 August 1990, he continued to use the old identity number. Two documents were used by Mr *Maakane* to illustrate this point. The first document is an affidavit that the plaintiff deposed to on 8 February 1996 in response to Rego of Tile Africa’s demand for payment. This affidavit was deposed to by the plaintiff to explain that he was not the person who had had purchased goods from Tile Africa. In the preamble of the said affidavit, the plaintiff stated his full names as well as ID No: 5[...], his old ID number.

[14] The second document whereon the same ID number appears is the plaintiff’s warning statement. The plaintiff’s explanation with regard to the affidavit was that same was drafted by his attorney who used his old identity number. On the police warning statement he stated that he provided all other particulars thereon, except for the ID number. The suggestion obviously being that someone else inserted his old identity number on the warning statement. I find the above explanations flimsy and unconvincing. The attorney must have drafted the affidavit from the information provided by the plaintiff. Where else would the attorney have obtained the ID number from, if not from the plaintiff himself? In any case, the plaintiff signed the affidavit, having satisfied himself that the information contained in the affidavit, was correct, including his ID number. With regard to the police warning statement, he similarly must have supplied the old ID number to the police

officer who was taking down his statement. His explanation that he provided all other information except the ID, is therefore unpersuasive.

[15] I shall assume, without deciding the issue, that the plaintiff was in fact, not the person intended in the warrant of arrest. The next question to be decided is whether Roux can seek immunity in terms of section 46(1) of the Criminal Procedure Act, 51 of 1977. The section provides as follows:

“46. Non-liability for wrongful arrest

(1) Any person who is authorised to arrest another under a warrant of arrest or a communication under section 45, and who, in the reasonable belief that he is arresting such a person, arrests another, shall be exempt from liability in respect of such wrongful arrest.”

[16] The test which has to be applied to establish “reasonable belief” set out in the subsection was laid down in *Ingram v Minister of Justice* 1962 (3) SA 225 (W) at 229 E-H, where it was decided that in determining this aspect, the question is asked whether a reasonable and careful man who has been entrusted with the execution of the warrant, would have believed that the person whom he had taken into custody was the person identified in the warrant.

[17] In this regard, Roux testified that he received the docket from Norwood Police Station and noted a warrant of arrest for a Mr Charles Phillip Payne. He obtained a profile from the police records and noticed further therefrom that a BMW motor vehicle was registered against Charles Phillip Payne’s identity number 5[...].

[18] He proceeded to the address mentioned in the warrant, namely 3[...] S[...] V[...] Flat, 1st A[...] Street, S[...], Pretoria accompanied by members of the “blits” patrol. Upon arrival he was welcomed by the plaintiff’s son and told him he was looking for Charles Payne. The son called the plaintiff whereupon Roux introduced himself to the plaintiff. He asked him whether he was Charles Payne and the plaintiff confirmed it. He asked the plaintiff for his identity document. He noticed that the plaintiff produced the old “big” identity document. He opened it and the ID number thereon was exactly the same as that in the warrant. The plaintiff denied that Roux asked for his ID book. I find it highly improbable that Roux would have proceeded to arrest the plaintiff without having established his identity, more so in light of the nature of the complaints which led to the issue of the warrant.

[19] He also noted the BMW motor vehicle mentioned above and also questioned the plaintiff about it. This was not disputed in cross-examination or during the plaintiff’s evidence-in-chief. He told him that he was arresting him on the basis of a warrant for theft under false pretences. It was approximately 22:15 when he

arrested him. He gave him a copy of the warrant and left the plaintiffs identity book with his wife. He told the plaintiffs family that he was taking the plaintiff to the Norwood Police Station where he immediately drove to. At the police station he detained the plaintiff and explained his constitutional rights to him and the reason for his arrest. Roux must also be criticized for not confiscating the plaintiffs old ID book. This was surely one of the exhibits that could be used in the possible trial of the plaintiff.

[20] It was argued by Mr *Maakane* that the plaintiff was arrested on the basis of a warrant, the validity of which was not challenged and that the person whom the warrant had been directed at, was the plaintiff. On the other hand, Ms *Van der Heever* on behalf of the plaintiff contended that given that the warrant was an old one and that the plaintiff gave an explanation to Roux, the latter should have been more circumspect and prudent in arresting the plaintiff. In short, the plaintiffs argument is that there was “theft” of his identity by an unknown person as a result of which he, as an innocent person, was arrested instead of the real culprit.

[21] Ms *Van der Heever* relied on *Ingram*, as well as *Minister van Wet en Orde v Van der Heever* 1982 (4) SA 16 (C), for the proposition that Roux’s conduct in arresting the plaintiff was not prudent and failed to meet the test laid down in both cases. In my view, the present case is distinguishable from both *Ingram* and *Van der Heever*, on the facts.

[22] In both those matters it was common cause that there was a clear mistaken identity, whereas in the present action, this is not common cause. In *Ingram*, the warrant reflected the name of the plaintiff. It was, however, in fact meant for the plaintiffs son who had a similar name. In *Van der Heever*, the warrant was issued in the name of the plaintiffs brother, John, while the real intendee was his brother, Rudolph. What led to the confusion is that, upon his arrest on a charge of drunken driving, Rudolph had furnished the police with the name of his brother, John. Rudolph was tried and convicted under the name of his brother, John. After conviction, he failed to appear for sentence. A warrant was issued in the name of John, upon which the accused’s brother was arrested. John was later released when it transpired that the warrant was not intended for him but for his brother, Rudolph.

[23] I have also considered the views expressed in a judgment of this Division in *Edwards v Beneke* 1970 (2) SA 437 (T). The court in that case was also, as in *Ingram and Van der Heever*, faced with a question of a mistaken identity where a warrant intended for one individual was executed upon the other. It was held at 440A-B, where the evidence established that the appellant was the person against whom the warrant had been directed, that the sheriff or his deputy was entitled to arrest the appellant even if, as it subsequently transpired, he was not the real judgment debtor.

[24] Reverting to the facts of the present case, when evaluating the conduct of Roux on the night of the plaintiffs arrest, I take into account the following: first, that *prima facie*, the person named in the warrant and

the plaintiff, were one and the same person, secondly, that upon being requested to produce his identity document the plaintiff produced the old identity document, the number of which corresponded with the identity number in the warrant. Thirdly, Roux also noticed the BMW motor vehicle at the plaintiffs premises, which had been registered under the plaintiffs name with the identity number reflected on the warrant. Lastly, at the police station, the plaintiff furnished the identity number which corresponded with the one on the warrant.

[25] On the above considerations, I come to the conclusion that Roux acted ordinarily prudent and reasonably under the circumstances. Regarding the evidence of the plaintiff that he tried in vain to explain to Roux that this was a case of mistaken identity, I agree with Roux's retort that under the circumstances of the case he would still have arrested the plaintiff. What the plaintiff sought to convey to Roux, amounted to a possible defence in a criminal trial. In my view, Roux had conducted a "mini enquiry" alluded in *Van derHeever*. The plaintiffs case therefore falls to be dismissed.

[26] Finally the issue of costs. The costs of the action should follow the cause. There are, however, costs occasioned previously on different occasions, namely 11 October 2006 and 4 March 2009. On the former occasion, the matter had to be postponed due to the late filing of the defendants' discovery affidavit in terms of which the warrants of arrest were discovered. On the latter occasion, the defendants applied for a postponement due to unavailability of the witnesses for the defendants.

I reserved costs on that occasion. In my view the costs occasioned on 4 March 2009 should be paid by the defendants jointly and severally. With regard to the costs occasioned on 11 October 2006 I deem it fair and just that I make no order as to costs. I am not persuaded that the late discovery should necessarily result in a postponement. Only in cases where the discovered documents are voluminous and of a complex nature, which require extensive consultations and preparation, would it be proper to postpone the matter on that basis.

[27] I therefore make the following order:

1. The plaintiff's action is dismissed with costs.
2. The said costs shall not include the costs occasioned on 4 March 2009, which costs shall be paid by the defendants, jointly and severally, the one paying the others to be absolved.

HEARD ON: 3 & 4 March and 4 August 2009

FOR THE PLAINTIFF: Adv N Van den Heever

INSTRUCTED BY: Louis Benn Attorneys, Pretoria

FOR THE FIRST,

SECOND. THIRD &

FOURTH DEFENDANTS Adv SS Maakane

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 5 February 2010