

SOUTH AFRICA / JUDGMENT

Goliath v Minister of Police (CA107/2017) [2017] ZAECGHC 119 (14 November 2017)

[2017] ZAECGHC 119

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, I Schoeman

CASE / FILE NUMBER

CA107/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA 107/2017

In the matter between:

NATASHA GOLIATH

Appellant

and

THE MINISTER OF POLICE

Respondent

APPEAL JUDGMENT

Bloem J :

- [1] The appellant instituted an action against the respondent in the magistrate's court for damages arising from her alleged unlawful arrest and detention. The magistrate found that the appellant's arrest was lawful but that her detention was unlawful. She awarded the appellant the sum of R10 000.00 for unlawful detention, interest thereon calculated from date of service of the summons and costs. The appellant appeals against the finding that her arrest was lawful and that she was awarded only R10 000.00 in respect of the unlawful detention. The respondent cross-appealed against the finding that the appellant's detention was unlawful.

[2] The undisputed facts are that the appellant became aware that her boyfriend had an affair with another woman, referred to in the evidence as Fiona. The two women met at about 21h00 on Tuesday, 1 February 2011 at the corner of the street in which the appellant resided. The appellant stabbed Fiona with a steak knife causing her to sustain certain injuries. After the stabbing the appellant went home. At approximately 00h15 on Wednesday, 2 February 2011 Fiona arrived at the appellant's

house accompanied by Pieter Vermaak, a sergeant in the South African Police Service, who told the appellant that he was arresting her because she had stabbed the complainant. Before she accompanied them to the police vehicle the appellant asked sergeant Vermaak whether he could not give her a date to appear in court instead of taking her to the police station for detention. She made that request because she was concerned about her minor children, one of whom was four months old and still breastfeeding. According to the appellant sergeant Vermaak ignored her. On arrival at the police station she requested the policeman in charge to be released from custody and appear in court on a date given by him. Her request was denied. She was then placed in a cell. She appeared in court after 14h00 on Thursday, 3 February 2011 when a magistrate granted her bail in the sum of R300.00 which was paid later that same day. The appellant was in custody for approximately 38 hours.

[3] An arrest constitutes an interference with the liberty of the arrestee. Our courts have therefore deemed it to be fair and just to require the arrestor to bear the onus of proving that his or her arrest of the arrestee was justified in law.[1] In this case the onus was on the respondent, through sergeant Vermaak, to prove that the appellant's arrest was lawful.

In an endeavour to justify the appellant's arrest the respondent relied on the provisions of section 40 (1) (b) of the Criminal Procedure Act,[2] which reads as follows:

"A peace officer may without warrant arrest a 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".

[4] The jurisdictional facts for a defence under section 40 (1) (b) are that firstly, the arrestor must be a peace officer; secondly, the arrestor must entertain a suspicion; thirdly, the suspicion must be that the arrestee (the suspect) committed an offence referred to in Schedule 1; and fourthly, the suspicion must rest on reasonable grounds.[3] All four jurisdictional facts must be present for such a defence to be successful. A defence based on section 40 (1)

(b) will fail if one of those facts is absent.

[5] It was not in dispute that sergeant Vermaak is a peace officer. The next issue to be decided is whether or not sergeant Vermaak, when he arrested the appellant, reasonably suspected her of having committed an offence referred to in Schedule 1. That issue is dispositive of the

lawfulness of the appellant's arrest. The facts at sergeant Vermaak's disposal when he arrested the appellant were that she had stabbed Fiona with a knife and that the latter had sustained two open wounds. He testified as follows regarding the reasons for the appellant's arrest:

"Why was the arrest lawful, tell us quickly? --- Because the complainant was stabbed."

Yes? Is that all you have? --- And there was a docket opened.

Okay. --- And then the accused must be arrested so that she can be brought before court because there was a crime committed.

Okay, let's see now your grounds for saying that the plaintiff's arrest was lawful. The complainant was stabbed; that is what you said? --- Yes, she was stabbed.

There was docket opened? You must tell me if I am missing something. --- Yes, go on.

She had to be brought before court. --- Yes, there was a crime committed.

Okay, a crime committed; those four grounds: the complainant was stabbed, there was a docket opened, she had to be brought before court because there was a crime committed, correct? --- Yes.

Is that it? Nothing further you wish to add? Now is your chance. --- No, if you have another question then I can answer it."

[6] Schedule 1 refers to a number of offences, one of them being "Assault, when a dangerous wound is inflicted". Mr Wessels, counsel for the appellant, submitted that the respondent failed to establish that sergeant Vermaak reasonably suspected the appellant of having committed an offence referred to in Schedule 1. Mr Barnett, counsel for the respondent, submitted that all that the respondent was required to show was that sergeant Vermaak entertained a reasonable suspicion, not proved facts, that the appellant had committed an offence referred to in Schedule 1 and that such onus was discharged.

[7] Mr Wessels relied on amongst others *Rex v Jones*[4] for the above submission. In that case the court dealt with the provisions of the First Schedule of the Criminal Procedure and Evidence Act of 1917[5] which referred to offences in respect of which arrests could be made without a warrant. One of the offences referred to in that Schedule was an "assault in which a dangerous wound is inflicted". At 332D-F Jennett J had the following to say about a "dangerous wound", as referred to in the Schedule:

"The expression 'dangerous wound' is not easy to define. One may well ask, 'Is a serious wound always a dangerous wound?' A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then however it is not the wound which causes the danger but the sepsis."

It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted.”

[8] It is apparent from *Rex v Jones* that before the arrestor can arrest the arrestee he or she must have reasonable grounds for suspecting that the arrestee has inflicted a wound on another person which was likely to endanger life or the use of a limb or organ. In that case a man used a sjambok on a young girl causing an open wound on her face. Despite the fact that the court described the assault as cruel and a savage attack on her that must have caused her excruciating pain, it held that was insufficient to afford the arresting officer reasonable ground for suspecting that “an assault in which a dangerous wound is inflicted” had been committed. The wound should be “one which itself is likely to endanger life or the use of a limb or organ”. That is illustrated in *Bobbert v Minister of Law and Order*[6] where the plaintiff was arrested on the basis of an entry that the arresting officer had read in a police register to the effect that the plaintiff was sought on a charge of assault with intent to do grievous bodily harm. The court held that because the sole basis for the plaintiff’s arrest in terms of section 40 (1) (b) was the arresting officer’s suspicion that the plaintiff had committed an assault with intent to do grievous bodily harm, there was no reasonable ground for the arresting officer to suspect that an assault in which a dangerous wound had been inflicted. It was held that the term “grievous bodily harm” was not always synonymous with the term “dangerous wound”. It does not follow that a person who intends to do grievous bodily harm necessarily intends to inflict a dangerous wound.

[9] In this case neither party adduced evidence on the nature and extent of the injuries sustained by Fiona. Sergeant Vermaak testified that he did not inspect the injuries because he, as a male, did not believe that it was appropriate to look at Fiona’s body to ascertain the nature and extent of the injuries. The appellant, on the other hand, downplayed the nature of the injuries as being scratches although she did not see them because Fiona’s clothing covered those injuries. Her evidence in this regard was the following:

“Where did you put the knife as you were still going to confront the complainant? --- I had it in my hand.

Was it visible or it was hidden? – It was hidden.

Pardon? – Hidden, weggesteek. It was hidden.

So, you understood very well that this was a dangerous weapon; that is the knife that you were carrying, you understood it to be a dangerous weapon, didn’t you, because a knife is dangerous in itself? --- Yes.

Furthermore, you were alive to the fact that it may inflict serious injuries on a person when you stab a person before you even used it, you have seen it yourself, people who get stabbed, they get serious injuries? --- Yes.

You continued to use it knowing for a fact that it may cause these injuries to this particular woman that was stealing your man? --- As I said, I more scratched her with the knife.

No, no, no, I am not yet there. I am still trying to deal with the fact that as you are going to her, for instance if I am carrying a knife going to the court, I know for a fact that if I stabbed her, I am going to injure her. --- Yes.

You knew that very well? --- Yes.

And you intended to injure her by the fact that you wanted to stab her? --- Yes”.

[10] The onus was on the respondent to show that, when sergeant Vermaak arrested the appellant, he had reasonable grounds for suspecting that during the assault the appellant inflicted wounds on Fiona which were likely to endanger her life or the use of a limb or organ. In my view, the respondent failed to discharge that onus as sergeant Vermaak did not establish the nature of Fiona’s injuries at all. He neither asked Fiona about the severity of her injuries nor did he ascertain the nature of the injuries himself. He accordingly had no information upon which he could reasonably have suspected that the appellant inflicted a dangerous wound or wounds on Fiona. That being the case, I am of the view that the respondent failed to establish that sergeant Vermaak reasonably suspected the appellant of having committed “an offence referred to in Schedule 1.” The magistrate’s finding that the appellant’s arrest was lawful can accordingly not be supported. Her arrest was unlawful because the respondent, on whom the onus rested to justify the arrest, failed to prove that sergeant Vermaak reasonably suspected the appellant of having committed an offence referred to in Schedule 1. In the light of that finding it is unnecessary to deal with the two remaining jurisdictional facts for a defence under section 40 (1) (b).

[11] Regarding the quantum of damages for the unlawful detention, the magistrate, in the exercise of her discretion, awarded the sum of R10 000.00 for the appellant’s unlawful detention. The appellant must be compensated for having been unlawfully arrested and detained. Counsel referred to various awards[7] made by the courts. As was pointed out in *Minister of Safety and Security v Seymour*[8], the assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The awards made in previous cases are a useful guide to what other courts have considered to be appropriate but they have no higher value than that. In other words, those awards serve no more than a general guide in the determination of an appropriate award of damages in the circumstances of the case in question. Each case must obviously be determined on its own facts.

[12] The evidence is that the appellant, a 37-year old employed single mother, was arrested at approximately midnight while sleeping at home. She was then detained with approximately nine other women. Her evidence of the conditions under which she was detained was unchallenged. She testified that the two blankets which were allocated to her were stinking such that, although it was cold, she did not use them. The cell had a terrible smell. It having been her first experience of being in custody, she was scared. Her experience lasted for

approximately 38 hours. The appellant must be compensated therefor. In the circumstances of this case, I am of the view that the sum of R50 000.00 will adequately compensate her.

- [13] There was some debate as to the date from which interest on the damages awarded should run. Mr Barnett submitted that interest should run from the date of judgment whereas Mr Wessels submitted that interest should run from 2 March 2012, the date on which summons was served on the respondent. Section 2A of the Prescribed Rate of Interest Act[9] deals with interest on unliquidated debts. Insofar as it is relevant to this appeal Section 2A reads as follows:

“(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.

- (2) (a) Subject to any other agreement between the parties and the provisions of the National Credit Act, 2005 (Act 34 of 2005) the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.
- (b)
- (3)
- (4)
- (5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.
- (6)”

- [14] In *Adel Builders (Pty) Ltd v Thompson*[10] Howie JA had the following to say about section 2A (2) (a) and (5):

“Section 2A(2)(a) lays down what is to be the general position, namely that interest runs from date of demand or summons. If a plaintiff seeks interest from an earlier time then the court must be urged to exercise its discretion under ss (5). To obtain a favourable discretionary decision a plaintiff must discharge the onus of establishing facts justifying such decision.”

- [15] As I understand it, the general rule in terms of section 2A (2) (a) is that interest accrues from the date of demand or the date of service of the summons, whichever date is the earlier. Section 2A (5) gives the court a discretion to make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run. To obtain a favourable discretionary decision, a party must discharge the onus of establishing facts justifying such favourable decision. In this case it is not open to the respondent to claim that interest should run from the date of

judgment because he placed no evidence before the court to justify such an order. Absent such evidence, the

general rule must apply, namely that interest shall run from the date on which the summons was served on the respondent.

[16] In the light of the above findings the cross-appeal must be dismissed with costs.

[17] In the result, it is ordered that:

17.1. The appeal is upheld with costs.

17.2. The order granted by the magistrate is set aside and replaced with the following:

“1. The plaintiff was unlawfully arrested on 2 February 2011 and thereafter unlawfully detained until 3 February 2011.

2. The defendant must pay to the plaintiff :

2.1 the sum of R50 000.00 as and for damages for the unlawful arrest and detention;

2.2 interest on the sum of R50 000.00, calculated at the prevailing prescribed legal rate, from 2 March 2012, being the date of service of the summons, to date of final payment;

2.3 cost of suit.”

17.3. The cross-appeal is dismissed with costs.

G H BLOEM

Judge of the High Court

SCHOEMAN, J

I agree

I SCHOEMAN

For the appellant:

Adv J W Wessels, instructed by Peter McKenzie Attorneys, Port Elizabeth and Dold and Stone Inc, Grahamstown.

For the respondent:

Adv A C Barnett, instructed by the State Attorney, Port Elizabeth and Enzo Meyer Attorneys, Grahamstown.

Date of hearing:

3 November 2017

Date of delivery of the judgment:

14 November 2017

- [1] Minister of Law and Order and others v Hurley and another 1986 (3) 568 (AD) at 589E-F.
- [2] Criminal Procedure Act, 1977 (Act No. 51 of 1977)
- [3] Minister of Safety and Security v Sekhoto and another 2011 (5) SA 367 (SCA) at 373B-C.
- [4] Rex v Jones 1952 (1) SA 327 (E).
- [5] Criminal Procedure and Evidence Act, 1917 (Act No. 31 of 1917).
- [6] Bobbert v Minister of Law and Order 1990
- (1) SACR 404 (C).
- [7] Prince v Minister of Safety and Security (CA 117/ 2010) [2013] ZAECGHC 48 (23 May 2013) wherein the sum of R20 000.00 was awarded in 2013 for unlawful detention of 14 hours and 25 minutes. That sum equates to R25 056.00 in 2017; Domingo v Minister of Safety and Security (CA 429/2012) [2013] ZACGHC 54 (5 June 2013) wherein the sum of R40 000.00 was awarded in 2013 for unlawful detention of 22 hours. That sum equates to R50 113.15 in 2017; Matthews v Minister of Police (CA 141/2013) delivered in the ECG on 21 May 2014 wherein the sum of R70 000.00 was awarded for the unlawful detention of approximately 24 hours. That sum equates to R82 653.84; Mfini v Minister of Safety and Security (Case No 3137/2010) [2015] ZAECPEHC 3 wherein the sum of R50 000.00 was awarded in 2015 for an unlawful detention for one day and Minister of Police v Swarts (CA 299/2015) [2016] ZAECGHC 75 (8 September 2016) wherein R30 000.00 was awarded for one hour's unlawful detention.
- [8] Minister of Safety and Security v Seymour 2006
- (6) SA 320 (SCA) at 325B.
- [9] Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).
- [10] Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 (SCA) at 1032C.

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