REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:11823/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE

01/08/2019
DATE

In the matter between:

SALIEM AHMED Plaintiff

And

THE MINISTER OF POLICE First Defendant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Defendant

THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT Third Defendant

JUDGMENT

MALUNGANA AJ

INTRODUCTION

[1] The Plaintiff, Saliem Ahmed, instituted action against the respondents' claiming damages for: (a) unlawful arrest; (b) unlawful detention and (c) malicious prosecution.

[2] It is common cause that the plaintiff was arrested without a warrant by members of the South African Police Services on 01 July 2016 at Jules Street, where he conducted his business as a motor dealer. He was released on 4 July 2016.

THE PLEADINGS

[3] In his particulars of claim it is alleged that, in arresting and detaining the plaintiff, the police had acted unlawfully and in consequence he was injured in his good name. He further alleged that, as a result of the unlawful conduct of the defendants he suffered deprivation of liberty, inconvenience, discomfort, contumelia, loss of income as well as legal costs for defending himself against the charges and malicious prosecution. Consequently the plaintiff seeks payment in the sum of R900 000.00 in damages.

[4] In their plea on the merits the defendants denied that the arrest was unlawful. The defendants pleaded that the arrest and detention of the plaintiff were justified in terms of section 40(1) (b) and section 50 of the Criminal Procedure Act 51 of 1977.

EVIDENCE AND CIRCUMSTANCES OF THE PLAINTIFF'S ARREST

[5] The plaintiff testified that he runs the business of buying and selling cars at Jules Street, in Malvern, Johannesburg. He is a devoted Muslim member who attends prayers every Friday. His arrest took place in the month of Ramadan, being the 1st of July 2016. He further testified that a preceding his arrest, his former employee Kenneth came to his car dealership and demanded that the plaintiff pay him some outstanding monies. However, the plaintiff preferred that an agreement to this effect be done through his lawyer at Springs, which proposition, Kenneth was not happy with. He then left and returned later with the police officers, one of whom he identified as Sgt Godi. A telephonic discussion between the plaintiff's lawyer and Sergeant Godi was held, after which it was agreed that they would return the following day to have the matter resolved. On Friday, Kenneth and the police returned to his premises with an affidavit. The plaintiff reiterated that the agreement be made through his lawyer to settle the wage dispute between him and Kenneth. An argument ensued whereupon the plaintiff's lawyer told the police, over the telephone , that they should stop harassing his client. Constable Godi walked to the backyard and observed a VW Fox vehicle which appeared to have been unregistered. The said vehicle had a stolen mark on it.

He then made a radio enquiry on the status of the vehicle, and the results came out positive. When he questioned the plaintiff about this, the plaintiff told him that the vehicle was bought from a friend. He also explained that he sent his employee to Aeroton to register it after he sold it to a customer, but could not be cleared. The employee in question was not at work at the time. After he explained these to the police, they immediately informed him that he was under arrest. Meanwhile his lawyer had already advised him to leave for his Friday prayers. So he got into his car to attend church. The police refused to let him go. He was then placed under arrest, had his pants removed after which they put him in the police van, and taken to the police station where he was detained. He described the condition in the police cell as being messy and dark. There was no mattress and the toilet was unhygienic. He said there were in a 'state of emergency'. He further testified that he has a prosthetic leg after he was involved in an accident. He eats Halaal food, and there was no such food in prison. He was released on bail on Monday, and had incurred about R100 000.00 in legal-fees as a result of the prosecution.

[6] In cross examination he testified that his constitutional rights were not read during the arrest. He spoke to his attorney three times on the date of the arrest. He first called the attorney as he was about to leave for mosque. His attorney told him to ignore the police who were in the premises, so he jumped into his vehicle to leave for

the mosque. All these occurred before the stolen vehicle was discovered by the police. He takes no prescribed medication for his condition. He also confirmed that the vehicle in question was registered in his names.

[7] Sergeant Godi gave evidence for the defendant. He and his colleague were doing public order policing on the 1st of July 2016 when Kenneth, the plaintiff's former employee, stopped him and requested to be accompanied to the plaintiff's dealership business to collect something. On arrival Kenneth discussed the issue of wages with the plaintiff. He indicated to Kenneth that the issue they were discussing falls within the purview of the CCMA. He stood by the door of the plaintiff's office during the discussion. The plaintiff called his lawyer at Springs who wanted to know what the police were doing at his client's premises. As he walked about with the plaintiff, they noticed an unregistered BMW vehicle parked alongside the Jetta Volkswagen near the entrance of the dealership. He checked the status of the VW via the radio and discovered that it was reported as stolen under case 111/02/2016 Pretoria West. He then questioned the plaintiff who was about to leave the premises. The plaintiff said the vehicle was his, and jumped into his Mercedes Benz. Realising that the plaintiff was leaving, Sgt Godi blocked him using the police vehicle. At that moment he placed the plaintiff under arrest and read his constitutional rights. When questioned what he would have done if the plaintiff explained how he got the vehicle, the witness replied that he would not have arrested him.

[8] During cross examination he admitted that the plaintiff gave explanation of how he acquired the vehicle. He, however, said that the plaintiff failed to produce supporting documentation such as proof of purchase and ownership of the vehicle. He further testified that that the manner in which the plaintiff tried to escape from the scene led him to effect an arrest. He also said that if the plaintiff showed him documentary information, he would not have effected the arrest. He questioned the plaintiff at the scene and at the police station about the papers of the vehicle. He denied ever meeting Kenneth prior to the date of arrest of the plaintiff.

[9] It was put to Sergeant Godi if he was aware that on the day in question plaintiff had to go for prayers when he was about to leave the scene. His reply was that the plaintiff was still on the scene.

[10] Captain Stanley N'wa-Rinhungu Mlongo was deployed to work with Sergeant Godi. He testified that the result of the inquiry conducted over the radio was that the vehicle found in the plaintiff's premises was reported as stolen. He further told the court that the plaintiff was about to leave the premises in his Mercedes Benz when they effected the arrest. After the arrest the plaintiff sent one of his workers to fetch the keys of the stolen vehicle so that it could be impounded. At the police station a case was opened for possession of stolen car after his rights were read. The copy was handed to the plaintiff. He denied ever meeting the plaintiff before the date of arrest,

and also denied that the plaintiff gave them any explanation pertaining to the vehicle.

[11] Funa Petros Masemona, the control prosecutor with 18 years experience, testified that his role is to peruse the docket and place it on the roll. In this case the investigator brought the case and after perusal he satisfied himself that there is a *prima facie* case for the plaintiff to answer. The matter was then placed on the roll. When he was asked in cross examination about the explanation given by the plaintiff in relation to the offence, he testified that he could not recall the explanation furnished by the plaintiff.

[12] Agnes Bezuidenhout, the control prosecutor of 20 years experience, testified that she withdrew the case against the plaintiff based on the statement of Vasco Moambe. This statement was obtained by the investigating officer known as Sordat. According to the record dated 10 October 2016 and is contained on page 4 of the trial bundle. In terms of the statement Vasco sold the vehicle to the plaintiff after he bought it from Phiri for the sum of R5000, 00. Elphias Phiri, the alleged previous owner of the vehicle also deposed to the statement of how on 6 July 2016. On 10 July 2016 the witness received the docket. She further testified that the prosecutor is not allowed to withdraw charges unless the supervisor agrees. During cross examination she testified that the duty to obtain the statement is that of the police. She is in no position to answer on behalf of the police.

APPLICABLE LEGAL PRINCIPLES

[13] It is trite that the onus of justifying the arrest and detention lies upon the defendant. See *Zeeland v Minister of Justice and Constitutional Development and another* 2008 (2) SACR 1 (CC) at paras 24 and 25.

[14] Section 40(1) (b) of the Criminal Procedure Act 51 of 1977 provides that the arresting officer must have 'reasonable suspicion' that the suspect has committed an offence referred to in Schedule 1 of the Act. The test therefore, is whether a reasonable suspicion could have existed and exists, is to be determined by objective standard, namely that of a reasonable person with the knowledge and experience of a peace officer based upon the facts and circumstances then known to the arresting officer.

[15] The following jurisdictional requirements must exist before the power conferred by section 40 (1) (b) may be invoked, *firstly* the arrestor must be a peace officer; *secondly* he must entertain a suspicion, *thirdly* it must be a suspicion that the arrestee has committed an offence referred to in Schedule 1 of the Act; and *fourthly* the suspicion must rests on reasonable grounds.

[16] The term "reasonable grounds to suspect" has enjoyed considerable attention by our courts. In *R v Van Heerden* 1958 (3) SA 150 (T) at 152E Galgut, AJ (as he then was) stated that:

"*[t]hese words must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have a suspicion,"*

[17] In *Mabona v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 F-H, Jones J in dealing with 'the reasonableness of suspicion' the arrestor should entertain, remarked as follows:

"It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of suspicion and without the need to swear out a warrant; i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will only allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds,. Otherwise, it will be flighty or arbitratory and not a reasonable suspicion."

[18] In *Gellmann v Minister of Safety and Security* 2007 ZAGPHC; 2008 (1) SACR 446 W at [90-94} the court held:

"A policeman should always consider whether the accused's attendance can be procured through summons as this is the preferable method. In determining whether he should arrest or not effect an arrest, the arresting officer should carefully consider

his/her standing orders. The arrest which is a violation of the standing order would be indicative that the discretion was not properly exercised and that the warrantless arrest was unlawful."

[19] In *Tsose v Minister of Justice and others* 1951 (3) SA 10 (A) at 17G-H, Schreiner JA held that:

An arrest is, of course, in general a harsher method of initiating prosecution, than citation by way of summons. But if the circumstances exist which make it lawful under a statutory provision to arrest the person as a means of bringing him to court, such an arrest is not unlawful even if it was made because the arrestor believes that the arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest, so the worst motive will not render legal arrest illegal. What I have said must not be understood as conveying approval of the use of arrest where there is no urgency, and the person to be charged has a fixed and known address. In such cases it is generally desirable that summons should be used. But there is no rule of law that require the milder method of bringing a person into court to be used whenever it will be equally effective."

[20] Once the jurisdictional facts for arrest, whether in terms of section 40(1) or section 43, are present, discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of

construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest." See *Minister of Safety and Security v Sekhoto and Another.*[1]

[21] In *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) at 186a, Bertelsmann J stated the following:

" *I am of the view that the time has arrived as a matter of law that, even if a crime is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.* "

EVALUATION OF ISSUES

[22] Sergeant Godi testified that the plaintiff gave the police an explanation of how he came to possess the vehicle in question. The plaintiff did not deny the fact that the car had been marked stolen. He testified that the police were informed prior to effecting an arrest that the vehicle was purchased from the plaintiff's friend. There is no indication from Sergeant Godi's testimony in arriving at his decision to arrest the plaintiff that he had employed the standards stated in *Mabone* case, stated supra.

[1]See Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 8140-E

Absent from his testimony is whether he tried to verify the existence of the alleged transaction in relation to the purchase of the vehicle by the plaintiff from his friend. In order to understand what a reasonable person in a position of the arrestor could have done, it is necessary for me to quote the following excerpt from the investigating officer's statement (Sordat).

'2. I spoke to Mr. Phiri telephonically and he actually bought the vehicle from the Dealer in Germiston. Mr. Smith is the Dealer who got the vehicle from Park Village Auctions. The vehicle was repossessed from the Complainant when he was in prison."

This is an exercise which a reasonable officer in Sgt Godi's position would have performed by simply calling the alleged friend. At best he arrested the plaintiff at his place of business whose attendance in court would easily have been secured by means of summons. In the circumstances one gains the impression that the arrest was motivated by the failure to resolve wage dispute between the plaintiff and his former employee, and it had nothing to do with the crime prevention for which they were deployed to perform. It is mind boggling why the police would intervene in a labour dispute matter. I say this because, had Godi and his colleague questioned Kenneth before accompanying him to the plaintiff's place of business they would have been informed of his intention of visiting the plaintiff. The only inescapable and reasonable conclusion one can draw in the circumstances, is that the police' s persistence and desire to assist Kenneth compromised their duties of sufficiently and

objectively scrutinising and consider the information before them. I accept the plaintiff's version that he did give the police an explanation about how he came to possess the vehicle in question. In the circumstances the effect of Sgt Godi and his colleague in failing to assess and evaluate the information provided by the plaintiff, is that plaintiff's arrest was unlawful, and the first defendant as their employer is therefore liable.

[23] Regarding the malicious prosecution: 'malicious prosecution consists of wrongful and intentional assault on the dignity of a person encompassing his good name and privacy.' See *Relyant Trading (Pty) Ltd v Shongwe& another* [2006] ZASCA 162 (2007) 1 ALL SA 375 (SCA at para.5. The test of absence of reasonable and probable cause was set out in *Beckenstrater v Rottcher and Theunissen*1955 (1) SA 129 (AD) as follows:

" *When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged, if despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause."*

[24] A prosecutor exercises discretion on the basis of the information before him or

her[2]. It is clear from the above passage (in *Beckenstrater),* that the prosecutor should have acted with *malice* and without a reasonable and probable cause. The defendant should have also set the law in motion. Petros Masemona testified he decided to pursue the prosecution against the plaintiff based on the information contained in the docket. He believed that there was a *prima facie* case when he enrolled the matter. The information regarding the purchase of the vehicle only came into existence in the form of statement by Vasco. On the strength of such of the information demonstrating how the vehicle was acquired by the plaintiff, Mrs Bezuidenhout exercised her discretion and withdrew the charges against the plaintiff. Prior to the information being brought to her attention the prosecutor would not have been able to formulate such a view about the prospector otherwise the successful prosecution of the plaintiff. In my view the prosecutor acted objectively, and without malice.

QUANTUM

[25] There has been a general acknowledgement by the court that the right liberty is one of the most important right afforded to a person. Courts are duty bound to protect persons' liberty when it was illegally infringed on.[3]After the adoption of our constitutional democracy courts continue to safeguard, jealously so, the individual rights to personal freedom, and the deprivation of a person's liberty is regarded as a serious injury.

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[2]State v Lubaxa 2001 (2) SACR 703 (SCA) para.19.
[3]Willem Kok and NathhelBalie(1879) 9 Buch 45 at 64

[26] I am equally alive to the fact that the primary purpose of damages on an unlawful arrest and detention is to vindicate infringed rights to liberty, i.e. to give the aggrieved person compensation in the form of money, taking into account all relevant factors and circumstances. In deserving cases heavier amounts for damages should be awarded, having regard to the comparative case laws. The idea is not to enrich the aggrieved person, but to award him damages which are commensurate with the injury which was afflicted upon him by the wrong doing of the police. As was stated in *Minister of Safety and Security v Seymor,* 2006 (6) SA 320 (SCA) at para 17, 'in the assessment of general damages the facts of the particular case must be looked at as whole.'

[27] The approach to the assessment of damages for wrongful arrest was summarised in *Ntshingana v Minister of safety and Security,* unreported case no: 1639/01, ECO, 14.10.2013 as follows:

"*The satisfaction in damages to which a plaintiff is entitled falls to be considered on the basis of the extent and nature of his personality. As no fixed or sliding scale for the computation of such damages, the court is required to make an estimate ex aequo et bono. The authors of Visser and Potgieter' s Law of Damages 2nd Edition, 475 have extracted from our case law factors which can play a role in the exercise: 'The circumstances under which the deprivation of liberty took place, the presence or*

absence of improper motive or (malice) on the part of the defendant, the harsh conduct of the defendant., the duration and nature of the confinement of the deprivation of liberty, status, standing, age and health of the plaintiff, the extent of the publicity given to the deprivation of liberty; The presence or absence of an apology or satisfactory explanation of the events by the defendant, awards in previous comparable cases, the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high value of the right to physical liberty; the effect of inflation, and the fact that the actual inuriarem also has a punitive function."

[28] This court has considered that the above factors, the fact that the plaintiff is fairly an old man and amputee who uses a prosthetic leg to ambulate, he was arrested in a month of Ramadan which is the most important event in the religion of Muslim. He was about to leave for the prayers when he was deprived of his personal liberty by the defendant. He was kept in a most unhygienic place in a condition which was humiliating. I was referred to several decisions in which similar awards were made. In *Manase v Minister of Safety and Security and another* 2003 (1) SA 567 (CK), a 65 year -old businessman had been detained for 49 days. It was considered that he suffered hardship, humiliation and indignity, and had lost the esteem of the people in the town in which he lived, and also his business associates. He was awarded R90 000,00 for malicious arrest and detention. In *Hofmeyr v Minister of Justice and another,* 1993 (3) SA 131 (AD), the plaintiff was awarded R50 000,00 after being

detained for 165 days in solitary confinement. In *Mogakane v Minister of Safety and Security*[4], Lekgodi JP made the following observations:

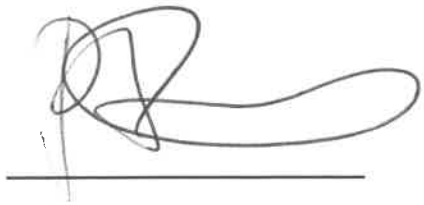
"There is no fitted formula for the determination of the quantum of damages obtainable through the *action iniuriarum. Such determination is the discretion of the judge, who must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair.* In the present case, I consider an award of R150 000,00 to be appropriate.

[29] In the result, I grant the following order

1. The first defendant is liable to the plaintiff in the sum of R150 000, 00;

2. The first defendant is also liable to pay interest on the aforesaid amount at the prescribed rate from a date 14 days from the day of this order to date of final payment.

3. The defendant shall also pay the cost of suit on the Magistrate's Court scale



P H MALUNGANA

Acting Judge of the

High Court of South Africa

Gauteng Local Division, Johannesburg

[4]This judgment was delivered in South Gauteng High Court on 24 May 2012, case no:50811/2011

APPEARANCES

Counsel for Plaintiff	**: Adv R. Bhima**
Instructed by	**: Hajibey-Bhyat Incorporated**
Counsel for Defendants	**: Adv NM Mtsweni**
Instructed by	**: The State Attorney**