

REPUBLIC OF SOUTH AFRICA

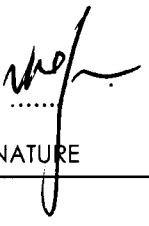


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

20/5/14

CASE NO: 30124/2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
20/5/2015	
DATE	SIGNATURE

In the matter between:

MICHELLE VAN DER WESTHUIZEN

Plaintiff

and

MINISTER OF POLICE

First Defendant

MINISTER OF EDUCATION

Second Defendant

JUDGMENT

NKOSI AJ

A. INTRODUCTION

[1] The plaintiff is Michelle van Der Westhuisen, a major female travel agent who conducts business as Select Resorts who sues the first defendant for her unlawful arrest and detention.

[2] The plaintiff withdrew her claim against the second defendant and it is not necessary for the court to further concern itself with the claim for malicious proceedings, which was against the second defendant.

[3] At the commencement of the trial, the plaintiff and the first defendant agreed that the merits and quantum should be separated as provided for in terms of Rule 33(4) of the Uniform Rules of Court and the court made an order to that effect. This order is hereby withdrawn and retracted vide paragraphs 57 and 58 infra.

B. THE TRIAL

[4] The allegations in the plaintiff's particulars of claim are set out as follows:

4.1 **Paragraph 4** – the plaintiff alleges that, on 24 March 2011 at Pinetown, members of SAPS arrested her without a warrant on a charge of fraud;

4.2 **Paragraph 5** – the aforesaid members of the SAPS were acting in the course and scope of their employment with the first defendant;

4.3 **Paragraphs 6 and 7** – the plaintiff was wrongfully arrested without any reasonable suspicion for justifying the arrest and she was detained at the

Phoenix Police Station and thereafter the Bronkhorstspuit Police Station on the insistence of the aforesaid policemen:

4.4 **Paragraph 9** – the plaintiff alleges that the aforesaid members of the SAPS had a duty to take cognisance of the following facts which were explained to them;_

4.4.1 that there was no objective evidence to justify the plaintiff's arrest;

4.4.2 that there was no reasonable suspicion for justifying the arrest;

4.4.3 that the plaintiff had conducted the joint inspection with the complainant pertaining to the accommodation;

4.4.4 that the plaintiff previously arranged accommodation for the Ekangala School with success;

4.4.5 that the members of the Ekangala School had concluded an agreement with the plaintiff;

4.4.6 that the complainant had only lodged a complaint several months after the alleged incident.

4.5 **Paragraph 10** – the plaintiff alleges that because of the foregoing unlawful arrest and detention, she suffered damages.

[5] The defence of the first defendant as set out in its plea is summarised as follows:

5.1 **Paragraph 4.1** – the defendant admits that on or about 24 March 2011 at or near Pinetown, members of the SAPS, acting within the course and scope of their employment arrested the plaintiff without a warrant;

5.2 **Paragraph 4.2** – the first defendant alleges that the plaintiff was arrested on a reasonable suspicion that she had committed the offence of fraud which is a Schedule 1 offence.

5.3 **Paragraph 4.3** – the first defendant alleges that members of the SAPS, acted in terms of Section 40(1)(b) of the Criminal Procedure Act and lawfully detained the plaintiff at the Phoenix Police Station under case number 272/09/2010;

5.4 **Paragraph 4.5** – the first defendant alleges that the plaintiff was transferred to Bronkhorstspuit Police Station, where she was further detained under case number: 272/09/2010.

[6] From the pleadings, it is common cause between the parties that the plaintiff was arrested and detained without a warrant.

[7] An arrest without a warrant is lawful, inter alia, at the time of the arrest, the arresting officer had a reasonable belief that the plaintiff had committed a Schedule 1 offence. The court had to decide whether members of the SAPS had a reasonable belief that the plaintiff had committed a Schedule 1 offence based on the information available to them before effecting the arrest.

C. THE EVIDENCE BY THE PARTIES

[8] The plaintiff is a travel agent, who operates as Select Resorts from an office adjacent to her home in Pinetown, Kwazulu-Natal.

[9] The plaintiff has a website that can be visited and viewed and it shows a number of destinations throughout the Republic of South Africa at which she can arrange accommodation.

[10] During on or about May 2010, the plaintiff was contacted by Joyce Mpai of the Ekangala School to arrange accommodation for a number of school children and teachers who wished to secure accommodation at the Durban Beach front.

[11] The plaintiff managed to secure accommodation for 210 students and 40 teachers at the Durban Beach front for the sum of R69 900-00.

[12] The representatives of the Ekangala School were satisfied with the accommodation and the price charged.

[13] A dispute arose between the plaintiff and representatives of the Ekangala School regarding the payment of a deposit of R20 000-00. This amount was not in dispute.

[14] According to the plaintiff, the representatives of the school had to pay a deposit of 50% to secure the accommodation whereas, according to the representatives of the school, payment of the sum of the R20 000,00 would be sufficient to secure the accommodation at the Durban Beach front. It was her evidence that she does not discuss her commission with client or was neither necessary to discuss it as an agent.

[15] During the beginning of August 2010, on a Sunday, evening, Joyce Mpai and the Head Master of the Ekangala School and two police officers from Pinetown arrived at the plaintiff's residence and demand to be shown the accommodation, which the plaintiff had arranged.

[16] The plaintiff allowed them in and gathered all documents relating to the accommodation and showed the documents to the representatives of the accommodation and showed the documents to the representatives of the school and the two police officers accompanying them.

[17] The details furnished of the accommodation arranged by the plaintiff did not satisfy the representatives of the school and the police officers accompanying them and they demanded to be shown the accommodation.

[18] The next day, the plaintiff took the representatives of the school to the accommodation at the Durban hotel at the beach front, which she had arranged. They went through the rooms where the teachers and the children would stay.

[19] The plaintiff and the representatives of the Ekangala School were unable to resolve their differences regarding to what amount had to be paid to secure the accommodation.

[20] Eventually, the plaintiff advised the representatives of the Ekangala School that they had to deal directly with the owner of the hotel, which they duly did.

[21] On 16 August 2010, a letter was sent by Cool Ideas 27 (Pty) Ltd t/a The Durban Hotel to the plaintiff. The letter appears on page 45 of Bundle A and confirms the booking of the group of the Ekangala School, which comprised of 40 adults and 210 learners. The plaintiff later forwarded the said letter to the representatives of the school and impressed upon them to pay the balance of the deposit to secure the accommodation.

[22] The representatives of the school were unhappy with the fact that the plaintiff earned a fee and proceeded to negotiate directly with the owner of the Durban Hotel and they stayed at the Durban Hotel.

[23] During 2011 and after having stayed at the Durban Hotel, Mr Mpai of the Ekangala School escalated the matter by filing a complaint at the police station in Bronkhorstspuit. The detail of the complaint was not made known to court.

[24] She brought detective constable, Moloto, *"fully into the picture"* and told him everything that had happened. She also gave him all the documents which she had in her possession. This was after a docket was opened and allocated to Detective Constable Moloto.

[25] The documents included correspondences exchanged between the plaintiff and the school and in particular the letter from the owner of the hotel confirming that accommodation had arranged.

[26] On 24 March 2011, detective constable Moloto and a colleague drove down to Pinetown to arrest the plaintiff for fraud.

[27] They arrived at the plaintiff's home at approximately 09h00 and said that they were seeking accommodation. They were not dressed in uniform and the plaintiff invited them in.

[28] After the plaintiff invited them in, they advised her that they were policemen from Bronkhorstspuit who came to arrest her for fraud.

[29] The plaintiff fetched her file and she showed them all the documents and explained the situation to the members of SAPS from Bronkhorstspuit.

[30] The plaintiff's explanation was not acceptable and she was told to get in the back of the van and they drove to Durban Hotel.

[31] Upon arrival at the hotel, the police officers from Bronkhorstspuit spoke to the manager's son, Ryan, who explained to them the situation and that there has been a booking previously.

[32] She was taken to the Phoenix Police Station where she was arrested and detained in the holding cells until the early morning of 25 March 2011.

[33] During the early morning of 25 March 2011, detective constable, Moloto and his colleague took the plaintiff to Bronkhorstspuit Police Station where she was detained further until she was taken to court later during the day of 25 March 2011 and then released on bail.

[34] The plaintiff was deprived of her freedom and humiliated by her arrest. She broke down in tears while giving testimony, having to recall the ordeal that she was put through.

D. CONSIDERATION

[35] When police have arrested and detained a person without a warrant, the onus of proving the lawfulness of the arrest rest on the State. This is trite law.

[36] The first defendant can discharge the onus of proving the lawfulness of the arrest if he can show that, at the time of the arrest, the arresting officer had a reasonable belief that the plaintiff had committed a Schedule 1 offence, fraud in this case. This is a requirements in terms of section 40(1)(b) of the Criminal Procedure Act.

[37] In **Duncan v Minister of Law and Order** 1986 (2) SA 805 (AD) at 814 D – E the following was said:

“It was also common cause that the question whether a peace officer reasonably suspects ‘a person having committed an offence within the ambit of Section 40(1)(b) of the Act is objectively justifiable and it seems clear that the test is not whether a policeman believes that he has a reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion’”.

[38] Given the circumstances of the arrest in this instance, it is trite that the onus rests on the defence to justify an arrest.

[39] The only question to be decided by the court deciding on the matter is whether on objective reasonable grounds (in the sense as referred to in the **Duncan** case *supra*) existed at the time of arrest to support the belief that the plaintiff had committed a Schedule 1 offence.

[40] It was submitted that the first defendant has failed to discharge the onus of proving that the arresting officer, detective constable Maloto had a reasonable belief that the plaintiff had committed the offence of fraud, which is Schedule 1 offence of fraud: The commonly accepted definition of fraud according to **CR Snyman 4th ed**: *"Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another"*.

[41] Detective constable Moloto's own version was that he arrested the plaintiff for fraud because firstly, she received the deposit of R20 000,00 in her personal bank account and secondly, because she was unable to furnish any proof of the fact that she had made a booking for the Ekangala School at the Durban Hotel. This was despite the correspondence between the plaintiff and the school regarding the 50% deposit to secure the booking.

[42] The grounds advanced by detective constable Moloto to support of his belief that the plaintiff had committed fraud were not justifiable. He could not provide proof of a personal bank account as he stated that the amount of R20 000,00 deposit was made to the Plaintiff.

[43] The invoice sent by the plaintiff to the representatives of the school had the bank details of the plaintiff's business, Select Resorts, on it. The acceptable rate agreed upon between the parties also appeared from the invoice. There was no misrepresentation made to the representatives of the school on the invoice.

[44] Moreover, the letter in Bundle B page 45, sent by the owner of the Durban Hotel to the plaintiff confirmed that the plaintiff had made a booking on behalf of the Ekangala School at the Durban Hotel.

[45] The aforesaid correspondences clearly revealed that objectively speaking that the grounds for supporting the reasonable belief that the plaintiff had committed the offence of fraud did not exist and therefore the arrest and the detention of the plaintiff was unlawful.

[46] Matters got worse for detective constable Moloto when he testified that he had arrested the plaintiff before making any enquiries with the owner of the Durban Hotel regarding the booking. It was his evidence that the plaintiff acted as if she was the owner of Hotel accommodation. This could not be substantiated by him.

[47] He was also forced to concede that the behaviour of the plaintiff was not consistent with the behaviour someone who had just committed fraud. The plaintiff continued to write letters to the representatives of the Ekangala School and even gave them her home address. The defendants' witnesses all confirmed that the plaintiff's home had a board indicating Select Resort C.C as a private residence and office.

[48] It is obvious from the documents which detective constable Moloto had in his possession that the dispute between the parties related to contractual dispute over

payment of the sum of R20 000,00. That much was revealed by the evidence of Ms Mpaai when she testified that the school was happy with the total of R69 900,00 for the accommodation, having paid the deposit to the plaintiff in the amount of R20 000,00 and settled the balance of R49 900,00.

[49] All of the aforesaid information was available to detective constable Moloto before he arrested the plaintiff. The plaintiff's testimony that she was a booking agent and her deposits were obtainable on website was not disputed. The issue of an agent was confirmed in *Wakefields Real Estate v/s Aftree* (666/10) 2011 ZASCA 160 citing *Aida Real Estate v/s Lipschitz* 1971(3) SA 871 (W) with approved that: "in case an agent had introduced a purchaser who ultimately negotiated directly with the seller in concluding a sale. The agent was nonetheless held to be the effective cause of the sale and therefore entitled to commission. This is consistent with the situation of the present case.

[50] When one applied the objective test as enunciated in the case of **Duncan v Minister of Law and Order** *supra* to the facts of the matter, it is clear that, on an objective approach to the facts (having listened to the versions of the representative parties and having sight of all the documents) there were no reasonable grounds to support the belief that the plaintiff had committed fraud and for arresting her.

[51] Detective constable Moloto attempted to rely on certain statements, which were allegedly available to him and were in the police docket.

[52] When he was asked where the docket is, why it was not discovered and why he did not bring it to court despite the fact that a subpoena *duces tecum* was served on the first defendant he had no answers.

[53] Detective constable Moloto had no answers and it leaves the first defendant in a position, which the evidence of detective constable Moloto was based on nothing more than inadmissible hearsay evidence.

[54] The only inference to be drawn from the persistence to refuse to make the docket available despite the trial running over into a second day is that there are statements or documents in docket which the first defendant does not want the court to see. This was one amongst others: that the relationship between the plaintiff and the Ekangala Secondary School was a contractual one between an agent (booking agent) and the school through Miss Mpai was not disputed. The deposit received was not denied and it was accounted for on payment of agents fees and R3000,00 securing the booking at Durban Hotel which the school finally used for its accommodation in Durban. There was no evidence of cancellation of the oral agency arranged and Miss Mpai confirmed that the plaintiff introduced them to the hotel. Should they have cancelled it they would have been entitled to claim their deposit paid. This would be a civil action and not a criminal offence. The police through Moloto did not act like a bonus paterfamilias officer but chose to effect an arrest. There was no reasonable suspicion of commission of an offence let alone of a

Schedule 1 offence. The school eventually used the accommodation as introduced by the plaintiff.

[55] It was further submitted that, objectively speaking, a reasonable police officer having been brought "fully into the picture" would not have formed the belief that the plaintiff had committed the offence of fraud and as such, the plaintiff's arrest without a warrant was unlawful. A reasonable police officer, after receiving a docket could have approached the state prosecutor for a decision whether to effect arrest for prosecution. He did not do that.

[56] In the above premise, it was submitted that the Honourable Court should enter judgment in favour of the plaintiff as follows:

56.1 That the first defendant is liable for all the proven damages of the plaintiff arising from her unlawful arrest and detention on 24 March 2011;

56.2 That the first defendant be ordered to pay the plaintiff's costs occasioned in respect of the merits component of the case;

[57] Though the parties agreed to separate the merits and quantum from the beginning the court is entitled to determine the exact amount of compensation to avoid unnecessary escalation of costs of further attendance, in case the finding is in favour of the plaintiff.

[58] The court is guided by its own jurisprudence and previous similar relevant precedents, which is hereby applied in this case. The plaintiff was detained for one day and the case was later withdrawn by the court. This court is entitled to set a reasonable compensation for such unlawful arrest and detention.

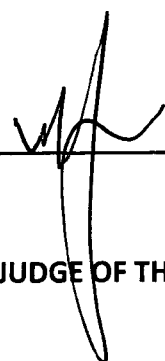
E. CONCLUSION

[59] In the result I am of the view that the plaintiff succeeded to prove its case on a balance of probabilities and the 1st defendant's defence is dismissed.

F. ORDER

(a) The 1st defendant is ordered to compensate the plaintiff in the amount of R150 000,00 for the unlawful arrest and detention.

(b) The defendant is further ordered to pay costs of this action on party and party scale on the Regional Court scale.



VRS NKOSI
ACTING JUDGE OF THE HIGH COURT

Plaintiff's Counsel : Adv Uys PL

Brief by : Gildenhuis Malatjie Attorneys

1st defendant's Counsel : Adv. MH Mhambi

Brief by : Office of the State Attorney, Pretoria