

SOUTH AFRICA / JUDGMENT

Burford v Minister of Police (CA128/2015) [2015] ZAECHGC 126 (10 November 2015) [2015] ZAECHGC 126

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J D Pickering, T Malusi

CASE / FILE NUMBER

CA128/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

CASE NO: CA128/2015

Date heard: 6 November 2015

Date delivered: 10 November 2015

In the matter between

BENJAMIN JOHANNES BURFORD

Appellant

Vs

THE MINISTER OF POLICE

Respondent

JUDGMENT

PICKERING J:

- [1] On Thursday 10 January 2013 appellant was arrested without a warrant by members of the South African Police Services on a charge of housebreaking and theft. He was thereafter detained until Monday 14 January 2013 when he was taken to court and released on warning. Eventually, on 8 April 2013, the charge against him was withdrawn.

- [2] Appellant thereafter instituted action against defendant in the Regional Court, Port Elizabeth claiming damages for both wrongful arrest and for wrongful detention. The regional magistrate found, however, that appellant's arrest and subsequent detention were lawful and he dismissed both appellant's claims with costs.
- [3] Appellant appeals now only against that part of the judgment dismissing his claim for unlawful detention.
- [4] In his amended particulars of claim appellant alleged, inter alia, as follows with regard to his continued detention from Thursday 10 January to Monday 14 January:

"The detention and incarceration of Plaintiff from the 10th of January 2013 to the 14th of January 2013 was wrongful, unlawful and completely unjustified, in that, inter alia:

16.1 the arresting officer, as well as other police officers at the Mount Road police station, failed to apply their minds, in respect of Plaintiff's detention and incarceration;

16.2 there were no reasonable and/or objective grounds justifying Plaintiff's subsequent detention;

16.3 he was not released on police bail, in terms of provisions of Section 59 (1) or 59A of the Criminal Procedure Act 51 of 1977;

16.4 in violation of Section 50 (1) (b) of the Criminal Procedure Act 51 of 1977, he was not informed of his right to institute bail proceedings; and

16.5 he was not brought before a court of law, as soon as reasonably possible.

Notwithstanding Plaintiff's arrest, without a warrant, none of the Defendant's employees took any reasonable steps to release Plaintiff, as soon as reasonably possible, even though no reasonable grounds or sound reasons for his continued detention had existed and notwithstanding the fact that Plaintiff professed his innocence and protested against his continued detention."

- [5] The reference to appellant not being brought before a court of law as soon as reasonably possible alluded to the provisions of s 50(1)(c) of the Criminal Procedure Act which provides:

"Subject to paragraph (d) if such an arrested person is not released by reason that no charge is to be brought against him or her or bail is not granted to him or her in terms of s 59 or 59A he or she shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest."

- [6] It was common case that appellant, together with one Clinton Minnaar, was arrested at the premises of a company known as Henred Fruehauf situated in Burman Road, Deal Party, Port Elizabeth, at which company Clinton was employed as a spray painter.

[7] Appellant stated in his evidence that on the evening in question Clinton, whom he knew as a neighbour, came to his house and asked him to give him a lift to his place of work at Deal Party. Appellant agreed to do so and they proceeded to the premises in appellant's motor vehicle. The gate to the premises was opened by the security guard on duty and appellant drove in. Clinton was in possession of a key with which he opened a storeroom.

He entered the store room and emerged carrying certain pieces of aluminium which were loaded into the boot of appellant's motor vehicle. At that moment they were confronted by the owner and manager of the business who, unbeknown to Clinton and appellant, had been alerted to their presence by the security guard. The police were called and appellant and Clinton were arrested.

[8] Appellant testified that he had merely innocently afforded Clinton a lift to his place of work and had no inkling that Clinton was involved in any nefarious activities.

[9] It is clear, however, that in the circumstances prevailing the police who arrived at the scene had a reasonable suspicion that appellant was acting in concert with Clinton to steal the aluminium. It is for this reason that no appeal has been pursued against the regional magistrate's finding that the appellant's arrest was lawful.

[10] The respondent called only two witnesses, both of them being the policemen who were involved in the arrest of the appellant at the scene at Deal Party. The arresting officer, Constable Zembe, testified that after the arrest he took appellant to Mount Road Police Station where he was placed in the holding cells. He thereafter had no further dealings with appellant. Constable Nombembe, who was present when appellant was arrested, testified that he had explained appellant's rights to him at Mount Road Police Station and that he too had thereafter had no further dealings with him. Neither policemen had any knowledge as to why appellant had not been taken to court the next day, Friday 11 January 2013.

[11] It is common cause that the investigating officer took charge of the docket on Friday 11 January 2013 at 09h00. He, however, was not called as a witness by the respondent.

[12] The issue of appellant's alleged wrongful and unlawful detention was not only raised in the particulars of claim but was also canvassed during the course of the cross-examination of Nombembe by appellant's counsel. Despite this issue having been pertinently raised in both the pleadings and evidence, no evidence was tendered by respondent to justify the continued detention and respondent contented itself with closing its case after the evidence of Zembe and Nombembe had been adduced.

[13] In his reasons for judgment, however, the regional magistrate stated as follows:

"The plaintiff also failed to prove on a balance of probabilities that the police officers abused the powers vested in them by section 50(1)(d). The plaintiff was arrested on a Tuesday (sic) night. The 48 hours within which he must have been brought before court would expire on at night the following Saturday. He failed to prove on balance of probabilities that police acted negligently in their failure to bring him to court the following day ie Friday."

[14] As submitted by Mr. Wessels, who appeared for appellant both at the trial and at the hearing of this appeal, the regional magistrate has seriously misdirected himself in this regard. There was no onus on the appellant to prove that his continued detention was unlawful. The onus of justifying that detention rested throughout on the respondent.

[15] In *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) Navsa ADP stated as follows at para 14 – 17:

“[14] Police bear the onus to justify an arrest and detention. In Minister of Law and Order and others v Hurley and another 1986 (3) SA 568 (A) at 589E–F the following is stated:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

[15] Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.

[16] In *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) [also reported at

[2008] JOL 21448 (CC) – Ed] at paragraph [24] the following is said:

‘The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily

or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of

liberty, whatever form it may have taken.’

[17] Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.”

[16] The regional magistrate then stated further as follows:

“The police officers who arrested the plaintiff were Constables in the police of junior ranks. They were dispatched thereby by their supervisors to attend to the complaint. They took the plaintiff and his partner to the police station. It was already late on Thursday evening. It is clear that other procedures that follow the arrest could only take place the following day, and considering the fact that police were

not only dealing with this matter and that Mount Road Police Station is a busy police station in the Port Elizabeth, it is understandable that the plaintiff was not brought to court on the Friday 11 January 2013. There is no evidence that police did not act normally in the course of their ordinary work, or in the execution of their duties or that they had animus injuriandi to spite the plaintiff or acted negligently in their failure to take him to court on Friday following the night of his arrest.”

- [17] In taking judicial notice of the fact that Mount Road Police Station is a “busy station in Port Elizabeth” and that it was therefore understandable that the appellant was not brought to court the following day the regional magistrate has again, in my view, seriously misdirected himself. In my view the regional magistrate was not entitled to take judicial notice of the fact that Mount Road Police Station is a busy station. It may be that the regional magistrate was satisfied in his mind that that is so but that fact is not so notorious as to be a proper subject for judicial notice.
- [18] However, even if the regional magistrate were to have been entitled to take judicial notice of the fact that Mount Road Police Station is busy he certainly cannot take judicial notice, as by inference he has, of the fact that it was so busy that it was not reasonably possible for the police to have brought appellant to court on the Friday.
- [19] The regional magistrate stated further in this regard to the fact that there was no evidence that the police had not exercised their discretion properly in failing to bring appellant before a court on the Friday. His finding in this regard was obviously influenced by his misdirection as to the incidence of the onus.
- [20] Mr Wessels submitted that in all the circumstances where the respondent had failed to adduce any evidence whatsoever in order to justify appellant’s continued detention from the time that the investigating officer took charge of the docket it had failed to discharge the onus upon it in this regard. He submitted accordingly, with reference to *Mashilo v Prinsloo* 2013 (2) SACR 648 (SCA) that appellant’s detention from the morning of Friday 12 January 2013 to Monday 14 January, a period of approximately three days, was therefore unlawful.
- [21] Mr. Rugunanan, who appeared for the respondent, submitted, however, that sight must not be lost of the documentation which was handed in to court by consent concerning the progress of the investigation. It appears therefrom that the investigating officer took a number of statements from witnesses during the course of the Friday morning culminating at 11:30am. These statements implicated both Minnaar and the appellant in the commission of the offence and there was nothing contained therein, so Mr. Rugunanan submitted, to alert the investigating officer to the reasonable possibility that appellant had been innocently at the scene. He submitted that it was clear therefore that the investigating officer was not sitting

back on the Friday supinely doing nothing and that respondent had accordingly discharged the onus of proving that it was not reasonably

possible to have brought appellant to court on the Friday.

- [22] The investigation diary reveals that eventually, at approximately 13h00 on Saturday 13 January, a statement was taken from Clinton Minnaar in which he confessed to his involvement in the commission of the offence and absolved appellant of any complicity therein. A statement taken from appellant at 13h20 on the same day confirmed this.
- [23] Mr. Rugunanan conceded therefore that it would have been clear to the investigating officer by 13h20 on Saturday, 12 January 2013, at the latest, that appellant was innocent and that there was therefore no justification for his continued detention. He conceded therefore that despite the provisions of section 59(1) of the Criminal Procedure Act 51 of 1977, which precludes the release on bail of an accused who is in custody in respect of an offence referred to in Part II or Part III of Schedule 2, such as in the present matter, the appellant should have been released by the investigating officer at that stage

when it had become obvious that the appellant was innocent.

- [24] The investigation diary does indeed disclose that the investigating officer was conducting investigations into the matter on Friday, at least until 11h30. However, the fact that he was doing so does not, in my view, assist respondent in respect of the issue as to why it was not reasonably possible to have brought appellant before a court that morning. The respondent tendered no evidence at all in this regard. Where the onus rested on the respondent it is impermissible, in my view, to speculate in favour of the respondent to the effect that it was not reasonably possible to have brought appellant before a court. Having regard to the onus it was incumbent on the respondent to have adduced the evidence of at least the investigating officer in this regard. Depending on the nature of that evidence the respondent may well have been able to discharge the onus. In present circumstances, however, respondent has not discharged the onus of showing that the appellant's continued detention from Friday morning was justified.

- [25] In *Mashilo v Prinsloo* 2013 (2) SACR 648 (SCA) the following was stated at par 16:

"The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hours expires before or during the weekend. Expedition relative to circumstances is what is dictated by the subsection and the Constitution."

- [26] Appellant's detention from at least 11h30 on Friday 11 January 2013 until his release at approximately 10h00 on Monday, 14 January 2013 was therefore unlawful.
- [27] I turn then to consider what amount should be awarded to appellant on damages for his unlawful detention.
- [28] The unlawful deprivation of liberty has always been regarded as a particularly serious infringement of a person's rights. In *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E), van Rensburg J stated in respect to quantum that "sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which

should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and the rights of an individual.”

[29] In *Olgar v Minister of Safety and Security* ECD case no 608/07 unreported, Jones J in assessing damages for an unlawful arrest and detention held:

“In modern South Africa a just award for damages 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.”

[30] We have been referred to a number of cases involving awards for damages in largely comparable cases such as *Boshoff v Minister of Safety and Security*

[2005] JOL 15310 (W) and *Roger Michael Russel v Minister of Safety & Security* (Case no 963/07) (ECP). I have had regard thereto. Obviously each case must be decided on its own facts.

[31] In the present matter the appellant, who was entirely innocent, suffered the humiliation of detention in a filthy police cell for approximately three days. Whilst he was in detention his wife died on the Saturday and, despite there being no justification for his continued detention from 13h00 on that same day, his pleas to be released went unheeded. This must have been an exceptionally traumatic experience for him.

[32] In my view, in all the circumstances an award of R130 000,00 would be appropriate.

[33] Mr. Wessels submitted that in the circumstances of this case certain increased fees should be allowed in terms of the Magistrate’s Court Rules. Mr. Rugunanan did not object thereto.

[34] Accordingly the following order will issue:

- a. The appeal is upheld with costs.
- b. The order of the court a quo is set aside and the following substituted:
 1. The defendant is ordered to pay the plaintiff damages in the amount of R130 000,00.
 2. Interest is payable on the aforesaid amount, calculated at the prevailing prescribed rate of 15,5% per annum, from date of service of summons (i.e 27.08.2013) to date of final payment.
 3. The defendant is ordered to pay the plaintiff’s costs of suit, such costs to include perusal fees and increased fees for counsel, but limited to X 2 of the tariff, for consultations and two trial days.

J. D. PICKERING

JUDGE OF THE HIGH COURT

I agree:

T. MALUSI

ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Adv. Wessels

Instructed by: Dold & Stone Attorneys, Mrs. Wolmarans

Appearing on behalf Respondent: Adv. Rugunanan

Instructed by: State Attorney, c/o Yokwana Attorneys, Mr. Yokwana

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