

REPUBLIC OF SOUTH AFRICA



GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE NO: A720/2013

48018/09

2/4/2014

(1)	REPORTABLE: YES / <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO
(3)	REVISED.
<p>31/03/14</p> <p><i>[Signature]</i></p>	

In the matter between:

PASTOR JEREMIA SHANIKA

1st Plaintiff

GAMEDZE INVESTMENT CORPORATION CC

2nd Plaintiff

and

MINISTER OF POLICE

Defendant

J U D G M E N T

KGANYAGO AJ

[1] The plaintiffs have instituted an action for damages against the defendant arising out of an incident which happened on 15 August 2008.

[2] The first plaintiff claims in his personal capacity and also in the representative capacity as a member of the second plaintiff.

[3] The first plaintiff alleges that he was wrongfully and unlawfully arrested by the members of the South African Police Services who were acting within the course and scope of their employment. He further alleges that he was arrested without a warrant and detained for 10 days. The plaintiffs further alleges that as a result of the wrongful and unlawful conduct of the members of the South African Police Services, they suffered damages for pain and suffering, loss of business opportunities, loss of profit, deprivation of freedom and discomfort and also contumelia.

[4] The action is defended. The defendant denies that the arrest was unlawful. The defendant aver that the plaintiff was arrested by members of the South African Police Services in terms of section 40 (1)(b) of the Criminal Procedure Act 51 of 1977 as they reasonably believed that the arrest was lawful. In their view, the members of the South African Police Services were justified in arresting the first plaintiff without a warrant.

[5] The parties agreed that the defendant bore the onus to show that the arrest was justifiable and lawful.

[6] Mr Pather testified on behalf of the defendant. He testified he is the one who had arrested the first plaintiff on 15 August 2008. The first plaintiff was

arrested on allegations fraud after the complainant has opened a charge against him. He was taken to the first plaintiff's business by the complainant.

[7] The first plaintiff was identified by the complainant at his business. At the office of the plaintiffs, there were other people who were complaining that the first plaintiff has defrauded them. He also found that the first plaintiff was having a Namibian passport.

[8] He did not have a warrant to arrest the first plaintiff. Based on the complaint of the people that he found at the first plaintiff's business and also the fact that the first plaintiff was having a Namibian passport, he came to the conclusion that the first plaintiff might abscond should he first obtain a warrant of arrest. He then arrested the first plaintiff.

[9] The first plaintiff was arrested on Friday 15 August 2008, and appeared in court on Monday 18 August 2008. The first plaintiff was facing a schedule I offence, and it is only the magistrate who can release him.

[10] The witness was cross examined and he admitted that the first plaintiff has produced an agreement which he had entered into with the complainant, but his conclusion was that the first plaintiff was rendering fraudulent services. The witness further stated that the case against the first plaintiff was struck off the roll as he was unable to trace witnesses.

[11] The first plaintiff gave evidence on behalf of himself and the second plaintiff. According to the first plaintiff, he is working for the second plaintiff as a para-legal. The service that he renders relates to immigration issues and as an insurance advisor.

[12] He was born in Namibia and came to South Africa during 1989. He is having a dual citizenship.

[13] On 15 August 2008 he was arrested by Mr Pather. Mr Pather has told him that he owes one Mr Fernandez R66 000.00 and that if he does not pay that person, he is going to arrest him. He refused to pay and was arrested.

[14] On the 16 February 2007 he had entered into an agreement with Mr Fernandez to render the services to him. His arrest was unlawful. He had spent 10 days in the cells. The conditions in the cells were horrible.

[15] The first plaintiff was cross examined and he stated that he is the sole director of the second plaintiff. According to the first plaintiff, as he was having a contract with the complainant, the police should have warned him to appear at court instead of arresting him. He admitted that the complainant in his statement to the police is requesting that the matter be investigated.

[16] That is in short the evidence that was adduced. It is common cause that the first plaintiff was arrested on 15 August 2008. He appeared in court on 18 August 2008 and was remanded in custody. On the second appearance in

court he was released on bail. The matter did not go for trial but was struck off the roll as witnesses could not be traced. The dispute in this matter is whether the arrest of the first plaintiff was lawful or not

[17] It is trite that a person's liberty, personality and dignity are usually compromised by a wrongful or malicious arrest. It is also trite that in the absence of a warrant, an arrest is lawful if it is effected in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provided that the person being arrested, is alleged to have committed a crime listed in schedule 1 of the Act or of someone who is on reasonable grounds suspected of having committed such a crime.

[18] An arrest interfere with an individual's freedom of movement and dignity and should only be the last resort as a means of securing the suspect attendance at court. Police officers are therefore obliged to consider whether there are no less invasive options to bring the suspect before court than an immediate detention unless there is a reasonable suspicion that the suspect will abscond or fail to appear in court if a warrant is first obtained for his/her arrest or a notice of summons, then in that situation the police officer can exercise the power to arrest. See *Minister of Safety and Security v Van Niekerk* 2008(1) SACR 56 (cc).

[19] Section 40(1) (b) of the Act permits an arrest by a police officer without a warrant where the arrestor reasonably suspects the arrestee of having

committed an offence. In *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 T at 347 E-G the Court said the following:-

"To decide what is a reasonable suspicion there is must be evidence that the arresting officer formed a suspicion which is objectively sustainable. It was described thus by Jones J in Mabona and Another v Minister of Law and Order and Others:-

'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and.... (t) he reasonable man will therefore analyse and assess the quality of 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 allow himself to entertain a suspicion which will justify an arrest.'

[20] Mr Pather testified that the complainant, Mr Fernandez has opened an alleged fraud case against the first plaintiff. It is common cause that fraud is a schedule I offence. The complainant is the one who pointed out the first plaintiff to Mr Pather. Mr Pather found that the first plaintiff was having a dual

citizenship, a South African and also a Namibian. Mr Pather also found other people complaining about the first plaintiff. On interviewing the first plaintiff he found that he was receiving money from his clients but not issuing them with receipts and that to him looked like a syndicate. Mr Pather was not challenged on this version. Based on this information, he came to the conclusion that reasonable grounds existed which warranted an arrest without a warrant.

[21] The first plaintiff testified and came up with a version which was never put to Mr Pather. He conceded that he is having a dual citizenship. It is fair to say that the evidence of the first plaintiff was vague, confusing and utterly unconvincing. The first plaintiff was an evasive witness and his evidence is not satisfactory. In my view the first plaintiff is an untruthful witness.

[22] Mr Pather's evidence was clear and satisfactory. He did not contradict himself. Despite the gruelling cross examination, he was not shaken. In my view he was a credible witness.

[23] The first plaintiff was a suspect in a schedule 1 offence and is having a dual citizenship. He was receiving money from clients and not issuing them with receipts. There were other people who were also complaining about the first plaintiff.

[24] In my view Mr Pather has acted reasonably and was justified to have formulated a suspicion that should he first obtain a warrant, the first

plaintiff was going to evade the arrest. The reasonable suspicion does not mean that there is prima proof, as long as the suspicion is based on solid grounds. In my view, the information that was at the disposal of Mr Pather, warranted him to formulate a reasonable suspicion and effect an immediate arrest, of which he did.

[25] Under the circumstances, in my view, the arrest of the first plaintiff was justified. The defendant has therefore succeeded in discharging their onus of prove and have proved that the arrest of the first plaintiff was lawful.

[26] In the result I make the following order:-

26.1 The claim of the first and second plaintiffs is hereby dismissed with costs.


M. KGANYAGO

ACTING JUDGE OF THE GAUTENG
HIGH COURT, PRETORIA