

SOUTH AFRICA / JUDGMENT

Shabalala v Minister of Police (23661/2015) [2018] ZAGPJHC 472 (6 August 2018) [2018] ZAGPJHC 472

COURT

South Gauteng High Court, Johannesburg

BEFORE

Petersen

CASE / FILE NUMBER

23661/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 23661/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED.

6 AUGUST 2018

In the matter between

SIMTHEMBILE MBALI SHABALALA PLAINTIFF

and

THE MINISTER OF POLICE DEFENDENT

JUDGMENT

PETERSEN AJ:

- [1] The plaintiff instituted action for payment of damages in the sum of R900 000, together with costs against the defendant for alleged arrest, detention and violation of human dignity.

[2] The arrest and detention of the plaintiff is not in dispute. The lawfulness of the arrest and ensuing detention and violation of the plaintiff's human dignity is in dispute.

[3] The plaintiff testified in support of her claim and the defendant relied on the evidence of two (2) witnesses, Sergeant Dumisani

Gladman Novela and Sergeant Mpho Violet More. The evidence in its totality can be succinctly summarised as follows: The plaintiff was employed at a pharmaceutical distribution company, UPD as a checker responsible for checking orders which have been packaged. On 19 February 2015, the plaintiff was confronted by a certain Faith concerning an order which she conceded she had dealt with. The plaintiff was requested to accompany Faith to the Security Manager, a Mr Naicker in connection with the order. The plaintiff refused to do so and elected rather to approach her line manager, a certain Ashley but ultimately attended at the office of Mr Naicker where she found Ashley. Mr Naicker confronted the plaintiff with a black plastic bag containing eye drops and questioned her about the items which were said to have been in excess of the order whilst part of the order was in shortage. Mr Naicker subsequently contacted the Florida police and was assisted by Sergeants Novela and Mfisa who attended at UPD's offices. A statement was obtained from Mr Naicker by Sergeant Mfisa and no explanation requested from the plaintiff. The plaintiff was arrested by Sgt Mfisa, who only explained to her that she had a right to an attorney and a phone call.

[4] The plaintiff was handcuffed, placed in the police vehicle in the presence of colleagues and taken to Florida station where the case was registered; and subsequently detained at Roodepoort Police station holding cells at around 17h45pm. The plaintiff was detained in a holding cell with two detainees, one arrested on an allegation of murder and another for theft from her employer. The holding cell had no beds or mattresses and the plaintiff and her fellow detainees were furnished only with blankets and boxes. The plaintiff scared by her incarceration with a detainee accused of murder did not sleep that night or the following night. The following day, Friday 20 February 2015 at around 13h30pm, the plaintiff was formally charged by Sgt More at Roodepoort Police station and informed of her right to an attorney and bail at the instance of a public prosecutor as the value attached to the theft was R20 000. She was unable to consume the food given to her which constituted samp and cabbage. The cells were permeated by a smell, the blankets were dirty and the use of the ablution facilities was done in full view of other detainees as there was no door at the toilet and itself had a stench. The smell in the cells is disputed by Sgt More.

[5] The plaintiff secured the services of an attorney and on Saturday 21 February 2015, was granted bail by a public prosecutor at the Roodepoort Magistrates' Court, albeit in a disputed amount. The matter was declined on the court roll on 24 February 2015.

[6] It is trite that any deprivation of liberty, inherent in arrest and detention by the police is prima facie unlawful. See *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993 (3) SA 131(A) 153D-E.

[7] The plaintiff bears the onus of proving the arrest and detention and once established the defendant bears the onus of proving the existence of grounds of justification for the arrest. In *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) Rabie CJ stated as follows at 589D-E:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

[8] The arrest and detention of the plaintiff is common cause. What remains to be decided is the existence, if any, inherent in the evidence of the defendant, of grounds of justification for the arrest. Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that a peace officer may without warrant arrest any person –

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1...”

[9] The jurisdictional facts for a defence premised on s 40(1)(b) were set out in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H as follows:

“(i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect

(the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.”

[10] Once the jurisdictional requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 are satisfied, the peace officer is vested with a discretion, to arrest as sanctioned by law. The discretion is to be exercised rationally and not arbitrarily. In *Minister of Safety and Security v Magagula* (991/2016) [2017] ZASCA 103 (6 September 2017) at paras 9-10, Lamont AJA said:

“9 In Shabaan Bin Hussein and Others v Chong Fook Kam & another [1969] 3 All ER 1627 it was held that a suspicion ‘in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of

prima facie proof is the end’. See *Powell NO & others v Van der Merwe NO & others* 2005

(5) SA 62 (SCA) para 36: *Woji v Minister of Police*

[2014] ZASCA 108; 2015 (1) SACR 409 (SCA)

10 The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion. Once the required suspicion exists an arresting officer will be vested with a discretion to arrest, which he must exercise rationally.”

[11] It is accepted that Sergeant Novela and his colleague Sergeant Mfisa are peace officers. Sergeant Mfisa, on the evidence of Sergeant Novela, effected the arrest of the plaintiff. Sergeant Mfisa was not called as witness and neither was Mr Naicker. The reason for the

arrest of the plaintiff lies within the personal knowledge of Sergeant Mfisa who did not testify. It is from her evidence that the court would have to objectively assess the lawfulness of the arrest. The matter is exacerbated further by the fact that Mr Naicker was not called to testify. Whilst Mr Nxumalo for the defendant indicated that Mr Naicker was not called as his attendance could not be secured, the defendant made no effort to prove the content of Mr Naicker's affidavit which formed the basis for the arrest of the plaintiff in any other manner. The absence of any evidence from Sergeant Mfisa leaves the court with no basis from which to determine if she entertained a suspicion, and in particular a suspicion that the plaintiff committed the crime of Theft as referred to in Schedule 1 of the Criminal Procedure Act and ultimately on what basis she decided to arrest the plaintiff.

- [12] The defendant on the evidence of Sergeant Novela has failed to prove any justification for the arrest of the plaintiff. (*Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE)). On Sergeant Novela's evidence his colleague at most appears to have regarded her duty to arrest the plaintiff without further ado.
- [13] It follows that the arrest of the plaintiff being unlawful, the detention which followed was unlawful. The plaintiff bears the onus of proving the duration of her detention in police custody. The plaintiff's evidence in chief in this regard was very scant save to sketch a very general picture of her arrest, being taken to Florida police station, being detained at Roodepoort police station and in particular being detained overnight on Thursday 19 February 2015, being charged the next day with no pertinent details as to what happened when she was charged, spending another night detained and the being released on bail. Sergeant More's evidence in this regard is that she charged the plaintiff on Friday 20 February 2015 at around 13h30pm and explained to her the right to an attorney and securing bail through a Public Prosecutor as a result of the value of the theft. The plaintiff mentioned none of the latter in her evidence. Her release on bail could therefore have been secured within a reasonable period of time since Sergeant More explained the right to bail to her with no reasons put forward why it was only secured on the Saturday. In the final analysis the evidence demonstrates that the plaintiff was detained from around 17h45pm on 19 February 2015 to at least 11h00am on Saturday 21 February 2015.
- [14] The plaintiff is required to properly and adequately plead her heads of damage. The plaintiff's pleadings is woefully terse in that she initially pleaded that she was unlawfully arrested and detained for five (5) days which was subsequently amended to three (3) days which detention caused her emotional pain and trauma. Notwithstanding this the court accepts, in the absence of evidence to the contrary that the plaintiff was detained in a holding cell without proper bedding and was subjected to a violation of her human dignity by having to use ablution facilities without a door in serious violation of her dignity as a human being. The plaintiff was detained for a period just over one and a half days and not three as pleaded and is entitled to be compensated for such period. The plaintiff was arrested in the presence of her colleagues and this cannot be ignored. The emotional impact of the unlawful arrest and detention was clearly evidence when the plaintiff testified and

was reduced to tears at times.

[15] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 SCA, the court said the following in relation to compensation at para [26]:

‘26...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.’

[16] In my view, the heads of damage considered as a whole justifies an award in the amount of R50 000.00 (fifty thousand rand).

[17] Nothing precludes a plaintiff from instituting action in the High Court rather than the magistrate’s court or regional court. In *Vermaak v Road Accident Fund* 2006 JDR 0182 (SE), it was said:

“The high court frequently restricts costs to the magistrates’ courts scale on the ground that the plaintiff could and should have proceeded in the magistrate’s court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the judgment or settlement is always a significant factor in balancing fairness. The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more in the way of costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration.... As a general rule the proper exercise of a court’s discretion on costs provides a powerful deterrent against bringing proceedings in the High court which might more conveniently be brought in the magistrates court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour’.

[18] The plaintiff could have litigated at substantially lower costs than the High Court in two tiers of jurisdiction, the magistrate’s

court and regional court. I am accordingly of the view, without derogating from the seriousness of the effects of the unlawful arrest and detention on the plaintiff that the merits of the matter justifies a limitation of the costs recoverable by the plaintiff.

[19] In the result the following order is made:

1. The defendant is to pay the plaintiff:

1.1 The sum of R50 000.00 (fifty thousand rand).

1.2 Interest on the amount in 1.1 above at the rate of 15.5% per annum from date of judgment until date of final payment.

2. The defendant is ordered to pay the plaintiff's costs of suit on Scale B of the scale of costs and fees in the magistrate's court.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF:

ADV E NHUTSVE

PLAINTIFF'S ATTORNEYS

BH TAULA ATTORNEYS

FOR THE DEFENDANT: ADV

Z NXUMALO

DEFENDANT'S ATTORNEYS THE STATE ATTORNEY

DATES OF HEARING

01 AND 02 AUGUST 2018

DATE OF JUDGMENT

06 AUGUST 2018

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