

SOUTH AFRICA / JUDGMENT

van Rooyen v Minister of Police (CA 332/2018) [2020] ZAECHGC 44 (26 March 2020)

[2020] ZAECHGC 44

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, G H Bloem

CASE / FILE NUMBER

CA 332/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)

CASE

NO. CA 332/2018

In

the matter between:

EDWIN
VAN
ROOYEN
Appellant
and
MINISTER
OF POLICE
Respondent

JUDGMENT

MBENENGE JP:

- [1] The appellant was detained at Motherwell Police Station pursuant to his arrest without a warrant by Constable Ndulana on a charge of being drunk and disorderly in a public place.
[1] The detention spanned the night of 27 February 2016; he was released, after having been served with a notice to appear in court, on the following morning.[2]

- [2] Aggrieved at the treatment meted out to him referred to above, the appellant launched an action before the court a quo seeking to recover damages in the sum of R50 000. The claim before the court a quo was formulated as one founded on “[u]nlawful and wrongful detention.” That much is plain if one has regard to the relevant particulars of claim which, in part, reads:

“[8] After the Plaintiff’s arrest without a warrant on the 27th of February 2016 at Port Elizabeth, the Plaintiff was detained . . . and released from custody on the 28th of February 2016 on a J534 to appear in court.

- [9] The detention and incarceration of plaintiff on the 27 February 2016 until his release from custody on 28 February 2016 was wrongful and unlawful.
- [10] By reason of the wrongful detention and incarceration of the Plaintiff, the Plaintiff has suffered damages in the amount of R50 000 for which the Defendant is legally liable.”
- [3] In the alternative, the appellant pleaded that, in the event of it being found that his detention and incarceration had at any stage been prima facie lawful, and only in such event, a duty was cast on the police who detained him to ensure that he was, in terms of the Constitution, not detained unnecessarily, when no objective grounds for such detention existed. He further alleged that notwithstanding his arrest without a warrant, “neither the [respondent nor] ... its employees, took any reasonable steps to release the [appellant] even though no reasonable grounds or sound reasons for his continued detention had existed and notwithstanding the fact that the [appellant] persistently professed his innocence and protested his continued detention.”
- [4] In its plea, the respondent sought to justify the detention by contending that it had been a sequel to a lawful arrest effected in terms of section 40 (1) (a) of the Criminal Procedure Act 51 of 1977[3], particularly in that the appellant had, in the presence of the arresting officer, Constable Ndulana, been drunk and disorderly in a public place. No other reason was advanced to justify the detention.
- [5] The ensuing trial focused on the circumstances surrounding the arrest of the appellant and, in particular, whether he had been drunk on the night of his arrest, and not on the impugned detention and the justification therefor. Upon considering the respective versions of the parties, the court a quo found that “the version of the [respondent] on a balance of probabilities is the truth and it has been proved that the [appellant] was drunk and disorderly on the day in question, which caused his arrest.” This conclusion was predicated on the finding that a police station was one of the delineated areas in the Liquor Act. In the result, the appellant’s claim was dismissed with costs.
- [6] The onus of justifying the detention rested on the respondent.[4] Despite this trite legal position, no evidence was elicited in relation to why the appellant was detained and what the justification

therefor had been. The judgment of the court a quo is also silent on the issue it had identified for determination, namely whether the detention was wrongful and unlawful.

[7] At the hearing of the appeal, Ms Msizi who appeared for the respondent, had insurmountable difficulty justifying the detention. Besides merely leaving the matter in the hands of the court, she was content to suggest that the same reasons that underpinned the arrest must have underpinned the

detention. This contention does not find support from the record. As already pointed out above, no evidence was led in relation to why the appellant was detained and not merely notified to appear in court, which is what the police, in any event, ended up doing. Moreover, this approach constitutes a conflation of arrest and detention, which are separate legal processes. The fact that both result in someone being deprived of his or her liberty, does not make them one legal process.[5] Whilst the arrest may have been lawful, the ensuing detention need not have been; the one may be lawful, and the other not.

[8] In light of the fact that no evidence justifying the detention was led, the court a quo ought to have determined the issue as formulated in the pleadings and decided that the detention of the appellant had not been justified. Resulting from this, the court a quo ought also to have awarded the appellant damages for the loss of freedom he occasioned. It erred in not doing so.

[9] The formulation of the appellant's claim as being one for wrongful detention has had the effect of rendering moot the issue as to the lawfulness of the arrest and whether being drunk and disorderly in a police station is proscribed by the provisions of section 59(1) (d) (iv) of the Liquor Act. It behoves me to mention even in passing only that in *S v Buthelezi*[6] the full court of the then Natal Provincial Division, using the *eiusdem generis* rule held that "any place of entertainment, café, eating house, race course or other premises or place to which the public are granted or have access" referred to premises or places of recreation only, and not to literally "any place". It was accordingly decided that a courtroom or a police station were excluded.

[10] It now remains to consider the quantum of damages to which the appellant is entitled. The appellant was born on 13 March 1972. His highest level of education is standard 8, and he is on record as not having been employed. He joined other cellmates who were, at the time, incarcerated, and slept on a mattress that was laid on the floor. The cellmates supplied him with a "piece of a blanket" to cover himself. The cell stank of vomit and urine which were on parts of the floor. The inmates were noisy and swore at one another. The plaintiff could not sleep because he did not know what next could happen to him during the night. He was released in the morning after having been issued with a notice to appear in court.

- [11] The fact that the appellant was detained at night and released on the following morning, does not detract from the fact that deprivation of personal liberty is a serious injury and an infraction of the constitutional right to freedom. This court has previously provided guidance on the exercise of discretion when quantum, within the context of a detention, is being considered. The approach adopted in Nel[7] was followed in Damise[8] and, quite recently, in Madyibi.[9]
- [12] Having regard to awards previously made and the fact that each case must be considered on its own merits and not on a flat rate basis per day, a fair and reasonable award in the circumstances of this case is R35 000.
- [13] The question of costs remains. With the appellant having attained substantial victory, it follows that costs should follow the result. This applies both to the appeal and to the judgment of the court a quo. Only the scale of costs need be dealt with. The appellant was represented by counsel before the court a quo. The case involves the protection of a constitutionally entrenched right. There seems good reason for the court a quo to have allowed counsel's fees. It is trite law that an award of party and party costs including counsel's fees at three times the amount of the tariff in the magistrate's court is not incompetent.[10] Here, too, that award is justified.
- [14] The following order is made:
1. The appeal succeeds, with costs.
 2. The judgement of the court a quo is set aside and substituted with the following:
 - (a) Judgment is entered in favour of the plaintiff for payment by the defendant of R35 000 as and for damages resulting from the plaintiff's detention at Motherwell Police Station on 27 to 28 February 2016.
 - (b) The defendant pay-
 - (i) interest on R35 000 calculated at the applicable legal rate per annum from 19 April 2018 to date of payment; and
 - (ii) costs of suit, including all reserved costs, on the party and party scale, such costs to include fees of counsel at three times the magistrate's tariff, which counsel's fees shall include the drafting of the heads of argument, with interest thereon, calculated at the legal rate per annum from a date 14 days from the date of taxation to date of payment.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

BLOEM J:

I agree.

G H BLOEM

JUDGE OF THE HIGH COURT

Appellant's counsel

: D S Bands

Appellant's attorneys

: N N Dullabh & Company

Grahamstown

Respondent's counsel

: N Msizi

Respondent's attorneys

: Joko & Co Inc.

Date appeal heard

: 31 January 2020

Date judgment delivered

: 26 March 2020

[1] The charge was predicated on section 59(1)(d) (iv) of the Eastern Cape Liquor Act 10 of 2003 (the Liquor Act), which reads: "No person may –

(a) ...

(b) ...

(c) ...

(d) be drunk and disorderly in or on –

(i) ... (ii) ... (iii) ... ; or (iv) any place of entertainment, café, eating hive and house or race course or any other premises or place to which the public has or is granted access, irrespective of whether access is granted against payment or is restricted to any category of persons or not;"

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(iii) . . . ; or

(iv) any place of entertainment, café, eating hive and house or race course or any other premises or place to which the public has or is granted access, irrespective of whether access is granted against payment or is restricted to any category of persons or not;”

[2] It is common cause that he was released on 28 February 2016, at 09:00

[3] The section authorises a Peace Officer to arrest without a warrant any person who commits or attempts to commit any offence in the presence of the Peace Officer.

[4] Mhaga v Minister of Safety & Security

[2001] 2 All SA 534 (Tk)

[5] Cf Raduvha v Minister of Safety and Security (CCT 151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (11 August 2016) at para 39.

[6] 1979

(3) SA 1349 (N); also see R v Bush 1947 (1) SA 734 (E)

[7] Nel v Minister of Police 2018 (7K6) QOD 398 (ECG) Nel vs Minister Of Police (CA 62/2017) [2018] ZAECGHC1

[8] Damise v Minister of Police 2019 JDR 2533 (ECGEL); Damise v Minister of Police (Case No EL354/2018) delivered on 12 December 2019; (EL354/2018)

[2019] ZAECELLC 34 (12 December 2019)

[9] Madyibi v Minister of Police (unreported judgment of the Mthatha High Court by Tokota J delivered on 18 March 2020 under Case No 4132/2017

[10] The Road Accident Fund vs Cornel Forbes Case No CA197/05 by Jones J delivered on 28 September 2006; (CA 197/05) [2006] ZAECHC 47 (28 September 2006) also see Brand v Road Accident Fund by Kroon J delivered on 30 November 2009 under Case No CA170/09; (CA170/09) [2009] ZAECGHC 85 (30 November 2009)

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