

SOUTH AFRICA / JUDGMENT

Abrahams v Minister of Police (7/2016) [2018] ZAECPEHC 54 (18 October 2018) [2018] ZAECPEHC 54

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Goosen

CASE / FILE NUMBER

7/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH)

In

the matter

between:

Case No: 7/2016

LIONEL

ABRAHAM

ABRAHAM'S Plaintiff

And

MINISTER

OF

POLICE Defendant

Coram:

Goosen J

Date

Heard:

23 and 27 August 2018

Date

Delivered: 18 October
2018

JUDGMENT

Goosen J:

- [1] The plaintiff was arrested on 8 January 2013 at Loerie, in the Eastern Cape, on a charge of housebreaking with intent to steal and theft. He was held in custody at the police cells at Hankey until his appearance at court on 9 January 2013. On his appearance the charge was withdrawn and he was released. It is common cause that he was in custody for approximately twenty-four (24) hours.
- [2] The plaintiff seeks payment of damages for unlawful arrest and detention. The defendant admitted that the plaintiff was arrested on 8 January 2013 without a warrant. Defendant pleaded that the arrest was lawful inasmuch as a peace officer, Detective Warrant Officer Bradley (Bradley), had formed a reasonable suspicion that the plaintiff had committed the offence and accordingly gave instructions to arrest the plaintiff.
- [3] It is necessary to recount briefly the circumstances giving rise to the arrest of the plaintiff. These emerge from the evidence of Bradley and Sergeant Tania Serfontein (Serfontein), who was the arresting officer.
- [4] On 28 November 2012, a complaint was received regarding a housebreaking which had occurred at the house of Mr and Mrs Meyer. It was reported that a hunting rifle had been stolen from a safe on the property. Bradley, who was then the commander of the Detective Branch at Thornhill police station, was responsible for oversight of the investigation. He immediately tasked certain police informers to gather information regarding possible suspects. He stated that he received a report that the plaintiff had attempted to sell a firearm to one Marlin Felix (Felix), a tavern owner. The informant furnished a statement that “Tonsie”
- a nickname by which the plaintiff is known, had approached Felix. Bradley accordingly instructed the investigating officer to undertake certain tasks, which included obtaining details regarding the firearm, circulating these, obtaining a report from the forensic team regarding fingerprints, obtaining a statement from Felix and opening a negligence docket in relation to theft of the firearm. He also instructed that the plaintiff be traced and arrested.
- [5] On 7 December 2012 Bradley interviewed Felix and obtained a signed statement from him. The statement was only obtained on 7 December 2012 because Felix was not always available in Loerie. The statement, which was tendered in evidence, reads as follows:

“Gedurende die laaste week van November op ‘n Donderdag laat middag so tussen 16:00 and 18:00, het “Tonsie” na my winkel toe gekom met ‘n jaggeweer wat hy wou verkoop. Hy het oop geloop met hom en wou hê dat ek ‘n prys moes maak daarvoor. Ek het gesê dat ek nie belangstel nie. Hy het bier gekoop en toe geloop.”

[6] Bradley's evidence was that the plaintiff is known to him and that he is known by the nickname "Tonsie". Loerie, he said, is a small town and its inhabitants are generally known to him. He said that the theft of a firearm is an unusual

occurrence and at that time there was no other case involving the theft of a firearm. According to Bradley the plaintiff had been implicated in other matters. Although he lived in Loerie he was often away from Loerie, travelling to Port Elizabeth for periods.

[7] The arresting officer was Sergeant Tania Serfontein (Serfontein). She stated that the plaintiff was known to her as "Tonsie". She was aware that Constable Arbrie (Arbrie), the investigating officer, had been looking for the plaintiff as a suspect in the theft of a firearm. On 8 January 2013 she was on duty. She spoke to both Arbrie and Bradley. She was informed that there was a witness statement, under oath, which implicated the plaintiff. She was told to arrest him. She went to the plaintiff's home. He was present. Serfontein told him that he was being sought in connection with the theft of a firearm. She placed him under arrest and transported him to the police station. He was charged by Arbrie and held in custody at Hankey until the following day.

[8] Serfontein stated that at the time of the arrest the plaintiff did not explain to her that someone else (one Tiens) had tried to sell a firearm to him. She said that he did mention that he has a "pellet gun". It was put to her that the plaintiff walks around with this pellet gun which he uses to scare animals out of his yard.

[9] The plaintiff testified that he has lived in Loerie all his life. He had been living at the address where he was arrested for seven (7) or eight (8) years. He lives with his father, mother, sister and his sister's child. He said that before his arrest no-one had come to the house looking for him. When the police arrived he was in the backyard. He was called by his mother. Serfontein asked him about a housebreaking and theft of a firearm. He told her that he knows nothing about that. He said he told her he has a pellet gun ("n windbuks") that he uses to scare goats and cattle from his yard. He was arrested, although not handcuffed, and transported to the police station.

[10] At the station he was interviewed by Arbrie. He told Arbrie that he knows nothing about a housebreaking. He made a statement in which he alleged that a "Tiens" had approached him to ask if he wanted to buy a hunting rifle.

[11] When asked about whether he was aware that Felix had made a statement about him wanting to sell a hunting rifle to him, he said he was unaware of this at the time. He explained that he had been to the tavern at some stage and that he was carrying his pellet gun.

[12] The central question to be answered is whether the information at the disposal of the police officers, more particularly Bradley, was such as to give rise to a reasonable suspicion that the plaintiff had committed one or more offences listed in Schedule I to the Criminal Procedure Act (the Act)[1]. In *Mabona and Another v Minister of Law and Order and Others*[2] Jones J held that:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? 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 the 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.”

[13] In this instance the information that Bradley obtained on 29 November 2012, i.e. a day after the housebreaking and theft, was that the plaintiff had attempted to sell a firearm to Felix. It was on the strength of this that Bradley gave the instruction to arrest the plaintiff. According to Bradley the information caused him to suspect, reasonably, that the plaintiff was involved in the commission of the offence. That instruction remained operative until the arrest was effected on 8 January 2013.

[14] As noted by Jones J in the passage cited, the reasonable man would be cognisant that s 40(1)(b) authorises a drastic invasion of a suspect's rights. It would therefore be required that the information on which the reasonable suspicion is based is critically assessed and, where possible, checked.

[15] The instruction given by Bradley was, in relation to this aspect, two-fold. He instructed that a statement be obtained from Felix and that the plaintiff be arrested. The effort directed to verifying his intelligence cannot be faulted. It appears however that the decision to arrest was taken immediately, without first checking the veracity of the intelligence. It is that instruction which was ultimately carried into effect. The statement of Felix was obtained on 7 December 2012.

[16] The defendant presented no evidence as to the further investigation of the matter or as to the steps taken to trace the plaintiff in the period between 29 November 2012 and 8 January 2013. It is however common cause that the forensic investigation of the scene of the housebreaking produced no identifiable fingerprints. Bradley conceded that the decision to arrest the plaintiff was based on the information which had been received from the informer. It was this information – prior to the interview with Felix – upon which he founded his suspicion and upon which he gave the instruction. Bradley testified that Felix was also known to run a tavern from which drugs were sold and that he was often out of town due to his activities.

[17] In my view the decision to arrest was not preceded by steps to establish the reliability of the information. The fact that Felix’s statement, obtained thereafter, tends to lend credence to the claim does not assist. The information available to the police, at best, pointed to possible unlawful possession of a firearm and/or possession of a stolen item. The plaintiff however was arrested

almost two (2) months later on a charge of housebreaking. At the time of the arrest no search was conducted to establish whether he was indeed in possession of the firearm. There was no information to found a reasonable suspicion that he had committed housebreaking or theft.

[18] The defendant bears the onus to prove, on a balance of probabilities, that the arrest without a warrant was lawful in terms of s 40(1)(b) of the Act. I am unable to find that the onus has been discharged inasmuch as I do not find that Bradley harboured suspicion founded upon reasonable grounds to justify the arrest. It follows therefore that the plaintiff’s arrest and subsequent detention was unlawful.

[19] I turn now to the assessment of damages. In his particulars of claim the plaintiff claimed an amount of R650 000. At the trial the quantum was substantially reduced to an amount of R120 000. The plaintiff, as already indicated, was detained in custody for a period of approximately twenty-four (24) hours. He stated that he was detained in a cell along with four (4) or five (5) other persons; that the cell was dirty; and that he had to sleep on the floor covering himself with his clothes. He was however, able to obtain food from relatives. He explained that being detained in this manner caused him distress.

[20] It was submitted by Ms du Toit that the award should reflect the importance of plaintiff’s right to liberty and dignity. In *Olgar v Minister of Safety and Security*[3] Jones J said:

“In modern South Africa a just award for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the “horn of plenty”, at the expense of the defendant.”

- [21] The plaintiff is thirty (30) years of age. He was, at the time of the arrest, unemployed and living with his parents at Loerie. Although he testified to the circumstances in the holding cells he did not testify to any circumstances which might be held to aggravate the affront to his character and reputation. In the circumstances of this case I consider that an award of R120 000 would fairly compensate the plaintiff for the infringement of his right to liberty and dignity. I did not understand counsel for the defendant to suggest that such an award would be excessive.
- [22] It was submitted by Ms du Toit for the plaintiff that interest on the damages ought to run from date of summons to date of payment. I disagree. The damages awarded seeks to compensate the plaintiff for the infringement of his rights. They are assessed as at the date of judgment. In the circumstances it would be unjust to order the defendant to pay interest thereon from the date other than the date of judgment. (See *Smit v Minister of Safety & Security*[4]).
- [23] Finally there is the question of costs. Two (2) issues need to be addressed. The first, easily disposed of, concerns the scale of costs awarded. The quantum of damages falls within the jurisdiction of the Magistrates' Court. The issues raised in the trial were not such as might have justified prosecution of the claim in this court. Accordingly an award of costs at the Magistrates' Court scale is appropriate. Ms du Toit sought, however, in addition certain specific orders relating to the costs of consultations, counsel's fees and that such fees be allowed at a higher than normal rate. I do not consider that a higher than normal rate is justifiable in the circumstances. It is also not appropriate to fetter the discretion of the taxing master/mistress.
- [24] The second issue concerns the costs of the first day of trial which were reserved. This came about because at the conclusion of the defendant's case, midway through the day, the trial could not proceed. It transpired that the plaintiff, who had been present at court, left without informing his attorney and counsel, did not return and was thereafter uncontactable. The matter therefore had to be postponed to Monday, 27 August 2018, necessitating a second day of trial. On resumption, plaintiff's counsel handed in proof of attendance of plaintiff at the Loerie clinic on 24 August 2018 (i.e. on the Saturday). It was stated that the plaintiff had been ill and for this reason had not remained at court. Whilst it is to be accepted that plaintiff may have felt unwell, there is, in my view, no excuse for leaving court without informing his attorney or counsel at a stage when he knew that he would be required to testify. In these circumstances it would be fair to order the plaintiff to pay the wasted costs occasioned by the adjournment of the trial from 24 to 27 August 2018.
- [25] I make the following order:
1. The defendant is ordered to pay to the plaintiff the sum of R120 000, 00 as and for damages arising from the plaintiff's unlawful arrest and detention on 8 January 2013.

2. The defendant is ordered to pay interest on the aforesaid amount at the legal rate from date of judgment to date of payment thereof.
3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the Magistrates' Court scale.
4. The plaintiff is ordered to pay the defendant's wasted costs occasioned by the postponement of the trial on 24 August 2018 to 27 August 2018.

G.G. GOOSEN

JUDGE OF THE HIGH COURT

Obo the Plaintiff: Adv du Toit

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[1] Act No, 51 of 1997

[2] 1988(2) SA 654 (SECLD) at 658E-H

[3] Unreported case, ECD Case No. 608/07

[4] (51/2010) [2016] ZAECPEHC 73 (22 November 2016) at par 40

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