

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case no: CA90/2012
Date heard: 5 June 2015
Date delivered: 11 June 2015

In the matter between

NOMTHUNZI NOMBULELO BANGO

Appellant

vs

MINISTER OF SAFETY AND SECURITY

Respondent

JUDGMENT

PICKERING J:

[1] The appellant instituted a claim for damages in the sum of R500 000,00 against the respondent in the High Court, Mthatha, arising out of her alleged wrongful and unlawful arrest and detention at the hands of certain police officials in the employ of respondent. The issues relating to the merits and quantum were separated and the matter proceeded to trial before Griffiths J on the merits only. At the conclusion of the trial Griffiths J dismissed appellant's action with costs. With the requisite leave the appellant now appeals to the Full Bench of this Division against the whole of the judgment and order of the learned Judge a quo.

[2] For the sake of convenience I shall refer to the appellant and the respondent as the plaintiff and defendant respectively.

[3] Much of what transpired leading up to the arrest and detention of plaintiff was or became common cause at the trial. It appears that plaintiff, together with her husband, one Malusi (Shepherd) Bango occupied certain

residential premises belonging to one Mlamli Bango. At some stage Mlamli Bango instituted eviction proceedings in the High Court, Mthatha, citing as respondents the Minister of Justice (first respondent); the Magistrate of Mqanduli (second respondent); and plaintiff's husband, Malusi Bango (third respondent).

[4] On 7 October 2004 an order was granted by Hole AJ in the following terms:

- "1. That the judgment of the second respondent granted on 7 April 2004 is hereby reviewed and set aside.*
- 2. That the third respondent is hereby directed to vacate the premises bearing the residential allotment no 43 at Mqanduli district;*
- 3. That the third respondent is hereby ordered to pay costs of this application."*

[5] It is common cause that at some time later plaintiff's husband noted an appeal against this order and filed an application for the rescission thereof. There is no indication as to the fate of either the appeal or the application. Be that as it may, it is also common cause that during February 2007 plaintiff, her husband and their children were still in occupation of the premises.

[6] Eventually, during February 2007, Mlamli Bango approached the magistrate, Mqanduli, for assistance and attested to an affidavit on 5 February 2007 in the following terms:

"I Mlamli Bango paid an amount of R477, 40 to Mr. C. Koti (Mqanduli sheriff) for a service the High Court decided on 21-02-06 to Malusi Bango respondent in the case 900/04, High Court of South Africa (Transkei Division). Since 27/07/06 he has not done the service. I am aggrieved because I am now a laughter in my area. I wish he should be punished for this and be forced to serve." (sic)

[7] The magistrate thereupon arranged for the sheriff to execute upon the order of Hole AJ. On 6 March 2007 the sheriff, armed with the order of 7 October 2004, proceeded to the premises and evicted not only plaintiff's husband therefrom but also plaintiff and her family. Their goods and chattels were removed from the house which was then locked by the sheriff who gave the keys to Mlamli Bango.

[8] Plaintiff thereupon consulted her husband's attorney in Mthatha. He advised her that because her husband had noted an appeal against the eviction order the sheriff had not been entitled to execute upon it. The attorney addressed a letter to this effect to the sheriff. Plaintiff handed this letter to the sheriff who, after reading it, gave it back to plaintiff stating that he did not understand it as it did not have a High Court stamp.

[9] Because of the attorney's advice that she had been wrongfully evicted plaintiff moved back into the house, entering through the back door which had a defective lock. Mlamli Bango then approached the magistrate again. The magistrate took him to the police station and requested to speak to a senior policeman. They were referred to Captain Mbaleni. The magistrate related Mlamli Bango's complaint to Captain Mbaleni and then left.

[10] In his evidence Captain Mbaleni confirmed having been shown a copy of the court order of 7 October 2004 by Mlamli Bango. In the light thereof he requested constable Mdubeki to open a case against plaintiff. He stated that he had formed a reasonable suspicion that by re-entering the premises in breach of the court order plaintiff had committed an offence referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977. As he put it, he had concluded that plaintiff should be arrested "*because there was an order vacating her husband out of those premises*". This was all that he had relied upon.

[11] He then instructed constable Diko to accompany constable Mdubeki to the premises in question together with Mlamli Bango and to arrest the plaintiff because of her breach of the terms of the court order.

[12] In his testimony constable Diko confirmed having been called to Mbaleni's office. He stated that *"Captain Mbaleni showed me a court order in terms of which one Shepherd and others had been evicted from the homestead of Mlamli Bango and that having been evicted they had returned into that homestead. He further informed me that a case had already been opened by Constable Mdubeki relating to the fact that some people have - those people have gone against a court order."* (My emphasis)

[13] Diko then requested to be allowed to read the statement made by Mlamli Bango which was in the docket.

This statement reads as follows:

"On the 01-03-07 I went to the magistrate court applying for an order that Nomthunzi Bango must get out of my site. Then the magistrate send sheriff to do that. The sheriff went there and took off Nomthunzi's property and told Nomthunzi to get out of my site and the sheriff leafed (sic) Nomthunzi out of my site. After the sheriff had gone Nomthunzi took her property back to my site. I said nothing to him but on the next day I went to the magistrate again to report the matter and the magistrate suggested me to open the case and I decided to open a case against Nomthunzi as she didn't want to get out of site."

[14] After Diko had read the court order and the aforementioned statement he proceeded to the premises accompanied by Mlamli Bango and two other police officers. As they alighted from their motor vehicle at the premises plaintiff emerged from the house. At that stage Mlamli Bango informed the police officers that plaintiff was *"one of those people who had been ordered to vacate those premises."* He further told them that plaintiff had taken her belongings back into the house.

[15] Diko accordingly confronted plaintiff and showed her the court order. He informed her that she had disregarded a court order by breaking into the

house and that he was arresting her. Asked as to what offence he suspected her of having committed he replied that *“she disregarded the court order and then she went on to breaking into those premises. She entered the premises, which she had been specifically barred from entering.”*

[16] Diko then took plaintiff to the charge office where she was formally charged. After this she was taken to court along with the docket. The court, however, refused to entertain the matter and plaintiff was taken back to the police station and detained overnight in the cells, being released the following day. It is common cause that plaintiff was charged with housebreaking with intent to commit an offence to the prosecutor unknown (count 1); trespass (count 2) and contempt of court (count 3). At her trial in the magistrate’s court she was acquitted on count 1 but convicted on counts 2 and 3. She appealed to the High Court against both these convictions. Her appeal was upheld and she was acquitted on both counts.

[17] In his judgment Griffiths J set out the principles to be applied in a matter such as this as follows:

“[13] It is trite that a defendant raising a defence based on section 40(1)(b) of the Act bears the onus of establishing the following jurisdictional facts:

‘(i) The arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.’ [Minister of Safety and Security v Sekothoto 2011 (1) SACR 315 (SCA)].

[14] It is furthermore clear that the test as to whether or not such suspicion is reasonable is an objective one. The approach to be adopted in considering whether or not the suspicion is reasonable was succinctly set out by Jones J in the matter of Mabona and Another v Minister of Safety and Security and Others as follows:

‘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 he 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.’”

[18] There was some debate in the court a quo as to whether the arresting officer was Captain Mbaleni or Constable Diko. In this regard Griffiths J referred to the fact that Diko had not simply accepted Captain Mbaleni’s instruction to arrest plaintiff. He had instead requested not only to read the court order but also to read Mlamli Bango’s statement. At the premises he also took into account the verbal statement made to him by Mlamli Bango. The learned Judge found that in the circumstances Diko had exercised an independent discretion and that he was therefore the arresting officer. In my view this finding cannot be faulted.

[19] There was also some debate as to whether the offence which Diko suspected plaintiff had committed fell within the purview of Schedule 1 to the Criminal Procedure Act. Having considered the evidence in this regard Griffiths J concluded that *“it seems clear to me that the offence, or offences, of which she was suspected by Diko of having committed, fell under the relevant wording of Schedule 1 as it, or they at the very least amounted to breaking and entering with the intention of committing an offence.”*

[20] Again, in my view, the learned Judge was clearly correct in this finding.

[21] The following issue was whether or not Diko's suspicion that plaintiff had committed a Schedule 1 offence was, objectively viewed, reasonable, as it was held to be by Griffiths J.

[22] In this regard Griffiths J stated as follows:

"[27] Of some importance in this regard is the fact that the sheriff, having seen the letter from the plaintiff's attorney, did not communicate this information to the police. Had he done so, matters might have been different. As I have indicated earlier in this judgment. Diko was given all the information available to Mbaleni notwithstanding which he took the trouble to satisfy himself as to the facts of the matter by reading the relevant statement, perusing the court order and discussing the matter further with Bango. Once he had done this, he himself formed the suspicion that the plaintiff had indeed both violated a court order and committed the crime of housebreaking. He had no idea that there was a possibility that the operation of the court order might have been suspended, and I do not believe that it was incumbent upon him, being in possession of a court order which on the face of it was valid and being possessed of the knowledge that the sheriff, an official of the court, had executed that very court order, to have investigated this aspect any further. Additionally, the local magistrate had taken it upon himself to bring Bango to the police station which, in itself, would have lent more credence to Diko's belief that the court order was extant and valid.

[28] Based on this, Diko's knowledge that the plaintiff had re-entered the premises after having ostensibly been lawfully evicted therefrom, and his knowledge that the house had been locked and the keys handed to the sheriff, served to fortify his suspicion that the plaintiff had in fact broken into the premises. As it turned out, the suspicion was correct to the extent that the plaintiff had re-entered the premises via

the kitchen door which did not require a key as the lock was defective. Such an act in itself, as I have indicated, would amount to housebreaking but Diko did not know about this, believing that she must have somehow broken the lock herself or used some other means to break into the premises.”

[23] Again I am of the view with respect, that this reasoning cannot be faulted.

[24] The learned Judge dealt further with regard to the wording of the court order itself as follows:

“As regards the fact that the court order did not refer to the plaintiff, but to her husband, Malusi, and that it did not state that all those persons residing in the premises through him were also to be evicted, I do not think anything turns on this. As I have already said, the sheriff, rightly or wrongly, interpreted the order to be so all-encompassing and proceeded by virtue of such authority to evict the plaintiff. Furthermore, the magistrate had not disavowed this and had, by his very presence, intimated that the actions of the sheriff were lawful. In my view, and as against this background, it would be too much to have expected Diko to have second-guessed these officials as to the lawfulness of this document.”

[25] It is clear, when regard is had to Ntai and Others v Vereeniging Town Council and Another 1953 (4) SA 579 (AD), that the Sheriff was entitled to evict from the premises all those persons claiming through or under Malusi despite the fact that the order did not refer to them. See too: Jones & Buckle: The Civil Practice of the Magistrate’s Courts in South Africa, Vol ii 10th ed at Annexure 1-34, note 1.

[26] I am further not persuaded that Griffiths J erred in his finding that in all the circumstances *“it would have been too much to have expected Diko to*

have second-guessed” the magistrate and the Sheriff as to the lawfulness of the court order.

[27] In my view therefore the arrest and detention of the plaintiff was as found by Griffiths J, lawful.

[28] The appeal accordingly cannot succeed.

[29] The appeal came before this Court on a number of previous occasions, only to be postponed on the application of respondent due to its remissness particularly in the timeous briefing of counsel. On each such occasion the costs occasioned by the postponement were reserved for later decision. There is no reason why those costs should not be borne by respondent.

[30] The following order will issue:

- (a) The appeal is dismissed with costs.
- (b) The respondent is ordered to pay all such costs as were previously reserved.

J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

D. CHETTY
JUDGE OF THE HIGH COURT

I agree,

L.P. PAKADE
JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Adv. Ntsaluba
Instructed by: Caps Pangwa & Associates

Appearing on behalf of Respondent: Adv. Ntshiba
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