

SOUTH AFRICA / JUDGMENT

Russel v Minister of Safety and Security (963/07) [2008] ZAECHC 161 (19 September 2008)

[2008] ZAECHC 161

COURT

High Courts - Eastern Cape

BEFORE

Chetty

CASE / FILE NUMBER

963/07

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FORM A

**FILING SHEET FOR SOUTH EASTERN
CAPE LOCAL DIVISION JUDGMENT**

PARTIES:	ROGER MICHAEL RUSSELL Plaintiff And MINISTER OF SAFETY AND SECURITY Defendant Case
Number:	963/07 High
Court:	South Eastern Cape Local Division DATE HEARD: 16 September 2008 DATE DELIVERED: 19 September 2008
JUDGE(S):	Chetty, J LEGAL REPRESENTATIVES –

Appearances: For
the Plaintiff(s): Adv
B Pretorius
for

the Defendant(s): Adv
Nobatana
Instructing

attorneys:

Plaintiff(s): Nel
Mentz Inc: Mr Nel

Defendant(s): State
Attorneys: Mr Potgieter
CASE
INFORMATION -
Nature

of proceedings : Civil
Trial

Topic: Delict
Key

Words: Delict
– arrest and detention – unlawfulness of - absence of
reasonable suspicion – quantum of damages –
ulterior
motives of arresting officer
OF
INTEREST
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION –
PORT ELIZABETH)
In the matter
between: Case No: 963/07
Coram: Chetty, J
Date Heard: 16
September 2008
Date
Delivered: 19 September 2008
Summary: Delict
– arrest and detention – unlawfulness of - absence of
reasonable suspicion – quantum of damages –
ulterior
motives of arresting officer

JUDGMENT

CHETTY, J

[1] The plaintiff is a candidate attorney in the employ of attorneys Nel Mentz Incorporated at Humansdorp in the Province of the Eastern Cape. On Friday, 6 October 2006, he travelled to Port Elizabeth in the early afternoon in order to honour a pre-arranged meeting with the station commander of the Gelvandale police station, one director Bentley (Bentley). The meeting had been scheduled for 3 p.m. on the latter's insistence, the date and time agreed upon well in advance and

confirmed by Bentley's assistant, Inspector Whitebooi (Whitebooi), the previous day. Upon arrival at the police station at 2:45 p.m. the plaintiff proceeded to Bentley's office where he met Whitebooi. The latter informed him that Bentley was away and would not be in office for the rest of the day. The inference that the scheduling of this meeting was a pretext to secure the presence of the plaintiff at the police station that afternoon is, upon a holistic approach to the evidence, a compelling one given what transpired thereafter.

[2] The plaintiff requested Whitebooi to note that he had presented himself at the police station and en route from her office encountered Sergeant Humphreys and another

policeman in the passage who, without further ado, informed the plaintiff that he was under arrest. I shall in due course narrate

what occurred between them. Suffice it at this juncture to recount that the plaintiff was arrested on a charge of attempted murder and detained in the police cells where he remained until Monday morning when he was taken to the Port Elizabeth magistrate's court. He was released on bail in an amount of R1 500, 00 on stringent conditions and his trial remanded to 5 December 2006. However, on 20 November 2006, the plaintiff appeared before the district court at Port Elizabeth and the charge against him withdrawn.

[3] The plaintiff duly instituted an action for damages against the defendant for the alleged unlawful arrest and detention. In its plea the defendant denied that Humphreys' had acted wrongfully and pleaded that the plaintiff had been lawfully arrested without a warrant in terms of s 40 (1) (b) of the Criminal Procedure Act 51 of 1977 on a charge of attempted murder.

[4] During the pre-trial conference the defendant admitted that the complainant on the attempted murder charge, one Clive Lewis (Lewis), had been shot at 14h45 on the 1st October 2006. It further admitted the correctness of an entry in the occurrence book at the Humansdorp police station to the effect that the plaintiff had, at the request of Captain Muller of the Gelvandale police station, presented himself at the Humansdorp police station at 14h30 the same afternoon. That entry, with details of the persons whom the plaintiff was with at the time and their telephone numbers, form part of the bundle of documents handed in by counsel as exhibit "A". Its content and correctness is not in issue.

- [5] At the commencement of the trial before me the defendant accepted that it bore the onus of establishing the lawfulness of the plaintiff's arrest. Although the defendant would ordinarily in such circumstances be under the duty to begin, plaintiff's counsel commenced with the adduction of evidence by reason of the onus resting upon the plaintiff to prove the measure of his damages. The plaintiff's evidence was followed by that of his principal, Mr Heinrich Nel (Nel), after which the plaintiff's case was closed. Sergeant Humphreys was the sole witness called on behalf of the defendant to discharge the onus resting upon it.
- [6] The crucial issue which falls for determination is whether, when arresting the plaintiff, Humphreys entertained a reasonable suspicion that the latter had committed the offence of attempting to murder Lewis. In order to determine that issue it is perhaps necessary to reiterate that the test whether the suspicion held by Humphreys to arrest the plaintiff was reasonable is an objective one – would a reasonable man in Humphreys' position and possessed of the same information have considered that there was sufficient grounds for suspecting that the plaintiff had attempted to murder Lewis.
- [7] As I shall presently demonstrate this is one of those unfortunate cases where the arrest and detention was not only grossly unreasonable but highly questionable. Humphreys knew that Lewis was a gangster and was being sought by the police. He also thought, albeit mistakenly at the time, that the plaintiff was a qualified

attorney. Earlier in this judgment I recounted the apparently fortuitous meeting between the plaintiff and Humphreys and his colleague in the passage at the Gelvandale police station. Humphreys' evidence concerning the circumstances under which he acquired the knowledge that the plaintiff would be at the police station on that particular day was that he had elicited such information from persons apparently lounging about the plaintiff's parental home the previous day. That evidence is untruthful for a number of reasons. On his own admission Humphreys had not conducted any investigation whatsoever after receiving the docket from the prosecuting authorities on 5 October 2006 until he arrested the plaintiff on 6 October 2006. There was thus no reason to go to the plaintiff's parental home. Humphreys was at the police station at precisely the time the plaintiff arrived to honour his appointment and the inference is inescapable that he had been informed either by Bentley or some other police official of the scheduled appointment and lay in wait for the plaintiff to make his appearance. There is no other explanation for his presence, armed as he was, with the docket. His untruthfulness is further underscored by what transpired thereafter.

- [8] He recounted that after informing the plaintiff of his impending arrest and apprising him of his constitutional rights the latter demurely and without any protest accepted the fact that he would be locked in a police cell the entire weekend. On his version the only request from the plaintiff was for permission to telephone his family to provide him with a set of clothing and to which he readily assented. This version is not only highly improbable but patently untruthful. When the plaintiff testified he stated that when Humphreys threatened to arrest him he immediately informed him that the charge preferred against him by Lewis was a trumped up one and that the police in Humansdorp could confirm that he was in fact at the

police station at the time he allegedly

committed the offence. The response from Humphreys' colleague was that the plaintiff should not dictate to them how they should perform their work. Humphreys in turn paid scant regard to the plaintiff's protestations of innocence. It is improbable in the extreme that the plaintiff, given his legal qualifications, would have acted in the manner suggested by Humphreys.

[9] There is no doubt that when the plaintiff's explanation for his whereabouts at the critical time was summarily rejected by Humphreys, he telephoned Nel to inform him of his plight. Nel's evidence establishes that he spoke to Humphreys but that the latter was not open to reason whereupon he was compelled to seek redress from the office of the public prosecutor but here again his efforts to secure the plaintiff's release on bail was to no avail. During Humphreys' cross-examination he denied that the plaintiff spoke to Nel and remained steadfast that the only telephone call made by the plaintiff was to his family. However, he had forgotten that in his statement, which formed part of exhibit "A", he had stated that the plaintiff had telephoned his attorney. When I pointed this out to him he found himself in a quandary spewing out more untruths in the process. In fact the record is replete with examples of Humphreys' untruthfulness. He was shown to be dishonest, deceitful and his evidence is not worthy of further analysis or evaluation. In fact

counsel for the defendant was constrained during argument not to suggest that any tittle of Humphreys' evidence be accepted.

[10] The plaintiff's evidence concerning the countless conversations he had with a number of police officials attached to the Gelvandale police station was unchallenged. I have already related that on the day of the shooting incident, Captain Muller instructed the plaintiff to report to the Humansdorp police station ostensibly to verify the plaintiff's presence in Humansdorp.

Later that afternoon the plaintiff received another telephone call, the caller, also from the Gelvandale police station, a certain

Inspector Mapena. The latter wanted to know whether the plaintiff had reported to the Humansdorp police station to which the plaintiff replied in the affirmative. The next day, the plaintiff received two further telephone calls from Inspectors Swanepoel and Brockman respectively. They too enquired whether the plaintiff had reported to the Humansdorp police station and the plaintiff confirmed his attendance thereat. Later that same day the plaintiff received a further telephone call, this time from Bentley. The plaintiff's protestations of innocence by virtue of his presence in Humansdorp seemed to make no impression on Bentley because it was during this conversation that she in fact ordered the plaintiff to come to Port Elizabeth for an audience with her.

[11] The plaintiff's case was corroborated in all material respects by Nel and what emerges therefrom is that Humphreys clearly had an ulterior motive in causing the plaintiff's arrest. I accept the plaintiff's evidence that Humphreys had made a veiled threat against him whilst at court in the maintenance matter concerning his wife. It is furthermore a matter of grave concern that members of the office of the senior public prosecutor did nothing to avoid the incarceration of the plaintiff.

Their resolute inaction in the face of compelling evidence that the plaintiff was innocent of the charge preferred against him is to be deprecated. As I previously alluded to, Nel had made a concerted effort to appraise the prosecuting authorities of the plaintiff's innocence but to no avail. A simple

telephone call to the Humansdorp police station by any of the police officials or prosecutors involved in the matter would have confirmed that the plaintiff's version was true.

[12] The plaintiff must obviously be compensated for the injustice perpetrated upon him and in the assessment of the amount of damages to be awarded there are a number of factors which have to be considered. The plaintiff is obviously a person of stature. From humble beginnings he progressed, through fortitude and resilience, to his current status as a candidate attorney. Nel spoke highly of him and I accept that the plaintiff is an honest, hardworking individual. His arrest and incarceration not only lowered the esteem in which he was held by his landlord and others, but moreover, and more importantly, it subjected him to suspicion and ridicule amongst his peers. During his period of incarceration he was locked up with members of the criminal underworld and the attendant indignity suffered in the squalid conditions of the prison cell must perforce have been immeasurable. I have been referred to a number of recent cases (e.g. *Gellman v Minister of Safety and Security*

[2007] ZAGPHC 269; 2008 (1) SACR 446 (W.L.D.); *Thembisile Margaret Ngcobo v The Minister of Safety and Security*, (unreported judgment of Nicholson J in the N.P.D, case no 4327/06, delivered on 19 March 2008) dealing with awards in similar matters and whilst these cases provide a useful guide in the assessment of damages the peculiar facts of each case ultimately influence the amount of damages to be awarded. In this case there are a number of aggravating factors to which I have already adverted to which have a material bearing on the measure of damages to be awarded.

[13] In the result I make the following order:

1. There will be judgment in favour of the plaintiff against the defendant in the sum of R130 000, 00 together with costs.

D. CHETTY

JUDGE OF THE HIGH COURT

Obo the Plaintiff: Adv B Pretorius

(instructed by Nel Mentz Inc: Mr Nel)

Obo the Defendant: Adv Nobatana

(instructed by State Attorneys: Mr Potgieter)

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Prepared on 13 October 2026 · Esheria