

REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Not reportable

Case No:2459/2017

OLWETHU KULATI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MFENYANA AJ

Introduction

[1] The plaintiff is an eighteen-year old man. He instituted proceedings against the defendant for damages emanating from his arrest by employees of the defendant, without a warrant. He alleges that on 14 April 2017 he was arrested by members of the South African Police Services (SAPS) near Soga Street in Kwa-Nobuhle, Uitenhage who accused him of being in possession of mandrax.

[2] It is common cause that the plaintiff was transported in the back of a police van to the KwaNobuhle Community Service Centre (KwaNobuhle) and thereafter to the Church Street Community Service Centre (Church Street) where he was detained until his release on 18 April 2017. He did not appear in court. It is further common cause that at the time of his arrest, the police officers were acting within the course and scope of their employment with the defendant which and that this renders the defendant vicariously liable for their actions.

[3] It is the plaintiff's contention that his arrest and detention was unlawful on the basis that his arrest was for a purpose other than that intended by the legislature, the police did not entertain a reasonable suspicion that he had committed an offence and they failed to exercise their discretion if at all, in a manner that is fair, and rational by using less invasive methods of securing his attendance at court. He further alleges that the police failed to bring him before a standby prosecutor forthwith, in order to secure his release on bail. The plaintiff claims an amount of R500 000.00 for his arrest and detention.

[4] The defendant denies that the plaintiff's arrest and detention was unlawful. In denying liability the defendant relies on sections 40(1)(a) and 40(1)(h) of the *Criminal Procedure Act*¹ (the Act) which authorise the police to arrest any person who commits an offence in the presence of the police, and who is reasonably suspected of committing or having committed an offence under a law governing the supply and possession of drugs, respectively. The defendant contends that the plaintiff was arrested for the purpose of bringing him to justice.

[5] It was agreed between the parties that the duty to begin rests with the defendant who bears the onus to prove that the plaintiff's arrest and detention was lawful.

Issues to be determined

¹Act 51 of 1977

[6] This court has to decide whether the plaintiffs' arrest and detention was justified in terms of sections 40(1) (a) and (h) and if so, determine the appropriate amount to be awarded to the plaintiff for damages.

The evidence

[7] The defendant called two witnesses; the arresting officer, Warrant Officer Kobus Allers (Allers) and Captain Monwabisi Kwitshi (Kwitshi). Allers testified that he has been a warrant officer with the SAPS for nineteen years. On the day in question he and his colleague, Sergeant Ova were on duty, patrolling on Soga Street when the plaintiff emerged out of a house which they know to be selling drugs. At that point he had a 'reasonable' suspicion that the plaintiff was in possession of drugs. When the plaintiff saw him and his colleague, he started running. They chased after him and once they caught up with him he threw away a matchbox he had in his hand. Allers picked up the matchbox and inside he found half a mandrax tablet. He asked to search the plaintiff and once he did he found nothing on him. After reading him his rights he arrested him for possession of drugs. He testified that the plaintiff did not ask to enforce any of his rights after being advised of them. He further testified that that he arrested the plaintiff because he was in possession of mandrax and KwaNobuhle has a big drug problem with children stealing from their own families so they can buy drugs and he wanted to bring the plaintiff before court. He took him to the police station at KwaNobuhle where he was processed, a statement and fingerprints taken, and all the necessary police requirements met. He further testified that the plaintiff read the warning statement before signing it. He testified that throughout the engagement he spoke to the plaintiff in English. He thereafter took the plaintiff to the charge office where he filled in the cell register (SAP 14) and handed the plaintiff over to his colleagues at the cells. His role ended there.

[8] During cross examination, Mr Le Roux, appearing on behalf of the plaintiff put to Allers that the plaintiff's level of education is up to standard 4, he does not understand English let alone the details of prosecutorial bail which Allers himself stumbled to explain in court. He however maintained that he informed the plaintiff of all his rights but the plaintiff did not respond or ask any questions and did not tell him that he did not understand anything that was said to him. It was further put to him

that the plaintiff never fled from the police and nothing was found in his possession. This is despite the fact that Mr Le Roux had put to Allers that the plaintiff had gone to buy *vetkoeks*. It is rather surprising that he did not have anything in his possession, not even the *vetkoeks* he went to buy. In relation to the item found inside the matchbox, Allers maintained that the plaintiff threw the matchbox on the ground, which he (Allers) then opened in the presence of the plaintiff and found half a mandrax tablet inside.

[9] When it was put to Allers that he never asked the plaintiff if he wanted to be released on bail, he stated that the plaintiff did not say anything when his rights were read to him, including the right to be released on bail. He conceded that he did not ask the plaintiff for his address after he arrested him, and deferred this to the investigating officer. He added that it was also the duty of the investigating officer to determine whether a suspect is fit to be granted bail.

[10] Kwitshi testified that as a captain, he has the overall responsibility of supervising case dockets and preparing them for court. In relation to the present matter, he was the officer on standby and it was his duty to inspect the docket, attend to bail applications and ensure that everything that needed to be done was done. He saw the docket in respect of the plaintiff on the morning of 15 April 2017 when he went to the station. He testified that he is required to inspect a docket within 24 hours if it is not urgent. He played a dual role of investigating officer and standby officer as he needed to know everything. He further testified that he did not request the prosecutor to grant bail in this case because the plaintiff did not apply for bail and had he applied for it, he would have called the prosecutor. He testified further that the plaintiff had said that he wanted to speak in court. Under cross examination he maintained that his duty to request the prosecutor for bail only arises if the accused person informs him that he requires bail. He testified that when he received the docket on the morning of 15 April 2017, the docket was ready for court and it was sent to court on the next court day which was Tuesday, 18 April 2017 as it was the Easter long weekend. He testified further that he did not complete the bail information sheet as it is the responsibility of the investigating officer or the arresting officer to do so. He handed the docket over to Warrant Officer Groenewald (Groenewald) who was the investigating officer to whom the matter was ultimately

allocated. Kwitshi testified however that there was no bail information sheet when he received the docket and agrees that at least one of the three people who handled the docket including himself, should have noticed that it was not there, but they did not. This meant that bail was not considered. He further testified that he suspected that the case against the plaintiff would be withdrawn as it is usually the case with cases involving possession of drugs, as they have to wait for results to come back from the laboratory. He conceded that if the results come back indicating that the substance is not a drug, that would be the end of the matter. Kwitshi further conceded that the charges against the plaintiff could have been withdrawn on 15 April 2017 if it was a court day because the police had already completed their work. He testified that he did not think of presenting the docket to the prosecutor on 15 April and did not see the need to tell the plaintiff that he could be released on bail even if he qualified for it, as he said he would speak in court. He testified that if the plaintiff did not understand anything, he could have just asked. He further testified that he did not interview the plaintiff at any stage and largely relied on what was on the docket regarding what the plaintiff had been apprised of. When asked why he saw it necessary to detain an 18 - year old, his response was that he is an adult and was caught in possession of an illegal substance. For that reason, he testified that he would not have recommended bail, but would not have opposed it either. It was put to Kwitshi that the plaintiff's mother attended at the police station at approximately 19h00 on 14 April 2017 to pay his bail but did not get any assistance as she was told that the plaintiff had been transferred to Church Street, and told to wait at home. His response was that if the police officers, including the investigating officer or any detective had such information, they would have contacted him as they work as a team. He reiterated that he did not see the need to prioritise the plaintiff's matter as it was not urgent, and attended to it within the required 24-hour period. He conceded that nothing was done on the docket between 15 and 18 April, but added that this was because everything that needed to be done was already completed. He ultimately stated that if he had to give an amount for bail, he would have recommended R600.00 but added that it was not his duty to recommend bail if the plaintiff did not ask for it.

[11] On behalf of the plaintiff, only one witness testified, the plaintiff's mother, Ms Ntwazana Pieta (Ms Pieta). She testified that on 14 April 2017 she was informed by a passer-by that her son had been arrested. Her neighbours lent her R500.00 as she

assumed that she would have to pay for her son's release on bail. She thereafter attended at the police station at KwaNobuhle and arrived there at approximately 19h00. After telling the police officer who attended to her the purpose of her visit, she was told to wait, whereafter she was told that the plaintiff had been transferred to Church Street. The same police officer told her to go home and wait for the police to come to her house. The police did not arrive. On Tuesday, 18 April 2017, she went to the KwaNobuhle court and waited until she realised that her son was not there. She eventually gave up. As she was leaving, she met a police officer and asked him where her son could be. The police officer told her that he may have been released "from downstairs", referring to matters that were not enrolled. This later turned out to be the case as it later transpired that the plaintiff had been released without appearing in court.

Applicable legal provisions

[12] Section 40(1)(a) of the Act authorises a peace officer to arrest a person without warrant if that person commits or attempts to commit an offence in his presence.

[13] Section 40 (1)(h) on the other hand authorises a peace officer to arrest without a warrant, any person,

"who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition..."

[14] For a defence in terms of section 40 (1) (a) to succeed, certain jurisdictional facts must be present. First, the arrestor must be a peace officer. Second, the arrestee must have committed or attempted to commit an offence in the presence of the arrestor. For a defence under section 40(1)(h), the arrestor must entertain a reasonable suspicion that the arrestee has committed an offence under the liquor legislation or the drug and drug trafficking and/or the firearms control legislation. The

broad purpose of this subsection as *Du Toit*² states, is to make it possible for peace officers to enforce the provisions of these laws. Similarly, to a defence under section 40(1)(b), the suspicion must rest on reasonable grounds.

[15] The issue then turns on whether Allers entertained a reasonable suspicion as required in section 40(1)(h). In my view he did. He found a mandrax tablet or what appeared to be mandrax in the plaintiff's possession after seeing the plaintiff coming out of a drug den. I do not make light of the fact that the substance was not confirmed to be mandrax. It was in any event, not required of Allers to have any certainty that the substance was in fact mandrax. He was not at that stage seeking a conviction, only an arrest. In *Mabona & Another v Minister of Law and Order*³ the court stated the following:

"Would a reasonable of 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."⁴

² *Du Toit et al Commentary of the Criminal Procedure Act, [Service 62, 2019]*

³ 1988(2) SA 654 (SE)

⁴ At 658 E-H

[16] Admittedly, when Allers saw the plaintiff coming out of a 'known drug house', he formed a suspicion, reasonable in his view, that the plaintiff was in possession of drugs. The only basis for his suspicion was that the place the plaintiff was coming from was known to be selling drugs. When the plaintiff started running as he saw Allers and his colleague, Allers became even more suspicious. When the plaintiff threw the matchbox on the ground, this fuelled the suspicion even further, and when he found half a mandrax tablet inside the matchbox, his suspicion was confirmed. Only at this stage was an offence committed, which set in motion the application of section 40(1)(h). On the basis of these events he arrested the plaintiff. The turn of events at the time of arrest, taken together, pointed to a suspicion, reasonable as I have found, that the plaintiff was in possession of a prohibited substance or drugs. This in my view satisfies the requirements of section 40(1)(h). I have difficulty in accepting the same to be the case in respect of section 40(1)(a). The authority of the police to arrest under section 40(1)(a) is limited to crimes which are already completed and attempts to commit crimes. The section does not require the peace officer to entertain any suspicion. The offence must be committed in their presence. Thus, an arrest following an honest and reasonable belief that a crime has been committed will not trigger the application of this section. Allers's suspicion when the plaintiff came out of the drug house is of no significance in the absence of any facts which point to the commission of a crime at that time. The facts observed by him did not "as a matter of law *prima facie* establish the commission of the offence in question."⁵ On this aspect, the defence in respect of section 40(1)(a) must fail.

[17] It does not follow that because the arrest was lawful, the detention must also be. It was contended on behalf of the plaintiff that the plaintiff's detention from approximately 16h00 on 14 April to 13h00 on 18 April 2017 was unlawful as it followed an unlawful arrest. As I have already found that the plaintiff's arrest was lawful his ensuing detention must equally be. It was further contended on behalf of the plaintiff that his further detention was unlawful on account of the failure by the police officers to facilitate his release on 'prosecutorial' bail in terms of section 59A. I agree. Kwitshi testified that the investigation in respect of plaintiff was completed on 15 April 2017. By his own admission, the standard practice in relation to the offence

⁵ *Scheepers v Minister of Safety and Security (2015) (1) SACR 284 (ECG)* at 20.

allegedly committed by the plaintiff was to release the accused person pending the testing of the substance found in their possession. This, he testified, would be done after the accused's circumstances have been established, his address confirmed, previous convictions ascertained and the police satisfied that he/she is not a flight risk. He confirmed that all these had been established in relation to the plaintiff. Notwithstanding, his release on bail was not considered as he contended that it was the plaintiff's responsibility to inform the police that he wanted to be released on bail and that the police do not have a responsibility to gratuitously grant him bail. It appeared that the overriding factor for his decision to not consider granting the plaintiff bail, was that the plaintiff said he would speak in court. There is no merit to this contention. The general provisions in relation to bail impose a duty on the police to release an accused person on bail, where circumstances allow it. In this regard it is important to briefly consider the provisions of the Act which deal with bail. He also stated that the plaintiff had been arrested for a serious offence.

[18] Section 59 provides:

Bail before first appearance of accused in lower court

(1) (a) An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

[19] Nothing need be said about the nature of offence for which the plaintiff was arrested, it being common cause that it falls within Part II of Schedule 2 to the Act. Its relevance to the present matter is that it sets out the duties of the police in relation to bail, and make it the responsibility of the police to consult with each other and determine the amount of bail to be paid by the accused. From the literal reading of the provision it is clear that the accused person is not in a position to pay any amount until the police have consulted with each other and determined the amount of bail. This is hardly surprising as the police are vested with the necessary

information to inform the accused person whether or not bail is competent in each circumstance. In respect of offences not covered by section 59 and for which the attorney-general or a prosecutor is authorised to grant bail section 59A finds application. It provides:

59A Attorney-general may authorise release on bail

(1) An attorney-general, or a prosecutor authorised thereto in writing by the attorney-general concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

(2) For the purposes of exercising the functions contemplated in subsections (1) and (3) an attorney-general may, after consultation with the Minister, issue directives.

(3) The effect of bail granted in terms of this section is that the person who is in custody shall be released from custody- (a) upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail at his or her place of detention contemplated in section 50 (1) (a); (b) subject to reasonable conditions imposed by the attorney-general or prosecutor concerned; or (c) the payment of such sum of money or the furnishing of such guarantee to pay and the imposition of such conditions.

(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the attorney-general or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.

[21] It is clear from this section as well that the provision does not envisage a request by the accused person, but a determination by the prosecutor armed with such information as may be relevant for them to arrive at a decision, in consultation with the investigating officer. It involves the exercise of a discretion by the prosecutor in consultation with the police officer. Were this not the case, it would be reasonable for the prosecutor to simply wait for the accused person and only then, make such a determination. This is not what is contemplated by Section 59A. That discretion was

not exercised, ostensibly in the belief that the accused person had to make a request and in the absence thereof, the discretion did not arise. This cannot be. *Du Toit* affirms that the exercise of this discretion follows the same considerations as in respect of the discretion to arrest, and in appropriate circumstances the accused person may bring an application for release on bail in terms of section 59A. It was incumbent on Kwatsha in consultation with Groenewald, to assess the circumstances of each case, and make a determination whether the matter qualifies to be brought before the prosecutor for bail. With due diligence, the police could have ensured that the plaintiff was released upon finalisation of the investigation and prevent a further infringement of his right to liberty. As Kwitshi stated, nothing further was done on the plaintiff's docket until it was taken to court where the charge was withdrawn and the plaintiff released without appearing in court. There was no reason to detain the plaintiff beyond 08h00 on 15 April 2017.

[23] I was referred to a judgment of this division in *Malisha v Minister of Police*⁶ where the court found that there was no legal duty on the police to contact a prosecutor and to secure bail for the plaintiff where there was no request from the plaintiff. I respectfully disagree with the reasoning of the learned judge for the following reasons:

- (a) *Section 59A does not require the accused person to make application or representations to be released on bail.*
- (b) *It remains a constitutional imperative for an accused person whose liberty has been limited, whether justifiably or not, to be informed of all his rights including the right to be released on bail.*
- (c) *Section 59A places a duty on the prosecutor upon receiving the relevant information from the investigating officer, to make a determination whether or not to release the accused. By their own admission, the police did not place this information before the prosecutor.*

[24] The evidence before the court is that the bail information was not completed and no attempt was made to establish from the plaintiff whether he wanted to apply for bail. This dispels any suggestion that the police may have entertained an

⁶ (2006/2016)[2019] ZAECPHC

intention to release the plaintiff on bail. Consequently, the plaintiff's detention from 08h00 on 15 April to 13h00 on 18 April 2017 was unlawful.

[25] I do not consider it necessary to deal with the evidence tendered on behalf of the plaintiff, that of Ms Pieta, in any elaborate detail. The less said about it, the better. As a witness, she was unreliable and unhelpful to the court. Her evidence was incoherent and improbable. It did not take the plaintiff's case any further. In that regard, and given the unreliability of her evidence, it remains unclear whether she in fact went to the police station to post bail for her son as she testified. The court finds it improbable that any reasonable person would simply go home and wait for the police to come as Ms Pieta testified. It is also improbable that she, of her own volition, simply knew when her son would appear in court. Overall, her testimony appears to have been tailored to suit the circumstances as she may have assumed necessary. However in view of my finding that it was the responsibility of the police to determine the plaintiff's eligibility for bail and bring his matter to the attention of the prosecutor, her evidence would not have changed the outcome of the matter, that the police had an obligation to inform the plaintiff of his right to be released on bail, including prosecutorial bail, and bring his matter to the attention of the prosecutor within a reasonable time.

Quantum

[26] In considering what would be an appropriate award for damages, it is necessary to set out at the outset that the purpose of an award is not to enrich the plaintiff, but to provide the necessary *solatium* for the infraction on his rights. Guidance to whatever extent possible can be sourced from various awards made in this division and other divisions. Of particular importance is that it must be noted that an arrest is an infringement of a constitutionally entrenched right to freedom of movement and dignity. The Supreme Court of Appeal in *Minister of Safety and Security v Tyulu*⁷ stated:

⁷ 2009 (5) SA 85(SCA)

"... our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law."⁸

[27] The facts of a particular case need to be looked at as a whole in order to arrive at what could be considered a fair amount of damages. In this matter the plaintiff was detained from 14 April 2017. On the evidence before the court it appears that his detention from 15 April to 18 April 2017 was without justification. The SAP10 reflects that he was arrested at 16h00 on 14 April 2017 and taken to court at 08h10 on 18 April 2017.

[28] No evidence was led with regard to the conditions under which the plaintiff was detained. However in *Madze v Minister of Police*⁹ the court held that conditions in police cells anywhere in the Eastern Cape are generally unsavoury and far from comfortable.

[29] I have been referred to various decisions of this and other divisions by both counsel and have considered them to the extent relevant. I confine myself to mention those that warrant commentary from this court. I do not find De Klerk applicable in this matter, it being concerned with detention post-court appearance. That is not the issue in this matter. It is trite that comparative awards serve as a useful guide to what other courts have considered appropriate. As Nugent JA (as he then was) in *Minister of Safety and Security v Seymour*¹⁰ stated, "they have no higher value than that".

[30] I have given due consideration to comparative awards made by this division in relatively comparative circumstances, none of which fit squarely within the circumstances of this case. I have also considered the personal circumstances of the plaintiff and the duration of the detention as well as the peculiar circumstances of his

⁸ At 93D

⁹ (48/2014)[2015]ZAECHGC

¹⁰ [2007] 1 All SA 558 (SCA)

detention. I am guided in my endeavour by the words of Innes CJ in *Pitt v Economic Insurance Co. Ltd*¹¹ where the learned judge stated:

"I have only to add that the court must take care to see that its award is fair to both sides- it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense."¹²

I find an amount of R128 000.00 appropriate in the circumstances.

Costs

[31] It was submitted on behalf of the plaintiffs that costs should be allowed on the High Court scale of costs. Mr Le Roux however submitted that the plaintiff should be awarded an amount of R150 000 for damages. On the other hand, the defendant argued that in view of the *quantum* involved, costs should be granted at the Magistrate's Court scale. It is trite that the award of costs is a matter within the discretion of the court, which discretion should be exercised judicially. There has been a general acknowledgement by the courts that the right to liberty is one of the most important rights afforded to a person. The infringement of such right is a matter of public interest. While the *quantum* of damages is a consideration, it is not the deciding factor in determining the scale of damages. There is no doubt that this matter is of significant importance to both parties that an award of costs on the High Court scale is justified.

In the result I make the following order:

- (a) The arrest of the plaintiff and his subsequent detention from 14 April to 08h00 on 15 April 2017 was lawful.
- (b) The continued detention of the plaintiff from 08h00 on 15 April to 13h00 on 18 April 2017 was unlawful.

¹¹ 1957 (3) SA 284 (D)

¹² At 287E- F

(c) The defendant is liable to compensate the plaintiff for damages arising from the plaintiff's unlawful detention in the amount of R128 000.

(d) The defendant shall pay interest on the above amount at the prescribed rate of 10.25 % calculated from date of judgment to date of payment.

(e) The Defendant is ordered to pay the plaintiff's costs of suit.

S. M. MFENYANA

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff:

Mr JD le Roux

Instructed by:

*Lessing, Heyns, Keyter and
van der Bank Inc.*

Counsel for the Defendant:

Ms A Rawjee

Assisted by:

Mr N O'Brien

Instructed by:

The State Attorney, Port Elizabeth

Date Heard:

11- 15 November 2019

Date Delivered:

18 February 2020