

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1340/2018
1343/2018

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

CHARNDREI LE ROUX

1st Plaintiff

CHARMAINE LE ROUX

2nd Plaintiff

and

**MINISTER OF POLICE: REPUBLIC OF
SOUTH AFRICA**

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT BY:

REINDERS ADJP

HEARD ON:

13 MAY 2022

DELIVERED ON:

4 NOVEMBER 2022

[1] Mrs Charmaine Le Roux, the plaintiff under case number 1343/2018, is the mother of Ms Charndrei Le Roux, the plaintiff under case number 1340/2018. For ease of reference Ms Le Roux will be referred to as the first plaintiff, and Mrs Le Roux as the second plaintiff or interchangeably on their first names (or collectively the plaintiffs). Such references are with no intent of disrespect but merely for ease of clarity. The first defendant is the Minister of Police (the defendant). Reference to all other witnesses will be as indicated once mentioned.

[2] The plaintiffs instituted action against the defendant claiming damages arising from their alleged unlawful arrest and detention. It is common cause that they were arrested without warrants on 1 September 2015 and detained until 8 September 2015 when they were released on bail.

[3] The defendant disputed the unlawfulness of the arrests and subsequent detentions. More specifically, reliance is placed on s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) which stipulates that a peace officer may without a warrant arrest any person *“whom he reasonably suspects of having committed an offence referred to in Schedule 1 ...”*

[5] To prove their cases both plaintiffs testified and called Mr Jerry Brummer (Jerry). The defendant presented the evidence of members of the South African Police Services (SAPS). Mr Wiese (at the time Warrant Officer Wiese (Wiese), Warrant Officer Fouché (Fouché), Sgt Khene (Khene) and Captain Mokgobo (Mokgobo) testified.

[6] It is common cause that one Mrs Buschouw (the victim/Mrs Buschouw) was attacked and seriously injured when she went jogging in a Bloemfontein suburb in the early hours of 31 July 2015. The averred unlawful arrests and detentions have their origin in this incident.

[7] The upshot of the testimonies of the plaintiffs related to their arrests at their place of residence (a smallholding) on 1 September 2015. The plaintiffs testified on what had transpired on the said day. They testified in essence that they were approached by several police officers. It became common cause that the said police officers were Khene, Wiese and Jacobs. The plaintiffs testified that a female officer accompanied them in the police van. This was corroborated by Khene who testified that he had given instructions that a female officer should accompany the team as females would be involved. Although there were discrepancies relating to whether the arrests were effected on the smallholding or at the police stations, I have no reason not to believe the evidence of Wiese that he effected the arrests on the plaintiffs at the smallholding. According to Charmaine they were not properly informed of the reasons for their arrest, which was echoed by Charndrei. Thereafter they were transported in a police vehicle to Park Road Police Station, interrogated and later detained at separate police stations (Charmaine was detained at Bayswater Police Station). The evidence of Jerry in my view did not take the matter any further. Whether he had been assaulted by the police to make a statement is of no consequence for determination by this court on the unlawfulness of the arrests of the plaintiffs. Although he likewise instituted action against the defendant for unlawful arrest and detention, I was not called upon to adjudicate thereupon.

[8] According to Fouché he arrested Jerry at the smallholding (where the plaintiffs resided) earlier that morning in the company of and on Khene's request to do so. Wiese, who was also present during the arrest, confirmed the arrest. Jerry was transported to the Parkweg Police Station where he was interrogated. Khene testified that Jerry divulged information which subsequently led to the aforementioned arrests of Charmaine and Charndrei later that day. Khene's evidence will be addressed in more detail herein below. The evidence of Wiese confirmed that he was requested by Khene to effect the arrests on the plaintiffs at the smallholding.

[9] The defendant bore the onus of proving that the said arrests were lawful. In **Duncan v Minister of Law and Order**¹ it was held that:

“The jurisdictional facts which must exist before the power conferred by section 40(1)(b) of the present Act may be invoked, are as follows:

The arrestor must be a peace officer; he must entertain a suspicion; it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act and that suspicion must rest on reasonable grounds.”

[10] Khene testified that he attended to the scene of the crime and, although he was not the Investigating Officer (one Sgt Methu was the IO) he remained in contact with the victim and her husband after having met them shortly after the attack had occurred. At *“some stage during the investigation”* they contacted him regarding certain information, but he was unable to state exactly when this had occurred. The said information led to the victim’s husband accompanying him to the residence of the plaintiffs where Jerry was found. This information was not in any way discussed by him with the IO. Khene testified that Jerry was arrested at Park Road Police Station after he confessed that he was the person who attacked the victim. According to Khene the names of Charmaine and Charndrei were specifically mentioned by Jerry, who told him that he had been offered an amount of R 20 000-00 to effect the assault. No notes were made by him, and he only made a statement on 2 September 2015 on the information provided to him by Jerry. When prompted during cross-examination on what exactly was conveyed to him by Jerry, Khene was vague and responded: *“what he said to me is in my statement.”* Khene testified that he could not remember speaking to the plaintiffs prior to them being arrested by Wiese, but could only recall that at *“some stage”* he interviewed the plaintiffs and confronted them with the information in his possession and *“they denied everything”*. He was not involved in the process to have Jerry appear before a magistrate in terms of Sec 217(b) of the CPA. In fact, he was unaware that this had transpired.

[11] It is not disputed that Khene made his statement regarding the information given to him by Jerry during his interrogation, only on the following day, 2 September

¹ 1986 (2) SA 805 (A)

2015. The alleged confession of Jerry was likewise only reduced to writing on 2 September 2015 before Mokgobo who took down Jerry's warning statement. Both the victim and her husband made statements detailing their suspicions and the basis therefore. However, these statements were attested to after the arrests of the plaintiffs respectively on 5 and 9 November 2015 (as evidenced by the Trial Bundle).

[13] In the case of **Zealand v Minister of Justice and Constitutional Development and Another**² Langa CJ held as follows:

“The constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom... The respondent then bore the burden to justify the deprivation of liberty, whatever form it may have taken.” As stated by O’Reagan J in S v Coetzee and Others [There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]. Our constitution recognizes that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprive citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.”

[14] This was echoed in **Minister of Law and Order and Others v Hurley and Another**³ the following is stated:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

² 2008 (4) SA 458 (CC)

³ 1986 (3) SA 568 (A) Rabie CJ held

[15] In the matter at hand the defendant admitted to the arrest and subsequent detention of the plaintiffs, but pleaded that it was justified because the arresting officer had a reasonable suspicion that plaintiffs had made themselves guilty of an offence as referred to in Schedule 1 Act 51 of 1977, namely attempted murder/conspiracy to commit murder.

[16] **Duncan** *supra* referred to **Ingram v Minister of Justice**⁴ where the test to be applied was stated as follows:

“The words, ‘reasonable suspicion’ may tend to indicate some subjective test to be applied; however, that is not so; the test as to whether “reasonable suspicion” could have existed and did exist, it to be determined by an objective standard, namely that of the reasonable man with the knowledge and experience of a peace officer based on the facts and circumstances then known to the arresting officer.”

[18] With reference to the matter of **Mabona and Another v Minister of Law and Order and Others**⁵ the crucial question to be asked is stated as follows (at 658 E-G):

*“Would a reasonable man in the second defendant’s position and possessed with 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 be stolen? **The reasonable man will therefore analyse and assess the information at his disposal critically, and he will not accept 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 justify an arrest.** This is not to say the information at his disposal must be of sufficiently high quality and cogency to engender in him conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However, the suspicion must be based on solid grounds.”*

⁴ 1962 (3) SA 225 (W) at 229G-230A

⁵ 1988 (2) SA 654 (SE) at 656B-D)

And further at 658 E-G:

*“The test of whether a suspicion is reasonably entertained within the meaning of s40(1)(b) of the Criminal Procedure Act 51 of 1977 is **objective**.”*

[19] In **Nxomani v Minister of Police**⁶ it was held that:

“reasonable grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion. The arrester’s grounds must be reasonable from an objective point of view. When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a “reasonable” suspicion before the peace officer arrests.”

[20] Moreover, the quality and source of the Arresting Officer’s information is to be considered critically.⁷

[21] Police officers who purport to act in terms of s 40(1)(b) should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purpose of a lawful arrest.⁸

[23] Applying the aforementioned case law to the facts, the defendant’s conduct in my view fell short of a reasonable police officer in the circumstance armed with the information he had at the time. I say so for the following reasons:

It is undisputed that Khene did not have any evidence under oath linking the plaintiffs to the crime. At the time he only had the oral confession by Jerry. The statement of Jerry was only reduced in writing the following day. He knew, or at least had to know, that armed with only the confession by Jerry without having it in writing under oath, he could not present a *prima facie* case in a court of law against the plaintiffs, as

⁶ (123/2017) [2020] ZAECHC 27 (13 October 2020) at [109]

⁷ **De Klerk v Minister of Police** where Shongwe ADP (Majiedt JA and Hughes AJA concurring) found at paragraph 11

⁸ **Louw & Another v Minister of Safety and Security & Others** 2006 (2) SACR 178 (T) 183J – 184D and **Sibugashe v Minister of Police & Another** (unreported, ECB case no 527/2011, 22 October 2015) at [57]

such information would not only amount to hearsay evidence, but it would also be inadmissible unless such person testifies. He did not conduct any further investigation after the oral information of Jerry. No evidence was presented by Khene that there was an urgency to have the plaintiffs arrested immediately. Nothing would have prevented him from first having a proper conversation with the plaintiffs and, after having heard their versions denying any involvement in the crime, keeping the arrests back. The information could then be further investigated and arrests effected later. Ms Wright, appearing on behalf of the defendant, submitted that Khene did not “simply rush to the plaintiffs to arrest them”, but “*merely wanted to interview them*”. This submission cannot be sustained. Khene could not remember whether he had spoken to the plaintiffs at the smallholding or not. This ties in with the plaintiffs’ evidence that they were provided with very scant information on the reason for their arrest. I agree with the submission of Mr Zietsman, representing the plaintiffs, that a proper interview would at least have had the potential to dissipate the suspicion held by Khene. Had Khene properly conducted an interview with the plaintiffs, one would have expected him to not only have a clear recollection of such interviews, but also recorded it in writing. The end results were that the state prosecutor elected not to proceed and charges against the plaintiffs were withdrawn on 18 February 2016. I am of the considered view that Khene was not at liberty to have arrested the plaintiffs under these circumstances and accordingly the arrests were unlawful.

[24] I am therefore satisfied that the plaintiffs should be compensated for their unlawful arrests.

[25] The finding as aforementioned that the arrests by the defendant was unlawful however does not automatically lead to the inference that the detention of the plaintiffs was also unlawful. In **MR v Minister of Safety and Security**⁹ it was held at para [39] that “*arrest and detention are separate legal processes, despite the fact that damages are often claimed in respect of both.*”¹⁰

⁹ 2016 (2) SACR 540 (CC)

¹⁰ See also **Lombo v African National Congress** 2002 (5) SA 668 (SCA) at [26]

[26] In respect of the detentions, the parties were *ad idem* that a distinction be drawn between two periods of detention, to wit the period of detention from the time of arrest up to the first court appearance on 3 September 2015, and detention after such appearance until release on bail.

[27] The liability of the defendant for detention **after** the plaintiffs' first court appearances, should be determined by applying the principles of legal causation as comprehensively dealt with by the Constitutional Court in **De Klerk v Minister of Police**.¹¹

[28] It was also held in **De Klerk supra**¹² that, once the plaintiffs were brought before a court for their first appearance, the authority of the SAPS to detain, inherent in the power of arrest, was exhausted.

[29] In **Mahlangu v Minister of Police**¹³ the Supreme Court of Appeal held (at [41]) as follows:

“Public-policy considerations ... limit liability for the continued judicial detention to the stage where it could reasonably be expected of the plaintiffs to have pursued the bail application to finality.”

[30] It was submitted by Ms Wright that the plaintiffs did not plead, nor did they so testify, that the SAPS had committed any wrong in regard to their first appearances in the magistrate court or thereafter. In fact, it was alleged in the particulars of claim that the *“public prosecutor’s failure to comply with his/her/their legal duty resulted in the further detention.”* The plaintiffs moreover, so the argument goes, did not allege any omission by the arresting officer to prevent the plaintiffs' further detention after their first appearance which resulted in wrongfulness.

[31] It is common cause that the plaintiffs appeared in court within 48 hours of their arrests for attempted murder, a schedule 5 offence. Accordingly, a formal bail application was necessitated in terms of s 60(11)(b) of the CPA. A postponement

¹¹ 2020 (1) SACR 1 (CC) at [63]

¹² at para [60]

¹³ 2020 (2) SACR 136 (SCA)

was requested in terms of s 50(6)(d) and the decision to remand the matter to 8 September 2015 was ostensibly that of the presiding magistrate at the time. From the evidence before court it is clear that the SAPS did not oppose bail (as evidenced by notes made in the investigating diary).

[32] In view of the aforementioned I conclude that the defendant cannot be held liable for damages flowing from the plaintiffs' first court appearance on 3 September 2015 to 8 September 2015. I do not see any reason for not applying the same principles of legal causation enunciated by the court in **De Klerk** *supra* for the determination of liability of the defendant for detention from the date of plaintiffs' arrest on 1 September 2015 to their first court appearances on 3 September 2015.

[33] In reaching the conclusion as I did that the arrest of the plaintiffs was unlawful, I considered all of the factors as indicated in para [23] for a determination of the reasonableness of the suspicion held by Khene. The question thus is whether there is a casual link between the unlawful arrests and the detention of the plaintiffs that followed as a result of the determined unlawful arrest. In my view such casualty is evident as, had it not been for the unlawful arrests, the plaintiffs would not have been deprived of their right to freedom for the time from their arrest until they appeared before the magistrate. In **De Klerk** *supra* the court held that that the authority of the SAPS to detain was inherent in the power of arrest. Therefore, if such power flows from an unlawful arrest, the authority of the SAPS to detain would in my view also be unlawful. Put differently, the unlawful arrest of the plaintiffs resulted therein that the plaintiffs were unlawfully be detained causing them to suffer damages. Accordingly, I am of the view that the plaintiffs should be compensated for the unlawful detention by the defendant, but only in respect of the period of detention from 1 September to 3 September 2015.

[34] The plaintiffs initially instituted action, amongst other, against the defendant for defamation and against the National Director of Public Prosecution for malicious prosecution. The claim of defamation was withdrawn and the plaintiffs abandoned the claim for malicious prosecution. Under the heading "unlawful detention" the plaintiffs claimed that they suffered damages in the amount of R 500 000-00 for unlawful arrest and detention, unlawful prosecution and *contumelia*. Under a

separate heading “Loss of enjoyment and amenities of life”, the plaintiffs claimed to have suffered general damages in the amount of R 500 000-00 as a result of “temporary loss of the enjoyment of the amenities of life in that a loss of self-respect, humiliation, degradation, loss of dignity and an unusual and cruel punishment post-traumatic stress disorder.”

[35] As stated, the plaintiffs did not persist in prosecuting the claim for unlawful prosecution and accordingly any reference thereto in the determination of the award of damages, should be disregarded. Moreover, in assessing general damages no evidence was tendered by either plaintiff in relation to the alleged post-traumatic stress disorder. Although I have sympathy with the plaintiffs for the ordeal they went through, this court is not at liberty to “teach a lesson” to the defendant as requested by the first plaintiff. Mr Zietsman supplied me with case law in respect of damages awarded by our courts in respect of unlawful arrest and detention to serve as a helpful guide in making an award. I was however unable to find any of the case law referred to on all fours with the matter before me. The correct approach to be followed to have regards to all the facts of a particular case and to determine the quantum of damages thereon as was held in **Rudolph and Others v Minister of Safety and Security and Another**.¹⁴

[36] Charmaine testified that she was humiliated by the experience, and focused mainly on the fact that the media attention had dire consequences for them. Charndrei stated that she was separated from her mother and felt alone, she could not eat and was scared, moreover the blanket and mattress provided to her was dirty and the toilet was in a deplorable condition. In their pleadings the plaintiffs, in claiming defamation, stated that the negative media reporting on them caused them to be ashamed and isolated them from being in the public eye. It was conceded that their relocation to George, was not necessitated by their wrongful arrest, but rather by the media hype that started with the attack. A determination for damages for *injuria*, especially as the kind of *injuria* in matters like these, cannot be determined with mathematical precision. I harbour great sympathy for the plaintiffs for the emotional trauma that they had to endure. Both plaintiffs were visibly upset when they testified on the conditions in their holding cells. It cannot be gainsaid that this

¹⁴ (380/2008) [2009] ZASCA 39 at paras [26]- [29]

negative experience caused emotional hardship to the plaintiffs. Although I have sympathy with the plaintiffs for the ordeal they went through, this court is not at liberty to “teach a lesson” to the defendant as requested by the first plaintiff. Damages are not to punish the defendant, but are awarded to “*deter and prevent future infringements of fundamental rights by organs of state. They are a gesture of goodwill to the aggrieved...*”¹⁵ Taking into account the living conditions in custody, the period of 2 days spent in custody and relevant previous rewards, I am of the view that R 75 000-00 would constitute a fair and appropriate compensation to each of the plaintiffs.

[37] Both plaintiffs claim payment in the amount of R 50 000-00 in respect of legal assistance upon their arrest. Not only did first plaintiff not testify to having paid any amount in this regard, but second plaintiff testified that she (second plaintiff) was assisted by family members in paying their legal team and she only paid an amount of R 10 000-00. No proof was provided for such payment and accordingly the second plaintiff's reduced claim cannot succeed.

[38] From the pleadings under case number 1340/2018 the first plaintiff claimed to have suffered a loss of income in the amount of R 250 000-00. It was common cause that the first plaintiff was not earning any income at the time of her arrest. It follows that the aforementioned claim cannot succeed.

[39] I am indebted to counsel for both the plaintiffs and defendant for their able heads which assisted me greatly. There is no reason why costs should not follow the result. Mr Zietsman pressed on me to award costs on a High Court scale and also to include the reasonable travelling and accommodation costs for attending the trial, in respect of counsel and the plaintiffs. The plaintiffs had to travel from George to Bloemfontein to attend the trial. They should not be out of pocket for having done so. I am however of the view that counsel's cost should best be left in the discretion of the Taxing Master.

[40] Wherefore both first and second plaintiffs' claims succeed as follows:

¹⁵Mahlangu and Another v Minister of Police 2021 (2) SACR 595 (CC) at para [50]

1. The first defendant is ordered to pay an amount of R 75 000-00 (seventy-five-thousand-rand) to the first and second plaintiff respectively for unlawful arrest and detention.
2. Such payment to be effected before or on 15 January 2023.
3. Should payment not be effected in respect of orders 1 and 2 before or on 15 January 2023 the aforementioned amount will bear interest at the rate a *tempore morae* calculated from date of this order.
4. The first defendant is ordered to pay the taxed party and party costs on a High Court scale, such costs to include the reasonable expenses of the plaintiffs in attending to trial.

C REINDERS, ADJP

On behalf of the applicant:

Instructed by:

Adv C Zietsman

Rosendorff Reitz Barry

BLOEMFONTEIN

On behalf of the respondent:

Instructed by:

Adv G Wright

State Attorneys

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