IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: 34441/2011

In the matter between: 15/5/2013

MAPURANGA JEVAS (ALIAS JEVAS MPOFU) Plaintiff

and

THE MINISTER OF POLICE Defendant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
15/05/2013
DATE SIGNATURE

JUDGEMENT

MAKHUBELE AJ

INTRODUCTION

[1] The plaintiff (Jevas) is an unemployed Zimbabwean national who according to the particulars of claim, resides at Plot 198, Buffelsdrift Nature Reserve, Pretoria. He instituted action against the Minister of Police (Defendant) and claimed payment of an amount of R240 000 ,00

(Two hundred and fourty thousand rand) for damages he suffered as a result of his arrest and detention which according to him was unlawful .

[1.1] The trial commenced on 31 January and adjiurned on 01 February 2013. Counsel submitted heads of argument on 18 and 01 March respectively. Plaintiff filed replication to defendant's submissions on 05 March 2013.

[2] In his particulars of claim, Jevas alleged that he was arrested by unknown members of the "South African Police Force on 04 January 2010 at Kameeldrift police station without a warrant and was detained there until he was released on Friday, 08 January 2010 *"unconditionally, without been charged or brought before a court of law"* .

[3] The defendant filed a special plea and plea on the merits on 23 September 2011. In terms of the special plea, defendant alleged that plaintiff has failed to give a notice in terms of section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State within the prescribed six months period after the occurrence of the incident that gave rise to the cause of action.

The plaintiff filed a substantive application for condonation a day before the matter was heard. Defendant did not oppose the application and condonation was duly granted.

[4] On the merits, defendant;

[4.1] placed in issue the plaintiff's name and alleged that the name given to the arresting officer was *"Sylvester"*. Nothing turns on this.

[4.2] admitted the arrest with the qualification that it was lawful and it took place on *"05 January 2010 at 12:00 at Buffelsdrift Nature Reserve by Constable E K Diale on a reasonable suspicion of being an illegal immigrant in terms of section 41 of the Immigration Act, No 13 of 2002"*.

[4.3] pleaded that plaintiff was *"lawfully detained in terms of Section 34(2) read with Section 41 of the aforesaid Act, until 8 January 2010 At Kameeldrift Police Station.."*

[4.4] pleaded that it had no knowledge as to whether plaintiff was released, charged or brought before court. However, the plea went on, plaintiff was taken to Home Affairs at 09:30 on 08 January 2010 for deportation.

[5] Two trial bundles, A[1] and B[2] were handed in and references were made therein throughout the proceedings.

[6] I was advised at the commencement of the proceedings[3] that the parties had agreed that there should not be a separation of issues in terms of Uniform Rule 33(4) . The trial proceeded on both merits and quantum.

ISSUES FOR DETERMINATION

[7] The date of arrest was placed in issue by the defendant. Plaintiff alleges that he was arrested on 04 January 2010, however, he has not substantiated this. On the other hand, defendant has submitted documents to support its contention that the date of arrest is 05 January 2010. It appears from plaintiff's heads of argument that there is a concession that this is the correct date. I therefore accept the version of the defendant that plaintiff was arrested on 05 January 2010. In any event, plaintiff did not adduce any evidence in rebuttal thereof.

The remaining issues are:

[7.1] The place where the arrest took place.

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[1] Pleadings
[2] documents
[3] See also paragraph 4.6 of pre-trial minutes dated 15 November 2012

[7.2] The lawfulness of the arrest and detention.

[7.3] The quantum of damages should the arrest and detention be declared unlawful.

ONUS

[8] Dendant has admitted that plaintiff was arrested and remained in custody from 05 to 08 January 2010. This is all that the plaintiff was required to prove. The onus[4] is then on the defendant to justify the lawfulness of the arrest and deprivation of freedom.

EVIDENCE

[9] Mr Ekele Kissinger Diale testified on behalf of the defendant. His evidence in chief was briefly as follows:

[9.1] He is a constable with nine years experience and he is stationed at Kameeldrift Police Station.

[9.2] On 05 February 2010 he was busy with his duties amongst which was patrols and attending to complaints.

[4] See: Minister of Order v Hurley 1986(3) SA 568 (A) AT 589 E-F

He received a complaint from Buffelsdrift Nature Reserve about one of the residents who, it was alleged, brought workers into the complex without registering them at the gate. This, it was alleged was a contravention of the rules of the Home Owners Association.

[9.3] He could not remember the complainant or the alleged transgressor of the rules. He left the police station with the complainant though.

[9.4] When they arrived at the transgressors house, they found a male person working at the garden. The person introduced himself as Sylvester Mpofu[5]. Diale informed him about the purpose of their visit. He realized that the person did not understand Sepedi. He then addressed him in English. He established that the person was from Zimbabwe. He asked him to produce documents that entitled him to be in South Africa.

[9.5] Plaintiff informed Diale that his documents were at his residence, in East Lynne. Diale asked him to accompany them[6] to East Lynne, about 20 kilo metres from Buffelsdrift.

[9.6] When they reached the destination, plaintiff found that the door was locked. The key was with his brother who had gone to Mamelodi. They did not go to Mamelodi because plaintiff claimed that he did not know the exact place his brother had gone to.

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[5] It is common cause that this person is plaintiff. I will refer to him as s such.

[6] It is common cause that a colleague accompanied Diale; although he claimed that he could not remember that it was a male or female.

[9.7] He took plaintiff to the police station because in any event it was not his responsibility to go to East Lynne with plaintiff. He was just helping him to get the documents that entitled him to be in South Africa. Plaintiff, according to Diale was supposed to have his documents in his possession so that he could produce them whenever he was asked to.

[9.8] He detained him at the police station for Home Affairs to fetch him for purposes of investigating and verifying if indeed he had documents that entitled him to be in South Africa. The intention was not to take him to court.

[9.9] When asked how he effected the arrest, Diale indicated that he informed plaintiff that he was under arrest and proceeded to complete the relevant documentation, namely SAP 3A and 3B and the immigration form. He referred to Bundle B.

[9.10] The Notice of Rights in page 2 was completed by one Mr Maphakane who was assisting him. This was done on 05 January 2010, the date inserted therein.

[9.11] The Preamble to and the Statement[7] were completed by him whilst plaintiff was at the holding cells. He confirmed that the plaintiff provided him with his personal details such as his name and age. The statement(form in page 5 of the bundle) was completed on 05 January 2010. The copy in the bundle has a date stamp of 24 May 2011 because that is the date on which it was certified.

[7] Pages 3, 4 and 5 , Bundle B

[9.12] He also completed the warrant of detention in page 6 of Bundle B in order to detain plaintiff to allow Home Affairs officials to proceed with the investigations.

[9.13] He also completed the form titled *" Arrest of illegal foreigner in terms of section 41 and Regulation 43 of the Immigration Act*". He confirmed that plaintiff was in the waiting cells when this form was completed. The waiting cell is in the charge office and plaintiff gave him answers to all the questions in the form, such as duration in the country and his home language. Plaintiff confirmed, when asked, that he understood English. Plaintiff signed the form under "illegal immigrant". He did not tell him that his real name is Javas Mapuranga. This is the reason why this name does not appear in all the forms he completed.

[9.14] Diale was asked to explain the "X" marks in the form that appears in page 8 of Bundle B. He explained that these are the reasons why he decided to arrest the plaintiff after completion of the interview.

> [9.14.1] Plaintiff did not produce a valid passport with visas or work permit on request.
>
> [9.14.2] Plaintiff's passport had expired because he failed to produce it on request.
>
> [9.14.3] Plaintiff admitted that he was not in possession of a valid passport.

[9.14.4 Plaintiff acknowledged that he was not born in the Republic of South Africa.

[9.15] When asked how Home Affairs would know that he had detained plaintiff at Kameeldrift, Diale explained that they (police) inform them by telephone.

[9.16] He believed that plaintiff did not have a permit to reside in South Africa because he failed to produce it when he was asked to at Buffelsdrift. He noted a copy of plaintiff's passport in page 1 of Bundle B. He denied having seen it at the police station on the day he arrested plaintiff.

[9.17] His counsel asked him what his response would be if it were to be argued that plaintiff was arrested at the instance of the complainant and that the signature attributed to plaintiff in the forms were forged. Diale maintained that he arrested plaintiff after he, as a police offer had asked him certain questions and not because he was told by someone to do so . He denied that plaintiff's signature was forged. He did not know plaintiff before the day in question.

[10] Cross examination of Diale yielded the following facts:

[10.1] He ould not remember the name of the complainant.

[10.2] He did not record the complaint in the Occurence Book, his diary, nor did he take a statement

[10.3] He admitted that the complaint had no "criminal smell on it", and that it was an issue that fell within the mandate of the Home Owners Association. He maintained that as a police offer he felt that he had to accompany the complainant to help the parties to resolve it.

[10.4] He admitted that he did not have knowledge of the rule that was allegedly transgressed, nor did he have sight of the rules . He did not ask for a copy of the rules to verify if the complaint was a transgression of the rules. He also could not remember the name of the alleged transgressor.

[10.5] He could not remember whether his colleague was male or female.

[10.6] He could not remember whether the complainant (put to him as a Mr Ras) remained in his vehicle whilst he talked to the plaintiff.

[11] Diale contradicted his own version (evidence in chief) and Defendant's plea that plaintiff was arrested at the police station after the interview in terms of section 41 . When asked under cross examination when exactly did he arrest plaintiff, Diale gave the following explanations:

[11.1] He found plaintiff at the alleged transgressor's house. He aked his whereabouts and he was informed that he was not available. He told the complainant that the transgressor is not home. He does not know what happened to the complainant after he told him this.

[11.2] He and his colleague did not return to the police station after being informed that the transgressor is not available. They returned to where the plaintiff was and asked him about his documents. His answers as to where they arrested plaintiff were not consistent. At some point he said at Buffelsdfrift where they found him. He later changed and said after they returned from East Lynne and then he changed again and said he was arrested at Buffelsdrift.

It appears, from the contradictory responses that when they went to East Lynne plaintiff was placed on terms. He would be let off if they found the documents they were looking for at East Lynne.

[12] Counsel for the plaintiff informed Diale that Plaintiff, if he testifies, would make certain assertions about how the police arrived at his workplace, discussed with his employer and how he was arrested. Plaintiff did not testify and as such I will not accept his alleged version that has not been tested under cross examination by defendant

It was put to Diale that plaintiff will testify that:

[12.1] He was asked by Mr Ras to make certain that plaintiff did not return to the nature reserve. Diale denied this.

[12.2] The alleged transgressor , Mr Brand was at home when the police arrived. He called plaintiff who was in the house at the time. He denied this.

[12.3] Mr Ras addressed Mr Brand and informed him that the police were there to arrest and take away the plaintiff because he was a trespasser in the nature reserve.He denied this.

13. Diale could not remember a conversation between Mr Ras and Mr Brand about the home owners rules. He also could not remember his conversation with Mr Ras as they were leaving the nature reserve.

[13.1] It also transpired during cross examination that Diale did not know the procedures of the Immigration Act, in particular how section 41 operates. According to him, the arrest comes before the interview. He admitted that he does not have knowledge of the provisions of section 34(2), despite the fact that he completed forms outlined above in this regad. He also indicated that he would not arrest someone who informs him that he is a South African citizen, even if he does not have documents to prove this.

[14] Diale could not explain why certain portions of the forms he completed were not filled in. For example, the space where it should indicated to whom it is addressed was left blank.

He also did not hand the form to an immigration officer because they are not stationed at the police station. He left the forms at the charge office (Client Service Centre).

[15] He could not explain why he declared under oath that he arrested plaintiff after the interview when in fact he arrested him at Buffelsdrift.

[16] Defendant closed its case,

[17] The plaintiff closed his case without testifying or calling witnesses.

LEGAL FRAMEWORK

[18] The Immigration Act, 13 of 2002 (the Act) and Regulations pursuant thereto regulate the arrest, detention and deportation of illegal immigrants.

The Act makes provision for and distinction between persons who are suspected of being illegal immigrants and those who , as a fact have already been declared as such. This distinction is very important as it will become clear hereunder.

[19] Section 41 creates a mechanism of identifying persons suspected of being illegal immigrants, and how they are to be dealt with pending verification of their legal status.

Section 34 empowers immigration officers to arrest and prescribes the period of detention for certain categories of illegal immigrants.

[20] It is necessary, for the sake of completeness, to quote the relevant sections :

34 Deportation and detention of illegal foreigners

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or C cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned —

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his D or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.'"

21. Section 41(1) reads as follows:

"When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic,

such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34"

SUBMISSIONS AND FINDINGS ON THE MERITS

[22] As stated above, Defendant pleaded that the arrest and detention was lawful and was effected in terms of section 41(1) read with 34(2) of the Immigration Act.

[23] I agree with the submission of counsel for the plaintiff that this is the case that the latter was supposed to meet. In fact defendant maintained during the trial that the said sections authorized Diale to arrest and detain the plaintiff.

[24] In his written submissions, counsel for the defendant changed tune and argued that the arrest and detention was in terms of section 40(1(i) of

the Criminal Procedure Act, 51 of 1977 which authorises a peace officer to arrest, without a warrant, any person :

"who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic"

[25] Counsel for the plaintiff objected to defendant's reliance on the Criminal Procedure Act on the basis that this was not pleaded, and it was not tested during cross-examination.

[26] I agree with the submissions of counsel for the plaintiff in this regard. It may be that the Criminal Procedure Act authorises such an arrest, however, the arresting officer still have to explain how he exercised his dicretion. I do not intend to waste time on this issue, but it is clear that on the evidence presented, Diale did not show that he exercised a discretion.

[27] As I have stated above, the Immigration Act regulates the arrest, detention and deportation of illegal immigrants.

The procedures that ultimately lead to the deportation of an illegal immigrant are supposed to be carried out in terms of the Immigration Act.[8]

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[88] SEE Jeebhai and Others v Minister of Home Affairs and Another 2009 (5) SA 54 (SCA), paragraphs 23

[28] Defendant should have pleaded the Criminal Procedure Act, and led evidence to show how Section 40(1)(i) was applied in casu. It is not for me to embark on an analysis of how the discretion in terms of the Criminal Procedure Act should be applied simply because that was not the case before me. I cannot rule on matters that were not pleaded and clearly not argued before me.

[29] It is clear from Diale's evidence that he did not know that Section 41 of the Immigration Act enjoins him to assist plaintiff to prove his status. He (Diale) thought that he was merely being humane when he accompanied plaintiff to East Lynne. Diale did not know that he had a discretion not to arrest plaintiff. At the police station he got on with the process of filing in what he called interview and detention forms simply because he assumed that there was nothing else he could do since plaintiff failed to produce documents that entitled him to be in South Africa.

An immigration officer who decides that an illegal immigrant is liable to be deported has discretion whether or not to arrest and detain the person pending his deportation. There is no obligation to do so.

[30] In the matter of **Ulde v Minister of Home Affairs and Another 2009**

(4) SA 522 (SCA) the appeal court considered the issue of the discretion of the arresting officer in terms of the immigration Act.

In the matter of Lawyers for Human Rights v Minister of Home Affairs[9], this discretion had been held to be "limited".

[31] The appeal court expressed its concerns about the so-called limited discretion and held that it gives an impression that an officer is merely being helpful when he or she assists an illegal foreigner to prove his status. The court referred to the matter of **Northwest Townships (Pty) Ltd v The Administrator of the Transvaal** **1975 (4) SA 1** (T) p 8F-G where Colman J said:

> *'(A) failure by the person vested with the discretion to apply his mind to the matter (includes) capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and the application of wrong principles.'*

[31.1] Cachalia JA went on to state that"

> *(8)" The approach I have outlined is now subsumed under s 12(1)(a) of the Constitution which provides that freedom may not be deprived 'arbitrarily or without just cause'. Simply put a person may not be deprived of his freedom for unacceptable*

[9] 2003 (8) BCLLR 891 (T)

reasons[10]

However, once the decision-maker has demonstrated that the discretion has been properly exercised, a court will not interfere, even if it appears that the wrong decision was made.

[32] On the facts of this matter, it is clear that Diale did not know what he was doing, and as such, the question of whether or not he exercised his discretion does not arise. It could only arise if he knew the purpose of his actions and the consequences for the plaintiff.

[33] The defendant has failed to justify that Diale was entitled to arrest and detain plaintiff. Diale simply filled in the forms without applying his mind as to the consequences arising therefrom. He did not care what happens to plaintiff after he has completed the forms, which in any event were not fully done.

[34] Plaintiff closed his case without testifying. I cannot hold this against him, moreso because the onus was on the defendant to establish the lawfulness of his arrest and detention.

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10 *S v Coetzee* **[1997] ZACC 2**; **1997 (3) SA 527** (CC) para 159, quoted in *De Lange v Smuts* **[1998] ZACC 6**; **1998 (3) SA 785** (CC) para 18.

[34.1] On the facts, defendant has failed to discharge the onus , and therefore I make a finding that the arrest and detention of plaintiff was unlawful.

SUBMISSIONS ON QUANTUM OF DAMAGES

[35] I warned plaintiff after he closed his case without testifying that I would have nothing to evaluate his damages against should I find that he was arrested and detained unlawfully. Plaintiff chose not to place his personal circumstances, the cisrcumstances under which he was held, his state of mind or any other factor(s) that could have assisted me to quantify his damages.

[36]. It is so that an arrest and detention in itself infringes on a person's right to dignity and freedom as counsel for the plaintiff has submitted. However, circumstances under which a person is held, duration and how it affected him determines the extent of compensation to be awarded.

[37] Counsel for the plaintiff has submitted that I should not "slavishly adhere to a consumer price index in adjusting the award" or refer to awards in previous cases.

[38] Whilst I agree with the principle, I still hold a view that the starting point is an individual's circumstances. In that way, a trial judge is able to distinguish those circumstances from those of any other case.

It is as simple as legal precedents. The facts determine how a specific principle should be applied.

[39] Counsel for the defendant has asked me to award an amount of R10 000,00 as damages, mainly because I have no other information except that the plaintiff was detained for theree (3) days (5 to 8 January 2010).

Counsel for the plaintiff is of the view that a fair amount is R50 000,00 for each day that plaintiff was incarcerated.

[40] The only information I have about plaintiff is what has been admitted in the plea and the concessions and admissions made during cross examination of the defendant's witness, and that is;

[40.1] Plaintiff was removed from his work place, driven to East Lynne, about 20 km away. He was taken to the police station; and

[40.2] He was detained for three (3) days as I stated above.

[41] I will not determine a daily award because I do not know the circumstances under which plaintiff was held or how he coped on each of those three days or how it affected him.

[41.1] An amount of R90 000,00 in my view represent a fair amount of damages suffered by plaintiff as a result of his unlawful arrest and detention.

[42] I make the following order;

[42.1] The arrest and detention of plaintiff is declared unlawful,

[42.2] Defendant is ordered to pay plaintiff damages in the amount of R90 000, 00 (ninety thousand rand) together with interest at the current prime rate and calculated from date of summons to date of payment.

[42.3] Defendant is ordered to pay plaintiff costs of this action.

~~Makhubele AJ~~

Acting Judge of the High Court

Date heard: 31 January and 01 February 2013.

Judgment delivered on: 15 May 2013

Appearances:

Plaintiff: Advocate JH v B Lubbe

Instructed by: De Klerk & Marais Inc.

Lynwood Ridge, PRETORIA.

Defendant: Advocate MS Phaswane

Instructed by: State Attorney, PRETORIA.