

SOUTH AFRICA / JUDGMENT

Links v Minister of Safety and Security and Another (2271/10)

[2015] ZAECPEHC 18 (30 March 2015)

[2015] ZAECPEHC 18

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

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CASE / FILE NUMBER

2271/10

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 2271/10

In the matter between

JOEY JOHNNATHON LINKS.....Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY.....First Defendant

THE NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS.....Second Defendant

JUDGMENT

REVELAS J

- [1] The plaintiff instituted an action against the two defendants for payment of the amount of R750,000.00 as damages he allegedly sustained as a result of his arrest without a warrant on 27 December 2009, by members of the South African Police Services, and his continued detention thereafter until 17 March 2010.

- [2] The plaintiff contends that his arrest at his residence in Schauderville was unlawful. His detention at the Mount Road Police Station until his first court appearance on 29 December 2009 and thereafter in St Albans Prison, at the instance of the first defendant's employees, he maintains was also unlawful. The plaintiff contends that through taking ordinary investigative steps it could have been established that no proper grounds or objective facts existed which justified his continued detention.
- [3] Insofar as the liability of the second defendant is concerned the plaintiff's pleaded case is that the prosecutors involved, in the case brought against him and who had control over the docket, and who dealt with the members of the police at his court appearances during his incarceration, failed in their duty to timeously withdraw charges against the plaintiff. They further failed to inform the magistrate expeditiously that there were no objective facts linking him to the commission of the offences with

which he was charged, and failed to ensure his release as soon as possible.

The Crimes which gave rise to the arrest of the plaintiff

- [4] Just after midnight on 27 December 2009, a young man, I will refer to only as B, was driving his father's Corsa bakkie in Newton Park. His friend, I will refer to only as J, was in the passenger's seat. Both of them ("the complainants") worked at a cocktail bar in Humeraal and they were on their way home from work. At a robot in Cape Road they were approached by two men, one of the men had a firearm and pointed the firearm at J's head, thereby gaining access to the vehicle. J was made to sit at the back of the bakkie with one of the perpetrators (who sported a tattoo on his right biceps) while the other (who sported a dollar signage tattoo on the middle finger of his left hand) climbed into the passenger's seat next to B, who was ordered to turn right into Fourth Avenue, and drive towards Schauderville. In Newton Street, B was ordered to stop and get out of the bakkie. The two complainants were made to kneel next to the bakkie where they were delivered of the contents of their pockets. While one of the assailants was busy searching for more loot, the other forced B to perform oral sex on him. Fortunately for J, the assailant who was searching the vehicle did not take up his partner's suggestion that he should do the same to J. Thereafter the two robbers ordered the complainants to run away and they drove off with the Corsa and the items they had stolen which was cash (about R800), two cell phones (one was a Samsung) a watch and Oakley sunglasses. The two complainants phoned B's mother to fetch them. At about 02:00 B and J made statements to the police. They were also taken to Greenacres Hospital where B received medical attention and semen samples were taken from his clothes.

The Events Preceding the Plaintiff's Arrest

- [5] The arrival of the police at the house of the plaintiff's grandmother, 77 Jameson Road, Schauderville Port Elizabeth was in consequence of the arrest of a man called Raven or Fiela Lucas, also known as Allan Maart ("Lucas", earlier that morning just after 03h00. He was arrested by Inspector Wait in connection with the hijacking, robbery and sexual assault which had occurred at about midnight. According to Wait he and Student Constable Matthys

were on patrol in a police vehicle in Newton Park when they received a radio alert call about the hijacking of a vehicle and the robbery of cash, cellphones and sunglasses. A description of two suspects was given. Wait and Matthys were then looking for two coloured males of whom one had a dollar tattoo (“\$”) on the middle finger of his left hand. On their way to Schauderville, Wait and Matthys came across two coloured males, who upon noticing the police vehicle, increased their pace. Wait stopped next to them, and indeed, one of them had a dollar sign on his left middle finger. He was also very nervous and had in his possession R480.00 cash and a cellphone in his pockets for which he was unable to give an explanation. Wait then drove this person Lucas and his companion to the Greenacres Hospital where the two complainants were. J identified Lucas as one of the perpetrators of the hijacking and stated that the man who was with him (the one found by Wait and Matthys in the company of Lucas) was not one of the assailants. This other man was released and only Lucas was arrested. B was still with the doctor at that point and therefore did not come outside to identify his assailant(s). Upon questioning Lucas about the identity of the second perpetrator, he gave the plaintiff’s name, (Joey Links) and his address being 77 Jameson Street, Schauderville. This was confirmed by Matthys in his statement.

The Arrest

[6] It was common cause that during the early hours of 27 December 2009, Wait and Matthys, together with other members of the police arrived at the house of the plaintiff’s grandmother where the plaintiff, his sister and her children resided. The plaintiff occupied a room outside at the back of the house, attached to the garage. Wait and Matthys entered this back room where they found the plaintiff and his friend Sergio Rhodes. Upon searching the room the two policemen found a firearm under the mattress of the plaintiff’s bed and a Samsung cellphone elsewhere in the room. Several facts alleged by the witnesses for sides, (the plaintiff and his sister on one hand, and Wait on the other), were in dispute. According to the plaintiff and his sister (Mrs Armoed), he and Rhodes were assaulted during the search. Pepper spray was also allegedly used and according to Armoed, a foul mouthed female police officer beat her brother and Rhodes with a torch. They were also trampled on and their heads

pushed and knocked against the floor. Armoed also testified that members of the police entered the main house forcefully, caused damage to the front door and the garage door. Both the plaintiff and Armoed testified that Rhodes told the police that the firearm they found belonged to him and that the plaintiff had nothing to do with anything regarding the firearm. This was disputed by Wait, who also denied witnessing or carrying out any assault on the two men. According to him, they were co-operative and willing to go with him. It is common cause that they were not handcuffed when they walked out of the premises. The plaintiff alleged that he had already been arrested at that point. Wait denied that. He testified that the plaintiff was arrested only after he was identified later a by one of the complainants. For reasons that will become apparent, one has to accept that Wait was mistaken about this. The plaintiff was not identified that night by any of the complainants.

- [7] Both complainants noticed that one of the robbers had a dollar sign on the middle of his left hand (the one who got into the passenger seat) and the other one had a tattoo on the biceps of his right arm. J said in his statement that he would be able to recognize both perpetrators. B said in his second statement made at 12h55 on the same day (in his first statement made at 02h00 that day he does not mention the sexual assault) that he would be able to identify the perpetrator who sexually assaulted him.
- [8] Both complainants were taken to the Greenacres Hospital. While B was attended to by a doctor, J pointed out the robber with the dollar sign on his finger (Lucas) as one of the perpetrators to Wait.

The Identification of the Plaintiff

- [9] According to the plaintiff, after his arrest at his grandmother's home, both he and Lucas were taken to Greenacres Hospital in the same vehicle. Rhodes was also taken there but in a different vehicle. There a young white man pointed out Lucas but said about him (the plaintiff):
- "No, no, not this one."*
- [10] The plaintiff testified that the policeman and the young white man thereafter walked towards another police vehicle in which Rhodes was brought to the hospital.
- [11] Wait denied that this second trip to the Greenacres Hospital ever took place. According to him, he drove Lucas (who was already in the vehicle), the plaintiff and Rhodes straight to the Mount Road Police Station, when they left Schauderville.
- [12] According to Wait's police statement and his evidence in court, B identified Lucas and the plaintiff as the two hijackers at the Mount Road Police Station. The plaintiff testified that he was arrested at his grandmother's house. Wait said he arrested him only after the other complainant, B, identified both the plaintiff and Lucas as the perpetrators.
- [13] It is common cause that a day after the arrests in question, Rhodes made a statement in which he stated that the plaintiff had nothing to do with the firearm found in his room by Wait. He made no further admissions.
- [14] According to the warning notices issued to the plaintiff, Lucas and Rhodes in terms of section 35 of the Constitution, Lucas and the plaintiff were arrested on suspicion of robbery and hijacking and Rhodes for the possession of an "illegal firearm".

According to the "First Appearance Report" completed by "Pre-Trial Services" on 29 December 2009, all three were arraigned on charges of hijacking, sexual assault, robbery, and the possession of an unlicensed firearm.

- [15] Lucas, Rhodes and the plaintiff, respectively became accused numbers one, two and three, charged with (according to the charge sheet):

“Hijacking + Robbery + sexual assault (sic)”

- [16] Although the Investigating Officer in the matter, Inspector Ntlasana noted in the Investigation Diary that bail should be granted. It was not. The offences in question were categorized in Schedule 6 of the Act as offences in respect of which bail could only be granted upon a formal bail application in court. All three accused were legally represented at their first court appearance and thereafter.

Events after the First Appearance

- [17] The case against the plaintiff and his co-accused was postponed from week to week. Bail was opposed because, the accused were charged with a Schedule 6 offence. On 1 February 2010 their attorney was absent and they indicated to the magistrate that they were going to seek different legal representation. To that end, the matter was postponed to 18 February 2010.
- [18] On 18 February each accused was represented by a different attorney. The plaintiff was represented by Mr Malgas. The matter was postponed to 3 March 2010. An identity parade was to be held. On 3 March 2010, according to the pressing magistrate's notes, the public prosecutor reported that the State “was trying to organize an identification parade but all accused persons refused to attend there without their attorney present”. Mr Coetzee, for accused number two (Rhodes), said he represented all three accused and stated that an identity parade was held but that the former representatives of accused numbers one and three (the plaintiff) “did not pitch up” and that they were accordingly not called from their cells to attend the parade. The matter was postponed to 17 March 2010.
- [19] An identity parade was finally arranged on 15 March to be held on 16 March 2010. In the interim, the plaintiff had secured the services of another attorney, Mr Cunningham, to represent his interests at the identity parade. Sixteen men including the three accused were in the parade. The first witness called upon to point out the two perpetrators in question was J, who pointed out Lucas and Rhodes as the two assailants without hesitation. B was the second witness called after the sixteen men in the parade changed places and numbers. B first pointed out Lucas and then Rhodes, as the two assailants almost immediately.
- [20] Not surprisingly, the charges against the plaintiff were withdrawn the following day, 17 March 2010.
- [21] On 2 September 2010, the matter was struck from the roll by the presiding magistrate. On 21 September Mr Kirchner, a regional court prosecutor (the third state witness called by the defence) wrote to the Branch Commander of the Mount Road Police Station. He requested that the investigating officer in the matter be granted permission “to take exhibits to Cape Town for DNA analysis” and that a request had been made by the Director of Public Prosecutions, Grahamstown that the matter receive their urgent attention. On the same day Kirchner also wrote to the Forensic Science Laboratory in Kuilsrivier, requesting analysis of the semen and blood samples forwarded to their offices as a matter of urgency. This very late endeavour to complete the investigation is indicative of a serious dereliction of duty on

the part of the police, and in my view, of the investigating officer in charge.

Discussion

[22] In terms of section 40(1)(b), a Peace Officer, which Wait was at the time, may arrest, without a warrant (as in the present case), any person:

“(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody; . . .”

[23] The jurisdictional facts which must exist before the power to arrest can be exercised are the following:

(i) The arrestor must be a peace officer

(ii) The peace officer must entertain a suspicion

(iii) It must be a suspicion that the person arrested committed an offence in terms of Schedule 1

(iv) The suspicion must rest on reasonable grounds.[1]

[24] Once the jurisdictional facts are present, a discretion arises as whether or not to arrest a suspect, and that discretion must be exercised in good faith and not arbitrarily.[2] It was submitted on behalf of the plaintiff that:

“Wait made very little effort to further investigate, i.e. get a better description of those involved in the crime and made no effort to get the two persons he arrested at 77 Jameson Road to the Greenacres Hospital where JD and/or BM (the complainants) could have been asked to identify. (It is common case, it is respectfully submitted, that had JD and/or BM been given an opportunity to pick out from the three accused on the night in question that they would have picked out AM and SR (accused 1 and 2) and exonerated the plaintiff.” (Heads of Argument page 24)

[25] Accordingly, it was submitted that Wait had no reasonable grounds to arrest the plaintiff on the basis of the unlawful possession of the firearm or any of the other charges.

[26] It is simply not open to the plaintiff to argue that Wait should have made an effort to take the plaintiff and Rhodes to the Greenacres Hospital to be identified by both or either of the complainants. The plaintiff's version was that he was indeed taken to the hospital with Rhodes, albeit in a different vehicle.

[27] According to the plaintiff, he was specifically excluded by J. This second trip to the hospital was disputed by Wait, who testified, as set out above, that he had already been at the hospital, where Lucas was identified by one of the complainants and his companion released. Based on what Lucas had said, namely that the other person involved was the plaintiff, Wait had gone to the plaintiff's house.

[28] In my view, the plaintiff's version that he and Rhodes were taken to the Greenacres Hospital is highly improbable. Wait had already been to the hospital where the person he had just arrested was identified by one of the complainants (J). B also referred to this identification

by J of one of their assailants while they were at the hospital. Wait testified that the doctor was still busy with the other complainant (B) when he left. I assumed he could not wait because the second culprit had to be found and the plaintiff's name and address was given to him by Lucas. He accordingly left the hospital for Schauderville. This was confirmed by Matthys in his statement.

[29] Another reason why I am inclined to reject the plaintiff's version about the trip to the hospital, is that by the time his room in Schauderville was searched, the doctor would have finished his examination of B. B would have had to return to the police station to make his second statement about the sexual assault which he omitted to do in his first statement.

[30] In my view, in the prevailing circumstances, it was not necessary for Wait to first obtain a warrant before he proceeded to the address given to him by Lucas. If he did, the objectives of a search there would have been frustrated.

[31] At the plaintiff's house Wait found the plaintiff with Rhodes. There was a firearm in the room and Wait knew

that a firearm was used in the crimes under investigation. Cellphones and a pair of Oakly sunglasses (items that were allegedly

robbed) were also found there. Wait could not have been expected at that point, to make a decision as to which one of the two men was the second culprit. Also, one of them could have been involved in the matter as an accessory after the fact in some other way.

The facts were not as simple as made out by the plaintiff.

[32] Wait denied the plaintiff's evidence that Rhodes had repeatedly told him that he was the culprit and not the plaintiff. Rhodes only owned up as to the ownership of the firearm found under the plaintiff's mattress. Rhodes never made any admissions about the other crimes, only about the firearm, when he made his statement the following day at the police station.

[33] It is hardly likely that Rhodes would have made admissions regarding the other crimes to Wait, but not in his statement to the police the following day. Armoed testified that when the police arrived at her house, they said they were looking for a man with a tattoo. She also said that Rhodes sported a tattoo on his back. J and B said in their statements that Rhodes had a tattoo on his right biceps.

[34] It is clear that at that stage, Wait justifiably entertained a suspicion that the plaintiff was involved in the crime. There were no obvious indicators at that stage that the plaintiff's involvement in what had happened to the complainants that night,

could be excluded with any certainty. A gun was used during that incident and one was indeed found under the plaintiff's

mattress. Moreover, Lucas who had a criminal record akin to that of a habitual criminal, had implicated the plaintiff, and not Rhodes. The plaintiff was also a suspect in other cases at that stage, namely two theft cases and the unlawful possession of a fire arm, according to the investigating officer's notes. In my view, Wait could not reasonably have been expected to exclude the plaintiff as a suspect. In the circumstances I am unable to find that the plaintiff's arrest was unlawful.

The Plaintiff's Continued Arrest

- [35] The determination of the second defendant's culpability in the plaintiff's continued incarceration depends largely on a credibility finding. The plaintiff's case was that at their first appearance Rhodes told the magistrate that the plaintiff was not involved in the crimes that the three of them were charged with. That is tantamount to an admission by Rhodes that he was involved in the crimes the three of them were charged with. The plaintiff testified that he, himself raised his hand and also told the magistrate that he was not involved in any of the offences they were charged with, but was told that his lawyer should speak for him. This response was not unreasonable because one can accept that presiding officers are often faced with persons protesting their innocence, only to be convicted later after damning evidence was lead against them. The magistrate did not have the docket before him.
- [36] The court record of the proceedings does not reflect that Rhodes ever made self-incriminating remarks in court or that he insisted that the plaintiff had nothing to do with the matter. In the absence of direct testimony by Rhodes, who could have been called as a witness but was not, I am compelled to reject this version.
- [37] The State never applied for any of the postponements. The legal representatives for the accused were also responsible for some of the postponements. Why they did not apply for bail at the earliest opportunity, or at least in the case of the plaintiff is quite perplexing. In my view, the legal representatives for the plaintiff during his period of incarceration had a lot to answer for. One of them was also responsible for the first identity parade not proceeding.
- [38] In the Investigation Diary kept in respect of this case (Case No. 683/12/2009), is an entry made as early as Sunday 28 December 2009, where a senior prosecutor of the second defendant's personnel had given the following directives as to the further investigation of the matter:
- (1) Fingerprints should be taken from the vehicle (the Corsa bakkie)
 - (2) The origin of the firearm in question should be determined
 - (3) The docket for further investigation must be obtained
 - (4) An Identification Parade must be arranged

- (5) DNA samples of suspect must be taken for comparison (probably with the semen taken from J's clothes)
- (6) The stolen property must be identified
- (7) "Have case remanded for ID Parade and further investigation – I/C (in custody) No Bail. Contact me on 082-697.... for bail application or in case of problems."

The above directives indicate an approach inconsistent with a diligent investigation of the serious crimes committed. However, these

directives were not timeously adhered to. The firearm found under the plaintiff's mattress was traced back to an earlier robbery.

- [39] Blood samples were also taken from the suspects, I presume from Lucas, and with the semen samples referred to, forwarded to the Laboratory in Kuilsrivier.
- [40] The investigation directives were carried out, but most of them only in September 2010, and that constitute negligence on the part of the police, perhaps not at that late stage in relation to the plaintiff, but in respect of the complainants. By that time the plaintiff had been a free man for six months.
- [41] In my view, the identity parade should have been a matter of priority for the prosecution and investigating officer in this case. That is a matter of common sense. After the first appearance, if anyone had read the statements of the two complainants, it must have been clear that there were three accused charged with offences which arose from an incident where only two culprits were involved. One of the three accused was therefore not involved in the commission of the crimes in question and efforts should have been made to eliminate that person from their investigations and have the charges withdrawn against him.
- [42] By the second appearance at least, the police and the prosecutors could assume with certainty that Lucas was involved in the commission of the crimes under investigation and that his co-perpetrator sported a tattoo on his right arm, on the biceps. Rhodes had admitted to possession of the firearm. An identification parade should have been a top priority for both the prosecution and the police. The directives of a senior prosecutor, which both the police and the prosecution should have carried out, but did not, demanded that an identification parade be held. It was a matter, not only of common sense, but also of urgency, that the identification of the actual two culprits be resolved and finalized. The legal representatives for the plaintiff and the other accused also held matters back. That was however no excuse for scheduling the identity parade only in March.
- [43] After 3 March 2010, the plaintiff's attorney was responsible for the parade not proceeding, but before that, it was the fault of both the investigating officer and the prosecution that an identity parade was not arranged to be held during the period after 6 January, their second appearance, until 3 March 2010. A simple informal pointing out by the complainants could have been a conducted at court, or down at the cells. Both J and B made comprehensive

statements wherein they say that they will be able to identify both their assailants. The plaintiff's legal representatives could have done more to assist their client. That, however, did not absolve the prosecution and the police from their responsibilities to conduct a proper investigation. The offences in question were Schedule 6 offences and without the assistance of the police and prosecution bail would have been difficult to obtain.

[44] The fact that the investigating officer was inclined to agree to bail for the plaintiff, but not the other two accused, at their first appearance, is indicative of some acknowledgement on her part that the plaintiff's case was different in that he had less to answer for. That should have been the trigger for her to make time for this case in her schedule and establish whether the charges levelled against the plaintiff should be proceeded with. A simple exercise with the help of two good witnesses (the complainants) would have achieved that result. Instead, bail was opposed and the approach was adopted that all three accused should remain in custody until such time as it behoved the police and prosecutors to find the time to arrange for an identity parade.

[45] There was no justification for the plaintiff's continued incarceration for more than two months after his arrest. Both the first and second defendants are accordingly liable, jointly and severally, to pay damages to the plaintiff in the amount determined

below.

Damages

[46] The plaintiff was an unmarried, unemployed man aged 27, when he was arrested. He languished unnecessarily in an overcrowded prison and was subjected to great indignities and hardship, such as sleeping on a mat on the floor and sharing a scant ablution facilities with a multitude of men. Counsel for the plaintiff, Mr Price, listed all the relevant requisites for the incarceration of prisoners (sentenced and unsentenced) contained in the Regulations of Correctional Services which were flouted while the plaintiff was in St Albans Prison. I need not list them. The conditions in aforesaid prison are often referred to in our courts.

[47] According to the plaintiff he was also raped four times while in prison. This was not pleaded although the plaintiff said he told his former attorney thereof. However, his pleadings were not amended accordingly. The plaintiff said he was too shy to tell anyone about what happened to him and he suffered retribution when he made an effort to report it while in prison. The plaintiff carries the onus of proving his damages. There was no evidence that the plaintiff, once he decided that he was not too shy to mention the incident in open court, went to seek professional help. There is also no evidence from a psychologist as to how the alleged rape affected him. That type of evidence would have provided some corroboration for the allegations made in this regard and in assisted in assessing how or to what degree that should impact on the award to be made. These are serious allegations and very little, by comparison to the allegations pertaining to the plaintiff's arrest, were said about them.

[48] In assessing what damages to award the plaintiff, one has to take into account the period of incarceration, the plaintiff's

reputation, his standing in the community and how it affected him to sit in prison, suspected of crimes he was not guilty of. I also take into account that the plaintiff was not an entirely innocent person as far as his brushes with the law are concerned. The fact that Lucas, a hardened criminal by all accounts, knew the plaintiff's address and that Rhodes could be found at the plaintiff's house that night, after the crimes were committed, suggests that the plaintiff was no stranger in criminal circles. That does not justify his prolonged incarceration, but it should be taken into account when considering his standing in the community as a factor in determining an award.

[49] The plaintiff's counsel referred me to several cases where awards were made in these type of matters and submitted that a certain amount per day is usually awarded and the per diem amounts awarded varied from R3 400,00 per day to R33 000,00 per day. To apply a daily rate so to speak, strikes me as arbitrary. Not every case is the same and the award of damages should reflect the individual characteristics of each case. Also, the amount of damages is to be paid from public funds and therefore courts should be cautious and responsible in their calculations of the amounts to be awarded.

[50] Having considered all the factors and the case law I was referred to by the plaintiff, I conclude that an appropriate award for damages in this matter is an amount of R250 000,00.

Order

[51] Accordingly I make the following order:

- (i) The defendants are liable, jointly and severally, to pay damages to the plaintiff in the amount of R250 000,00, the one paying the other to be absolved;
- (ii) Interest is payable at the legal rate, 15,5% on the aforesaid amount from date of demand to date of payment;
- (iii) The defendants are to pay the plaintiff's cost of suit, jointly and severally, the one paying the other to be absolved.

E REVELAS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv T Price

Port Elizabeth

Instructed by: Gregory Clark & Associates

Counsel for the Defendant's: Adv N Msizi

Instructed by: State Attorney

Dates Heard: 31/07/14; 1/08/14; 15/08/14

Date Delivered: 30 March 2015

[1] Duncan v Minister of Law and Order 1986(2) SA 805 at 818 F – H.

[2] Minister of Safety and Another v Sekhoto and Another 2011(1) SACR 315 (SCA).

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