

10/6/2011

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

Case No.: 26864/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO	
(3) REVISED.	
10 June 2011	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

EDWARD McCAY BROWN

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The plaintiff has instituted a claim against the defendant arising from his alleged unlawful arrest and detention by members of the South African Police Force (SAPF) allegedly acting within the course and scope of their employment. The plaintiff is also asking for punitive costs.

[2] In his particulars of claim the plaintiff is claiming damages in an amount of R1 000 000,00 for the following damage allegedly suffered by him: deprivation of liberty; contumelia; emotional stress; unlawful

detention, and costs for defending the criminal charges. The total amount of damages (R1 000 000.00) was not, however, broken down in accordance with the above listed heads of damages.

[3] The defendant pleaded that the plaintiff was lawfully arrested in terms of section 40 of the **Criminal Procedure Act** 51 of 1977 (the Act). The defendant does not dispute the arrest and detention of the plaintiff. At the start of the trial, the defendant's counsel moved for an amendment of the defendant's plea, which amendment was not opposed by the plaintiff. The amendment was granted and the amended plea reads as follows:

"Lawfully arrested the plaintiff in terms of section 40 of Act 41 of 1977 as a suspect on charges of attempted murder and/or assault where a dangerous wound was inflicted."

[4] Section 40 (1) of the **Criminal Procedure Act** 51 of 1977 reads as follows:

"(1) A peace officer may without a warrant arrest any person –

(a) ...

(b) Whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act."

[5] In *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) it was held at 320h para [6] that in order for section 40(1) (b) defense to succeed, the jurisdictional facts must be present:

- 5.1 the arrestor must be a peace officer;
- 5.2 the arrestor must entertain a suspicion;
- 5.3 the suspicion must be that the suspect (arrestee) committed an offence referred to in schedule 1; and
- 5.4 the suspicion must rest on reasonable grounds.

See also *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

[6] Wrongful arrest consists in the wrongful deprivation of a person of his liberty. Liability for wrongful arrest is strict, neither fault nor awareness of the wrongfulness of the arrestor's conduct being required. *Relyant Trading (Pty) Limited v Shongwe and another* 2007 (1) All SA 375 (SCA) at para.4; *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139D. Once there is an alleged unlawful arrest, the defendant bears the burden of proving that the arrest was lawful or justified. *Minister of Law and Order v Hurley* 1986 (3) SA 568(A) at 587 – 589. Furthermore, once it is proven that the arrest is unlawful, the consequent detention of the plaintiff is also wrongful.

[7] It is common cause that at around 16h30 on 24 December 2008 the police were called to the Steak and Ale Restaurant in Botha Avenue, Lyttleton ("the restaurant") after a complaint was received about an incident which had occurred. The police, together with the plaintiff, the victim and a car-guard had driven to the Lyttleton Police Station where the plaintiff was subsequently arrested and held in custody. The plaintiff was released around 08h20 on 26 December 2008 after the local control prosecutor issued a *nolle prosequi* on

charges of attempted murder, alternatively, assault with intention to commit grievous bodily harm after the victim of the alleged assault could not be located.

[8] Inspector Karabo Mafisa ("Mafisa") was the first to testify on behalf of the defendant and his testimony is as follows.

[9] On the day in question he had received a report on his radio about a stabbing at the restaurant. He had proceeded to the restaurant together with a crew member, Constable Cheliwe who has since passed away. On arrival at the scene he found a man leaning against a bakkie and bleeding from his chest and one of his arms. He could not recall which arm it was. A car-guard approached him and informed him that the injured man was stabbed by a white man who accused him of stealing his car keys. Shortly thereafter the plaintiff came out of the restaurant, approached Inspector Mafisa and informed him that he had stabbed the victim with a knife for stealing his car keys. The plaintiff thereafter took out the knife from his pocket and gave it to him. This explanation surprised him as he could see the car keys dangling from the door of the plaintiff's car. Since there was a restless crowd outside the restaurant on the pavement, Inspector Mafisa decided to move the plaintiff, the victim and the car guard to a safer place at the Lyttleton Police Station.

[10] On arrival at the police station, Inspector Mafisa took the plaintiff to sit on a bench behind the counter in the Customer Service Centre ("**CSC**"). He left the victim and the car-guard in the front of the counter in the CSC. Inspector Mafisa again spoke to the car guard

who repeated what he told him earlier at the crime scene. According to Inspector Mafisa both the plaintiff and the defendant appeared to be under the influence of alcohol.

[11] After talking to the car guard Inspector Mafisa spoke to the plaintiff inquiring as to what might have happened. The plaintiff had confirmed what he told him at the crime scene, that he had stabbed the victim with a knife for stealing his car keys. He then decided to arrest the plaintiff. The plaintiff was detained at around 18h05 on suspicion of inflicting a serious injury. Inspector Mafisa further testified that he had not taken any warning statement from the plaintiff as he was not a detective. Further that after detaining the plaintiff he had nothing further to do with him.

[12] Under cross examination Inspector Mafisa substantially confirmed his evidence in chief. He testified that initially at the crime scene he did not interview the victim as he appeared to be in pain. Later after speaking to the plaintiff, he went back to where he had left the victim and the car guard at the front of the CSC. However, he did not find them and was informed that a certain Captain Falke, the station commander had allegedly chased them away. He further testified that he also wanted to get medical attention for the victim. On being asked further as to why he did not make an entry in the occurrence book about the fact that Captain Falke had chased away the two witnesses. Inspector Mafisa explained that he had expected Captain Falke to make the entry as he was the senior officer.

[13] The plaintiff's version put to the Inspector Mafisa is as follows. Two African males tried to rob the plaintiff of his car. During the ensuing struggle the plaintiff managed to take out his pocket knife and stabbed one of his assailants. The other one ran away. In short the version of the plaintiff is that in stabbing the victim, he had acted in self defense. When Inspector Mafisa arrived with several other police officers he was arrested and taken to the Lyttleton police station where he was locked-up in a holding cell.

[14] On re-examination Inspector Mafisa clarified the fact that when he made the entry in his occurrence book and when he made his statement, he was unaware that the two witnesses (i.e the victim and the car guard) were no longer where he had left them.

[15] The next witness to testify on behalf of the defendant was Constable Letsietsa who testified that, on the morning after the arrest and detention of the plaintiff (i.e on 25 December 2008) and after going through the normal formalities before a warning statement is taken from an accused, the plaintiff had exercised his constitutional right to remain silent.

[16] At the end of Constable Letsietsa's testimony, the defense closed its case.

[17] The plaintiff testified as follows. After visiting the restaurant with some friends, he had decided to leave. On reaching his car which was parked outside a chemist, he opened the window on the driver's

side when he noticed a black man coming from the front. The man tried to take his keys through the open window. He managed to hit the man with his open hand through the car's open window. Then someone held him by his shoulders trying to drag him to the ground. He rose, stood up, managed to take out his pocket knife which was in a holster on his belt and screamed for help that the police be called. He then stabbed the man on the left side of his chest. A pharmacist, a Mr van Wyk, came to his rescue. They managed to overpower the assailant and Mr Van Wyk pinned him to the boundary fence. Thereafter he had gone back into the restaurant where he washed his hands and the knife. Van Wyk called the police. Four police officials in two cars arrived at the scene. He testified that he told Inspector Mafisa that he was defending himself and protecting his property. Inspector Mafisa had then requested him to the police station which he did driving his own vehicle. At the police station he was made to sit on a bench at the back of the counter, between the charge office and the holding cells. Inspector Mafisa informed him that he was arresting him for inflicting a dangerous wound. He was then processed and he was also read his constitutional rights which were explained to him in Afrikaans as he claimed not to be well conversant with English. The plaintiff also claimed that during the scuffle with the persons who attempted to rob him of his vehicle he was injured. He was examined by a doctor on 27 December 2008 after his release on bail on 26 December 2008. However, the J88 indicated that there were no injuries observed. On 26 December 2008 he was released on bail. On subsequently appearing in court, the charges were withdrawn by the office of the Director of Public Prosecutions.

[18] Although the plaintiff denied giving Inspector Mafisa the knife he used to stab the victim, this was not put to Inspector Mafisa during cross examination. Further the plaintiff claimed that he had found his keys in his car on the passenger sit.

[19] Under cross examination the plaintiff conceded that he was not, on arrival at the police station, put in a holding cell as asserted by his counsel, but was left to sit on a bench behind the counter in the CSC. He also confirmed that he had refused to give a warning statement before he was locked up. An attempt to take a warning statement was made the following morning by a student constable and plaintiff had refused to give one. He only gave a statement to Inspector Debbie Van Zyl on 26 December 2008.

[20] Still under cross examination the plaintiff had difficulties explaining the discrepancies between his testimony in court and the statement taken by Inspector Van Zyl. In his evidence the plaintiff had indicated that he was attacked by two assailants. However in his statement he only made mention of one person who allegedly attacked him. Further, although the plaintiff admitted to not being locked up in a holding cell on arriving at the police station, in his statement he had indicated that as soon as he arrived at the police station he was put in a cell, hence the assertion by his counsel that he was arrested at the crime scene before any investigation being made.

[21] The plaintiff called Inspector Van Zyl to testify. Inspector van Zyl confirmed that the content of the plaintiff's statement was what he had told her. She conceded that if she had the same information

which Inspector Mafisa had when he decided to arrest and detain the plaintiff, she would also have acted in exactly the same manner.

[22] The plaintiff also called Captain Falke. His evidence did not add much except to confirm that he had explained to the plaintiff his constitutional rights. He also denied chasing away the car-guard and the victim from the police station on the day in question.

[23] In argument counsel for the plaintiff argued that the arrest was unlawful in that Inspector Mafisa was aware at the time of the arrest that the plaintiff was trying to defend himself from the two men who were trying to rob him of his car and to protect his property. He argued that Inspector Mafisa had no reason to arrest the plaintiff at the scene as he had not investigated the matter. It was suggested by the plaintiff's counsel that Inspector Mafisa should have interviewed some of the members of the crowd who were outside the restaurant. He argued that this failure to interview members of the crowd who had gathered outside the restaurant had rendered the arrest of the plaintiff unlawful. Counsel contended that even if the plaintiff had committed an offence, Inspector Mafisa had not exercised his discretion reasonably in that he did not consider other alternative methods of bringing the plaintiff before the court. Counsel further argued that Inspector Mafisa should have released the plaintiff when his wife and daughter came to the station and asked for his release particularly as the plaintiff was not a flight risk.

[24] Counsel for the defendant argued that the offence for which the plaintiff was arrested for was a schedule 1 offence. Therefore,

Inspector Mafisa was within his rights to arrest the plaintiff. Counsel further argued that the arrest of the plaintiff was lawful in that Inspector Mafisa, on the basis of the information from the car guard and from the plaintiff himself at the scene of the crime and at the police station, he had a reasonable suspicion to suspect that a schedule 1 offence had been committed. That therefore the arrest was lawful in terms of section 40(1)(b) of the Act. Counsel submitted that Inspector Mafisa had no powers to release the plaintiff once arrested either on bail or on his own cognizance as bail in the case of a schedule 1 offence could only be granted by a court. It was further submitted that Inspector Mafisa had exercised his discretion reasonably in deciding to detain that plaintiff.

[25] I found Inspector Mafisa to be a credible and honest witness. His testimony as to the events which occurred on the relevant day was satisfactory despite minor inconsistencies here and there particularly with regard to whether medical assistance was sought for the victim. Inspector Van Zyl also displayed the same candidness with the court. With regard to the plaintiff I would not say that he was not honest and honest witness. However under cross examination he was evasive in answering the questions put to him by counsel for the defendant.

[26] Taking into account all the evidence before me I am satisfied that the evidence of Inspector Mafisa is the more probable as regards the events of the day in question.

[27] It is not in dispute that the plaintiff had stabbed the victim with a pocket knife, an offence which is a schedule 1 offence. Secondly it is

not in dispute that the plaintiff was arrested at around 17h00 as testified to by Inspector Mafisa, the plaintiff and as reflected in the occurrence book. Further it is common cause that the plaintiff was brought before court within 48 hours of his arrest.

[28] Once Inspector Mafisa was satisfied that a reasonable suspicion existed that the plaintiff had committed s schedule 1 offence, he had a discretion either to arrest the plaintiff or release him. Taking into account the facts at hand: that there was a victim who, by the plaintiff's own admission was stabbed, Inspector mafias having observed the victim bleeding profusely from his wounds, and the victim having disappeared without reason and inspector Mafisa not knowing if the victim would live, he made a decision to arrest the plaintiff. Possibly further investigation could have been necessary. I am not convinced that Inspector Mafisa had not applied his mind to the facts when he decided to arrest and detain the plaintiff. Even Inspector van Zyl had conceded that if she was in the position of Inspector Mafisa and having the information he had, she would also have arrested and detained the plaintiff. In *Sekhoto* (supra) at para [25], the Supreme Court of Appeal held that:

"It could hardly be suggested that an arrest under the circumstances set out in s 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary. And an unlawful arrest will not necessarily give rise to an arbitrary detention. The deprivation must, according to Canadian jurisprudence, at least be capricious, despotic or unjustified."

[29] I am satisfied that when Inspector Mafisa decided to arrest and detain the plaintiff he did not act out of malice or on the basis of an unjustified reason. He acted on the basis of the facts before him and exercised his discretion reasonably. The argument by the plaintiff's counsel that it was not necessary for Inspector Mafisa to detain the plaintiff as he knew where he lived and could easily find him is misplaced as the Supreme Court of appeal in Sekhoto has held that there is no fifth jurisdictional fact in terms of section 40(1)(b) as alluded to in *Louw and another v Minister of Safety and Security and others* 2006 (2) SACR 178 (T) where the court held that:

"I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such crime has been committed, this in itself does not justify an arrest forthwith."

[30] When Inspector Mafisa decided to arrest the plaintiff he had no powers to release the plaintiff since the powers to release or detain the plaintiff rested with the courts. On that basis I am of the view that the detention of the plaintiff was also not unlawful.

[31] Accordingly the following order is made:

'The plaintiff's claim is dismissed with costs.'



NP MNGQIBISA-THUSI

Judge of the North Gauteng High Court