

SOUTH AFRICA / JUDGMENT

De Beer v Minister of Police (69360/2013) [2015] ZAGPPHC 959 (17 November 2015)

[2015] ZAGPPHC 959**COURT**

North Gauteng High Court, Pretoria

BEFORE

JJ Strijdom

CASE / FILE NUMBER

69360/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 69360/2013

DATE: 17/11/2015

In the matter between:

JAN DIRK DE BEER PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT:

STRIJDOM AJ:

1. The Plaintiff issued summons against the Defendant for (a) wrongful arrest and detention (b) loss of income and (c) legal expenses.
2. The Defendant pleaded that the arrest and detention of the Plaintiff were lawful and relied on Section 40 (1) (b) of the Criminal

Procedure Act. Act 51 of 1977 (the "Act"), which provides:

"A peace officer may without warrant arrest any person -

(a)

- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody. "
3. The Defendant accepted the burden to prove a lawful arrest.

ISSUES:

4. The issue to be determined herein is whether the Plaintiff was lawfully arrested, if so, whether his detention was warranted in the circumstances of the case. The Defendant stated that the Plaintiff was arrested for assault with intent to do grievous bodily harm.

COMMON CAUSE FACTS:

5. The following facts are common cause in this matter:
- 5.1. The Plaintiff was arrested at his residence which is also his business premises on 13 March 2013.
- 5.2. The Defendant admits the arrest of the Plaintiff by members of the South African Police Services without a warrant of arrest.
- 5.3. The Plaintiff have been detained subsequent to his arrest from 13h00 until 20h00 on 13 March 2013 in the police cells.
- 5.4. On 13 March 2013 the charge was withdrawn against him by the complainant.

PLAINTIFF'S CASE:

6. The Plaintiff testified that on 13 March 2013 he gave Jacob Nketsu an instruction to install a basin at the lapa on his property. He was not satisfied with the installation of the wooden top for the basin and during the subsequent conversation with Jacob he smell alcohol on the breath of Jacob. An argument ensued and Plaintiff requested Jacob to leave the premises because he was under the influence of alcohol.
7. Plaintiff testified that at some stage he pushed Jacob towards the front gate because Jacob refused to leave the property.
8. At some stage he left to purchase materials for construction work and upon his return he met Constable Maelane and another police officer inside his premises. Maelane refused to identify himself. At that stage Jacob was outside the main gate and did not enter the premises until he was requested to accompany the police officers to the Benoni police station.
9. He testified that other police officers arrived at the property of which two were dressed in uniform and two in private clothes. He informed the senior officer that Maelane refused to identify himself and to present his identification card. Maelane then showed him his identification card.

10. Plaintiff was then informed that he would be arrested for assault and was requested to accompany the police to the police station. He was allowed to travel to the police station with his own vehicle. At the police station he was arrested and held in a cell.
11. He further testified that he was allowed to make one (1) phone call to his attorney. He was released from custody at 20h00 after the charge against him was withdrawn by Jacob.
12. He testified that as a result of his non-attendance of a meeting with Bambanani as scheduled for 15h00 on 13 March 2013, the work that he quoted for and which work was in principle already accepted by Bambanani was not awarded to him.
13. He testified that he phoned his attorney, Vermaak Beeslaar to required his assistance but the attorney did not arrived at the
police station up until he was released at 20h00.
14. Plaintiff testified that he insulted the police officer Maelane by calling him an "asshole" because he refused to produce his identity card.
15. Jacob Nketsu an employee of the Plaintiff testified that he was in the employment of the Plaintiff since 2013. On 13 March 2013 he was instructed by Plaintiff to install a basin in the lapa on Plaintiff's premises. He denied that he was under the influence of liquor as testified by Plaintiff.
16. He testified that the arguments ensued between him and the Plaintiff as the Plaintiff was not satisfied with the installation of the basin. He confirmed that he was pushed by the Plaintiff during the argument and was ordered to stay outside the premises. He testified that on his way to the gate he fell in concrete mixture and injured his palm. He further testified that Plaintiff denied him to fetch his clothes. While standing outside the premises he called the police and complained about the clothes the Plaintiff refused him to take. The police later arrived and enter the premises.
17. Nketsu further testified that while standing outside other police officers arrived and enter the premises. He denied ever reported that he was assaulted by Plaintiff. However, he confirmed that he signed a withdrawal statement. He was referred to an affidavit that he signed. He testified that some of the allegations contained in this affidavit, which he denied, came from Maelane. He also denied that the Plaintiff threw a hammer at him. He denied ever been assaulted by the Plaintiff. However, he admitted that Plaintiff pushed him.
18. Moses Mnguni testified that he is one of two members of Bambanani Plant Hire and Civils CC and he knew the Plaintiff before March 2013. He requested Plaintiff to quote on repair and maintenance work. A letter dated 13 March 2013 was drafted and delivered by Mnguni personally to the residential premises of the Plaintiff to confirm the meeting on 13 March 2013. He further testified that when Plaintiff did not arrive for the meeting scheduled for 15h00 on 13 March 2013 a decision was taken not to do further business with Plaintiff.

19. Mnguni testified that as a result of Plaintiff not attending the meeting the awarding of the repair and maintenance work to Plaintiff was cancelled. According to Mnguni the tender by Plaintiff had already been accepted and that certain terms and conditions were to be discussed at the meeting on 13 March 2013.

DEFENDANT'S CASE:

20. Constable Maelane testified that on 13 March 2015 he was on duty when he received a complaint of an assault with intent to do grievous bodily harm at 96 Boden Street, Benoni. When he arrived at the scene Jacob, the complainant, was standing outside the premises. Jacob confirmed that he was assaulted by the Plaintiff. They then entered the premises with the police vehicle. The Plaintiff later arrived with his vehicle.
21. Constable Maelane and his colleague Nkwetsa alighted from the car. When the Plaintiff arrived he was shouting and insulting them. Maelane testified that he produced his identification card and showed it to the Plaintiff. He informed Plaintiff that he received a complaint that he assaulted Jacob. The Plaintiff pushed Jacob in front of them and told him to leave his premises. At that stage Maelane warned the Plaintiff that he arrested him for assault on Jacob and his rights were explained to him.
22. He testified that Plaintiff locked the gate and Maelane then called for back up. Warrant Officer Mofokeng arrived with other police officials and the Plaintiff was arrested. Plaintiff was allowed to drive his car to the police station where he was charged and detained.

CLAIM (1):

23. It is clear from the summary of the evidence that the main events and their sequence were common cause. The main dispute of the fact regarding this claim concerned the question whether the complainant Jacob was assaulted and if the nature of the assault falls within the ambit of a schedule 1 offence.
24. Assault is a schedule 1 offence only if a serious injury is inflicted, Common assault is not a schedule 1 offence as it is a

common law crime.

25. It was submitted by the Defendant that the Plaintiff assaulted Jacob with the intent to do grievous bodily harm by throwing a hammer at him. It is common cause and the evidence does not prove that Jacob sustained any serious wounds or injury. The concepts of "grievous bodily harm" and "dangerous wound" as formulated by the courts in the context of assault are, however, not synonymous.

26. Where the sole basis for an arrest in terms of Section 40 (1) (b) is the arrestors suspicion, based upon allegation that the Plaintiff has allegedly committed an assault with intend to do grievous bodily harm, there is no reasonable ground for the arrestor to suspect (i) that an assault in which a dangerous wound was inflicted, has in fact been committed, or (ii) that such an assault has been attempted. The evidence revealed that common assault was committed by the Plaintiff.
27. In order to rely on the protection of Section 40 (1) (b) it must be established that:
 - 27.1. The person who effected the arrest was a peace officer.
 - 27.2. He must have entertained a reasonable suspicion.
 - 27.3. It must be a suspicion that the arrestee committed an offence referred in Schedule 1 of the Criminal Procedure Act.
 - 27.4. The suspicion must rest on reasonable grounds. 1
28. In my view the Defendant has failed to prove that the officer who effected the arrest had the suspicion that the Plaintiff committed an offence referred to in Schedule 1 of the Criminal Procedure Act and that the arrest of the Plaintiff was unlawful.
29. Where the suspected offence is relatively trivial and not capable of attracting sentences of imprisonment it would clearly be irrational to arrest.
30. The jurisdictional facts for the arrest were not proved by the Defendant. It is only where the jurisdictional facts for an arrest in terms of Section 40 (1) (b) are present that a discretion to arrest arises.²

EVALUATION OF EVIDENCE:

31. The Plaintiff's evidence was not seriously contested during cross- examination.
32. The Plaintiff did not contradict himself on material aspects and there are no inherent improbabilities in his evidence. His evidence was corroborated by Moses Mnguni on material aspects.
33. Moses Mnguni was an impressive witness. He did not contradict himself and his evidence was also corroborated by the Plaintiff as far as the second claim is concerned.
34. Jacob Nketsu did not impress me as a reliable witness. He contradict the evidence of the Plaintiff on material aspects. He denies that he was under the influence of intoxicated liquor compare to the evidence of Plaintiff that he was under the influence.
35. There is a discrepancy as to how and when he was injured when he fell on the concrete mix.

IMPROBABILITIES:

36. He denied that he was assaulted by the Plaintiff and that the police compiled a false statement on his behalf. He also denied that he was under the influence of liquor as testified by the Plaintiff. If no charge was laid against the Plaintiff why would Mr Nketsu later withdraw the charge against the Plaintiff.
37. It is highly improbable that the police would fabricate an assault case against the Plaintiff. The Plaintiff conceded that he pushed Nketsu which is at least assault common.
38. When Mr Nketsu was asked whether it was justifiable for the Plaintiff to push him he answer by saying that he knew what assault is and that he does not know whether the assault by Plaintiff on him was justifiable. On the other hand he denied having being assaulted by the Plaintiff. His evidence create the impression that he doesn't want to incriminate the Plaintiff in fear to lose his employment. However, for purpose of this judgment regarding claim (1) it would not make any difference whether the court accept his evidence or not. The objective evidence is clear that assault common was committed by the Plaintiff and that Jacob Nketsu did not sustained a dangerous wound as envisaged in Section 40 (1) (b) of the Criminal procedure Act.
39. Constable Maelane testified on behalf of the Defendant. In my view he was a credible witness. He did not contradict himself and there are no inherent improbabilities in his evidence. He had the opportunity to charge the Plaintiff for assaulting Mr Nkhetsu in his presence and with interference with the exercise of his duties but decline to do so. This clearly indicates that he has no motive to falsely incriminate the Plaintiff. As far as the 1st claim is concerned his evidence does not revealed that the assault on Mr Nketsu was a schedule (1) assault.

FIRST CLAIM (UNLAWFUL ARREST AND DETENTION):

40. The police could lawfully have arrested the Plaintiff for assault on Mr Nketsu in their presence when he was pushed by the Plaintiff but resorted to the technically wrong basis for his arrest.
41. It follows that the Court must rule in favour of the Plaintiff in the first claim.

SECOND CLAIM (LOSS OF INCOME):

42. The police had knowledge of the business meeting of the Plaintiff on 13 March 2013. The arresting officer was informed by the Plaintiff about the meeting. He refused to let the Plaintiff use his cellular phone to inform Bambanani of his arrest and inability to attend the meeting at 15h00.
43. No evidence to contradict the evidence of the Plaintiff regarding this claim was presented by the Defendant.

44. This case is distinguishable from the Minister of Safety and Security v Scott³ where Theron JA found the damages claimed by Scott to be too remote to be recoverable. It was found that the arresting officers did not know of the agreement between Scottco and Field E Stream Magazine and could therefore not foresee that his detention would

have any impact on the planned hunt and which would lead to the cancellation of the contract and cause financial loss.

45. It was contended by counsel for the Plaintiff that the only factor that stood between the Plaintiff and the awarding of the work as quoted for and the financial benefits that would have accrued therefrom was the arrest and detention of the Plaintiff by members of the SAPS. They had full knowledge of the meeting as scheduled.

46. I must agree with this contention. The Defendant should have foreseen the consequences for the Plaintiff and should have acted to prevent such damages from accruing, which it did not. In my view the damages claimed by the Plaintiff is not too remote to be recoverable.

47. In my view the Plaintiff must succeed with this claim.

Third claim:

48. The Plaintiff bears the onus to prove that legal expenses were incurred and that such expenses were necessary and reasonable under the circumstances.

49. Plaintiff testified that after his arrest he was afforded the opportunity to make one phone call to his lawyer. He phoned his

lawyer and requested assistance. His legal representative did not arrive at the police station prior to his release.

50. The content of the two invoices as annexed to the Particulars of Claim shows numerous telephonic attendances and legal work to procure the release of the Plaintiff from custody. Plaintiff subsequently paid his attorney R2,418.00.

51. This claim was not seriously contested by the Defendant and no evidence was tendered to prove the contrary. As a result of the

unlawful arrest and detention the Plaintiff had to incurred legal costs in the amount of R2,418.00. In my view the Plaintiff succeed to prove this claim.

ON QUANTUM (CLAIM 1):

52. Plaintiff testified that during his detention from 13h00 to 20h00 on 13 March 2013 there was overcrowding and that in one of the cells in which he was detained there were more than ten (10) inmates. He further testified that the blankets in that cell were smelling.

53. It was submitted by counsel for Defendant that the evidence related to the conditions in the cell should be disregarded because it was not pleaded.

54. It is trite that the assessment of general damages is a matter within the discretion of the trial court and depends upon the unique circumstances of each particular case.
55. In *Kwenda v Minister of Safety and Security*⁴ the Plaintiff was awarded an amount of R70,000.00 for unlawful arrest and detention wherein the arrestee was detained for 44 hours.
56. In *Minister of Safety and Security v Jaco Scott and Another*⁵ the Plaintiff was unlawfully arrested and detained for one night and awarded R30,000.00 for general damages.
57. In *Minister of Safety and Security v Tyutu*⁶ the Plaintiff, a magistrate, was wrongfully arrested for being drunk in public. While the detention from that arrest was relatively short (a few hours) the court awarded the Plaintiff R15,000.00 in damages.
58. In my view, bearing all the circumstances in mind and taking in consideration decisions referred to and which were used as comparatives, an appropriate award is the sum of R20,000.0.

ON QUANTUM - CLAIM 2:

59. The Plaintiff claims damages in the amount of R730,170.00 (seven hundred and thirty thousand one hundred and seventy rand).
60. The Plaintiff must prove his damages and it will not be presume at all.
61. This claim is based on a loss of income suffered as a result of his arrest and detention. The Plaintiff furnished Bambanani with quotations regarding tenders and would have received R730,170.00. He was subsequently informed that the tenders were not awarded to him due to his absence. The Plaintiff suffered direct loss of income and in my view the court must find in his favour.

ORDER:

1. Claim 1 - The Defendant is ordered to pay the Plaintiff the amount of R20,000.00 (twenty thousand rand only) being damages for unlawful arrest and detention which amount shall bear interest at the rate of 15,5% per annum a tempora morae.
2. Claim 2 - The Defendant is ordered to pay the Plaintiff the amount of R730,170.00 (seven hundred and thirty thousand one hundred and seventy rand only) which amount shall bear interest at the rate of 15,5% per annum a tempora morae.
3. Claim 2 - The Defendant is ordered to pay the Plaintiff the amount of R2,418.00 (two thousand four hundred and eighteen rand only) which amount shall bear interest at the rate of 15,5% per annum a tempora morae.
4. Costs of suit.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

PRETORIA

DATE:

APPEARANCES:

Advocate for Plaintiff: Adv C Zietsman

Attorneys for Plaintiff: Vermaak Beeslaar

Advocate for Defendant: Adv MN Lebalo

Attorneys for Defendant: State Attorney

1 Duncan v Minister of Law and Order 1986 (2) SA 805 (A)

2 Minister of Safety and Security v Sekheto 2011 (1) SACR 315 SCA

3 Minister of Safety and Security v Scott 2014 (6) SA 1 SCA

4 2010 JDR 0780

5 (969/2013) [2014] ZASCA 84 (30 May 2014)

6 2009 (5) SA 85 (SCA)

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Prepared on 13 October 2026 · Esheria