

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER Appellant

and

DAVID MTHUZIMELE THANDANI Respondent

Coram: JOUBERT, HEFER, VIVIER, MILNE J J A
et KRIEGLER A J A.

Heard: 12 September 1991

Delivered: 26 September 1991

JOUBERT, J A : JUDGMENT

/This

/2...

This is an appeal against a judgment of VAN RENSBURG J in the East London Circuit Local Division awarding R22 000 damages to the Respondent against the Appellant. With leave of the Court a quo the Appellant now appeals to this Court.

The Respondent, a trade unionist employed as a full time organiser by the Transport and General Workers' Union, formerly resided at Mdantsane in the Ciskei. Because he had transport problems he changed his residence during July 1983 to Duncan Village in the Republic. While he was a lawful resident of the Republic he was at 3.20 p m on 17 August 1983 unlawfully arrested without a warrant of arrest by Captain (then Lieutenant) Schooling and other members of the Security Branch of the South African Police at the offices of the African Food and Canning Workers' Union in East London. He was unlawfully detained by them at Cambridge Police Station,

/3...

East London, until 6.05 p m when they unlawfully handed him over to the Ciskei Police who detained him at Mdantsane for a period of 59 days until his release on 14 October 1983.

During his detention in the Ciskei he was neither interrogated nor charged with any offence. He was never brought before a Court of law in the Ciskei.

On 16 February 1984 the Respondent instituted in the East London Circuit Local Division an action against the Appellant claiming payment of R10 000 (subsequently amended to R25 000) damages for his unlawful arrest, unlawful detention and unlawful handing over to the Ciskei Police by members of the Security Branch of the South African Police who acted within the course and scope of their employment as servants of the Appellant. In paragraph 5 of his Particulars of Claim the Respondent relied on a single delict, perpetrated by members of the Security Branch of the South African Police,

/4...

as constituting the cause of his action, viz. :

"The aforesaid detention of Plaintiff by members of the South African Police as also the subsequent handing over of Plaintiff by the said members of the South African Police to the Ciskei was wrongful and unlawful and but for the said handing over, Plaintiff would not have been detained for a period of 59 days by the Ciskeian Police. The said members of the South African Police accordingly bear responsibility for the Plaintiff's detention by the Ciskeian Police."

(My underlining).

Paragraph 5 should be read in conjunction with paragraph 3 of his Particulars of Claim which contains the necessary averments regarding the Respondent's unlawful arrest and detention by members of the Security Branch of the South African Police. In paragraph 4(b) of the Respondent's Further Particulars to his Particulars of Claim reasons were furnished why the members of the Security Branch of the South African

/5...

Police were in law responsible for his detention by the Police of the Ciskei, viz. :

"(i) The said members of the South African Police were responsible for Plaintiff's detention at the Mdantsane Police Station for the following reasons :

(i) Defendant's aforementioned servants wrongfully and unlawfully arrested Plaintiff whilst he was lawfully upon the territory of the Republic of South Africa.

(ii) Whilst Plaintiff was under the said arrest and detained by the said servants of the Defendant, Defendant's servants handed Plaintiff over to members of the Ciskeian Police Force who, but for such action on the part of Defendant's servants, would not have been able in law to arrest or take Plaintiff into their custody.

In so acting, Defendant's servants
well knew and/or reasonably
foresaw that the said members
of the Ciskeian Police Force,
having taken Plaintiff into
their custody would detain
Plaintiff for an indefinite
period in terms of the provisions
of Section 26 of the Ciskeian
National Security laws."

(My underlining)

The Appellant's defence, as pleaded,
was a denial that the detention and handing over of the
Respondent was wrongful and unlawful. It was also claimed
that the Respondent was lawfully detained by the Government
of the Ciskei.

The evidence of Captain Schooling who
testified at the trial on behalf of the Appellant was virtually

/7...

destructive of the Appellant's entire defence save for the alleged validity of the Respondent's detention in the Ciskei. He correctly conceded the invalidity and unlawfulness of the Respondent's arrest and detention by him without a warrant of arrest. The arrest and detention of the Respondent by him was executed on the instructions of Colonel Van der Merwe, his commanding officer, since a request had been received from the Ciskei Government, as conveyed by the Ciskei Police, according to which President Sebe requested the arrest of the Respondent. The request had been approved of by the Head Office of the Security Police in Pretoria. He knew at the time that the handing over of the Respondent to the Police of the Ciskei was unlawful and in breach of the existing Extradition Agreement between the Government of the Republic of South Africa and the Government of the Ciskei.

Moreover, he was also aware at the time that but for the

arrest and handing over of the Respondent to the Police of the Ciskei the latter would not have been able to have detained him as long as he did not enter the Ciskei.

As regards the alleged validity of the Respondent's detention in the Ciskei it is necessary to refer to the relevant provisions of sec 26(1) of the National Security Act 13 of 1982 of the Ciskei which provide as follows:

"Notwithstanding anything to the contrary in any law or the common law contained but subject to the provisions of sub-section (3) any commissioned police officer of or above the rank of lieutenant-colonel may, if he has reason to believe that any person who happens to be at any place in the Republic

(a) has committed or intends to commit an offence referred to in section 2, 3 or 5 - - - - ; or

(b) is withholding from the police any information relating to the commission of an offence referred to in paragraph (a) - - - -

without warrant arrest such person or cause him to be arrested and detain such person or cause him to be detained for interrogation in accordance with such directions as the Commander-General may from time to time issue, until the Commander-General orders his release when satisfied that the said person has satisfactorily replied to all questions at the interrogation or that no useful purpose will be served by his further detention in terms of the provisions of this section."

Sub-sec (3) merely provides that the detained person may at any time make written representations to the Commander-General in regard to his detention or release. No evidence was presented at the trial to establish that there had been compliance with the provisions of sec 26(1). Moreover, until 4 December 1981 the Ciskei was part of the territory of the Republic and as such subject to the common law of the Republic. The presumption that the common law of the

Ciskei is still Roman-Dutch law was not related. The abduction of the Respondent from the Republic by the Ciskei Police as well as his detention in the Ciskei was wrongful and unlawful. See S v Ebrahim, 1991(2) SA 553 (A) at p 576 C. The Appellant failed to prove that the Respondent's detention in the Ciskei was lawful. It was not the Respondent's case that his detention in the Ciskei was unlawful. For purposes of the Respondent's case it was irrelevant whether or not he was lawfully detained in the Ciskei. On the probabilities it would appear that he was in fact unlawfully detained in the Ciskei.

The issue in this Court is whether or not the Appellant was liable to compensate the Respondent for the period of his detention in the Ciskei. The Court a quo held that the Appellant was liable. In my judgment the Respondent has established the liability of the Appellant

/11...

for his detention in the Ciskei for two reasons, viz.

1. By having regard to the nature and scope of the Respondent's action as set out supra, and
2. in the light of the accepted evidence of Captain Schooling who testified on this aspect under cross-examination as follows:

"En u was bewus dat sou jy eiser oorhandig dat hy aangehou gaan word ? - - Ek het so veronderstel U Edele.

Maar dit het glad nie u besluit beïnvloed nie, u het nogtans voortgegaan ? - - Geensins, dis korrek.

Met jou enigste doel, die doel met jou arrestasie, was so ver ek u verstaan, was glad nie om eiser voor 'n hof te bring nie, die doel was om hom oor te handig omrede hy dan aangehou kon word deur die Ciskei se polisie ? - - Dis korrek U Edele."

There is a grave matter that calls for

/12...

condemnatory comment. It appears from the undisputed and accepted evidence of Captain Schooling that he and other members of the Security Branch of the South African Police have by their actions deliberately disregarded and flouted provisions of the Criminal Procedure Act 51 of 1977, the Extradition Act 67 of 1962 and the Extradition Agreement between the government of the Republic and the government of the Ciskei. It was not their function to accommodate the mere request of a foreign ruler. In terms of sec 5 of the Police Act 7 of 1958 one of the basic functions of the South African Police is the maintenance of law and order in the Republic. In the performance of their functions they are not above the law. No one in the Republic is above the law. Everyone in the Republic is obliged to observe and obey the law irrespective of how high or humble his station in the community may be. Even the State President as Head of State is

subject to the law. The Roman legal principle Princeps
legibus solutus est (D 1.3.31) was never received in the
Roman-Dutch law and therefore does not form part of our legal
system. See Groenewegen ad D 1.3.32 nrs 2 & 3.

In the result the appeal is dismissed
with costs, including costs of two counsel.

C. P. JOUBERT J A.

Hefer J A
Vivier J A Concur.
Milne J A
Kriegler A J A