

SOUTH AFRICA / JUDGMENT

Magoabi v Minister of Police (CA303/2017) [2019] ZAECGHC 74 (8 August 2019) [2019] ZAECGHC 74

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S. Rugunanan, E. Revelas

CASE / FILE NUMBER

CA303/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 303/2017

Date heard: 10 May 2019

Date Delivered: 08 August
2019

In

the matter between:

VUYOKAZI
YVONNE MAGOABI
Appellant
and
THE
MINISTER OF POLICE
Respondent

JUDGMENT

RUGUNANAN, AJ:

[1] The appellant, as plaintiff, instituted action in the Magistrates' Court, Port Elizabeth, against the respondent as defendant in which she claimed damages of R100 000 for her wrongful arrest and detention. The appeal to this Court lies against the judgment of the Magistrate dismissing the appellant's action for damages. For ease of reference the parties are hereinafter referred to as in the court a quo.

[2] The plaintiff's case is that on 24 February 2015 she was "wrongfully and unlawfully" arrested and detained by

members of the South African Police Service. The defendant admitted the arrest and detention but placed wrongfulness in issue on the basis that the arrest was effected in accordance with a "bench warrant" authorised by a Regional Magistrate on 10 December 2014 before whom the plaintiff failed to appear with her minor daughter who was required to testify in certain criminal proceedings. The defendant averred further that the member of the police service (identified in the record as "Warrant Officer Mtshawu") [1] who arrested the plaintiff, was a peace officer and that he was entitled to effect the arrest for the reason that he acted under the authority of a court order being the bench warrant that was authorised. On the facts, it cannot be gainsaid that Warrant Officer

Mtshawu knew of the existence of the warrant when he effected the arrest.

[3] The issue then, that arises in this appeal is whether the manner in which the arrest was effected with particular reference to section 39(2) of the Criminal Procedure Act [2] ("the Act") rendered the arrest lawful. Section 39(2) states:

"The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant."

[4] It is perhaps opportune to state at the outset that the issue of a "demand" does not arise since the evidence on the plaintiff's case discloses that she had no knowledge of the existence of the warrant when she was arrested. [3]

[5] It is trite that an arrest and detention is prima facie unlawful.[4] Further, it is well established that once an arrest is admitted, the onus rests on the defendant to allege and prove facts that provide legal justification for the arrest[5], and that justification for the detention after an arrest until the arrestee's first appearance in court continues to rest on the defendant.[6]

[6] In a decidedly brief judgment, without indication that the evidence relating to the plaintiff's arrest was properly considered, the trial court's ratio in dismissing the action appears from its finding that "... there is no evidence before court which challenges the validity of the warrant." Following delivery of the plaintiff's notice of appeal, the Magistrate's statement [7] incorporates the finding that "there is nothing illegal on (sic) the acts of the policeman." The reasoning employed by the Magistrate conveys that once armed with a warrant of arrest, the validity of which was unchallenged, Warrant Officer Mtshawu was duty-bound to arrest the plaintiff without further ado. The Magistrate's finding was wrong. It amounts to an obvious misdirection indicative that the issue of where the onus lies and its proper application to the facts in the matter with particular reference to section 39(2) of the Act, was misconceived.

[7] Relevant to section 39(2) of the Act it was ruled in *Minister van Veiligheid en Sekuriteit v Rautenbach*: [8]

"Artikel 39(2) weerspieël welbekende gewigtige oorwegings van regsbeleid. Die inhegtenisneming van 'n person beroof hom van sy vryheid. Dit is daarom noodsaaklik dat hy so gou as prakties moontlik is, verwittig moet word wat die rede is vir die drastiese inbreukmaking op een van sy fundamentele regte. Om hierdie oogmerk te verwesenlik moet 'n streng toepassing van die statutêre vereistes aangewend word, eerder as 'n toeskietlike een."

[8] Although the meaning ascribed to the words "immediately after effecting the arrest" would depend on the circumstances of each case they are categorical in indicating that the legislature is not tolerant of any delay. A lapse of time other than a mere trifling delay would result in non-compliance with the section. The requirements in the relevant

subsection of the Act mean that compliance therewith is required as soon as possible but where there is no intent or ability to comply therewith then the arrest is invalid from inception. [9]

[9] Turning to the facts that preceded and led up to the arrest and detention, it is not disputed that the plaintiff opened a criminal case of rape on behalf of her minor daughter, but having attended court on several occasions they decided to withdraw the case when the plaintiff signed a withdrawal statement. It is also not in dispute that at about 07h00 on 24 February 2015 at 217 Madala Street, the home of the plaintiff's boyfriend, the plaintiff was arrested and escorted to the New Brighton police station where she was detained and on the same day taken to the Regional Court and released from custody at about 12h00. In addition it is common cause that Warrant Officer Mtshawu [10] who arrested the plaintiff was also the investigating officer in the criminal case opened by her.

[10] Having signed the withdrawal statement, the plaintiff testified that she was informed by Warrant Officer Mtshawu that the criminal case had been withdrawn. Further, she stated that she did not know she still had to attend court with her daughter but would have done so if Warrant Officer Mtshawu had informed her that she was required to do so. Dealing specifically with the arrest, the plaintiff said that she did not know why she was being arrested and despite asking, she was not told anything except that she should ride in the back of the police van. In this regard she stated that Warrant Officer Mtshawu demonstrated

anger and aggression towards her. It bears mentioning that the plaintiff's minor daughter had already been in the police van at the time of the plaintiff's arrest much to the plaintiff's distress, she having left her daughter at their house at 48 Masangwana Street earlier that morning to mind a young relative who suffers from epilepsy. Evident from the plaintiff's testimony, as also corroborated by her sister Noxolo Magoabi, is that the plaintiff was not at any stage, neither at the time of her arrest in Masangwana Street nor at the police station informed, either by Warrant Officer Mtshawu or by any other police officer, that she had been arrested on the strength of a bench warrant.

- [11] The plaintiff's evidence on these aspects was unchallenged. Although the defendant's legal representative in the court

below acknowledged that the defendant bore the onus to justify the arrest and detention, the Magistrate was informed that the attendance of Warrant Officer Mtshawu could not be secured but that his testimony would have gone as far as only confirming that a warrant of arrest was authorised by the court for the plaintiff to be arrested which, it was submitted, was executed "lawfully and procedurally".[11] The legal representative informed the Magistrate further that these submissions on behalf of the defendant "stand as our case ... and in that respect I am closing my case."

- [12] A party who calls a witness is entitled to assume that if the witness's testimony has been deliberately left unchallenged in cross-examination then it has been accepted as correct unless such testimony is so manifestly absurd or fantastic or romanticised that no reasonable court can attach any credence to it. In *Small v Smith*[12] it was held as follows:

"It is ... elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him ... that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".

- [13] This was further confirmed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* where the Constitutional Court stated: [13]

*"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."*

[14] To my mind, the failure to put a version to the plaintiff's under cross-examination is decisive of the point that the defendant was unable to show that the arresting officer Warrant Officer Mtshawu demonstrated any ability or intent to comply with section 39(2) of the Act. Confronted by this imputation counsel who appeared for the defendant in this appeal, Mr Ngadlela, was constrained to concede that the defendant did not discharge the onus to justify the plaintiff's arrest and detention. The effect is that the plaintiff's uncontradicted evidence stands unshaken. The absence of a credibility finding taken together with the Magistrate's misdirection on the question of onus leaves it open to this Court to express its own conclusion regarding its preference for and the relative worth to be attached to the plaintiff's evidence.[14] On a plain reading of the record her evidence reflects clarity and consistency and is untainted by contradiction.

[15] The plaintiff claimed a globular amount of R100 000 for her wrongful arrest and detention, resultant contumelia, impairment of dignity and emotional distress. The claim resorts under the actio iniuriarum which is a general action relating to infringements of personality rights.[15] Quantifying general damages involves the exercise of a broad discretion by a court to award what it considers to be fair and adequate compensation.[16] In *Minister of Safety & Security v Tyulu*[17] the approach to quantifying damages in matters such as the present has been laid down to be as follows:[18]

*"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) 325 paragraph 17 [also reported at [2007] 1 All SA 558 (SCA)-Ed]; *Rudolph & Others v Minister of Safety & Security and Others* (380/2008)*

[2009] ZASCA 39 (31 March 2009) (paragraphs 26-29) reported at [2009] 3 All SA 323 (SCA)-Ed]."

[16] At the time of the trial the plaintiff was 34 years of age, unmarried and the mother of one child, the minor daughter mentioned earlier in this judgment. On the morning of the arrest the plaintiff had calamine lotion on her face, she wore a T-shirt, a wrap-around skirt and flip flops. It was a cold, rainy day and she was not given the opportunity to render herself presentable or to get warm clothing. She was distressed when she discovered that her daughter, whom she had left at home to mind a young relative, was already in the back of the police van and was sobbing. The daughter was barefooted and wore

only a vest and a short pants. The plaintiff felt embarrassed by the presence of members of the public who were watching. At the police station she was not detained in a holding cell but sat on a bench and began to cry when she observed her daughter being led into a cell. The plaintiff felt humiliated in having to endure the abrasiveness and heckling of some of the police officers in the station, apparently the insinuation being that by withdrawing the criminal case she and her daughter were assisting criminals in getting away. On being taken to court the plaintiff (and her sister Noxolo who had already been in waiting) met with the control prosecutor who apologised for the arrest when the plaintiff explained the circumstances of the withdrawal of the case. As for Warrant Officer Mtshawu it bears noting that no apology for his conduct was ever forthcoming. In all, the plaintiff and her daughter spent an approximate 5 hours in detention until their release when they appeared before a magistrate. They subsequently underwent counselling

with a psychologist to enable them to cope with the trauma and distress triggered by the events of that day.

[17] I have no hesitation in accepting that the events of the day caused the plaintiff to be traumatised and disturbed by having to endure the ordeal of her arrest and detention together with her daughter. In his heads of argument Mr Wessels who appeared in these proceedings as counsel for the plaintiff referred to several awards in previous cases.[19]

[18] Utilising the updated equivalent of these awards[20] as a broad guideline and looking at the facts of the matter as a whole, regard being had to the plaintiff's personal experience

of the circumstances attendant on the arrest and detention, the nature and duration of the detention [21] and, of course, being mindful of the admonishments in the dictum referred to hereinabove, I am of the view that an award of R60 000 would be indicative of an equitable exercise of discretion.

[19] During argument Mr Wessels raised the issue of pre-judgment interest on the amount of damages which may eventually be awarded by this Court.

[20] Section 1 of the Prescribed Rate of Interest Act[22] states inter alia that if a debt bears interest and the rate of interest is not governed by law, agreement, trade custom or in any other manner, than interest must be calculated at the rate from time to time prescribed in the Gazette by the Minister of Justice.

Section 2A is headed "Interest on unliquidated debts" and contains the following subsections (irrelevant wording is omitted):

"(1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law... shall bear interest is contemplated in section 1.

(2)

- (a) Subject to any other agreement between the parties 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.

...

- (5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law... 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.”

[21] Section 2A(5) confers on the court a discretion to make such order as to it appears just for the payment of interest on an unliquidated claim for damages. In this regard Mr Wessels submitted that interest at the rate of 9% per annum (applicable at the time of the institution of the action) as prayed for in the particulars of claim should in the exercise of this Court’s discretion to be declared to run from date of demand (13 March 2015) to date of payment. This consideration, he argued, is supported by aggravating features attendant on the plaintiff’s arrest and detention in that she was not given the opportunity to make herself look presentable and was heckled by the police.

[22] Mr Ngadlala argued that the final quantification of the plaintiff’s damages would occur as at the date of judgment by this Court, hence interest on damages should run from that date. In the alternative, a

liberal approach, if justified by the facts of the matter would be to have recourse to section 2A(2) (a) in terms of which he suggested

interest runs from date of service of summons.

[23] On the whole, section 2A has been held to aim at alleviating the plight of a party who has had to wait a substantial period of time to establish its claim, through no fault of its own and is paid in depreciated currency.[23] Against the consideration contended for by Mr Wessels is the circumstance that I have already factored into the assessment of the plaintiff’s damages the aggravating features mentioned by him. Furthermore, the assessment was not made in depreciated currency but in inflation adjusted currency values at the time of this judgment. Of final note is that the damages awarded seeks to compensate the plaintiff for the infringement of her rights. To this end, I endorse the approach adopted by this Court in *Minister of Police v Jonker*[24] and consider it unjust to order that interest be declared to run from date of demand.[25]

[24] A final aspect raised by Mr Wessels concerned costs. He contended for an order of attorney and client costs against the defendant in the event of the appeal being successful. The argument was premised on the fact that the defendant did not succeed in presenting a defence to the plaintiff’s action. The order contended for was not claimed in the prayer to the particulars of claim nor was it even remotely mentioned by Mr Wessels in his heads of argument. Mr Ngadlala stated that the belated raising of the issue for the very first time on

appeal was opportunistic. I agree. In the particular circumstances of this case notice that such costs would be asked for on appeal should have been given to the defendant beforehand so that it could have had the opportunity to advance reasons why such order should not be granted.[26]

[25] In the circumstances the following order is made:

[25.1] The appeal is upheld with costs;

[25.2] The Magistrate's order is set aside and replaced with the following order:

“(i) the defendant is directed to pay to the plaintiff the amount of R60 000 (Sixty thousand Rand) in full and final settlement of her claim for damages which arose from her wrongful arrest and detention on 24 February 2015;

(ii) the defendant shall pay interest on the aforesaid amount at the rate of 9% per annum with effect from 6 August 2019 to date of payment;

(iii) the defendant shall pay the plaintiff's party and party costs of suit on the Magistrates' Court scale.”

S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

REVELAS J:

I agree. It is so ordered.

E. REVELAS

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: Adv.

J. W. Wessels

Instructed by Dold & Stone Inc.

Makhanda / Grahamstown

For the Respondent: Adv.

N. D. Ngadlela

Instructed by Mabece Tilana Inc.

- [1] Record 45:5-6 and 89:13
- [2] Act No. 51 of 1977, as amended
- [3] In the particulars of claim the issue of demand was pleaded but not dealt with in the plaintiff's evidence. See further the evidence of the plaintiff at 57:11-14 and that of her sister at 40:15-18
- [4] Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (AD) at pages 587B-589D and 589E-F; Sabisa and Another v Minister of Police (2889/2016) [2018] ZAECMHC 35 (31 July 2018) at paragraph [10]
- [5] Mhaga v Minister of Safety & Security [2001] 2 All SA 534 (Tk) at page 537j; Minister of Safety and Security & Another v Swart 2012 (2) SACR 226 (SCA) at paragraph [19]; Zealand v Minister of Justice and Constitutional Development & Another [2008] ZACC 3; 2008 (2) SACR 1 (CC) at paragraph [24]; and Theobald v Minister of Safety & Security 2011 (1) SACR 379 (GSJ) at 389h
- [6] Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA) at paragraph [17]
- [7] Under rule 51(8)(a) of the Rules Regulating The Conduct Of The Proceedings Of The Magistrates' Courts Of South Africa
- [8] 1996 (1) SACR 720 (A) at 731g-h
- [9] Hiemstra's Criminal Procedure at 5-3 [Issue 2]; Theobald v Minister of Safety & Security supra at 390b; Rautenbach supra at page 733 d-h, see also Annual Survey of South African Law 1996 at page 718
- [10] Record 89:13
- [11] Record 32:5-6
- [12] 1954 (3) SA 434 (SWA) at 438 E-H
- [13] 2000 (1) SA 1 (CC) at paragraph [61]; see also Mkwati v The Minister of Police (92902/2013) [2018] ZAECMHC 2 (23 January 2018) at paragraphs
- [13] and [14]
- [14] R v Dhlumayo and Another 1948 (2) SA 677 (AD) at 678, paragraph [7]
- [15] De Klerk v Minister of Police 2018 (2) SACR 28 (SCA), paragraph [43]. The legal position in regard to the actio iniuriarum was considered in Minister of Police v Mbilini 1983 (3) SA 705 (AD), where Smuts AJA said at 715F-H: "It is trite law that one of the rights which is protected by the actio iniuriarum is the right to an unimpaired dignity. Dignity was defined by Melius de Villiers in 1899 in his well known work 'The Roman and Roman Dutch Law of Injuries' at 2425 as - '... that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately subjected by another to offensive and degrading

treatment, or when he is exposed to ill-will, radical disesteem or contempt...Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social work to which he may rightly lay claim and of that respect and esteem of his fellow men of which he is deserving, and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such a right.’ “

[16] Peterson v Minister of Safety & Security 2011 (6k6) QOD 1 (ECG) at paragraph [15]

[17]

[2009] 4 All SA 38 (SCA) at paragraph [26]

[18] In Thandani v Minister of Law and Order 1991 (1) SA 702 (E) it was 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 constitutes a serious inroad into the freedom and the rights of an individual.” In Olgar v Minister of Safety & Security (ECD) Unreported Case No. 608/07 at paragraph [16], the need for prudence in assessing

damages for wrongful arrest and detention was stated as follows by Jones J: “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.”

[19] Abrahams v Minister of police (CA 7/2016) [2018] ZAECPEHC 54 (18 October 2018) – R120 000 (updated R120 000) for 24 hours’ detention; Chauke v Paton (32005/03) [2005] ZAGPHC (31 March 2015) – R40 000 (Updated R85 000) for 9 hours’ detention; Seria v Minister of Safety & Security [2005] 2 All SA 614 (C) (15 October 2004) – R50 000 (Updated R105 000) for 20 hours’ detention; Khumalo v Minister of Safety & Security (Case No. 458/2010) [2015] ZAKZDHC 48 (4 June 2015) R50 000 (Updated R60 000) for 7-8 hours detention; Minister of Police v Swarts (CA 299/2015)

[2016] ZAECGHC 75 (8 September 2016)- R30 000 (Updated R35 000) for 1 hours’ detention

[20] Calculated with reference to CPI factors listed in “The Quantum of Damages in Bodily and Fatal Injury Cases” (Quick

guide) 2018 Juta at page 232

- [21] As one of the factors to be taken into account see Tyulu supra at paragraph [28]
- [22] Act No. 55 of 1975, as amended
- [23] Adel Builders (Pty) Ltd v Thompson 2000 (4) SA 1027 (SCA) at page 1031 G
- [24] (CA 93/2017) [2018] ZAECGHC 43 (10 April 2018) at paragraph [18]
- [25] See Lionel Abrahams v Minister of Police Unreported (7/2016) ECLDPE (18 October 2018) at paragraph [22]; also Minister of Police v Merodien Baartman and Another, Unreported CA 179/2017 (8 November
- 2018) for an informative analysis of the approach adopted in the majority of cases in this Division with regard to the accrual of interest in claims for unliquidated damages.
- [26] Shatz Investments (Pty) Ltd v Kalovyrnas 1976 (2) SA 545 (AD) at page 560 B-E; African Dawn Property Transfer Finance 3 (Pty) Ltd v Tuscaloosa 37 (Pty) Ltd (65139/2012) [2014] ZAGPPHC 992 (28 November
- 2014) at paragraph [56]; Naidoo v Matlala N.O. 2012 (1) SA 143 (GNP) at paragraph [15]; Marsh v Odendaalsrus Cold Storages Ltd 1963 (2) SA 263 (W) at page 269H-270A; and cf. Sopher v Sopher 1957 (1) SA 598 (W) at page 600 A-F where such order was contended for on the basis that a party had conducted itself vexatiously and maliciously.

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