



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Electronic reporting only
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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SIGNATURE

Appeal Case no: A5011/17
Case no: 43953/13

In the matter between:

ANDRE LANDMAN

Appellant

and

MINISTER OF POLICE

Respondent

Case Summary: Delict – Damages - due to unlawful arrest, detention, and malicious prosecution. Criminal Procedure Act 51 of 1977 – s 40(1)(b) confers power on a peace officer without warrant to arrest a person reasonably suspected of having committed a schedule 1 offence, which includes kidnapping – s 50(1)(a) requires that such arrested person be brought, as soon as possible, to a police station, and there detained – and s 50(1)(b) that he or she, as soon as reasonably possible, be informed of his or her right to institute bail proceedings. Whether police officers in casu had reasonable grounds to arrest the appellant - had reasonable grounds thereafter to detain him - and had maliciously set in motion a prosecution against him. Appeal dismissed.

JUDGMENT

MEYER J (WEPENER J and MANAMELA AJ concurring)

[1] Arising from an incident that happened on Thursday, 22 November 2012 (the Thursday), at a large filling station on the R21 highway, known as the Engen Highveld One Stop West (the filling station), involving an employee of that undertaking, Ms Nompumelelo Khumalo, who alleged that she had been detained in an office at the filling station for about eight hours on that day, the manager, Mr Andre Landman, was arrested without a warrant of arrest by members of the SA Police Service at around 08:00 on Saturday morning, 24 November 2012 (the Saturday), handcuffed and taken to and ultimately detained at the Olifantsfontein Police Station, until he was released on bail that afternoon at around 15:00. When he went to court on Monday, 26 November 2012, the charge against him of kidnapping Ms Khumalo was withdrawn and a *nolle prosequi* was issued in due course. A year later, Mr Landman instituted the action, which is the subject-matter of this appeal, against the Minister of Police, claiming damages in the sum of R606 000 due to unlawful arrest, detention, and malicious prosecution. Van der Linde J presided at the trial, and, on 28 September 2016, dismissed Mr Landman's claims with costs. This appeal, with leave of the trial judge, is purely on fact.

[2] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) confers the power on a peace officer without warrant to arrest a person reasonably suspected of having committed a schedule 1 offence, which includes kidnapping; s 50(1)(a) requires that such arrested person be brought, as soon as possible, to a police station, and there detained; and s 50(1)(b) that he or she, as soon as reasonably possible, be informed of his or her right to institute bail proceedings. The question here on appeal, as it was in the court a quo, is whether the police officers had reasonable grounds to arrest Mr Landman; had reasonable grounds thereafter to detain him; and had maliciously set in motion a prosecution against him.

[3] Ms Khumalo had been working in the Wimpy at the filling station for about six years. Soon after she had commenced her duties on the Thursday morning at 06:00, she poured herself a cup of coffee without paying for it. The value of the coffee was R11. The alleged pilfering was picked up soon after Mr Landman had come on duty that morning. He, together with his associate Mr Riaan Kok, reviewed the CCTV footage of the previous night, and saw Ms Khumalo take the cup of coffee without paying for it. He called her into his office and confronted her with the footage. She admitted taking the coffee without paying for it. In line with company policy, so he testified, he gave her the option to either resign her employment or face being criminally charged. As the trial judge states in his judgment:

'It was a Hobson's choice; if she resigned, she would not be charged, but she would no longer have her job. If she refused to resign, she would be charged and, in view of her admission, be found guilty. She would get a criminal record and would be subjected to an internal disciplinary enquiry anyway, upon which dismissal was likely to follow.'

[4] Ms Khumalo elected not to resign. Mr Landman required that in that event she had to wait in his office for the police. Two police officers arrived later at around 11:00. They spoke to Mr Landman, and according to him, told him that they would return later to fetch Ms Khumalo; they had a tyre issue with their vehicle. Ms Khumalo did not follow that conversation since it was in Afrikaans, a language she did not understand. Ms Khumalo was eventually fetched by two other police officers in the afternoon at about 14:30, which was about eight hours after she had stepped into Mr Landman's office. This happened only after Ms Khumalo had phoned a friend, Const Moabelo of the Flying Squad from her mobile phone. She was arrested, taken to the Olifantsfontein police station, charged for theft, and given bail. She appeared in court on the Friday, pleaded guilty to the charge of theft on the advice of a person at the court, and sentenced to a fine of R200. Later, after a disciplinary enquiry, she was found guilty and dismissed from her employment at the filling station.

[5] The Flying Squad occupied what was referred to in the evidence as a static point next to the R21 Highway at the off-ramp to the filling station. Const Moabelo was one of the members of the Flying Squad stationed at that static point. Members of the Flying Squad who were visibly present right there at the filling station, were at liberty to use the

toilet facilities and were treated with complimentary coffees. So too were police officers from the Olifantsfontein police station treated with complimentary breakfasts and coffees at the filling station. Over time Ms Khumalo became acquainted with Const Moabelo, and she also had his mobile phone's number stored in her one.

[6] Ms Khumalo was angry at her treatment by Mr Landman in, according to her evidence, detaining her in his office for about eight hours, not allowing her to go to the toilet (twice when she had asked him) and when he refused her to eat when lunch was brought to her by her supervisor, either in his office or to leave the office to go to the designated area where employees have their meals. Early in the morning on the Saturday, Ms Khumalo went to the static point and she asked Const Moabelo to accompany her to the Olifantsfontein police station in order to lay a charge against Mr Landman. She explained that she was scared to go alone. He accompanied her and her complaint was officially laid at about 07:00 at the Olifantsfontein police station. A docket was opened. Upon their return to the static point, Ms Khumalo reported to W/O Monoge and his team that she had laid a charge of kidnapping against Mr Landman at the Olifantsfontein police station, she provided the case number and she gave her account of the events on the Thursday - that she had been locked by Mr Landman in his office for the major part of the day for having taken a cup of coffee without paying for it, that she was not allowed to go to the toilet and that when food had been brought to her he denied her permission to have it.

[7] W/O Monoge and other members of the Flying Squad went to the filling station. Ms Khumalo pointed Mr Landman out to them. W/O Monoge was the arresting officer, and Sgt Tleane fulfilled a supportive role. The two of them confronted Mr Landman. W/O Monoge explained to him who he was, relayed Ms Khumalo's account of the events of the Thursday to him and he informed him that he had come to arrest him for kidnapping. Mr Landman denied the allegations of kidnapping against him and there was some exchange of words between them. W/O Monoge testified that Mr Landman did not deny that Ms Khumalo had been locked up in his office for several hours nor did he tell about the two police officers who allegedly arrived at the filling station at about 11:00 on the Thursday morning. W/O Monoge explained in his evidence that in such a

scenario he listens to both versions and tries to assess which one is, as he said, the truth. Here, he listened to both Ms Khumalo and Mr Landman. He took into account that she had already opened a criminal case of kidnapping against Mr Landman, the long duration of her detention in his office, that she was denied to go to the toilet and that she was denied to have breakfast or lunch. W/O Monoge testified that he had-
' . . . seen that there were some elements in that statement to indicate that there was some kidnapping.'

[8] W/O Monoge arrested Mr Landman. He was handcuffed, walked out to the marked police vehicle and driven to the Olifantsfontein police station to be detained. There the senior officer on duty, Cpt Marudi, was of the view that the facts presented to her did not establish commission of the crime of kidnapping on the part of Mr Landman and, on her instructions, the police officers on duty refused to accept Mr Landman for detention. But, W/O Monoge and Sgt Tleane held a contrary view. They were concerned that the refusal to detain him was motivated by the fact that the police officers there received gratuitous meals and coffees at the filling station. Sgt Tleane testified that 'they refused that he should be detained there because he is well known to them'. And in W/O Monoge's view they were 'busy defeating the ends of justice by refusing to detain the suspect' after the matter had been explained to them. They, therefore, took Mr Landman to the Ivory Park police station. There the police officer in charge also declined to detain Mr Landman on the basis that that police station did not have jurisdiction in the matter. They then took him to the Thembisa police station, where lack of jurisdiction was also raised. While at the Thembisa police station, someone from the Olifantsfontein police station called W/O Monoge and advised him that Mr Landman could be detained at the Olifantsfontein police station. They accordingly returned with Mr Landman to the Olifantsfontein police station where he was charged with kidnapping and detained in a police cell. At around 15:00 he was released on bail.

[9] As to the events on the Thursday, the trial judge found that Mr Landman's own evidence that he would have sent a person to be with Ms Khumalo so that she should not run away (if she had asked him to go to the toilet), his admission that he declined her permission to have her food in the office or to eat elsewhere and her undisputable

anger at her treatment belie his version that she was voluntarily waiting in the office for the police to fetch her since that had been her election when she was offered either a resignation or being criminally charged. The trial judge concluded that –

‘...the probabilities are rather, in my view, that the plaintiff considered that since Ms Khumalo had opted for being charged instead of resigning, she should be kept in the office until the police came to collect her, and charged her, precisely as in the event occurred. For that result to have eventuated, as it did, it was necessary to keep Ms Khumalo in the office.’

The trial judge found Ms Khumalo to have been a credible witness concerning the Thursday events; her evidence was truthful and her observations accurate and to the point. He found Mr Landman, on the other hand, to have been inclined to be argumentative with the cross examiner and the trial judge got the distinct impression that he tailored his evidence that Ms Khumalo was free to come and go as she pleased to suit his case. The trial judge, therefore, concluded that Mr Landman deprived Ms Khumalo of her freedom of movement and that her detention was unlawful. As to the element of intention, the trial judge was satisfied that Ms Khumalo was deliberately detained against her will, but he was not satisfied that Mr Landman had knowledge of wrongfulness, or differently put, appreciated that he was not entitled to keep Ms Khumalo in the office since he-

‘[a]ppears to have acted out of the conviction that in view of Ms Khumalo’s confession of theft, and her election to be charged, the inevitable next step was for the police to come collect her; and that she was obliged to wait for them, like it or not.’

[10] On the question whether Ms Khumalo had in fact been kidnapped, the trial judge concluded thus:

‘In the result, I find that although on the Thursday in question Ms Khumalo was kept without her consent and against her will, the crime of kidnapping had not actually been committed. Since it is not required for a successful invocation by a peace officer of s40(1)(b) of the CPA, that the offence was actually committed, the question is whether the arresting police officer had reasonable grounds for suspecting that such a crime had been committed. This requires only that the arresting officer should have formed a suspicion that must rest on reasonable grounds.’

(Footnote omitted)

[11] The trial judge rejected the suggestion in the cross-examination of W/O Monoge that he, together with Const Moabelo, 'was part of an integrated conspiracy vindictively to get back at the plaintiff, and blind to the actual events of the Thursday'. He found that '[t]here is just not evidence to support such a conclusion, neither direct nor inferentially' and he, therefore, accepted 'that W/O Monoge had not conjoined Const Moabelo in an effort to exact vengeance on the plaintiff'. The trial judge further found 'that W/O Monoge was not subjectively motivated by personal considerations' – 'of sympathy or vengeance' – and that his suspicion that Mr Landman had kidnapped Ms Khumalo was based on reasonable grounds. In this regard the trial judge concluded thus:

[59] The requirements of an unlawful and intentional deprivation of Ms Khumalo's freedom were evident to W/O Monoge from what Ms Khumalo told him. It is true that Ms Khumalo did not disclose to W/O Monoge that she had admitted guilt to a charge of pilfering, but the unlawful deprivation of freedom is not legitimised by Ms Khumalo's admitted pilfering. As pointed out, there was no suggestion that the plaintiff relied on any authority to keep Ms Khumalo in his office other than her own consent. And that version had been rejected.

[60] Nor would it have been a defence to kidnapping that the Thursday morning police, ignoring in favour of the plaintiff that W/O Monoge did not know about them, had said that they would come collect Ms Khumalo at some later, unspecified, time. The mere fact too that in the event the charge was not proceeded with, does not detract from the reasonableness of the suspicion that kidnapping had in fact occurred.

[61] If objectively viewed all the elements of the common law crime of kidnapping were satisfied, barring *mens rea*, it is difficult to see on what basis W/O Monoge could be said not have had a reasonable suspicion that the crime had been committed. After all, the absence of *mens rea* is not readily ascertainable and, given that the plaintiff's version of Ms Khumalo's consent was rejected, it was not unreasonable of W/O Monoge to have suspected that the crime could have been committed.'

[12] The trial judge further found that Mr Landman was not unlawfully detained; he 'in fact had access to a lawyer, and bail was in fact granted, all within a reasonable time'. Furthermore he found that –

'...there is no scope to conclude that the prosecution, as represented by those two preparatory steps, was set in motion maliciously. Certainly, once the plaintiff appeared in court, the prosecution ceased.'

[13] This, as I have mentioned at the outset of this judgment, is an appeal purely on fact. There has been, in my judgment, no misdirection of fact by the trial judge and I am convinced that his findings and conclusions are correct (*R v Dhlumayo* 1948 (2) SA 677 (A)). The trial judge carefully evaluated the evidence that was given against the underlying probabilities. An analysis of the evidence as a whole, proper regard being had to the probabilities, leads me to conclude that the findings of credibility were similarly well-founded (see *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) para 5).

[14] The only misdirection upon which Mr Poole (Mr Witz not having been available) relied in argument before us is the contention that the trial judge misdirected himself in not finding that W/O Monoge together with Const Moabelo were part of a conspiracy vindictively to get back at Ms Khumalo. I entirely agree with the trial judge that there is simply not evidence to support any such a conclusion, neither direct nor inferentially. Inferences must be consistent with all the proven facts. In any event, the more natural or plausible conclusion, which is consistent with the proven facts, is that both Const Moabelo and W/O Monoge in arresting and causing Mr Landman to be detained, were motivated by their sense of duty.

[15] So, why then did the trial judge grant Mr Landman leave to appeal to this full court? Section 47 of the CPA obliges males between the ages 16 to 60, when called upon by any police official to do so, to assist such police official in arresting or detaining any person so arrested. In his judgement dismissing Mr Landman's claims for damages due to unlawful arrest, detention, and malicious prosecution, the trial judge said:

'It needs to be gotten out of the way that the plaintiff's case is not that the first two police officers with the tyre problems had requested the plaintiff to keep Ms Khumalo detained. Nor is it the plaintiff's case that they had deputised him in some way to detain Ms Khumalo on behalf of the police until they had their wheel problems sorted. These scenarios were not pleaded, were not supported in evidence, and were expressly eschewed in argument. The plaintiff's case is that Ms Khumalo remained there voluntarily, and that she was free throughout the morning to leave at any time.'

[16] In the judgment granting Mr Landman leave to appeal to this court, the trial judge said this:

‘Mr Witz who again appears for the plaintiff and the applicant in this morning’s application submits that I misunderstood him at the trial and that indeed he did not eschew in argument the proposition that the plaintiff’s case was not that he had been deputised in some way by the police to detain Ms Khumalo. In truth he said that it was supported in evidence and he did argue that in truth Mr Landman (the plaintiff) had been asked by the police to keep Ms Khumalo there, therefore impliedly against her will, until they returned or some other police officer returned to arrest her and to take her away.

In other words the submission is that it was not the plaintiff’s case that Ms Khumalo remained there voluntarily. Indeed it was the plaintiff’s case that she was kept there by the plaintiff who was obliged to keep her there at the request of the police. I have to say that that is not how I understood either the evidence or Mr Witz when argument was submitted at the end of the trial. But of course any one can make a mistake, and although the basis has not been explained, I must have made a mistake if counsel submits that I misunderstood him at the trial. It seems to me therefore that on this first basis another court may reasonably come to a different conclusion and that I had misunderstood counsel in submissions made at the end of the trial.’

[17] Indeed, it was not Mr Landman’s case that he had been called upon by any police official to assist such police official in arresting or detaining Ms Khumalo or that any police official had deputised him in some way to detain Ms Khumalo on behalf of the police nor was there any evidence to support any such case. In his evidence in chief Mr Landman testified as follows:

‘And did the police arrive? --- The police arrived a while later. When they got to site with a bakkie, they said first that they have to go and fix a tyre. We asked them then to explain to Petunia [intervenes].

Is Petunia the lady in question? --- The lady which we... caught stealing then. We asked them then to explain to her that they are going to fix the tyre and they will come back for her. And then they spoke to her and she agreed to it. And then [intervenes].’

[18] The only suggestion that Mr Landman was in some or other way requested or deputised by the police to arrest and detain Ms Khumalo was from counsel’s mouth towards the end of his cross-examination of W/O Monoge when he suggested to him that Ms Khumalo ‘was arrested for theft of coffee and [Mr Landman] was waiting for the

police, [Mr Landman] did not kidnap her'. There was, however, no factual foundation for Mr Witz to have suggested that to W/O Monoge, who, in any event, disagreed with counsel's suggestion. Not surprisingly, at the appeal hearing before us, when I directed the attention of counsel who acted for Mr Landman to that passage in the record, he disavowed any reliance on a version that Mr Landman had arrested or detained Ms Khumalo at the request of the police.

[19] The trial judge was quite correct in his understanding that it was not Mr Landman's case that the first two police officers with the tyre problems had requested Mr Landman to keep Ms Khumalo detained and that it was not his case that they had deputised him in some way to arrest and detain Ms Khumalo. Furthermore, it is clear from the interaction between the bench and the bar during Mr Landman's closing argument that his counsel indeed eschewed such scenarios. It went like this:

COURT: Can I ask you Mr Witz.

MR WITZ: Yes.

COURT: Does, did the first two policemen empower Mr Landman to keep Ms Khumalo locked up?

MR WITZ: It appears that that was so, they said... (intervenes)

COURT: Under which section would they have done that of the Criminal Procedure Act ... (intervenes)

MR WITZ: They could have... (intervenes)

COURT: And do they have the power to do that?

MR WITZ: They actually do not, I think, they actually do, I think the police do have the power in terms of... (intervenes)

COURT: But... (Intervenes)

MR WITZ: I think it is of section 50.

COURT: But there is no pleaded case here that Mr Landman kept Ms Khumalo locked up because the police gave him the power to do it.

MR WITZ: Yes correct and he denied that he locked her up, he said she was in an... (intervenes)

COURT: But he did say that he would not allow her to go to the toilet on her own... (intervenes)

MR WITZ: Because she was a suspect.

COURT: Because he wanted to make sure that she would not run away.

MR WITZ: Yes correct, fairly... (intervenes)

COURT: Now that... (intervenes)

MR WITZ: She was a suspect in a theft charge.

COURT: But who is he to keep people locked up if he thinks they are a suspect?

MR WITZ: Well My Lord that is the normal process that occurs... (intervenes)

COURT: But does he have the power, does a member of the public have the power... (intervenes)

MR WITZ: Citizens arrest, they do.

COURT: Did he make a citizen's arrest?

MR WITZ: No, he did not make any arrest.
COURT: Well then, does he have the power to lock a person up, let us assume there was a theft.
MR WITZ: Yes
COURT: Does he have the power to lock a person up?
MR WITZ: He has no power to lock anyone up My Lord, although in terms of your powers as a citizen, you can effect an arrest and assist the police in arrest... (intervenes)
COURT: But we are not dealing with that here.
MR WITZ: But whether you can detain them or not My Lord, his evidence was that she was there, there is a button to go out, he left the office, there were other members there, on the probabilities, it is a Thursday, it is a management office, it is a busy garage and there were no complaints or nothing at all in that regard, so I think that would really deal with that My Lord, I mean she could have spoken to anyone that was there, including the people that came to bring her the food and said I am being kept against my will or I am being locked up.'

[20] Mr Landman's case in respect of the events on the Thursday was unambiguously that Ms Khumalo remained in the office voluntarily, and that she was free to leave at any time. Any suggestion that he effected a citizen's arrest or that he, at the request of the police, arrested and detained her, is contradictory to and irreconcilable with that account.

[21] In the result the following order is made:
The appeal is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

I agree

W.L. WEPENER
JUDGE OF THE HIGH COURT

I agree

K.L.M. MANAMELA
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 22 August 2018
Date of judgment: 4 September 2018
Counsel for the Appellant: Adv D Poole (heads of argument prepared by Adv M Witz assisted by Adv D Poole)
Instructed by: Witz, Callicchio, Isakow and Shapiro Attorneys Inc, Hydepark
Counsel for Respondent: Adv MM Zondi
Instructed by: State Attorney, Johannesburg