

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/310

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|---------------------------------|--|
| (1) | REPORTABLE: YES / <u>NO</u> |
| (2) | OF INTEREST TO OTHER JUDGES: YES / <u>NO</u> |
| (3) | REVISED <u>ON 10/03/2013</u> |
| <u>16/04/2013</u> DATE | |
| <u>[Signature]</u> SIGNATURE | |

In the matter between:

XOLANI ANTHONY LAMULA

First Plaintiff

THOKOZANI MDLALOSE

Second Plaintiff

POSI MADLALA

Third Plaintiff

KWEZIKWAZI NGUBANE

Fourth Plaintiff

and

THE MINISTER OF POLICE

Defendant

J U D G M E N T

MILTZ, AJ:

1. This is an action for damages for the allegedly unlawful arrest and detention of the plaintiffs.

2. On 23 December 2010, the plaintiffs were arrested by members of the South African Police Services in the circumstances related below. The arrests took place without warrants of arrest having been issued. The investigating officer in respect of the matter with which the arrests were concerned was a Warrant Officer Sali who was the only witness called for the defendant.
3. At the time of their arrests the plaintiffs all resided at Delvers Close in Johannesburg. The first plaintiff was unemployed. The second plaintiff was employed as a security guard at OR Tambo Airport. The third plaintiff was employed in a fabric business in the Johannesburg CBD and the fourth plaintiff conducted a hawker's business selling fruit from a stall at the corner of Twist and Fox Streets, Johannesburg.
4. The plaintiffs were detained at Johannesburg Central Police Station after their arrests until their appearance in court on 28 December 2010. They were then remanded in custody at Johannesburg Prison until their release.
5. The second plaintiff was released from custody on bail on 8 March 2011. The fourth plaintiff was released on bail on 9 March 2011. The third plaintiff was released on bail on 4 April 2011. The first plaintiff's release on 31 May 2011 coincided with the striking from the court roll of the charges of fraud and theft against the four plaintiffs apparently due to lack of investigation.

6. The plaintiffs claim that their arrest and detention was wrongful, unlawful and without cause. They claim to have suffered deprivation of their rights of freedom, *injuria* to their good names, reputation and dignity. Each claims damages against the defendant in the sum of R350 000. The claims are all broken up as to R175 000 for wrongful arrest and *contumelia* suffered as a result thereof and R175 000 for illegal detention and consequent deprivation of liberty.
7. Although the defendant pleaded in response to the allegations of unlawful and wrongful arrest that the arrests were justifiable in terms of section 40 of the Criminal Procedure Act No. 51 of 1977 ("the Criminal Procedure Act"), none of the jurisdictional facts necessary for such a defence was pleaded¹. In argument, however, it was ascertained that the defendant wished to rely on the section 40(1)(b) defence.
8. The four jurisdictional facts to be pleaded where section 40(1)(b) is relied on are that:
 1. the arrestor must be a peace officer;
 2. the arrestor must entertain a suspicion;
 3. the suspicion must be that the arrestee committed an offence mentioned in schedule 1 to the Criminal Procedure Act; and

¹ See *The Minister of Safety and Security v Sekhoto* [2011] 2 All SA 157 (SCA), para 52

4. the suspicion must rest on reasonable grounds².
9. The crimes with which the plaintiffs were charged was fraud alternatively theft. These are mentioned in schedule 1 to the Criminal Procedure Act. I will consider later whether it was established that the arresting officer was a peace officer. Before doing so, however, I consider it appropriate to deal first with the question whether the defendant discharged the obligation of alleging and proving the lawfulness of the arrest and the subsequent detention of the plaintiff³.
10. Section 40(1)(b) permits a police officer to make an arrest without a warrant where he "reasonably suspects" the arrestee of having committed an offence. The test as to whether the arrestor "reasonably suspects" an arrestee of having committed an offence is an objective inquiry⁴.

DID THE ARRESTING OFFICER OBJECTIVELY HOLD A REASONABLE SUSPICION THAT THE PLAINTIFFS HAD COMMITTED THE OFFENCE WITH WHICH THEY WERE SUBSEQUENTLY CHARGED?

11. Warrant Officer Sali testified that his first involvement in the trial, apparently since his departure from the building hijacking unit of the SAPS in early 2011, was in January 2013. He was then on leave for

² See *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H

³ See *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 714; *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A)

⁴ See *R v Van Heerden* 1958 (3) SA 150 (T) at 152 E and other authorities referred to in *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C) at pp 145 A to 146 D

the whole month of February and returned to work on 18 March 2013. His first communication with the defendant's legal team after his return was on Monday 8 April 2013 which was the first day of the trial.

12. The defendant discovered no documents relevant to any issue in the action. Warrant Officer Sali, although he said he had a copy of the police docket and that he had handed a copy to the defendant's legal representatives, introduced no documentation into evidence.
13. Warrant Officer Sali testified that he was the investigating officer on the case, that one Michael Khumalo had made a complaint to the SAPS (not to Warrant Officer Sali) that the plaintiffs, who were not the owners of Delvers Close, were collecting rentals from the other tenants.
14. Warrant Officer Sali was unable to identify when the complaint was made, to whom the complaint was made and when, if at all, a proper investigation of the complaint was undertaken. Warrant Officer Sali gave no evidence to link the officer in the service of the SAPS to whom the complaint was made with the person or persons who subsequently arrested the plaintiffs in the detailed circumstances more fully described below. He also did not identify who the arresting officer was. He did not say that he was the arrestor although he was placed at Delvers Close by the second, third and fourth plaintiffs at the first time of their arrests together with approximately 20 other SAPS members.

15. Although Warrant Officer Sali's evidence suggested that he conducted some investigation into the question of ownership of the relevant building, it was not clear when that investigation took place. The extent of the investigation apparently was constituted by an interview or interviews with Mr Khumalo and the receipt of statements from unidentified residents of Delvers Close. It was not said when the interviews were held or when the statements were received. As I have already mentioned no document relied upon was presented in evidence to justify the grounds for the arrest and detention of the plaintiffs.
16. No acceptable evidence was presented to support the suspicion of any person that any plaintiff had committed any crime, never mind one that is mentioned in the first schedule to the Criminal Procedure Act. The fact that the plaintiffs were charged with fraud or theft is of no assistance at all. The fact that a charge was laid does not prove that the arrests of the plaintiffs were objectively justified and lawful.
17. Apart from the inadmissible hearsay, unsubstantiated and secondary evidence of Warrant Officer Sali on what should have been key elements of the defendant's case, no evidence was presented to establish the fourth requirement for successful reliance by a defendant on the section 40(1)(b) defence. Without a full conspectus of the relevant facts it is not possible to conduct an assessment of the reasonableness of the arrestor's belief and suspicion in making an

arrest without a warrant. Accordingly a consideration of such of the evidence of Warrant Officer Sali as is admissible does not lead to a finding that any suspicion which the arresting officer or officers held was reasonable.

18. No analysis or assessment by the arresting officer of the quality of the information provided for the arrests was disclosed. No proper examination of the information was disclosed. What the evidence did disclose with certainty is that no satisfactory examination or investigation was undertaken of the information that was available when the drastic police action with which this case is concerned was carried out.
19. Accordingly, irrespective of whether I ought to infer that the arresting officer, whether it was Warrant Officer Sali or another SAPS member, was a peace officer, the defence based on section 40(1)(b) of the Criminal Procedure Act cannot succeed. The defendant, which did not sufficiently plead its case, has not discharged the onus of proving that the arrestor can be reasonably found objectively to have held the belief that the plaintiffs had committed the schedule 1 offence with which they were subsequently charged.
20. I would be remiss if I did not express in this judgment my concern that the members of the SAPS for whom the defendant is responsible, tasked as they are with the protection of all members of society and their rights, should violate the constitutional rights of the people they

are bound to protect, and then so casually and dismally fail even to attempt to justify the conduct that was *prima facie* unlawful and injurious.

LEGAL CONSEQUENCES OF UNLAWFUL ARREST

21. After their arrests the plaintiffs were detained at Johannesburg Central Police Station until 28 December 2010 when they appeared in court and were remanded in custody by the magistrate pending the further investigation of the charges against them.
22. Unfortunately, as in respect of so many other issues in the case, there is no admissible evidence of what transpired at court before the presiding magistrate on the day in question. The plaintiffs' evidence also did not deal with those events.
23. Accordingly, I must assume that the plaintiffs' unlawful arrest and detention at the hands of persons for whom the defendant is responsible came to an end on 28 December 2010 when the responsibility for their subsequent incarceration ordinarily would have been attributable to the exercise by the presiding magistrate of a discretion to release the plaintiffs or to remand them in custody as occurred.
24. I will revert to consider this aspect of the case when considering the appropriate award to be made to the plaintiffs in consequence of their

unlawful arrests and detention, deprivation of their right of freedom and *injuria* to their good names, reputation and dignity. For now I mention only that it is not clear from the pleadings or evidence that responsibility for the incarceration of the plaintiffs at Johannesburg Central Prison after their appearances in Court on 28 December 2010 can be attributed to the defendant.

PARTICULARS OF THE PLAINTIFFS AND THE CIRCUMSTANCES OF THEIR ARRESTS

25. On the evening of 23 December 2010 the first plaintiff, a church goer and now a priest, went to his church in Marshalltown in the Johannesburg central business district. At approximately 21h00 whilst in the church, he heard his name called over a loudspeaker. When he inquired about the announcement he was told by the priest, who looked at him in what he described as "a strange way", that people were looking for him outside. He then saw the flashlights of a police vehicle.
26. When he went outside and identified himself to a police officer, he was approached by an unidentified member of the SAPS who told him that he was there to arrest him for collection of rentals at Delvers Close. He tried to explain that he had not done so but was handcuffed with his hands behind his back, handed his mat and shoes and pushed roughly by several police officers into the back of the police van.

27. He was then driven in the police van to Delvers Close where he was held in the van until he was removed and made to stand in front of many people from Delvers Close who were mostly lying on the ground. He was made to join a line-up of four people. He did not know them well. After standing facing a wall with the other four, all handcuffed, he was put back in the police van with the other four and after a "wheel spin" or two was driven to Johannesburg Central Police Station where they arrived at approximately 22h00 or 23h00.
28. At Johannesburg Central Police Station the plaintiffs and the additional arrested person were taken to the charge office where charges of fraud alternatively theft were laid against them. They remained handcuffed. At some stage the fifth arrested person was released. The plaintiffs were fingerprinted and taken to an overcrowded holding cell where there were already many inmates in a fairly small area of approximately 25 square meters. They were told to fetch blankets and sponge mattresses to sleep on. The cell contained an open cubicle with a toilet with no door. The toilet was filthy and did not work properly. There seemed to be faeces on the walls of the cell, the windows were barred and closed and many inmates were smoking. The plaintiffs remained in the cell from 23 December 2010 until they were taken to Court on 28 December 2010 as already dealt with above.
29. The first plaintiff testified that his arrest and incarceration effected his spirit and mind. He felt as if he would rather be killed than live his life in jail. He still feels that people scorn him at church and at his

homestead where people think of him as a criminal because of his arrest. His credit was affected by the time he spent in prison and he is still paying moneylenders as a result thereof. He is the only breadwinner and supports three children including his sister's child.

30. The second plaintiff was at home with his wife and his two children on the evening of 23 December 2010 when at approximately 21h00 the door was kicked in by members of the SAPS. He was grabbed and pulled outside in front of his wife and children and although he asked why he was being treated in such a manner the policeman did not answer. He was handcuffed tightly with cable ties which affected his circulation and when he went down the stairs to the ground floor found many of the inhabitants of the building lying on their stomachs outside the building. He was then told by members of the SAPS that he and his friends had illegally taken or hijacked the building.
31. From the time of his arrest outside the building his evidence materially is the same as that of the first, third and fourth plaintiffs. The second plaintiff has five dependents whom he supports at home as well as the mother of his two children in Johannesburg. His mother was a sickly person who has not regained her health since his arrest and incarceration.
32. The third plaintiff was seated at home in his flat at Delvers Close on 23 December 2010 when between approximately 21h00 and 22h00 he

heard the sound of a door being kicked. He opened the door, was told by the police to come out, identified himself to the SAPS when asked who he was and was made to face the wall with his hands behind his back where they were handcuffed. He then suffered the same humiliation as that suffered by the other plaintiffs. He lost his job as a result of his arrest. In December 2011 he found employment as a security guard. At the time of his arrest he lived alone in the flat.

33. On the night of his arrest the fourth plaintiff was seated in his flat on the second floor of Delvers Square. At approximately 21h00 he was told to vacate his flat by members of the SAPS and go to the ground floor which he did. Initially he was made to join the people lying on the ground but after a while his name was called by a member of the SAPS. He identified himself, was told to stand up by the SAPS and was then told to point out his friends. He was then told to place his hands behind him and to face the wall. He asked why he was being arrested and treated like this and tried to look behind him but was told to face the wall. He was told not to talk to the police. The policemen said they did not have to tell him anything. He was so upset that he cried. Then the police brought four other people also to stand facing the wall. The police then asked the fourth plaintiff if he knew them and he said that he did. He was then also handcuffed with plastic ties. From this point the four plaintiffs and the fifth arrestee were taken to Johannesburg Central Police Station ("the Police Station") where the plaintiffs were detained as aforesaid.

34. After his release from custody the fourth plaintiff found that other vendors had taken over his stall in the Johannesburg CBD. He obtained work as a security officer in May 2011. He had six dependents including two children, a wife and his sister's child as well as two brothers at his homestead in the country. He was traumatized by his arrest and incarceration. The filth in the cell at the Police Station was intolerable and the blankets made him itch. He had to take off his clothes because of the heat in the very small and overcrowded cell.
35. Whilst at the Police Station the plaintiffs were fed twice a day. The meals comprised tea and bread in the morning at approximately 09h00 and soup that was like water and porridge at approximately 14h00 daily. The fourth plaintiff slept for much of the time that he was held at the Police Station.
36. Needless to say the plaintiffs were prevented by their arrests and detention from spending Christmas and the festive season with their families.
37. Mr Zondi, who appeared for the plaintiffs, has provided the court with several judgments which provide a useful basis for comparison in determining what should be a fair and just award for each plaintiff in the circumstances. In referring to and considering these I am mindful that the awards by courts in similar matters which provide useful

comparisons in determining a fair and just award, while instructive, can never be decisive⁵.

38. The plaintiffs all suffered considerable humiliation and trauma as a result of their unlawful arrests which were carried out publicly and in the humiliating and degrading manner that they described in their evidence.
39. The only material element of their arrests that was contested by the defendant was the claims of the third and fourth plaintiffs that they were assaulted during the course of their arrests. There was no evidence of injuries suffered and special damages are not claimed by the plaintiffs. The amounts of the awards which I make accordingly are not influenced by the disputed allegations of assault by members of the SAPS who were involved in the arrests.

COMPARATIVE AWARDS

40. In *Sondlo v Minister of Police (supra)* the plaintiff, while on his way home from work, was unlawfully arrested on a train. He was handcuffed and then detained at New Canada Railway Station in an overcrowded cell. Later he was taken to the Orlando Police Station and again held in an overcrowded cell. He was then returned to New Canada Police Station whereafter he was taken to the Booysens Police Station where his fingerprints were taken. Thereafter he was detained

⁵ Kollapen AJ (as he then was) in *Murrell and Another v Minister of Safety and Security* (24152/2008 [2010] 2AGPPHC16 (22 February 2010) referred to by Wepener J in para 7 in *Thobo Sondlo v Minister of Police* SGMC Case No. 1482/2011 dated 21 August 2012

at Johannesburg Central Police Station from approximately midnight until 12h00 the next day when he received food and tea and was then released at approximately 15h00. Sondlo's arrest and detention did not "sit well" with the members of his family, church and social club. The court ordered a sum of R50 000 as *contumelia* which it said was fair and reasonable under the circumstances and would adequately compensate the plaintiff.

41. In *Rowan v Minister of Safety and Security* 2011 (6K6) QOD 44 (GSJ), the plaintiff was detained in the Magistrate's Court's holding cells with awaiting trial prisoners and convicted criminals for approximately five hours by members of the SAPS acting within the course and scope of their employment with the defendant before being released on warning pursuant to section 72 of the Criminal Procedure Act. The court held that an appropriate award for the plaintiff's unlawful detention in the circumstances was an amount of R50 000.

42. In *Van der Merwe v Minister of Safety and Security* 2011 (6K6) QOD 34 (ECG), the plaintiff was arrested and detained on Friday 21 July 2006 at approximately 16h00 and placed in the back of a police van in full view of his employees. The following two days whilst the plaintiff slept in his cell a policeman entered and kicked him in the neck. He was released from detention on the morning of Monday 24 July 2006. The conditions in which he was detained were appalling and he claimed that after his release from detention he was shunned by the members of his church who perceived him as a criminal. The effect on

his life was that he could not focus properly on his business which he closed. The court awarded R120 000 as an amount constituting an appropriate award for the plaintiff's unlawful arrest and detention in the circumstances.

43. In *Kwenda v Minister of Safety and Security* 2011 (6K6) QOD 10 (GNP), the plaintiffs were arrested unlawfully and held in custody for approximately 44 hours. Each plaintiff was awarded general damages of R70 000.
44. In *Hoco v Mtekwani* 2011 (6K6) QOD 18 (ECP) the plaintiff, a self-employed adult, was detained unlawfully for approximately four days. The court awarded general damages of R80 000 for his unlawful detention.
45. In *Fubesi v Minister of Safety and Security* 2011 (6K6) QOD 28 (ECG) the plaintiff was arrested without a warrant and detained for almost four days. He was awarded compensation of R80 000.
46. In *Erasmus v Member of the Executive Council for Transport - Eastern Cape Province* 2011 (6K6) QOD 59 (ECM) the plaintiff, after unlawful arrest and approximately five hours of unlawful detention was awarded general damages of R75 000.
47. Finally, in *Weinberg v National Commission of Safety and Security* 2012 (6K6) QOD 107 (GNP) the plaintiff who had been arrested at

home in front of his wife and children and then taken from home to a police van in full view of twenty to thirty members of his community prior to being placed in a holding cell with other inmates for approximately 8 hours was awarded general damages of R75 000 for his *injuria*.

CONCLUSION


48. All of the decisions to which I have been referred and which are summarized above demonstrate the balance that the court must strive to achieve in avoiding awards which are out of proportion to the indignity suffered by an arrested person while ensuring simultaneously that due compensation for the constitutional infringement and indignity constituted by unlawful arrest and detention are properly and adequately addressed.
49. In all the circumstances and having had regard to the factors that I have highlighted in summarizing the evidence of the plaintiffs in respect of their arrests and the duration and nature of their incarceration as well as the effect upon them of the trauma they have suffered as also the awards in comparable cases, I am of the view that an appropriate award to compensate each of the second, third and fourth plaintiffs for their wrongful arrest and the deprivation of their liberty, public humiliation and unlawful detention from the time of their arrest on 23 December 2010 until their appearance in court on 28 December 2010 is an amount of R100 000.

50. Applying the same principles I consider that the degree of humiliation suffered by the first plaintiff was exacerbated by his standing as a religious leader in his community and his arrest at church.
51. I consider an appropriate award as compensation to the first plaintiff is an amount of R115 000 in respect of his arrest and detention for the same period.

ORDER

In the premises the following order is made:

1. The defendant is ordered to pay R100 000 to each of the second, third and fourth plaintiffs;
2. The defendant is ordered to pay R115 000 to the first plaintiff;
3. The defendant is to pay the plaintiffs' costs of suit.



I MILTZ
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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