

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 3670/2011

In the matter between:

WILLIAM KEVIN KAMMIES

Plaintiff

And

THE MINISTER OF POLICE

First Defendant

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Defendant

JUDGMENT

BESHE J:

[1] This matter concerns three claims for damages under the following heads:

- A. Wrongful and unlawful alternatively malicious arrest and detention.
- B. Continued detention.
- C. Malicious prosecution.

Plaintiff's claims arise out of his arrest on the 26 February 2010 at Voisen Road, Gelvandale in Port Elizabeth. It is common cause that he was then detained at Kabeka Park Police Station until the 1 March 2010 on which day he appeared in the Magistrate's Court Port Elizabeth on a charge of housebreaking. Claim B is founded on plaintiff's further detention following his appearance in court whereupon he was remanded in custody until his release on the 21 March 2010. Claim C is based on the assertion

that plaintiff's prosecution, which was set in motion by members of first defendant and or second defendant, was malicious and without reasonable cause and effected *animo iniuriandi*.

[2] In their plea, defendants admit that the plaintiff was arrested on the 26 February 2010 without a warrant. Defendants however deny that the arrest was unlawful. They claim that the arrest was in terms of *Section 40 (1) (b) of the Criminal Procedure Act 51 of 1977* in that there was a reasonable suspicion that the plaintiff had committed or attempted to commit a *Schedule 1* offence.

[3] Recounting the events that led to his arrest, plaintiff testified as follows:

At about 9h15 on that day he was invited to **Ms Dick's** house who in turn asked him to fetch her daughter from Mercantile Hospital. In order for him to do this, **Ms Dirk** provided him with keys to a Grey Toyota Conquest motor vehicle. He told **Ms Dirk** he will first go to his house to have breakfast. **Ms Dirk's** son **Morné** came along with him. **Morné** suggested that he drives to **Hermanus Johnson's** place to pick up something whilst plaintiff is having breakfast. He indeed drove in his mother's vehicle leaving plaintiff behind. **Morné** came back at about 11h15 with two others, **Clifford** and **Hermanus**. He also got into the car and dropped **Morné** and **Hermanus** at **Morné's** girlfriend's place. He arrived at the hospital at $\pm$ 12h00. It took him a while to find **Ms Dirk's** daughter. He then drove back to **Ms Dirk's** house with the latter's daughter. He found **Morné**, **Clifford** and **Brian** drinking and smoking at the **Dirk** household. He joined them. Later they drove to Tra's Tavern to get more drinks. There the police surrounded their car and arrested all

five of them who were in the car, those being the plaintiff, **Morné**, who was the driver at the time, **Clifford, Brian** and **Hermanus**. Police demanded firearms and advised them that they were arrested in connection with a housebreaking and theft charge.

[4] Plaintiff testified that he felt humiliated and embarrassed because the arrest was witnessed by many people. They were placed in a police van and driven in a convoy of police cars.

[5] **Constable Magre Toring** testified in support of defendants' case. His evidence, briefly stated was as follows:

At about 13h30 on the day in question, he received information relating to a motor vehicle that was involved in a housebreaking incident in the Sherwood area. During the course of following up on the information he proceeded to a house in Voisen Street, Gelvandale. He spotted the car whose description he had with five occupants. He called for backup and all five occupants of the vehicle were arrested. It is common cause that plaintiff was one of the five occupants of the motor vehicle. According to **Toring**, the information at his disposal was that a vehicle fitting the description of the motor vehicle in which plaintiff was, was seen parked next to the scene of a housebreaking and theft in the Sherwood area. Inside the said motor vehicle were four to five occupants. According to the information the housebreaking occurred at midday between 11h00 and 13h00. He confirmed that a search of the occupants of the motor vehicle and the vehicle upon arrest did not yield anything. He testified that it did not occur to him that it was possible that one of the occupants of the vehicle was not part of the earlier housebreaking. It was also put to

him that four to five men meant there could have been only four and one of the five found in the car later was not one of that four. He agreed.

[6] **Toring** testified that his involvement in the matter ended after the arrest of plaintiff and his four co-accused persons and handing them over to officer **Grootboom**. At that stage he did not have the police docket or witness's statements at his disposal. He stated that had plaintiff told him that he had an *alibi*, he would have followed up on the *alibi*. In this regard plaintiff testified that he did not mention the *alibi* because he realised that there would be no one else present at his home at the material time who would confirm his *alibi*..

[7] According to the statement deposed to by the owner of the burgled premises, **Mr Van Niekerk**, he was alerted to a possible break-in at about 11h30. He makes mention of a gold Toyota Conquest that was observed in front of his garage. According to **Toring's** statement and evidence in court – at 12h30 according to his statement and 13h30 according to his *viva voce* evidence he received information concerning the break-in. The motor vehicle allegedly involved therein was a silver-grey Toyota Tazz. According to the statement deposed to by **Mr Van Niekerk's** neighbour who blew the whistle about the possible break-in, **Ms de Swart**, it was at 10h30 when she observed a bronze Toyota Conquest / Tazz with three coloured males inside parked next to her neighbour's house. (my emphasis)

[8] When confronted about the discrepancy about the number of occupants in the car in question, **Toring** stated that he arrested all five

occupants because he was afraid that if he released some of them they would hide the stolen goods.

[9] *Section 40 (1) (b) of the Criminal Procedure Act* provides that:

“(1) A peace officer may without warrant arrest any 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.”

Breaking or entering any premises with intent to commit an offence is listed under *Schedule 1*.

[10] To answer the question whether the arrest and detention of the plaintiff was unlawful or not, I must determine whether on the evidence, the arresting officer has cause to believe or suspect that plaintiff had committed housebreaking which is an offence listed under *Schedule 1* and whether such suspicion rested on reasonable grounds.

[11] It is trite that the test whether a peace officer reasonably suspected a person of having committed a *Schedule 1* offence is an objective one. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a *Schedule 1* offence.¹

[12] To recap on the evidence upon which **Toring** arrested the five occupants of the Toyota motor vehicle one of whom was the plaintiff: He receives information at about 13h30 that a vehicle, whose description he

¹ Minister of Safety and Security v Swart 2012 (2) SACR 266 at 232 [20].

was given was involved in a housebreaking at Sherwood. He was told there were four to five people in the motor vehicle. He then spotted the motor vehicle with five people inside and arrested all five because he was afraid if he released any of them they would hide the stolen goods. The involvement of the motor vehicle was based on the fact that it was parked outside or next to the premises that were broken into.

[13] We know that none of the stolen goods were found on the suspects or on the vehicle were found in. According to the plaintiff they went to Tra's Tavern after 14h00. This is in a way confirmed by the certificate by detainee / notice of rights which he signed at 14h40.

[14] This was some four hours after the Toyota Conquest was seen next to **Van Niekerk's** house. At the time it had three occupants.

[15] Can it be said in the circumstances that the arresting officer would form a reasonable suspicion that the plaintiff has committed a *Schedule 1* offence.

[16] It does not seem as though **Toring** did much to verify the information at his disposal. To establish when this motor vehicle was seen parked next to **Van Niekerk's** premises, how many occupants it had. This is in view of the fact that he does not seem too certain of the number he was given – four or five. Yet we know there were three according to the whistle blower. None of the stolen goods were found in the said vehicle.

[17] In my opinion, in view of the guaranteed right to freedom, the arresting officer should have done more, should have examined the information he had at his disposal, more critically, asked or established more details to convert his suspicions into a reasonable one.

[18] In my view the arresting officer did not live up to the standard suggested by *Jones J* in ***Mabona and Another v Minister of Law and Order and Others***² where he states:

“The test of whether suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (*S v Nel and Another* 1980 (4) SA28 (E) at 33H. 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? 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.”

It is my finding that the suspicion entertained by **Constable Toring** was not reasonable in the circumstances. Accordingly the arrest and detention of the plaintiff were unlawful.

² 1988 (2) SA 645 at 658 E – H.

[19] No evidence was led to support the claims for malicious arrest and or prosecution.

[20] Plaintiff's claim for damages in respect of unlawful arrest and detention is for an amount of R150 000.00 against the first defendant. The following emerged from plaintiff's evidence in this regard:

He was arrested on the 26 February 2010, detained in custody until 1 March 2010 when he appeared in court on a charge of housebreaking.

He was locked up in a small cell with no windows with ten others. The blankets they used were dirty.

He was arrested in full view of many people, placed in a police van and driven in a police convoy. Felt humiliated and embarrassed.

Clearly plaintiff's rights to freedom, dignity and reputation were impaired.

[21] Counsel for the plaintiff *Mr Dyer* gave a helpful synopsis of awards given in similar circumstances. Having considered those as well as other awards given in similar cases I am of the view that an award of R60 000.00 will be an appropriate one in the circumstances. It will be such that it reflects the importance of the right to freedom of an individual.

[22] Accordingly the following order will issue:

(a) Plaintiff's claim for damages arising out of his arrest and detention (Claim A) succeeds.

(b) Claims for damages in respect of Claims B and C are dismissed.

(c) First defendant is ordered to pay the plaintiff R70 000.00 for damages in respect of his unlawful arrest and detention.

(d) First defendant is ordered to pay interest on the abovementioned amount at the legal rate.

(e) First defendant is ordered to pay costs of suit.

**NG BESHE
JUDGE OF THE HIGH COURT**

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