

SOUTH AFRICA / JUDGMENT

National Director of Public Prosecutions v Swarts (CA 164/2019)

[2020] ZAECHGHC 64 (17 June 2020)

[2020] ZAECHGHC 64

COURT

Eastern Cape High Court, Grahamstown

BEFORE

O H Ronaasen, D Van Zyl

CASE / FILE NUMBER

CA 164/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case No.: CA 164/2019

Court Date: 22 May 2020

Date Delivered: 17 June 2020

In

the matter between:

THE
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant
and
HYRON
SWARTS
Respondent

JUDGMENT

RONAASEN, AJ:

Introduction

- [1] Prior to the events described below the respondent, with three others, was arrested on a charge of rape. He was released on warning. The case was set down for trial in the Regional Court,

Port Elizabeth, but the charge against the respondent was withdrawn as the complainant in the case could not be located.

Subsequently, while the respondent was in Cape Town, he was contacted by the Investigating Officer who advised him that the complainant had been traced and that he was to make contact with the Investigating Officer. When he returned from Cape Town he telephoned the Investigating Officer and advised him that he was back in Port Elizabeth. The Investigating Officer told him that he was not to be concerned and that he would be fetched on 17 March 2016 and taken to court. He was duly arrested by a Sergeant Pehlo on that date and taken to the Magistrates' Court, Port Elizabeth.

[2] At his initial appearance in the Magistrates' Court, on 17

March 2016, the respondent was remanded in custody until 4 April

2016. The prosecutor asked for the postponement of the matter

on the basis that further investigation was required. This, despite the fact that Sergeant Pehlo had assured the respondent that he would be released on the same day. Sergeant Pehlo, furthermore, deposed to an affidavit to the effect that it was

unnecessary for the respondent to be detained in custody pending completion of the case, which had been fully investigated. This affidavit had been placed in the police docket and was available to the prosecutor at the time of the respondent's first appearance in the Magistrates' Court.

[3] On 4 April 2016 the matter was postponed until 5 April 2016 to allow

for the respondent to apply for bail. He remained in custody. On 5 April 2016 he was released on warning. He was ultimately acquitted on the charge of rape by the Regional Court, Port Elizabeth.

[4] The respondent instituted action out of the Port Elizabeth Magistrates' Court ("the trial court") in terms of which he sought payment of damages from the Minister of Police for wrongful and unlawful arrest and detention and from the appellant for his continued detention for the period 17 March 2016 to 5 April 2016. The trial court dismissed his claim against the Minister of Police, but upheld his claim against the appellant and awarded him damages in the sum of R350 000.00. It is against this order which the appellant appeals.

The pleadings

[5] The respondent contended in his particulars of claim that his detention over the period 17 March 2016 to 5 April 2016 was wrongful, unlawful and without reasonable and probable cause, as:

5.1. the prosecutor with control over the police docket before the respondent's first appearance in court on 17 March 2016 failed in his/her duty to:

5.1.1. acquaint himself/herself with the contents of the docket, from which it would have been apparent that there were no reasonable grounds or justification for the respondent's continued detention;

5.1.2. place before the court any information relevant to the exercise of its discretion to grant or refuse the respondent bail on his first appearance in court;

5.1.3. ensure that the respondent was in a position to apply for bail within seven days of his first appearance in court, contrary to the provisions of the Criminal Procedure Act, 51 of 1977 - I shall deal with these provisions in greater detail below;

5.1.4. take any reasonable steps to ensure that the respondent was released from custody as soon as possible;

5.2. as a result of the prosecutor's failure to discharge his/her duties the court ordered the respondent's continued detention.

[6] The respondent alleged further that the position of a public prosecutor and the fulfilment of the duties of a public prosecutor imposed a duty on him/her to perform his/her duties with the necessary skill, care, knowledge, diligence and responsibilities as can reasonably be expected of the average public prosecutor, without any manifest negligence. A prosecutor's discharge of his/her duties, so it was alleged, must always be subject to the dictates of the Constitution and the provisions of the National Prosecuting Authority Act.

[7] In conclusion it was contended in the particulars of claim that by

requesting the court to remand the respondent in custody the prosecutor acted recklessly, maliciously and animus inuriendi. In so acting the prosecutor had disregarded the respondent's constitutional right to be released from custody.

[8] In respect of the respondent's continued detention after his

first appearance in court on 17 March 2016 the appellant pleaded that, "(T)he case was also postponed to the 4th April 2016 at the instance of the State Prosecutor for purposes of further investigation."

[9] The appellant also pleaded that the court did not fix bail for the

respondent "because of the charge he was facing, which is a schedule 5 alternatively schedule 6 offence in terms of the Criminal Procedure Act, 51 of 1977 and as such the plaintiff needs to discharge the evidentiary onus on him to show that it is in the interest of justice that he be released on bail."

Appellant's

submissions

[10] The appellant's principal submissions are to the following effect:

10.1 the respondent was charged with an offence envisaged in schedule 5 to the Criminal Procedure Act;

- [20] The case record in respect of the respondent's appearance before the Magistrate on 17 March 2016 confirms the respondent's version of events. The the case was simply as a matter of routine postponed for further investigation, in circumstances where further investigation was clearly not required. This reflects very poorly on the prosecutors and, indeed, the Magistrate. What occurred in the court was a mechanical process with no consideration whatsoever being given to the right of the respondent to have been released on bail or warning.
- [21] As stated, the appellant's attempts to escape liability by invoking the onus provision in section 60(11)(b) of the Criminal Procedure Act must fail. Those attempts also underlay the appellant's application for absolution from the instance, incorrectly brought after the close of the case of the first defendant rather than after the close of the case of the plaintiff (the respondent in this appeal). That application was correctly dismissed by the trial court. Given the duty of the prosecutors, as described above, which duty flows from the provisions of section 11(1)(a) of the Constitution, and the breach of that duty by not disclosing Sergeant Pehlo's affidavit and the additional facts mentioned in paragraph [17] above to the Magistrate, which failures are confirmed by the case record, absolution from the instance could not have been granted. Furthermore absolution was precluded as the appellant bore the onus to establish that the detention of the respondent was not wrongful.
- [22] The trial court awarded the respondent damages in the sum of R350 000.00. The appellant contends that this amount is excessive. In my view the trial court did not misdirect itself with regard to material facts or in its approach to the assessment. The trial court's assessment of the respondent's damages

is not markedly different to my assessment thereof or the assessment of damages in similar matters by this court. See *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at [57]. The trial court has not materially misdirected itself in its approach to determining the amount of damages awarded or the facts it took into account in arriving at that amount. In *De Klerk* at [94] the Constitutional Court awarded a claimant who had been detained unlawfully for eight days a sum of R300 000.00 for damages under the action *iniuriarum*. The award in this case is not so disproportionate to an amount I would have awarded the respondent and I cannot therefore infer that the trial court did not exercise its discretion properly regard to the determination of damages. There is therefore no reason to interfere the amount of damages awarded.

Conclusion

[23] In the result the appeal is dismissed with costs.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

VAN ZYL DJP:

I agree.

D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

By Agreement between the parties this appeal was disposed of in terms of Section 19(a) of the Superior Courts Act, 10 of 2013, without oral argument.

Heads of argument for the appellant prepared by Adv F Petersen instructed by Karsans Incorporated c/o Dullabh Attorneys, Grahamstown and Adv J W Wessels for the respondent instructed by Peter Makenzie Attorneys c/o Donald and Stone Attorneys, Grahamstown

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