

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

10/3/2017

Case Number: 9326/2015

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

10/3/2017
DATE

D. Molefe
SIGNATURE

CHRISTOFF KOEKEMOER

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MOLEFE J

[1] The plaintiff in this action seeks damages against the defendant arising out of his arrest on 12 August 2014 in Pretoria North, his subsequent detention and the resultant withdrawal of the charges against him on 29 September 2014.

[2] The plaintiff alleges that his arrest in respect of the charge of possession of stolen property and his subsequent detention initiated by the members of the defendant acting within the course and scope of their employment with the South

African Police Services ("SAPS") was unlawful. Plaintiff pleaded that his arrest and detention by the SAPS officer were unlawful in that it was effected without a warrant and did not comply with the laws regulating an arrest without a warrant and further that it was effected arbitrarily.

[3] The defendant denies that the arrest and detention were unlawful and avers that the defendant acted in terms of section 40 (1) (e) of the Criminal Procedure Act 51 of 1977 ("CPA") when affecting the arrest. This section provides that a person found in possession of property reasonably suspected to have been stolen or acquired by dishonest means can be arrested without a warrant. The defendant pleaded that the plaintiff was arrested by Constable Moseme for allegedly committing an offence of possession of suspected stolen property in contravention of section 36 of the General Amendment Act, Act 62 of 1955 which provides that:

Failure to give a satisfactory account of possession of goods

"Any person who is found in possession of any goods, other than stock or produce as defined in Section 1 of the Stock Theft Act, 1959 (Act 57 of 1959) in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft¹".

[4] Section 40 (1) (b) of the CPA provides that a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence listed in Schedule 1. There is no doubt that the crime of possession of suspected stolen goods that was investigated and for which the plaintiff was arrested is listed in Schedule 1 of the CPA.

¹ Section 36 amended by section 4 of Act 18 of 1996

[5] It is common cause that the plaintiff was on 12 August 2014 arrested by the SAPS officers without a warrant at Just Metals Scrapyard where he is employed as a workshop manager. He was detained in the police cells at Pretoria North Police Station and was released on the same day at approximately 17h30.

It is further common cause that the charges against the plaintiff were withdrawn on 29 September 2014 as the investigating officer found that the plaintiff's explanation of how he got into possession of the copper was reasonable.

[6] The issues to be determined by the court are:

6.1 was the plaintiff's arrest and detention lawful or unlawful?

6.2 if unlawful, the quantum of the plaintiff's damages.

The burden to prove that the arrest was justified and not wrongful rest upon the defendant and the duty to begin was by agreement between the parties imposed upon the defendant.

[7] Constable Lehlohonolo Mosebe testified on behalf of the defendant. He testified that on 12 August 2014, he, together with his team were making routine inspections of scrapyards and was posted by Warrant Officer de Witt to do a routine check at Just Metals Scrapyard in Pretoria North. They arrived there at 11h40 and requested the plaintiff to allow them to tour the premises for the inspection. During the inspection they found copper cables packed and stored at the premises. Mosebe asked the plaintiff to explain the origin of the copper cables and to produce the documents relating to the cables but the plaintiff failed to explain to Mosebe the origin of the copper cables nor to produce the documents relating to the cables. One of the team members, Mr Frans Puta allegedly from Eskom informed Mosebe that

the cables were used by Eskom and that scrapyards were not allowed to purchase them.

Mosebe testified that he then had reasonable suspicion that the copper cables were stolen and he arrested the plaintiff as the plaintiff was unable to neither provide an explanation of the possession nor to provide the relevant documentation. Mosebe further testified that he was the arresting officer and not Warrant Officer de Witt. Plaintiff was taken to Pretoria North police station where he was detained in the police cells. Under cross-examination Mosebe testified that he weighed the copper cables and not de Witt but he could not explain why de Witt's signature appeared on the purchase note of the relevant cables.

[8] Plaintiff's version of the events leading to his arrest was that on 12 August 2014 at approximately 10h15, six armed police officers in uniform in four marked police vehicles arrived at Just Metals Scrapyard. Warrant officer de Witt informed him that he was in charge of the routine inspection of the scrapyard and informed the plaintiff that they are going to arrest the plaintiff. During their search they found a bag of shiny copper cables and a Mr Puta who was accompanying the police informed the plaintiff that the cables were illegal as they belonged to Eskom. De Witt requested the documents and the register in terms of the *Second Hand Dealers Act 6 of 2009* with the particulars regarding the acquisition or disposal of the second hand copper cables. Plaintiff testified that he got the purchase notes of the copper cables but when he handed them to de Witt, he refused to accept the documents. The copper was weighed at 319 kg at the scrapyard premises and de Witt arrested the plaintiff for possession of stolen copper cables. Plaintiff testified that the copper cables found at the scrapyard was commonly used by electricians and could be purchased

anywhere. The plaintiff was taken to Pretoria North Police Station in a police vehicle and was detained in a police cell with no rest rooms with eight other inmates. He was released on the same day at approximately 17h30.

[9] Plaintiff testified that his arrest and detention and having been accused of possession of suspected stolen copper cables was painful and embarrassing and his dignity was degraded. Under cross-examination the plaintiff denied that Constable Mosebe was the arresting officer but testified that the Warrant Officer was the arresting officer and that Mosebe was on that day, just a by-stander.

Mutually Destructive Versions

[10] The versions of the plaintiff and the defendant are irreconcilable in material aspects regarding how the arrest was made and are mutually destructive. The plaintiff's version is that Warrant Officer de Witt was in charge of the inspection and was the arresting officer and he refused to accept the documentation from the plaintiff.

The defendant's version is that Constable Mosebe was the arresting officer and that the plaintiff refused to produce the documentation to explain possession of the copper cables.

[11] The technique generally adopted by the courts in resolving factual disputes when dealing with two irreconcilable versions is set out in *Stellenbosch Farmers' Winery Group Limited and Another v Martell ET Cie and others*². The court should make findings on the credibility and reliability of factual witnesses and on the assessment of probabilities. An evaluation on the probability or improbability of each

² 2003 (1) SA 11 SCA at paragraph 5.

party's version should be determined on the disputed issues. After the assessment the court will determine whether the party burdened with the *onus* of proof, has succeeded in discharging it.

[12] The defendant's version is in my view flawed and unreliable in that it does not make sense that De Witt was not present at the inspection although his signature is on the purchase note dated 12 August 2014 at 12h06 when the copper was booked out from the scrapyard. Furthermore, it is highly improbable that the plaintiff would refuse to give an explanation and documentation of the origin of the cables to the arresting officer whilst faced with a possible arrest.

I therefore find the plaintiff's version on how the arrest occurred to be more probable.

[13] An arresting officer is required to form a reasonable suspicion of a commission of an offence before arresting an individual, which arrest effectively deprives the individual of his liberty. The question whether Constable Mosebe or/and Warrant Officer de Witt had a reasonable suspicion in the circumstances that plaintiff committed the offence must be considered by taking into account that:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end³".

[14] The arresting officer in this case refused to accept the documentation from the plaintiff which would have explained the acquisition of the suspected stolen cables. It is common cause that the investigating officer, Sergeant Ngobenj found that Mr Puta is neither an expert nor an Eskom employee but is an independent contractor and could not give expert evidence on the identity and the exact value of the cables.

³ Shabaan Bin Hussien and Other v Chong Fook Kam and Another [1969] 3 ALL ER 1626 (PC) at 1630.

Sergeant Ngobeni found that the plaintiff's explanation of how he got to be in possession of the copper is reasonable and that there were no prospects of a successful prosecution against the plaintiff.

[15] In my view, the arresting officer *in casu*, had no sufficient grounds for the reasonable suspicion that the plaintiff has committed the offence. The arresting officer had a duty to make enquiries about the acquisition of the copper, to assess and analyse the information at his disposal before the arrest and he failed to do so. The suspicion that the plaintiff was in possession of suspected stolen goods was in my view not based on reasonable grounds and was therefore unlawful.

Quantum of Damages

[16] When assessing damages in matters such as the present, the evaluation of the personal circumstances of the plaintiff, the circumstances around the arrest and the nature and duration of the detention is taken into account⁴. The testimony of the plaintiff about his personal experiences, the conditions that prevailed in the police cells and what effect the arrest had on him is also taken into account. The plaintiff, a workshop manager, was 36 years old when he was arrested and was detained for approximately five and a half hours.

[17] The purpose of an award for general damages in the context of matters such as the present is to compensate the claimant for deprivation of personal liberty and freedom as well as the mental anguish and distress. The primary purpose is not to enrich the claimant but to offer him or her *solatium* for his or her injured feelings⁵.

⁴ See *Ngcobo v Minister of Police* 1978 (4) SA 930 D at 935 B-F.

⁵ *Minister of Safety v Tyulu* 2009 (5) SA 85 (SCA) at par 26.

[18] Although the determination of an appropriate amount of damages is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases. Plaintiff's counsel referred me to the relevant comparisons made in *Minister of Safety and Security v Seymour*⁶:

"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that".

[19] As indicated above, awards made in previous cases can only serve as guidelines. An appropriate award will ultimately depend on the particular facts and circumstances of each case. I have taken into account the circumstances of the arrest, the duration of the detention, the indignity of being confined in a police cell, the personal circumstances of the plaintiff, the awards made in previous comparable cases and the gradual devaluation of the currency. Taking into account all the circumstances in this case, I deem R30 000, 00 to be a just and fair amount of damages for the plaintiff.

Costs

[20] Although the claim in the summons is R100 000, 00 which is a quantum of damages which falls within the Magistrate's court monetary jurisdiction, the plaintiff seeks costs on the High Court scale. Plaintiff counsel submits that the plaintiff's constitutional rights were violated and that justified the institution of proceedings in the High Court, although the quantum of the damages falls within the magistrate court monetary jurisdiction.

⁶ 2006 (6) SA 320 (SCA) at 325 par 17.

[21] The purpose of the costs order is to indemnify a party for the expenses to which he has been put through of having to institute or defend the action. The fundamental rule is that the award of costs is always within the discretion of the court. Even the general rule that costs follow the event or result, is subject to the overriding principle that the court has a judicial discretion in awarding costs.

[22] In *van der Merwe v Schraader*⁷ it was decided that a party who sues in the High Court for an amount that falls within the jurisdiction of a Magistrate's court, may be awarded costs in the High Court scale, depending on the circumstances. In this case, despite the fact that the amount claimed in the summons was clearly within the Magistrate's court monetary jurisdiction, the summons were issued in the High Court.

[23] Far too many cases are brought to the High Court with the sum initially claimed falling comfortably within the District Magistrate and Regional court monetary jurisdiction. This practice should be discouraged by sending a clear message to legal practitioners to give careful considerations to this aspect before proceedings are instituted. Although the plaintiff has attained a measure of success, I am of the view that this action should not have been brought in this court in the first place. In the circumstances, I decline to award costs on the High Court scale.

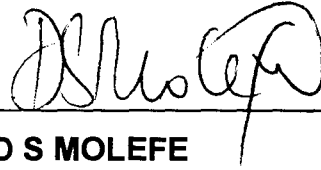
[24] In the result, the following order is made:

24.1 The defendant is ordered to pay the plaintiff an amount of R30 000.00 for unlawful arrest and detention;

24.2 interest on the amount shall run at the prescribed rate from date of judgment to date of payment;

⁷ 1953 (2) SA 339 (E)

24.3 the defendant is ordered to pay costs of the action on a magistrate court scale.



D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant : **Adv. J Groenewald**
Instructed by : **Prinsloo Attorneys Inc.**

For the Respondent : **Adv. C Lithole**
Instructed by : **State Attorneys**

Date Heard : **15, 16 and 24 February 2017**
Date Delivered : **10 March 2017**