



15/6/2011

IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 26865/2009

DATE: 15/6/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

7/6/2011

SIGNATURE

IN THE MATTER BETWEEN

BRAAM BEUKES

PLAINTIFF

AND

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

KOLLAPEN, AJ

- [1] In this action the plaintiff seeks damages against the defendant arising out of the plaintiff's arrest at Bronkhorstspuit on 29 September 2007, his subsequent detention at the police cells in Bronkhorstspuit until 4 October 2007 as well as the

prosecution initiated by employees of the first defendant which ultimately resulted in the plaintiff's acquittal on 26 March 2009.

[2] The plaintiff alleges that his arrest in respect of the charge of murder was unlawful if regard be had to the requirements of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 and that his subsequent detention was similarly unlawful. In addition the plaintiff avers that the prosecution in respect of the murder charge initiated on 30 September 2007 was malicious.

[3] The defendant denies that the arrest and detention was unlawful or that the prosecution was malicious and disputes the *quantum* of the damages allegedly suffered by the plaintiff.

Issues in dispute

- (1) Was the arrest of the plaintiff lawful or unlawful?
- (2) Was the prosecution of the plaintiff by the defendant malicious?
- (3) The *quantum* of the plaintiff's damages.

Background and facts

[4] The plaintiff, a business man of Pretoria, conducts his own business in the area of fleet management monitoring but is also engaged on a part time basis as a disc jockey. The plaintiff was employed on a regular basis by the Jo Jo's Pub in Bronkhorstspuit as a DJ where he worked for approximately three years on

Fridays and Saturdays. On 28 September 2007 there was an incident in the pub which resulted in the death of a person known as Mr Deacon who was allegedly assaulted during the course of the evening in the pub and who was pronounced dead as a result of injuries sustained during the course of the assault.

[1] It is common cause that the plaintiff was arrested during the morning of 29 September 2007 by members of the South African Police stationed at Bronkhorstspuit and held in custody until his appearance in the Bronkhorstspuit Magistrate's Court on 1 October 2007 when the matter was postponed to 4 October 2007 and on which date the plaintiff was released on bail. It is also common cause that on 30 September 2007 members of the South African Police formally charged the plaintiff with murder and that he made various court appearances in pursuance of the said charge ultimately resulting in his acquittal on 26 March 2009 in the Bronkhorstspuit Magistrate's Court.

[2] The plaintiff's version of the events leading to his arrest was that while on duty at approximately 12:00pm on the evening of 28 September 2007 he was alerted to an incident which was happening in the night club by a young lady who appeared to be hysterical. She pulled him by his hand to a section of the night club where he witnessed a male person holding another male person against the wall. He attempted to separate them which he did successfully and then as he approached the person who was standing against the wall the person suddenly fell forward. The plaintiff attempted to catch him in order to break his fall and put him down

on the floor of the discotheque. At that stage and as he withdrew his arms from the body of the fallen person he noticed that his hands were full of blood whereupon he panicked having regard to his fear that he may have been at risk of contacting the HIV virus. He immediately went into the bathroom where he was busy for approximately ten minutes in an attempt to wash the blood off his hands. When he returned from the bathroom the person who had fallen had been removed from the scene. The plaintiff went home and the next day was summoned by an unknown person to come to Bronkhorstspuit where he was arrested. The plaintiff's version was that apart from attempting to intervene in the fight that was ensuing in the night club and attempting to assist the person who was in the process of falling he was not involved in any manner whatsoever in any attack on the deceased and his only intervention in the proceedings of the evening relative to the death of the deceased was his attempt to separate the fighting parties and to assist the person who subsequently died.

[7] The plaintiff conceded in cross-examination that objectively speaking it would appear from his intervention that he may have had some involvement in the incident and that objectively speaking the presence of blood on his hands would suggest a level of involvement as well but denied that such levels of involvement were sufficient to sustain a basis of his involvement in the murder of the deceased. The plaintiff's further testimony was that the conditions of detention under which he was held fell considerably short of the minimum standards required by law. The cells were filthy and overcrowded, the food was not palatable and the

ablution and washing facilities were hardly consistent with human dignity. It is accordingly the plaintiff's contention that his arrest on 29 September 2007 was unlawful as well as his subsequent detention and that when he was charged on 30 September 2007 for the offence of murder it initiated a prosecution that was malicious and that had no reasonable prospect of succeeding.

On behalf of the defendant the investigating officer Warrant Officer Mawelela testified that he was on stand-by duty on the night of 28 September 2007 when he received a report of a person who had died at the Bronkhorstspuit hospital. He subsequently discovered that there was a fight at the Jo Jo's tavern and also testified that during the course of the evening and the early morning he received numerous reports and information regarding the incident. When he arrived at Jo Jo's tavern during the morning of 29 September 2007 he observed spots of blood on the wall close to the area where the DJ would have set up his apparatus and that it was clear to him that the floors and the wall of the tavern had been washed after the incident. He also testified that he received information from one Mr Riaan Nieuhoff a former traffic officer in the Bronkhorstspuit area that the plaintiff and one Diedericks were involved in the attack on the deceased. During the course of the morning the plaintiff and Diedericks arrived on the scene and were placed under arrest, taken into custody and then charged with murder on 30 September 2007. It also appears that certain witness statements were taken during the early hours of the morning of 29 September 2007 in particular from one Dorah Kgapahle as well as from Ms Sharon Fourie. Further statements from

other witnesses were taken later that day and on subsequent days. Warrant Officer Mawelela's view was that when he arrested the plaintiff and subsequently decided to charge him he was satisfied that there was a reasonable basis to suspect the involvement of the plaintiff in the murder of the deceased. It warrants mention that after the arrest of the plaintiff his wife brought in clothing and shoes that the plaintiff had been wearing on the previous evening and Warrant Officer Mawelela testified that he saw blood stains on both the clothes and the shoes which confirmed his initial view that indeed it was the plaintiff who was involved in the assault and subsequent death of the deceased.

[R] It warrants mention that Warrant Officer Mawelela's testimony with regard to the time sequence of when the statements of s Kgapahle and Ms Fourie were taken was less than satisfactory. His initial testimony was that the statements while reflecting the time as being taken during the early hours of the morning were in fact taken sometime during the afternoon of 29 September 2007. However he conceded that indeed the statements of Sharon Fourie and Dorah Kgapahle would probably have been taken during the early hours of the morning and prior to the arrest of the plaintiff and Mr Diedericks. It also warrants mention that the manner in which Warrant Officer Mawelela recorded the sequence of events and his failure to depose to an arrest statement was also viewed as unsatisfactory in ensuring a proper paper trail and a proper recording of his observations and his actions during the course of his investigation.

- [9] Notwithstanding this he was adamant that the information that was available to him on the morning of 29 September 2007 provided a reasonable basis for him to form the conclusion that indeed the plaintiff was involved in the assault and the death of the deceased and that his subsequent decision to charge the plaintiff was also based on information which in his view provided a reasonable basis to conclude that there was a good prospect of a conviction in the event of a prosecution.

The Law

- [10] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that:

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

In *Duncan v Minister of Law & Order* 1986 2 SA 805 (AD) 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 the offence referred to in Schedule 1 of the Criminal Procedure Act; and
- (d) the suspicion must rest on reasonable grounds.

In this matter the core issue in dispute and for determination is whether the arrest of the plaintiff was based on a suspicion that rested on reasonable grounds.

- [11] In *Mabona & Another v Minister of Law & Order and Others* 1988 2 SA 654 (SE) at 658E-F JONES, J described the test referred to in section 40(1)(b) 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 were 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?"

- [12] In determining the reasonableness of a suspicion what is required is a thorough and critical assessment and evaluation of all the relevant and available information by the arresting officer at the time of the arrest. Of course what is not required is the wisdom of hind-sight but clearly on the other hand the suspicion has to be based on reasonable grounds.

- [13] In *Duncan (supra)* the Court relied with approval on the *dicta* of Lord Devlin in *Shabaan Bin Hussein and Others v Chong Fook Kam & Another* [1969] 3 AER 1627 (PC) at 1630 that:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."

The formulation of Lord DEVLIN was endorsed and adopted by the SCA in *Powell NO & Others v Van der Merwe NO & Others* 2005 5 SA 62. CAMERON JA (as he then was) relied on the *dicta* of Lord DEVLIN to the effect **that-**

"another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all ... Suspicion can take into account also matters which, although admissible, could not form part of a *prima facie* case."

It is accordingly clear that while *prima facie* proof may satisfy the requirements of section 40(1)(b), what is required is not *prima facie* proof but a suspicion resting on reasonable grounds and that lack of proof may not in itself preclude the formation of such a suspicion that the law requires.

Did such a reasonable suspicion exist when the plaintiff was arrested?

[14] On the plaintiff's testimony the following appears not to be in dispute:

- (a) the plaintiff interacted with Diedericks and the deceased even if it was on the plaintiff's version an attempt to bring an end to the altercation;
- (b) the plaintiff would have been seen handling the deceased and would have been seen leaving the discotheque floor and entering the bathroom with blood on his hands;
- (c) the plaintiff would have spent ten minutes in the bathroom, exiting at the time when the deceased's body was already removed from the disco floor.

On the basis of this alone there would be a reasonable basis for anybody to at the very least reasonably suspect some involvement on the part of the plaintiff in the incident and at worst that he was involved in some way in the attack on the deceased. In addition and on the information available to the investigating officer the following emerges. He had received information during the course of the morning of 29 September 2007 from Mr Nieuhoff that the plaintiff and Mr Diedericks were involved in the attack on the deceased which led to the death of the deceased. This testimony is corroborated to some extent by an entry in the investigation diary on 29 September 2007 which reads as follows:

- "1. Suspects identified and arrested as per Braam and Johan.
- 2. Eye-witness is identified as Riaan wie is 'n vorige munisipaliteit verkeer van Kungweni Bronkhorstspuit."

13 In addition to this the inspection of the scene by the investigating officer revealed that indeed what appeared to him to be blood spots were close to the area where the plaintiff undertook his work as a DJ. The totality of this information it was

argued would certainly constitute a reasonable basis for the arresting officer to form the suspicion of the involvement of the plaintiff in the attack on the deceased.

It was argued on behalf of the plaintiff that if the arresting officer had regard to the statement of Sharon Fourie that was available at the time of the arrest which was exculpatory of the plaintiff and taken together with the plaintiff's exculpatory version it would raise doubts whether in fact there was a reasonable suspicion. If one has regard to the statement of Sharon Fourie then it is clear from her statement that all she was able to testify to was seeing the deceased fall from where he was standing. She says in her statement she saw him suddenly collapse and some of her customers helped to put him on the back of Mr Vorster's bakkie. If regard is had to this statement then it is strange that if she was observing the deceased she would have observed the deceased involved in a fight/scuffle which was the evidence of the plaintiff. She would have observed the plaintiff intervening to end the assault and she would have also observed the plaintiff assisting the deceased as he fell to the floor. It is indeed strange that her statement does not allude to any of the events deposed to by the plaintiff and accordingly the value that such a statement would have in the determination of whether in fact there was a reasonable suspicion would in my view be very limited and accordingly it would be unreasonable on the basis of the unsatisfactory and the incomplete statement of Sharon Fourie to form the conclusion that indeed the plaintiff was not involved in the incident whatsoever which the statement seeks to

suggest, somewhat contrary to the testimony of the plaintiff. Her statement to the extent that it seeks to exclude any involvement of the plaintiff raises more questions than it provides clarity.

Another issue which requires consideration in the totality of all the facts and information is the apparent inconsistency in the conduct of the plaintiff on the evening of 28 September 2007. While his initial intention was to assist the deceased by preventing him from falling, he then abandons all attempts to assist the deceased when he observes blood on his hands and remains in the bathroom for an inordinately long ten minutes. His latter conduct is hardly consistent with the actions of someone who sought to assist and prevent harm to the deceased. His statement as well as that of Ms Fourie, both of which are exculpatory in nature, must accordingly be approached with a measure of caution for the reasons I have offered.

[16] While a written statement from Nieuhoff was not obtained on 29 September 2007 because he had urgent commitments to attend to as he was a long distance truck driver, it would not have been unreasonable for the arresting officer to have placed some reliance on Nieuhoff's oral statement implicating the plaintiff. Nieuhoff after all was a former peace officer and relying on what he had made available to the arresting officer would not in my view be unreasonable. The fact that Nieuhoff's later statement submitted some time in December does not in any way implicate the plaintiff is hardly relevant. What is relevant is what was before

the arresting officer at the time and at the time what was available to him was Nieuhoff's communication that the plaintiff and Diedericks were involved in the attack on the deceased. This as indicated earlier is borne out by the entry in the investigation diary that the witness has been identified as Riaan. Coupled with the blood on the scene, the blood spots on the wall in the proximity where the plaintiff worked would in my view be sufficient to form a reasonable suspicion of the involvement of the plaintiff in the murder.

- [17] I accordingly am satisfied that the defendant has discharged the *onus* of proving that the arrest of the plaintiff was lawful.

The malicious prosecution

- [18] On the basis that a reasonable suspicion existed at the time of the arrest, subsequent to the arrest the investigating officer came into possession of the clothing and the shoes of the plaintiff which appeared to him at first sight to have blood on it which would have fortified his initial suspicion of the involvement of the plaintiff and which then led to his subsequent decision to charge the plaintiff.
- [19] In order to prove that the prosecution was malicious it would have to be shown amongst other things that the defendant acted without reasonable and probable cause and acted with malice. The requirements for such a malicious prosecution in my view have not been met in this matter. From the evidence of Warrant Officer Mawelela it is clear that when he charged the plaintiff on 30 September

2007, he honestly believed the plaintiff was involved in and guilty of the murder and this belief was based on the information he had gathered and was available to him. Even if it can be said it was a mistaken belief, I am satisfied that it was a belief he honestly held. In *Rudolph & Others v Minister of Safety & Security & Another* 2009 5 SA 94 at para [18] the court dealt with the requirement of malice and in this regard referred to with approval the *dicta* of the SCA in *Minister of Justice & Constitutional Development v Moleko* 2008(3) All SA 47 where the court said the following relevant to malice:

"The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice."

The court in *Moleko (supra)* in dealing with the requirement of malice took the view that what was required was *animus injuriandi* and relied in this regard on the exposition by Neethling in *Law and Delict* (5th ed) that:

"In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). It follows from this that the

defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty. In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore, *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*."

In the present matter it could hardly be said that Warrant Officer Mawelela acted with the recklessness that would ordinarily be required in satisfying the requirement of *animus injuriandi*. For the reasons already given he was possessed of sufficient information which in my view would militate against the position that he acted without reasonable and probable cause. In addition it was a view he honestly held which in itself would exclude the existence of *animus injuriandi*. For these reasons the claim in respect of malicious prosecution must also fail.

[20] In the circumstances I make the following order: The plaintiff's claim is dismissed with costs.

N J KOLLAPEN
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

26865-2009

HEARD ON: 19th and 20th April 2011.
 FOR THE PLAINTIFF: Advocate Gerber
 INSTRUCTED BY: Louber van der Walt Incorporated
 FOR THE DEFENDANT: Advocate Makgaj
 INSTRUCTED BY: The State Attorney